

# Internet and Telecommunications Regulation



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SECOND EDITION

**Stuart Minor Benjamin**

WILLIAM VAN ALSTYNE PROFESSOR OF LAW  
DUKE UNIVERSITY SCHOOL OF LAW

**Barak D. Richman**

KATHARINE T. BARTLETT PROFESSOR OF LAW  
DUKE UNIVERSITY SCHOOL OF LAW

**James B. Speta**

ELIZABETH FROEHLING HORNER PROFESSOR OF LAW  
NORTHWESTERN UNIVERSITY PRITZKER SCHOOL OF LAW



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*For Arti, Sophia, Anna, Laura, Ariella, Eden,  
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# Contents

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Table of Materials	xv
Copyright Permissions	xxiii
Preface	xxv

## Part One Foundations

<b>Chapter One · Introduction to Internet and Telecommunications Regulation</b>	<b>3</b>
§1.A. Telecommunications as a “Regulated Industry”	6
§1.A.1. Justifications for Regulation	8
§1.A.1.a. Market Failure Justifications	8
§1.A.1.b. Noneconomic Justifications	13
§1.A.2. The Challenges of Regulation	15
§1.B. The Institutions of Telecommunications Policy	18
§1.B.1. Why Agencies?	18
§1.B.2. The Federal Communications Commission	21
§1.B.2.a. FCC Origins and Predecessors	21
§1.B.2.b. The Communications Act of 1934	22
§1.B.3. The FTC and DOJ	24
§1.B.3.a. The Mechanisms of Antitrust Enforcement	24
§1.B.4. Agency Actions and Legal Constraints	27
§1.C. A Policy Analysis Framework	29
<b>Chapter Two · The Antitrust Laws and Their Regulation of Monopolies</b>	<b>31</b>
§2.A. The History & Purpose of the Sherman Act	32
§2.B. The Rise of the Chicago School and the Consumer Welfare Standard	35
United States v. Syufy Enterprises	36
§2.C. Antitrust’s Regulation of Monopolies	43
United States v. Aluminum Co. of America [ <i>Alcoa</i> ]	44
<b>Chapter Three · First Amendment Coverage</b>	<b>49</b>
§3.A. Industry-Specific Laws and the First Amendment	50
Turner Broadcasting System, Inc. v. FCC [ <i>Turner I</i> ]	51
Turner Broadcasting System, Inc. v. FCC [ <i>Turner II</i> ]	59
Sorrell v. IMS Health Inc.	64
§3.B. Antitrust and the First Amendment	73
FTC v. Superior Court Trial Lawyers Association	74

**Part Two**  
**Economic Regulation of Internet  
 and Telecommunications**

<b>Chapter Four · Early Telephone Regulation Through Divestiture</b>	83
§ 4.A. Telephone History	84
§ 4.B. Telephone Economics	89
§ 4.C. Telephone Regulation	90
§ 4.D. Precursors to Divestiture	91
§ 4.D.1. Competition in CPE	92
Federal Telecommunications Law	92
§ 4.D.2. Competition in Long-Distance Telephony	95
§ 4.D.3. Communications and Computer Convergence	96
§ 4.E. Breaking Up Bell: The 1984 Divestiture	98
§ 4.E.1. The MFJ	99
United States v. American Telephone & Telegraph Co.	99
§ 4.E.2. Discussion of the Government's Theory	106
§ 4.F. The 1996 Act	111
<b>Chapter Five · Natural Monopoly Regulation</b>	115
§ 5.A. Rate Regulation	117
§ 5.A.1. Rate of Return Regulation	117
§ 5.A.2. Price Cap Regulation	120
§ 5.A.3. Rate Regulation as Markets Become Competitive	121
§ 5.A.4. Price Regulation Strategies	123
§ 5.B. Access	126
§ 5.B.1. Interconnection Under the Telecommunications Act of 1996	127
§ 5.B.2. Common Carriage	131
Kinderstart.com LLC v. Google, Inc.	132
Joseph R. Biden v. Knight First Amendment Institute	139
§ 5.B.3. Nondiscrimination Obligations	144
Comcast Cable Communications v. FCC	145
§ 5.C. Vertical Prohibitions	152
§ 5.C.1. Regulation of Vertical Foreclosure by Television Networks	153
Schurz Communications, Inc. v. FCC	156
§ 5.C.2. Regulation of Vertical Foreclosure by Cable Companies	165
§ 5.C.2.a. The FCC's Program Access Rules	166
§ 5.C.2.b. MVPD Access to Buildings	167
National Cable & Telecommunications Ass'n v. FCC	168
§ 5.D. Unbundling	172
§ 5.D.1. Identifying Unbundled Elements	172
AT&T Corp. v. Iowa Utilities Board	172
United States Telecom Ass'n v. FCC [USTA II]	177



§ 5.D.2. Pricing Network Elements	184
Verizon Communications Inc. v. FCC	187
§ 5.E. Universal Service	196
§ 5.E.1. Achieving Universal Service Through Cross-Subsidies	197
§ 5.E.2. Universal Telephony Service After the 1996 Act	200
FCC 11-161	202
§ 5.E.3. Broadband Universal Service	211
FCC 11-161	213
<b>Chapter Six · Regulating Internet Access</b>	229
§ 6.A. Regulatory Characterization of Broadband Services	230
National Cable & Telecommunications Ass'n v.	
Brand X Internet Services	232
§ 6.B. Net Neutrality	241
Comcast Corp. v. FCC	243
Verizon v. FCC	249
Protecting and Promoting the Open Internet	252
United States Telecom Ass'n v. FCC	260
United States Telecom Ass'n v. FCC	273
Restoring Internet Freedom	280
Mozilla Corp. v. FCC	296
<b>Chapter Seven · Federal or State Regulation?</b>	317
§ 7.A. The 1934 Act: Spectrum and Telephony	317
§ 7.B. Jurisdiction to Implement the 1996 Act: Local Competition,	
National Regulation	320
United States Telecom Ass'n v. FCC [ <i>USTA II</i> ]	324
§ 7.C. Cable Television	325
§ 7.D. Jurisdiction to Promote Competition in MVPD Markets	332
§ 7.E. Internet Services	334
ACA Connects v. Bonta	336
<b>Chapter Eight · Antitrust in Networked Industries</b>	343
§ 8.A. Monopoly Leverage and Maintenance	344
§ 8.A.1. Market Definition in Digital Markets	344
FTC v. Facebook, Inc.	345
Epic Games, Inc. v. Apple, Inc.	353
§ 8.A.2. Interconnection	359
Otter Tail Power Company v. United States	360
Verizon Communications Inc. v. Law Offices of	
Curtis V. Trinko, LLP	365
§ 8.A.3. Vertical Restraints	372
United States v. Microsoft Corp.	372
United States v. Google LLC	384
Google Search (Shopping)	388

§ 8.B. Mergers	395
§ 8.B.1. Institutional and Statutory Landscape	397
Applications of Comcast Corp., General Electric Co., and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees	398
§ 8.B.2. Horizontal Mergers	401
Satellite Sisters: XM and Sirius Satellite Radio Merger	402
Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc.	404
Commission Approves Transaction between Sirius Satellite Radio Holdings Inc. and XM Satellite Radio Holdings, Inc. Subject to Conditions	407
§ 8.B.3. Vertical Mergers	410
United States v. Comcast Corp.	411
United States v. AT&T	417
General Motors Corp. and Hughes Electronics Corp., Transferors, and the News Corp. Ltd, Transferee, for Authority to Transfer Control	429
§ 8.B.4. Acquisition of Nascent Competitors	435
Google/Double Click	436
<b>Chapter Nine · Regulating the Spectrum</b>	441
§ 9.A. Characteristics of Electromagnetic Waves	442
§ 9.A.1. Wires Versus Airwaves as a Means of Propagation	444
§ 9.A.2. The Spectrum as a Resource	446
§ 9.B. Rationales for Regulation: Scarcity/Interference	447
Why Not Use the Pricing System in the Broadcast Industry?	451
§ 9.C. Managing the Spectrum	455
§ 9.C.1. A Note on Tradeoffs: Allotment	457
§ 9.D. Allocating the Spectrum	459
§ 9.D.1. Models of Spectrum Control	460
Spectrum Policy Task Force Report	462
§ 9.D.2. Transitioning to Flexibility and Dealing with Incumbents	469
§ 9.D.3. Dedicating Spectrum to Unlicensed Uses	473
Some Economics of Wireless Communications	474
§ 9.D.4. Unlicensed Usage Without Dedicated Spectrum	480
§ 9.D.4.a. Unlicensed Devices on Vacant Frequencies	480
Unlicensed Operation in the TV Broadcast Bands and Additional Spectrum for Unlicensed Devices below 900 MHz and in the 3 GHz Band	481
§ 9.D.4.b. Spectrum Sharing and Government Spectrum	485

Realizing the Full Potential of Government-Held Spectrum to Spur Economic Growth	486
§ 9.E. Moving Licenses Closer to Property Rights	490
§ 9.E.1. Spectrum Subdivision and Leasing (and the Possibility of a Private Commons)	490
§ 9.E.2. License Transfer	491
§ 9.E.3. License Renewal	493
§ 9.F. Assignment Mechanisms	497
Using Auctions to Select FCC Licensees	499
<b>Chapter Ten · Ownership Limits</b>	509
§ 10.A. Cable Television Ownership Limits	510
Time Warner Entertainment Co. v. FCC [ <i>Time Warner II</i> ]	511
Comcast Corp. v. FCC	521
§ 10.B. Spectrum Ownership Limits	525
Policies Regarding Mobile Spectrum Holdings: Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions	526
§ 10.C. Broadcast Ownership Limits	534
2014 Quadrennial Regulatory Review	537
FCC v. Prometheus Radio Project	540

### Part Three

#### Noneconomic Regulation of Internet and Telecommunications

<b>Chapter Eleven · Content-Based Regulations</b>	551
§ 11.A. Mandating Carriage of Speech Deemed Valuable	552
Red Lion Broadcasting Co. v. FCC	552
Miami Herald Publishing Co. v. Tornillo	557
§ 11.B. Restrictions on Speech Deemed Harmful	569
§ 11.B.1. Indecency	570
§ 11.B.1.a. Regulation of Broadcast Indecency	570
FCC v. Pacifica Foundation	570
§ 11.B.1.b. Regulation of Cable Indecency	584
Denver Area Educational Telecommunications Consortium, Inc. v. FCC	585
§ 11.B.1.c. Regulation of Internet Indecency	601
Reno v. ACLU	602
Ashcroft v. ACLU [ <i>Ashcroft II</i> ]	610
§ 11.B.2. Violence	621
Brown v. Entertainment Merchants Association et al.	622
§ 11.B.3. False Statements	630

New York Times Co. v. Sullivan	631
United States v. Alvarez	636
<b>Chapter Twelve · Regulating Algorithms</b>	647
Stuart Minor Benjamin, Algorithms and Speech	649
Tim Wu, Machine Speech	659
Jian Zhang et al. v. Baidu.Com Inc.	671
<b>Chapter Thirteen · Privacy Regulation</b>	677
§13.A. Common Law Tort Protections	679
Jackson v. Mayweather	680
McDonald v. Kiloo ApS	685
§13.B. Protection by Contract	688
In re: Facebook Privacy Litigation	688
§13.C. FTC Privacy Supervision	692
Snapchat, Inc.	692
§13.D. Federal Statutory Privacy Protections	698
§13.D.1. Communications Act Privacy	698
Protecting the Privacy of Customers of Broadband and Other Telecommunications Services	698
§13.D.2. Other Federal Statutory Protections	701
Dinerstein v. Google, LLC	701
§13.E. Other Sources of Privacy Law	707
Google Spain SL v. Agencia Española de Protección de Datos (AEPD)	709
<b>Chapter Fourteen · Copyright</b>	717
§14.A. Copyright Basics	719
§14.B. Copyright and Traditional Communications Services	721
§14.B.1. Individual Programs	722
§14.B.1.a. Compulsory Copyright Licenses	722
§14.B.1.b. What Constitutes a Performance under Copyright Law?	726
American Broadcasting Companies, Inc. v. Aereo, Inc.	727
§14.B.2. Syndicated Exclusivity and Network Nonduplication	734
§14.B.3. Retransmission Consent	736
§14.C. Copyright and Internet Platforms	739
Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.	740
Viacom International, Inc. v. YouTube, Inc.	752
<b>Chapter Fifteen · General Protection for Intermediaries of     User-Generated Content: Section 230</b>	763
§15.A. Background and Foundation: Zeran v. America Online	764
Zeran v. America Online, Inc.	764
§15.B. Attributing Authorship: The Problem of Joint or Separate Production	769

Fair Housing Council of San Fernando Valley v. Roommates.com, LLC	770
Jones v. Dirty World Entertainment Recordings LLC	777
Barnes v. Yahoo!, Inc.	785
§15.C. The Limits of Protecting Bad Content	791
Doe v. Backpage.com	791
<b>Conceptual Index and Glossary</b>	<b>799</b>



# Table of Materials

---

- 2014 Quadrennial Regulatory Review—Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd. 9802 (2017), 537
- ACA Connects v. Bonta, 24 F.4th 1233 (9th Cir. 2022), 336
- ACLU, *see also* Ashcroft v. ACLU and Reno v. ACLU
- Aereo, Inc., *see* American Broadcasting Companies, Inc. v. Aereo, Inc.
- Agencia Española de Protección de Datos (AEPD), *see* Google Spain SL v. Agencia Española de Protección de Datos (AEPD)
- Alliance for Community Media v. FCC, 529 F.3d 763 (6th Cir. 2008), 332
- Aluminum Co. of America (Alcoa), *see* United States v. Aluminum Co. of America (Alcoa)
- Alvarez, *see* United States v. Alvarez
- Amendment of the Commission’s Rules Related to Retransmission Consent, Notice of Proposed Rulemaking, 26 FCC Rcd. 2718 (2011), 735
- America Online, Inc., *see* Zeran v. America Online, Inc.
- American Broadcasting Companies, Inc. v. Aereo, Inc., 573 U.S. 431 (2014), 727
- American Telephone & Telegraph Co., *see* United States v. American Telephone & Telegraph Co.
- Apple, Inc., *see* Epic Games, Inc. v. Apple, Inc.
- Applications for Voluntary Assignments or Transfers of Control, 47 Fed. Reg. 985 (Jan. 8, 1982), 491
- Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, Memorandum Opinion and Order, 26 FCC Rcd. 4238 (2011), 398
- Ashcroft v. ACLU [*Ashcroft I*], 535 U.S. 564 (2002), 608
- Ashcroft v. ACLU [*Ashcroft II*], 542 U.S. 656 (2004), 610
- AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999), 172, 321
- AT&T, *see also* United States v. AT&T
- Backpage.com, *see* Doe v. Backpage.com
- Baidu.Com Inc., *see* Zhang et al. v. Baidu .Com Inc.
- Barnes v. Yahoo!, Inc., 570 F.3d 1096 (9th Cir. 2009), 785
- Benjamin, Algorithms and Speech, 161 U. Penn. L. Rev. 1445 (2013), 519, 649
- Benjamin, Transmitting, Editing, and Communicating: Determining What “The Freedom Of Speech” Encompasses, 60 Duke L.J. 1673 (2011), 279

- Benkler, *Some Economics of Wireless Communications*, 16 *Harv. J.L. & Tech.* 25 (2002), 474
- Berisha v. Lawson, 141 S. Ct. 2424 (2021), 635
- Biden, Joseph R., v. Knight First Amendment Institute, 141 S. Ct. 1220 (2021), 139
- Bonta, *see* *ACA Connects v. Bonta*
- Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 *J.L. & Econ.* 7 (1966), 35
- Bork, *The Antitrust Paradox: A Policy at War with Itself* (1978), 40
- Brand X Internet Services, *see* *National Cable & Telecommunications Ass'n v. Brand X Internet Services*
- Brown v. Entertainment Merchants Association, 564 U.S. 786 (2011), 622
- Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 *Air L. Rev.* 295 (1930), 23
- California v. FCC, 905 F.2d 1217 (9th Cir. 1990), 111
- CBS Broadcasting Inc. v. PrimeTime 24 Joint Venture, 48 F. Supp. 2d 1342 (S.D. Fla. 1998), 724
- Coase, *Why Not Use the Pricing System in the Broadcast Industry?* Testimony before the FCC, December 1959, *reprinted in* 4 *Study of Radio & Television Network Broadcasting*, 68, 451
- Comcast Cable Communications v. FCC, 717 F.3d 982 (D.C. Cir. 2013), 145
- Comcast Corp. v. FCC, 579 F.3d 1 (D.C. Cir. 2009), 521
- Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010), 243
- Comcast Corp., *see also* *Applications of Comcast Corp. and United States v. Comcast Corp.*
- Commission Approves Transaction between Sirius Satellite Radio Holdings Inc. and XM Satellite Radio Holdings, Inc. Subject to Conditions, Press Release, FCC (July 28, 2008), 2008 WL 2902112, 407
- Competition in the Interstate Interexchange Marketplace, Notice of Proposed Rulemaking, 5 *FCC Rcd.* 2627 (1990), 109
- Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York, Memorandum Opinion and Order [*Syracuse Peace Council*], 2 *FCC Rcd.* 5043 (1987), 566
- Customers of Broadband and Other Telecommunications Services, *see* *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*
- Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727 (1996), 585
- Dinerstein v. Google, LLC, 484 F. Supp. 3d 561 (N.D. Ill. 2020), 701
- Dirty World Entertainment Recordings LLC, *see* *Jones v. Dirty World Entertainment Recordings LLC*
- Dissenting Statement of Commissioner Ajit Pai, 31 *FCC Rcd.* 6,327 (2016), 400
- Doe v. Backpage.com, 817 F.3d 12 (1st Cir. 2016), 791
- Double Click, *see* *Google/Double Click*
- Entertainment Merchants Association, *see* *Brown v. Entertainment Merchants Association*
- Epic Games, Inc. v. Apple, Inc., 559 F. Supp. 3d 898 (N.D. Cal., 2021), 353
- Expanding the Economic and Innovation Opportunities of Spectrum



- Through Incentive Auctions, Notice of Proposed Rulemaking, 27 FCC Rcd. 12,357 (2012), 507
- Facebook, Inc., *see* FTC v. Facebook, Inc. *and* In re Facebook Privacy Litigation
- Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008) (en banc), 770
- FCC v. Fox Television Stations, Inc. [*Fox I*] 556 U.S. 502 (2009), 583
- FCC, National Broadband Plan § 5.1 (2010), 212, 461, 473, 506
- FCC v. Pacifica Foundation, 438 U.S. 726 (1978), 570
- FCC v. Prometheus Radio Project, 141 S. Ct. 1150 (2021), 540
- FCC Report to Congress on Spectrum Auctions, 1997 WL 629251 (1997), 504
- FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981), 562
- FCC, *see also* Comcast Cable Communications v. FCC, Comcast Corp. v. FCC, Denver Area Educational Telecommunications Consortium, Inc. v. FCC, In re FCC 11-161, Mozilla Corp. v. FCC, National Cable & Telecommunications Ass'n v. FCC, Red Lion Broadcasting Co. v. FCC, Schurz Communications, Inc. v. FCC, Time Warner Entertainment Co. v. FCC, Turner Broadcasting System, Inc. v. FCC, United States Telecom Ass'n v. FCC, Verizon Communications Inc. v. FCC, Verizon v. FCC
- FTC v. Facebook, Inc., 560 F. Supp. 3d 1 (D.D.C. 2021), 345
- FTC v. Superior Court Trial Lawyers Association, 493 U.S. 411 (1990), 74
- General Electric Co., *see* Applications of Comcast Corp.
- General Motors Corp. and Hughes Electronics Corp., Transferors, and the News Corp. Ltd, Transferee, for Authority to Transfer Control, Memorandum Opinion and Order, 19 FCC Rcd. 473 (2004), 429
- Google/Double Click, FTC File 071-0170, 2007 WL 4624893, Statement of the Federal Trade Commission, 436
- Google LLC, *see* Dinerstein v. Google, LLC *and* Kinderstart.com LLC v. Google, Inc. *and* United States v. Google LLC
- Google Search (Shopping), Commission Decision, Case AT.39740 (European Commission, June 27, 2017), 388
- Google Spain SL v. Agencia Española de Protección de Datos (AEPD), ECLI:EU:C:2014:317 (May 13, 2014) [European Court of Justice], 709
- Google, *see also* Dinerstein v. Google, LLC *and* Kinderstart.com LLC v. Google, Inc. *and* United States v. Google LLC
- Grokster, *see* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.
- Hovenkamp, Antitrust Policy After Chicago, 84 Mich. L. Rev. 213, 283–284 (1985), 40
- Huber, Kellogg, and Thorne, Federal Telecommunications Law 663–70 (2d ed. 1999), 84, 92, 128
- Hughes Electronics Corp., *see* General Motors Corp.
- Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal and Vertical Ownership Limits, Second Report

- and Order, 8 FCC Rcd. 8565 (1993), 520
- Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage, First Report and Order, 8 FCC Rcd. 3359 (1993), 165
- In re Facebook Privacy Litigation, 192 F. Supp. 3d 1053 (N.D. Cal. 2016), 688
- In re FCC 11-161, 753 F.3d 1015 (10th Cir. 2014), 202, 213
- In the Matter of Snapchat, Inc., 2015-1 Trade Cas. ¶17,115 (F.T.C.) (2014), 692
- Incentive Auctions, *see* Policies Regarding Mobile Spectrum Holdings
- Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798 (2002), 231
- Iowa Utilities Board, *see* AT&T Corp. v. Iowa Utilities Board
- Jackson v. Mayweather, 217 Cal. Rptr. 3d 234 (Cal. App. 2 Dist. 2017), 680
- Jones v. Dirty World Entertainment Recordings LLC, 755 F.3d 398 (6th Cir. 2014), 777
- Kiloo ApS, *see* McDonald v. Kiloo ApS
- Kinderstart.com LLC v. Google, Inc., No. C06-2057 JF (RS), 2006 WL 3246596 (N.D. Cal. July 13, 2006), 132
- Knight First Amendment Institute, *see* Biden, Joseph R., v. Knight First Amendment Institute
- Krattenmaker, The Telecommunications Act of 1996, 29 Conn. L. Rev. 123 (1996), 112
- Kwerel and Felker, Using Auctions to Select FCC Licensees, FCC Office of Plans & Policy, Working Paper No. 16 (1985), 499
- Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 34 Hastings L.J. 67 (1982), 42
- Law Offices of Curtis V. Trinko, *see* Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP
- Letwin, Congress and the Sherman Antitrust Law: 1887–1890, 23 U. Chi. L. Rev. 221 (1956), 32
- Mayweather, *see* Jackson v. Mayweather
- McDonald v. Kiloo ApS, 385 F. Supp. 3d 1022 (N.D. Cal. 2019), 685
- Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005), 740
- Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), 557
- Microsoft Corp., *see* United States v. Microsoft Corp.
- Mobile Spectrum Holdings, *see* Policies Regarding Mobile Spectrum Holdings
- Mozilla Corp. v. FCC, 940 F.3d 1 (D.C. Cir. 2019), 296
- National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005), 232
- National Cable & Telecommunications Ass'n v. FCC, 567 F.3d 659 (D.C. Cir. 2009), 168
- NBC v. United States, 319 U.S. 190 (1943), 450, 559

- NBC Universal, Inc., *see* Applications of Comcast Corp.
- New York Times Co. v. Sullivan, 376 U.S. 254 (1964), 631
- News Corp., Ltd., *see* General Motors Corp.
- Omega Satellite Prods. Co. v. Indianapolis, 694 F.2d 119 (7th Cir. 1982), 9
- Otter Tail Power Company v. United States, 410 U.S. 366 (1973), 360
- Pacifica Foundation, *see* FCC v. Pacifica Foundation
- Packingham v. North Carolina, 137 S. Ct. 1730 (2017), 618
- Policies Regarding Mobile Spectrum Holdings: Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, Report and Order, 29 FCC Rcd. 6133 (2014), 526
- Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd. 2873 (1989), 119
- Posner, Antitrust Law (2d ed. 2001), 36
- Privacy, *see* In re Facebook Privacy Litigation *and* Protecting the Privacy of Customers of Broadband and Other Telecommunications Services
- Prometheus Radio Project, *see* FCC v. Prometheus Radio Project
- Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015), 252
- Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, Report and Order, 31 FCC Rcd. 13,911 (2016), 698
- Quadrennial Regulatory Review, Second Report and Order, 31 FCC Rcd. 9864 (2016), 536
- Realizing the Full Potential of Government-Held Spectrum to Spur Economic Growth, President's Council of Advisors on Science and Technology (2012), 486
- Redevelopment of Spectrum To Encourage Innovation in the Use of New Telecommunications Technologies, Notice of Proposed Rulemaking, 7 FCC Rcd. 1542 (1992), 472
- Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), 552
- Reno v. ACLU, 521 U.S. 844 (1997), 602
- Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 (2018), 280
- Review of the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules, Report and Order, 11 FCC Rcd. 546 (1995), 155
- Riley v. National Federation of the Blind, 487 U.S. 781 (1988), 563
- Roommates.com, *see* Fair Housing Council of San Fernando Valley v. Roommates.com, LLC
- Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989), 600
- Schurz Communications, Inc. v. FCC, 982 F.2d 1043 (7th Cir. 1992), 156
- Sidak & Spulber, Deregulatory Takings and the Regulatory Contract (1997), 195
- Sirius Satellite Radio Inc., *see* Commission Approves Transaction between Sirius Satellite Radio Holdings Inc. and XM Satellite Radio Holdings *and* Statement of the Department of Justice Antitrust Division

- Snapchat, *see* In the Matter of Snapchat, Inc.
- Sorrell v. IMS Health Inc., 564 U.S. 552 (2011), 64
- Spectrum Policy Task Force Report, FCC, ET Docket No. 02-135 (Nov. 2002), 462
- Spectrum, *see also* Realizing the Full Potential of Government-Held Spectrum to Spur Economic Growth
- Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines, Commission File No. P810034 (September 15, 2021), 43
- Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc., Press Release, DOJ (Mar. 24, 2008), 404
- Sullivan, *see* New York Times Co. v. Sullivan,
- Superior Court Trial Lawyers Association, *see* FTC v. Superior Court Trial Lawyers Association
- James Surowiecki, Satellite Sisters: XM and Sirius Satellite Radio Merger, *The New Yorker* (March 12, 2007), 402
- Syufy Enterprises, *see* United States v. Syufy Enterprises
- Time Warner Entertainment Co. v. FCC [*Time Warner II*], 240 F.3d 1126 (D.C. Cir. 2001), 511
- Time Warner Entertainment Co. v. FCC [*Time Warner I*], 93 F.3d 957 (D.C. Cir. 1996), 329, 330, 519
- Tornillo, *see* Miami Herald Publishing Co. v. Tornillo
- Trinko, *see* Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP
- Turner Broadcasting System, Inc. v. FCC [*Turner I*], 512 U.S. 622 (1994), 51, 58, 564
- Turner Broadcasting System, Inc. v. FCC [*Turner II*], 520 U.S. 180 (1997), 58, 59, 564
- TV Broadcast Bands, *see* Unlicensed Operation in the TV Broadcast Bands
- Twentieth Century Music Corp. v. Aiken, 422 U. S. 151 (1975), 720
- United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416 (2d Cir. 1945), 44, 47
- United States v. Alvarez, 567 U.S. 709 (2012), 636
- United States v. American Library Ass'n, Inc., 539 U.S. 194 (2003), 620
- United States v. American Telephone & Telegraph Co., 552 F. Supp. 131 (D.D.C. 1982), 16, 99
- United States v. AT&T, 310 F. Supp. 3d 161 (D.D.C. 2018), 417
- United States v. Comcast Corp., Civil Action No. 1:11CV00106 (D.D.C. Jan. 18, 2011), 411
- United States v. Google LLC, No. 1:20-cv-03010 (D.D.C. Jan. 15, 2021), 384
- United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001), 372
- United States v. Syufy Enterprises, 903 F.2d 659 (9th Cir. 1990), 36
- United States Telecom Ass'n v. FCC [*USTA II*], 359 F.3d 554 (D.C. Cir. 2004), 177, 324

- United States Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016), 260
- United States Telecom Ass'n v. FCC, 855 F.3d 381 (D.C. Cir. 2017), 273
- United Video v. FCC, 890 F.2d 1173 (D.C. Cir. 1989), 735
- Unlicensed Devices, *see* Unlicensed Operation in the TV Broadcast Bands
- Unlicensed Operation in the TV Broadcast Bands and Additional Spectrum for Unlicensed Devices below 900 MHz and in the 3 GHz Band, Second Report and Order and Memorandum Opinion and Order, 23 FCC Rcd. 16,807 (2008), 481
- U.S. Dept. of Justice & FTC, Horizontal Merger Guidelines, revised April 8, 1997, 402
- Viacom International, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012), 752
- Verizon Communications Inc. v. FCC, 535 U.S. 467 (2002), 187
- Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004), 48, 365
- Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014), 249
- Wu, Machine Speech, 161 U. Penn. L. Rev. 1495 (2013), 659
- XM Satellite Radio, *see* Commission Approves Transaction between Sirius Satellite Radio Holdings Inc. and XM Satellite Radio Holdings *and* Statement of the Department of Justice Antitrust Division
- Yahoo!, Inc., *see* Barnes v. Yahoo!, Inc.
- YouTube, *see* Viacom International, Inc. v. YouTube, Inc.
- Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997), 764
- Zhang et al. v. Baidu .Com Inc., 10 F. Supp. 3d 433 (S.D.N.Y. 2014), 671



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# Preface

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This book is entitled *Internet and Telecommunications Regulation*, but if we could put “Internet” in a bigger font we would, because regulation of internet services is the heart of the book. The internet has become a centerpiece in the modern economy and is woven into most people’s lives. Internet platforms in particular, including search engines, social media, marketplaces, app stores, etc. (which frequently blend into one another), have become central to modern life and business. In light of the internet’s importance, this book devotes considerable attention to the regulation applicable to companies that provide internet services.

But this book is not just about the internet. It is also about broadcast, telephony, multichannel video like cable television, and other traditional telecommunications services. Why? There are three broad reasons. First, telecommunications services are important in their own right (as the smartphone that is probably within your reach can attest) and the law surrounding those services remain important. Second, internet access is built on the infrastructure of earlier technologies (particularly telephone and cable television). Third, and perhaps most relevant for a legal casebook, the regulation of internet services builds on the regulation of traditional telecommunications services. One cannot understand the regulation of internet services without understanding the telecommunications regulation that underpins it.

This relates to an important point: there is no comprehensive “law of the internet.” Law surrounds the internet and all activity that takes place within it, but one of the most important changes in communications law has been the move from a sector-specific regime, with a defined set of statutes and a particular agency with explicit regulatory authority (the Federal Communications Commission), to an assortment of overlapping regimes with no dedicated regulator. Congress passed several generations of laws to govern telephony, telecommunications, cable, and other wired sectors, but Congress has not seen fit to regulate “the internet,” and it is not clear what such regulation would look like. Instead, internet regulation has been confined to particular aspects of internet services. Prominent among these have been regulation of internet access service (the legal battle over which has turned on the interpretation of the word “telecommunications” in the federal statute regulating telephony, the Communications Act), regulation of wireless frequencies (also flowing from the Communications Act), and competition laws (including antitrust laws and those more specifically focused on particular telecommunications services).

Internet-focused laws have played a relatively small role in the regulation of internet services, with antitrust, telecommunications, and broad laws not specific to the internet (like privacy and copyright) playing a bigger role. This is not to say that there are no internet-focused statutes. The most prominent such law is 47 U.S.C. § 230, which has proved quite significant in providing fairly broad immunity for internet platforms with respect to third-party content. Congress has also attempted to regulate indecency on the internet (and every other form of telecommunications), but the Supreme Court has invalidated indecency regulation of every form of telecommunications other than broadcasting. This last point highlights an important constraint: the First Amendment, as interpreted, makes it difficult, if not impossible, for the government to regulate content. Users care deeply about the content that courses over internet and telecommunications services, but the government is largely disabled from regulating it.

In crafting this casebook, we focus on what we consider to be the centers of gravity for the legal and policy challenges concerning internet and telecommunications services. We believe there are common economic and policy challenges that characterize these services. There are common scale efficiencies, and thus a market tendency to slide towards concentrated ownership. There are common dangers, both economic and non-economic, to market concentration and to certain behaviors. There are common benefits to universal access. And there are common political dynamics, including a sense that wise regulation of the internet and telecommunications is important to our society and democracy (if only we could agree on what regulation is “wise”).

These commonalities have persisted for much of the 20th and 21st century, and thus our casebook is not isolated to the issues of the current day. To the contrary, although both the law and its underlying policy priorities have changed, the challenges that we confront with the rise of today’s internet platforms are informed by the challenges of the rise of the Bell System telephone monopoly. We believe that, normatively, today’s policymakers can learn from the lessons of the past, and, descriptively, current law is somewhat historically determined by past law. For that reason, we organize our casebook conceptually around common policy challenges while adding frequent references to the statutes, cases, and regulatory efforts of the past.

Now, some acknowledgments. Doug Lichtman, Howard Shelanski, and Phil Weiser, who worked on a predecessor to this casebook, have provided invaluable help, as has Doug Sicker. Sincere thanks, too, to Carolina Academic Press, and particularly to Linda Lacy, who has been especially supportive of our work on this project. We genuinely appreciate everything you do for us and our readers. For this edition we owe a particular debt to Leanna Doty and Balfour Smith of Duke Law School, whose careful reading of the text helped it immeasurably, and to Duke Law students Gloria Han, Andrew Tisinger, and Wenyi Zhou for excellent research assistance.

One final word before we step aside: the materials included in this book have been ruthlessly edited for style, length, and clarity. To avoid clutter, we have left almost all those changes unmarked. While we are confident that none of our edits altered the meaning of the relevant passages, we do want to warn readers that the materials have been edited so as to maximize their value in the educational setting and, thus, attorneys looking to cite materials in court documents are advised to look to the original sources before quoting any of the materials excerpted here.

With that, we welcome you to the text. We hope you find your study of internet and telecommunications law to be a rewarding one.

*Stuart Benjamin, Barak Richman, and Jim Speta*

