Telecommunications Law and Policy

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FOURTH EDITION

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Carolina Academic Press
Durham, North Carolina

ISBN 978-1-61163-691-8
LCCN 2014953062

Carolina Academic Press
700 Kent Street
Durham, NC 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

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Preface

The theme of almost any law school casebook is apparent from the outset. An administrative law casebook, for example, pulls together materials about governmental administration. An antitrust law book evaluates the basic laws and judicial decisions that protect competition by limiting how and when firms can cooperate, engage in potentially anticompetitive behavior, and merge with one another. Thus, even though an administrative law book will consider agencies as diverse as the Environmental Protection Agency and the Federal Aviation Administration, and even though an antitrust law book will apply to industries ranging from real estate to computer software to supermarkets, it is not difficult to describe the overarching themes that structure the set of materials covered by the text.

The implicit logic of a telecommunications book, at least on first blush, may be harder to understand. Why should statutes and regulations related to broadcast television, cable, satellite, wireline telephony, cellular telephony, and the Internet all be considered in a single volume? Do these communication mechanisms really have that much in common?

The challenge of capturing the story of telecommunications law is particularly interesting and important today because of technological convergence. This means that once-distinct technologies — for example, the traditional telephone infrastructure and the traditional cable infrastructure — can provide very similar and substitutable services, including telephone service, cable television, and broadband Internet access. The question of how to treat different technologies, be they telephone networks, cable networks, or wireless providers, can no longer be answered by reference to the service that those networks titularly support. Given that this answer was often the way such policies developed in the past, this book can be read on two levels: (1) what is the best policy for telecommunications networks of all kinds; and (2) in light of the legacy of policies long in place (and a statute first written in 1934), how can the administering agency (in almost all cases, the Federal Communications Commission) move towards the best policy (or find a second best one) if practical, legal, or political constraints limit its ability to get there?

Given the nature of technological convergence, it is hard to consider any one branch of telecommunications in isolation. It is the combination of broadcast, cable, telephone, and Internet regulation that together determine how wire, air, and other telecommunications resources are allocated between all their myriad competing uses. Because almost any telecommunications resource can be put to more than one telecommunications use, telecommunications topics are necessarily interconnected. And, as noted above, today's decisionmakers are not writing on a clean slate, creating challenges insofar as decisions of yesterday, such as how much wireless spectrum to dedicate to over-the-air television broadcasts, are not easily reversed to address the needs of today — say, more spectrum for wireless broadband services.

The topics addressed in this book are not only related in terms of basic technologies, but also they share common economic and institutional characteristics. On the economic front, the range of technologies we discuss raises the question of whether competition is either unworkable or undesirable. To give but one example, policymakers have long worried that the economics of local wireline telephone service are such that either only one firm can survive in the long run ("competition is unworkable") or a single firm can provide a given quality of phone service at lower total cost than can multiple competitors ("competition is undesirable"). Policymakers in this area therefore struggled with the question of whether regulation should displace competition as the principal mechanism for ensuring good performance. Similar arguments that regulation might have advantages over competition arise in every telecommunications market. This is therefore another reason to consider all of these topics in a single conversation. On the institutional side, the Federal Communications Commission has extensive regulatory authority over traditional telephony, broadcast, cable television, and satellite services, and at least some residual authority over all other telecommunications technologies. Thus, before we discuss the substantive telecommunications policy issues, Chapters One and Two begin with the basic economic and institutional issues that will be discussed throughout the book.

Now, some acknowledgments. This book grew out of an earlier book written by Tom Krattenmaker, and so first and foremost our thanks to Tom for getting us started back in 2001. Howard Shelanski and Phil Weiser were on previous editions, and their ideas and analyses remain in these pages, for which we are deeply indebted. We also thank Doug Lichtman who was on the first two editions. Jack Balkin, Dale Hatfield, Karl Mannheim, Preston Padden, John Roberts, Peter Shane, and Doug Sicker also have contributed significantly to this project over the years. We owe each sincere thanks for helping us think through issues. Our thanks go to Stanley Besen and Lucas Powe as well. While their contributions came to us through Krattenmaker, those suggestions nevertheless benefit the book still today. Sincere thanks, too, to the family at Carolina Academic Press. Linda, you especially have been 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 a few people whose careful reading of the text helped it immeasurably: Julie Moushon and Balfour Smith from Duke Law School and Duke Law students Ben Chalfin, Matthew Craig, Daniel Stockton, and Bill Warren.

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 of 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 telecommunications law to be a rewarding one.

Stuart Benjamin and Jim Speta