

TELECOMMUNICATIONS SEMINAR

12/06

PROFESSOR ROBERTS

SUGGESTED RESEARCH TOPICS

I. Broadcast Issues

1. Congress and the FCC have mandated a transition from analog to digital television by granting each current television licensee a second channel to use for digital programming. The transition is not proceeding on schedule and the FCC is considering a number of actions to force broadcasters and TV set makers to cooperate. A paper could analyze the overall issues, or focus on specific problems such as mandating digital tuners or digital copy protection.

2. Congress has mandated that all future allocation of broadcast frequencies will be done by auction to the highest bidder, as is currently done for cellular telephone and similar services. What are the special problems posed by the future auctioning of TV and radio licenses?

3. The FCC has recently created a whole new class of low-power radio stations, designed to provide new opportunities for community groups, under-served neighborhoods and other interests traditionally shut out of radio ownership. These stations, which will have extremely small coverage areas, are opposed by established broadcasters on interference grounds. What are the economic, political and technical problems posed by this new service?

4. The D.C. Court of Appeals in *Lutheran Church Missouri Synod* struck down the FCC's long-standing rules requiring broadcasters to abide by the agency's own set of EEO rules. The FCC then reformulated its rules and promulgated them again. Do the new rules conform to the D.C. Circuit's opinion? Are there other constitutional problems?

5. In 1992 the Congress created a new class of property rights for broadcasters, requiring that cable systems obtain written retransmission consent before carrying the signal of any broadcast station. Retransmission consent has not proven to be the boon to broadcasters that was anticipated, and a number of problems in administering the FCC's retransmission consent rules have surfaced.

6. The FCC promulgated a new set of ownership rules in July 2003, which allow large media owners to own more local TV stations. Critics contend that the new policies will further erode localism in TV broadcasting. After the 1996 Act, a similar relaxation of ownership rules in radio resulted in a major consolidation of ownership in large media hands. The Commission

has recently initiated an inquiry into the current state of local control over programming, news, etc., in broadcasting. How has this issue been dealt with over the years by the FCC?

II. First Amendment Issues

1. Congress has mandated that a special computer chip (the V-chip) capable of enabling viewers to screen out certain kinds of “undesirable” television programming be added to new TV sets. There are many unresolved technical and regulatory problems, including how to encourage better use of the program ratings system that the V-chip will use as a screening tool.

2. In 1996 Congress enacted a sweeping prohibition on indecent and obscene material on the Internet, and the Supreme Court struck down most of the law in *ACLU v. Reno*. Congress then passed another statute trying to accomplish the same thing, which has been enjoined by a federal district judge. Differences between the two statutory approaches would make a good research topic.

3. In the Supreme Court’s two most recent cases on content regulation of the media, *ACLU v. Reno* and *Denver Area Consortium v. FCC*, the Court continued its approach of treating different media differently for first amendment purposes. Some members of the Court are clearly uncomfortable with this approach, particularly since the media are “converging” rapidly. Can we still justify treating cable, broadcast and telephone content regulation differently?

4. For many years, the FCC required that broadcasters comply with the “Fairness Doctrine,” which required that stations affirmatively cover important public issues and that they present contrasting views on the issues they do cover. More recently, the FCC, with prodding from the D.C. Circuit, has abandoned the rules. Is the Fairness Doctrine in the public interest, and should it be re-instituted in some modified form?

5. The FCC has announced several sanctions against stations and networks airing “indecent” programming in the last year, involving incidents as varied as the Howard Stern show and the Super Bowl halftime “equipment malfunction.” CBS has announced its intention to fight the Super Bowl program fine in the courts. Many observers believe the Commission has expanded its definition of indecency and perhaps gone beyond Supreme Court precedent in this area.

6. After his most recent brush with FCC regulation, Howard Stern has announced that he will move his controversial show to subscription satellite radio. Some observers have noted that the FCC has no power to extend its indecency rules to satellite radio, but we have no definitive ruling on this issue.

7. The FCC has recently announced a new study of the effects of televised violence on young viewers. A good paper topic would be to review the Commission's efforts to control and sanction TV violence, and to trace court responses to these efforts.

III. Telephone Regulation

1. Congress created a large subsidy program for connecting schools and libraries to the Internet in the 1996 Telecommunications Act. Many controversial issues have emerged, including the proper funding levels for the program, its effect on telephone rates and the FCC's decisions on administration of the program.

2. A key part of the 1996 Telecommunications Act's deregulation of telephones is the reduction of access charges paid by long-distance carriers to local carriers for termination of calls. The FCC has steered a wavering course in the process of implementing this part of the Act, and many complicated issues remain.

3. The 1996 Telecommunications Act requires that local phone companies allow new competitors access to their systems by offering to lease them elements of the telephone system, called "unbundled network elements" or UNE's. The Supreme Court, while upholding the FCC's broad approach to implementation, remanded for further consideration of what elements of the local system must be "unbundled." The FCC's second and third efforts were rejected by the Court of Appeals, and it has now released interim rules in an effort to comply with the court's mandate. The definition of UNE's remains a major point of contention between the Bell companies and their new competitors, and raises a number of controversial questions.

4. In order to expand access to cellular telephone services, and particularly newer broadband services, in competition with foreign companies, U.S. cellular companies assert that they need much more spectrum space. The FCC and the Commerce Department (which controls governmental spectrum) are debating where to find this needed spectrum, and a number of difficult legal and policy issues have arisen.

5. One of the most contentious issues to emerge from the 1996 Act and the Supreme Court's decision in *Iowa Utilities Board* is the proper role of the state public utilities commissions in relation to the FCC. How much of their traditional authority over local telephone service do the PUC's retain after the 1996 Act?

6. The 1996 Act codified for the first time the FCC's long-standing policy of universal service funding – forcing telecommunications companies to pay into a special fund that helps support the high costs of providing service in rural and high-cost areas. The basic policy and the FCC's implementation of it have brought much criticism, including the argument that such a social policy should be supported by direct tax revenues, not an assessment on certain businesses

only. Also highly controversial (and heavily litigated) is the FCC's cost model to determine how much companies should pay.

7. Critical to the practical application of the interconnection rules under the 1996 Telecommunications Act is the pricing of Unbundled Network Elements that incumbent companies are required to share with competitors. The FCC adopted a complex system, based on forward-looking costs and a hypothetically efficient phone system. The Eighth Circuit rejected these "TELRIC" rules, but the Supreme Court upheld the basic principles of the system. The FCC then issued a new opinion on the meaning of TELRIC and many difficult issues remain. Indeed it could be argued that the Supreme Court's decision was incorrect and unwise.

8. The controversy over TELRIC pricing outlined in 8 above became the subject of a state battle in Illinois, after SBC persuaded the state legislature to enact a law in effect ordering the Public Utilities Commission to raise its UNE rates in the state. SBC argued that the state commission had set the rates far too low, giving its competitors an unfair advantage. The District Court in Chicago struck down the statute on federal preemption grounds, and the Seventh Circuit affirmed in a very confusing opinion. The controversy raises interesting issues about the proper roles of the FCC, the state commission and the legislature in regulating telephone rates.

9. After one of the FCC's cellular telephone auctions (the C-block auction) several of the winners announced that they had bid too much and could not build their systems. One of them, Nextwave, went into bankruptcy and entered into a long battle with the FCC over who controlled the licenses. The FCC reclaimed the spectrum and resold it, but later a federal court ruled that the bankruptcy court should have controlled the licenses. The Supreme Court affirmed. The controversy raises interesting questions about both auctions and the relative powers of the FCC and bankruptcy courts.

10. In the *Trinko* case, the Supreme Court recently held that the antitrust laws have no operation in the field of telephone regulation, removing a possible additional weapon against telephone companies allegedly blocking the implementation of the 1996 Act. The decision is quite controversial and may represent an extension of tradition antitrust doctrine in the area.

11. The FCC recently adopted rules allowing the development of telephone and broadband service over conventional power lines. What are the implications of this new service for competition in telephone service to consumers? There are also a number of interesting technical issues outstanding before this alternative becomes a reality.

12. Local controversies frequently erupt over the siting of cellular TV antennas in communities. The FCC attempts to limit the power of local municipalities, and a number of court decisions have attempted to sort out the legal issues, including preemption and federalism concerns.

IV. Industry Structure

1. The 1996 Act relaxed all controls on the number of radio stations one entity can own nationally, and a drastic consolidation of the industry has ensued. Is this restructuring good for the industry? For listeners? What should Congress and the FCC do, if anything?

2. In recent years the D.C. Circuit has struck down as unreasonable several of the FCC's TV, radio and cable ownership rules. It has also imposed a higher standard of proof for adoption of new rules, under a questionable interpretation of the 1996 Telecommunications Act. Partly in response to these developments, the FCC has recently announced a major revision of its rules governing who may own broadcast stations, allowing further consolidation of ownership among large media companies. They also allow newspapers to own TV stations in their home markets. The rules are very controversial, and Congress recently stepped in to modify one of them. The Third Circuit Court of Appeals upheld some of these rules and struck down others. Many interesting legal and policy issues are raised by the new rules and the courts' responses.

3. During the last ten years, significant changes have taken place in the structure of the cable television business. National companies like TCI and Time-Warner have bought competitors and have also swapped systems among themselves so as to create more complete coverage of metro areas. What are the public policy implications of these changes?

4. What is the proper role for the FCC in analyzing major corporate mergers of telecom companies? Does it interfere with Justice Department analysis and approval? Does it impede healthy merger activity needed for global competitiveness? What standards should the FCC use in approving a major merger such as AT&T- TCI or AOL-- Time Warner?

5. Particularly interesting issues are raised by the recently approved takeover of Direct TV by Rupert Murdoch, who owns the Fox network and many other media interests. The FCC imposed a number of controversial conditions on this merger, raising a number of public interest questions.

6. After the breakup of the old integrated Bell System in 1984, the local telephone business was dominated by the seven regional bell operating companies (RBOCs) that emerged from that process. In recent years, high profile mergers have reduced the number to four, and have also absorbed the largest independent, GTE. Is this level of consolidation in local telephone service good for the country, and for consumers?

7. The Southern New England Telephone Company reorganized itself into two separate entities. One is strictly a transmission company, owning telephone lines and providing common-carrier access to all comers. The second is a content and services provider, owning no lines and providing only telephone and Internet services. Is this a model for the nation? Would be better off eliminating all vertical integration in the telephone business, as seems to be happening with electricity?

8. Several state public utility commissions have proposed that telephone companies be forced to separate their customer retail services from their common carrier functions. This “structural separation” requirement is alleged to protect consumers but may also bring about inefficiency in company operations.

V. Broadband and Internet Issues

1 Comcast and Time-Warner offer their own proprietary Internet access services to cable subscribers. Competing ISP’s are arguing that cable companies must offer non-discriminatory access to competing ISP’s through an interconnection scheme similar to that mandated for local telephone companies. The FCC has refused to order access, and the 1996 Act doesn’t clearly provide an answer. What is the best legal and policy solution?

3. A key to resolving the “open access” controversy described in number 1 above is the regulatory classification of cable modem services under the 1996 Act. Three different federal courts have rendered conflicting decisions on this question, and the FCC has now issued a declaratory order containing its own legal interpretation. The Supreme Court recently side-stepped the issue. Is cable modem service a “cable service,” a “telecommunications service” or an “information service” under the 1996 Act?

4. Regular telephone service delivered via the Internet is fast becoming a reality, and may soon be a competitor even for local residential calls. The 1996 does not clearly tell the FCC how to regulate this service, if at all. Recently state public utilities commissions have ruled that Internet telephone service can be regulated by the states just like traditional phone service. Critics argue that it is an information service and should remain unregulated. The FCC has ruled that the service is intrinsically interstate and not subject to state jurisdiction, but the issue remains controversial?

5. If telephone service over the Internet (VoIP) becomes a real competitor to regular telephone service, a host of difficult issues must be resolved, including whether such service will pay access charges to local telephone companies, whether it will contribute to universal service, and whether it will be forced to offer emergency 911 service.

6. The FCC recently announced a sweeping inquiry into the role of so-called IP-enabled services, including VoIP, and how they should be regulated. This has led to calls for a revision of the 1996 Telecom Act to deal separately with broadband issues. Several bills have been proposed.

7. One of the most contentious issues created by the explosion of Internet Service Providers is whether these companies should receive so-called “reciprocal compensation” from incumbent local telephone companies that deliver their communications traffic. Large amounts

of money are involved, and the legal issues are complex. The FCC has waffled, but recently issued new rules designed to wean telephone companies carrying ISP traffic away from this compensation over a period of years. The Court of Appeals has twice rejected the FCC's legal theories. The rules are controversial, and raise interesting legal and policy issues.

8. Congressmen have been pushing hard for the Internet Freedom and Broadband Deployment Act, which would free the former Bell telephone companies to directly offer Internet services and relieve them of current obligations to share with competitors the facilities used to deliver broadband services. Is the pro-Bell-company bill in the public interest?

VI. Cable Television Issues

1. Currently cable systems must carry the signals of all local stations. Now that each station will (eventually) be broadcasting two signals, one analog and one digital (and perhaps even more), should these requirements be extended to the digital signal or signals as well? Will the burden on small cable systems be too great?

2. Over the years, the Congress and the FCC have imposed rate regulation on local cable systems, then abolished it, then re-imposed it. What sort of regulation should be imposed on the rates consumers pay for cable?

3. What is the proper role for the municipal franchising authority in cable television? What is its proper relationship to the FCC under the 1996 Act?

4. The Congress and the FCC have imposed significant structural and behavioral rules governing the relationship between cable companies and program suppliers. Are these rules in the public interest?

5. The 1996 Act instituted a complicated set of rules governing the entry of telephone companies into the cable television business. One of the alternatives is for telephone companies to operate as Open Video Systems (OVS). The FCC's initial OVS rules have been partially invalidated by a federal court, and many interesting issues remain unresolved.

6. The 1996 Act instructed the FCC to set limits on the overall size of a single cable company and the percentage of its channels that it could fill with programming in which it had a financial interest, both designed to preserve competition in program production. The FCC decided on limits of 30% of homes nationwide and 40% of a system's channels. A federal court struck down these rules as irrational, and the FCC is now reformulating them. Evaluate the legal and policy issues.

7. The FCC is currently considering whether to change its requirements for the way cable companies may offer channels to subscribers, possibly including a requirement that they be

offered “ala carte.” This would mean that subscribers could choose and pay for only those specific channels they desired. This has set off a major battle among programmers, cable companies and consumer advocates. Are these proposals sound?

VII. Copyright Issues

1. A separate law currently governs whether satellite delivered video systems (e.g., DirectTV) can carry local television signals. Until recently, such carriage was forbidden within the local station’s service area, creating severe competitive disadvantages for satellite systems trying to compete with local cable operators.. Congress passed new legislation allowing local carriage of local stations on satellite systems, but a host of difficult policy and technical issues remain.

2. The rights of cable systems to use the signals of broadcast stations are covered by a compulsory licensing scheme added to the Copyright Act in 1976. How well is this regime working?

3. Many copyright holders controlling video programming have resisted the transition from analog to digital television transmission because it will make copying of movies and other programs easier and more profitable. The FCC has recently started to consider new rules for digital copy protection, raising a number of interesting issues.

VIII. International Issues

1. How do the 1996 Act in the US and recent European Union deregulation efforts compare in the telecom arena? What different forces are at work that would affect their success?

2. Compare and contrast the experience of specific countries in modernizing telecom laws with that of the US.

3. The EU has promulgated rules for member states governing the kind of national telecom regulatory agencies they should have, their powers, etc. These rules include interesting comparisons with US experience.

4. Increasingly, international mergers and joint ventures face not only US antitrust scrutiny but also approval under EU competition law. How do the two regimes differ? Should they be more closely coordinated in an increasingly global marketplace?

5. EU rules provide that the broadcasting content of member state systems have a minimum percentage of “national” content, basically to forestall the complete domination of US programs. What are the legal and other issues presented by such restrictions?

6. Recent efforts by government-owned telecom companies like DT (Germany), NTT (Japan) and France Telecom have brought forth calls in Congress for stronger prohibitions on foreign control of US telecommunications companies. This would arguably be inconsistent with WTO principles, and perhaps economically short-sighted as well. What are the legal and policy issues relating to mergers involving foreign companies that still have majority government ownership?

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Additional Suggested Topics

In addition to the range of topics in my “Suggested Research Topics” memo, available on the College of Law website with the Syllabus, here are a few more possibilities, based on recent events.

1. The FCC recently approved the merger between AT&T and BellSouth, bringing together again most of the parts of the old Bell System in spite of the 1980’s antitrust decree that broke it up. Has the government now gone too far in allowing consolidation in the telecom industry? Are the conditions agreed to by the parties enough to protect the public interest?

2. The FCC has not reached consensus on new radio and TV ownership rules following its defeat in the *Prometheus* case. It has released a series of research studies on media concentration and localism and these raise interesting issues about what shape the new ownership restrictions should take. It has also granted Tribune Company a permanent waiver of the newspaper-TV joint ownership ban without adopting a general rule. Where should the Commission now turn on this important issue?

3. Telephone companies are now trying to get into the program distribution business, and are pushing hard to get around the local approval rules applicable to cable systems. Some states have passed statewide franchising rules, and Congress has considered national legislation. The FCC adopted rules going part way in that direction. What are the pros and cons of this issue?

4. The FCC last year issued a series of broadcast indecency rulings that arguably expanded the scope of its indecency doctrines. The Third Circuit recently struck down these decisions in *Fox Television Stations*. What is the future of FCC regulation of indecency?

5. The FCC has released a massive study of TV violence, and asserted the constitutional authority to regulate in this area. What are the first amendment issues here?

6. The FCC is being pushed hard by content producers (movie studios and others) to provide protection against wholesale copying of programming, which digital transmission makes easier and faster. The Circuit Court struck down the FCC’s proposed “broadcast flag” rules on grounds that the Commission lacked the power to issue them, but the issue is not going away. What is the best technical and policy solution to this problem?

7. The Library of Congress has set new rates for IP payments by internet radio broadcasters, which the broadcasters claim are ruinously high. What is the proper balance here to compensate creators in this new medium, as compared with traditional radio?

8. The Canadian Telecom Study Commission recently published a lengthy report proposing drastic deregulation of telecom companies in Canada. An analysis of this report from a comparative perspective would be interesting.

9. One of the most controversial current issues in the telecom world is “net neutrality,” a slippery term that generally aims to prevent internet access providers like telephone and cable companies from charging different rates to content providers based on the burdens their content places on the network. Proponents want all internet content treated alike, asserting that is a basic principle of the internet. Congress is considering several bills, and the FCC has not taken an aggressive stance on this issue. How do you sort out the pros and cons?

10. The FCC is moving toward a decision on how to regulate Voice Over Internet Protocol telephone service, and most observers believe that it will be left largely unregulated. Other countries (i.e., Canada), however, have decided to regulate it just like traditional telephone service. A comparative study would be interesting.

11. Should cities be able to operate their own WiFi networks, or should the field be left to commercial providers? Some states have passed laws outlawing municipal networks, and bills in Congress go both ways. What are the pros and cons?

12. Chairman Martin has recently argued that the FCC should move toward greater regulation of cable systems, invoking a little-known statutory provision allowing regulation (presumably of rates and services) when cable reaches 70 percent of homes and 70 percent of those homes subscribe. There is controversy about whether the statutory threshold has been reached, and also on the policy question of whether rates and services should be regulated by the FCC, as they were for a time in the 80’s and 90’s.

13. The FCC will hold the most important auction of available spectrum space in its history in January. This is the space gained by the transition to digital TV, scheduled to be complete in February 2009. Many have argued that telephone networks should be more open to different equipment and applications, instead of the restrictive arrangements mobile companies now employ. The FCC ordered that a portion of the spectrum coming up should be reserved for bidders who promise to build open networks, allowing the customer to use any equipment and application. Mobile companies are fighting against this idea. What are the pros and cons?

14. VOIP phone service presents special problems for 911 emergency services, and the FCC has struggled to find a good solution. What are the regulatory options?