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Articles

THE LEGACY OF THE FEDERAL COMMUNICATIONS COMMISSION'S COMPUTER INQUIRIES

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The FCC and the computer industry have learned much in the thirty-five years since the agency first began to regulate computer networks. Safeguards were imposed on common carriers for the benefit of the networks. This Article examines the so-called Computer Inquiries and how they have repeatedly re-examined and redefined the nature of the regulatory treatment of computer networks over communications networks. The Author reviews Computer I, in which the FCC first attempted to divide the world technologically between computers that ran communications networks ("pure communications") and computers at the end of telephone lines with which people interacted ("pure data processing"). In Computer II, the FCC reclassified the computer world on the basis of the services provided—basic or enhanced. The FCC's third and final attack on the issue, Computer III, retained the conceptual framework, but redetermined how the policy objectives would be implemented. The Author concludes that the actions taken by the FCC may not have "invented the Internet," but they certainly contributed to its success.

ADJUSTING THE HORIZONTAL AND VERTICAL IN TELECOMMUNICATIONS REGULATION: A COMPARISON OF THE TRADITIONAL AND A NEW LAYERED APPROACH

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This Article assesses the viability of different vertical regulatory regimes in an increasingly convergent environment. It reviews several FCC proceedings that have generated opportunities for stakeholders to avoid regulatory parity by qualifying for reduced regulation based on service definitions. It also considers whether a horizontal regulatory approach can reduce the number of regulatory asymmetries and inconsistencies. The Author concludes that although a horizontal regulatory structure may not secure sufficient political support because of the risk of extending new burdens on previously unregulated activities, that type of structure makes better sense in a convergent, increasingly Internet-dominated marketplace and provides a more intelligent model than the existing vertical orientation that creates unsustainable service and regulatory distinctions.

ACCESS TO LOCAL RIGHTS-OF-WAY: A REBUTTAL

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This Author rebuts the proposals and analysis regarding the impact of local rights-of-way access on competitive local exchange carriers put forth in a May 2002 *Journal* article by Christopher Day. He argues that Day's article lacks persuasive evidence that CLECs are harmed by lack of rights-of-way access. He states, first, that Day has misconceived the intent of the rights-of-way requirements in the Telecommunications Act of 1996, and, second, that the FCC does not have the authority to make substantive adjudicative decisions that Day called for. He concludes that neither of the proposals made by Day—an amendment to the Telecommunications Act of 1996 or more aggressive adjudication by the FCC on the issue of rights-of-way—should be adopted.

Notes

FROM DIVERSITY TO DUPLICATION: MEGA-MERGERS AND THE FAILURE OF THE MARKETPLACE MODEL UNDER THE TELECOMMUNICATIONS ACT OF 1996

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"Mega-owners" in the radio regime became possible with the Telecommunications Act of 1996, which radically deregulated national and local radio station ownership limits that had been in existence for almost sixty years. The Act reflected Congress's firm belief that a deregulated marketplace would best serve the public interest. This Note argues that the 1996 Act is an example of excessive adherence to the marketplace model, particularly for regulating the radio industry. The Author argues that although a less extreme marketplace model has guided the FCC's regulation of radio since the early 1980s, the current incarnation of the marketplace model is both contrary to the public interest and economically harmful for radio stations and industries affected by radio, such as advertising. The Author concludes that although a return to the prior trusteeship model of strict content regulation and small ownership caps may be premature, it is clear that the pendulum of deregulation has swung far too wide in the wrong direction.

AVOIDING SLIM REASONING AND SHADY RESULTS: A PROPOSAL FOR INDECENCY AND OBSCENITY REGULATION IN RADIO AND BROADCAST TELEVISION

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This Note explores the relevant law regarding the issue of indecency and obscenity in broadcast, with particular focus on a 2001 Policy Statement released by the FCC. The Author examines the major problems with the regulatory scheme as it now exists, and offers an alternative. The Author concludes by arguing that leaving the subjective decisions regarding indecency to market forces, leaving parents to determine what should or should not be indecent, and leaving the FCC free to pursue obscenity with greater zeal are the most appropriate courses of action for the future.

ENCRYPTION REGULATION IN THE WAKE OF SEPTEMBER 11, 2001: MUST WE PROTECT NATIONAL SECURITY AT THE EXPENSE OF THE ECONOMY?

By Matthew Parker Voors331

This Note argues that although privacy and economic concerns have ruled the encryption debate during the past decade, the move toward increased privacy on the Internet and relaxed encryption regulation, designed to promote electronic commerce, comes at the expense of national security and the protection of Americans' safety. The Article begins with historical information about encryption and an examination of how businesses use encryption to secure their communications and financial transactions on the Internet. This Section also observes that this technology is employed by terrorist organizations to accomplish the same goal: to send private communications. The Author next details the history of encryption regulation during the last decade and addresses why the government has relaxed its stance even though encryption ultimately poses such a threat. The Note then analyzes whether encryption regulation will provide the intelligence community the tools to deal with terrorists who are now technologically savvy, or whether regulation will hurt the nation's already wounded economy. The Author then examines Magic Lantern, cutting-edge technology developed by the FBI that effectively incorporates the privacy benefits of encryption while still providing Americans protection in this new era of terrorism. The Author concludes by proposing the adoption of Magic Lantern as a way to protect privacy and economic concerns while ensuring national security.

Book Review

Attacking *Brandenburg* with History: Does the Long-Term Harm of Biased Speech Justify a Criminal Statute Suppressing It?

By Anuj C. Desai353

A review of Alexander Tsesis's *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements*, New York University Press, 2002. At one level, Alexander Tsesis's thesis is simply one in a long line of arguments about the need to regulate racist speech. Yet on another level, it is fundamentally different from much American literature on "hate speech" because Tsesis draws on a broad historical swath, and because he contends that the United States should regulate "hate speech" due to a causal link between that speech and oppression of such magnitude as the Holocaust and slavery. Moreover, it is fundamentally different because Tsesis focuses on the ideology of racial inferiority and not where most proponents of regulating "hate speech" in the past have set their sights—epithets, or what one could term "verbal assaults." At the end of his book, Tsesis proposes a model statute for criminalizing hate speech.