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Articles

Brand X and the Wireline Broadband Report and Order: The Beginning of the End of the Distinction Between Title I and Title II Services

By J. Steven Rich..... 221

This Article traces the development of the FCC's distinction between "telecommunications services" subject to common carrier services under Title II of the 1934 Communications Act and "information services" regulated under Title I of the Act from the *Computer Inquiry* line of cases through the *Brand X* decision and recent *Wireline Broadband Report and Order*. The Author pays particular attention to the *Brand X* decision and the FCC's *Wireline Broadband Order* and its implications, suggesting that the *Order* may be subject to reversal when it is challenged in court and proposing how the Commission might react to a reversal. The Author concludes by applauding the Commission's effort to level the playing field for similar services provided over different platforms despite the remaining challenges and uncertainties facing incumbent local exchange carriers.

Spread Spectrum is Good—But it Does Not Obsolete *NBC v. U.S.*!

By Charles Jackson, Raymond Pickholtz & Dale Hatfield..... 245

The Authors criticize recent statements by leading legal commentators suggesting that the development of spread spectrum has eliminated radio interference and helped make the underlying legal foundations for regulating spectrum obsolete. The Authors provide a non-technical explanation of how spread spectrum works and why it does not have the effect of eliminating radio interference. The Authors conclude that new technologies are likely to increase the availability of usable spectrum, but they have not wiped out the problem of interference.

Rethinking Reform of the FCC: A Reply to Randolph May

By Russ Taylor 265

This brief Article responds to Randolph May's article, *Recent Developments in Administrative Law—The FCC's Tumultuous Year in 2003: An Essay on an Opportunity for Institutional Agency Reform*, 56 Admin. L. Rev. 1307 (2004). Taylor disputes May's anecdotal evidence that the FCC's poor handling of the *Triennial Review* and the media ownership proceedings are symptomatic of a broad agency inefficiency that should be remedied by drastically cutting the size of the FCC and placing it under the exclusive control of the executive branch to ensure electoral accountability. Taylor argues that while these suggestions may have value, such a rush to action should not be premised on anecdotal evidence, but instead must rest on a more empirical, objective undertaking that would study the FCC's track record. Furthermore, Taylor points out that there are numerous other avenues for reforming the communications regulatory regime: Congress, states, and international organizations. Taylor concludes by analogizing the United Kingdom's OFCOM to the FCC proposed by May. He argues that though OFCOM's centralized

structure and greater accountability have advantages, it also results in a more partisan regulatory process with less transparency. Further, the delays and inefficiencies that May criticizes in the FCC may be inherent in any agency decisionmaking that solicits and invites public comment, regardless of the agency’s structure.

Cable Operators’ Fifth Amendment Claims Applied to Digital Must-Carry
By Nissa Laughner & Justin Brown 283

This Article addresses the legal and policy implications of property rights in the digital must-carry issue. The Authors review must-carry regulations, present a traditional Fifth Amendment analysis of must-carry, address free speech implications of that property-based analysis, and show how property-based claims might influence future cable regulations and policies. The Authors conclude that while the Fifth Amendment claims are unlikely to succeed legally, they do contain significant rhetorical power that can help shift public policy in ways favorable to the cable industry.

An Economic Approach to the Regulation of Direct Marketing
By Daniel R. Shiman 323

The growing ubiquity of electronic media and the almost total absence of cost in mass distributions of direct marketing have exacerbated the problem of the increasing intrusion of direct marketing into the privacy of citizens. The Author proposes utilization of a microeconomic social welfare analysis to guide policymakers in determining what forms of direct media should be regulated and what the most effective forms of regulation are likely to be. Sending and receiving costs provide the key factors in determining the extent of the “welfare-reducing marketing” and “marketing aversions,” but the Author points to a number of other factors as well, including impact on third parties, impact of economic and technological factors, and changes in volume and targeting in traditional channels. The Author’s analysis suggests that increasing the receiver’s ability to process information by imposing labeling requirements on distributors could increase welfare without having to resort to the more sweeping and inefficient opt-in or opt-out programs. Many of these solutions can be effectuated by industry and, thus, do not necessarily require government intervention. In the absence of effective industry-based solutions, the Author contends that a complete ban on direct marketing may be required in the electronic media in particular.

Note

Rethinking Advertising Aimed at Children
By William A. Ramsey 367

In 1990, Congress passed the Children’s Television Act (“CTA”), which directed the FCC to establish standards for broadcasters regarding the amount of children’s programming aired and to enforce limits on the amount of commercial time aired during children’s programming. The limits are meant to protect children from various harms caused by advertising aimed at children. This Note examines the constitutionality and the effectiveness of these commercial limits. The Note concludes that while the CTA’s commercial limits are probably constitutional under the Court’s test for regulations of commercial speech, the limits do not provide children with adequate protection from the harms of advertising. The Note suggests several changes that should be made in the regulation of advertising aimed at children. Most importantly, the Note argues that the focus of the regulation should shift from limiting the amount of commercial material viewed by children to reducing the misleading nature of advertising aimed at children. The Note argues that the suggested content-based regulation would be constitutional under the Court’s test for regulation of commercial speech and would more effectively protect children from the harms of advertising than the current regulation.

Book Review

A Practitioner's View of Broadcaster Power

By Andrew J. Siegel 399

A Review of J. H. Snider's *Speak Softly and Carry a Big Stick: How Local TV Broadcasters Exert Political Power*, iUniverse, Inc. 2005. Assistant General Counsel for CBS Andrew J. Siegel reviews this critique of the spectrum award given to television stations as part of *The Telecommunications Act of 1996*. Using a principal-agent theory, this book examines the complicated relationship between politicians, local television broadcasters, and the U.S. public in an attempt to explain why television broadcasters received the additional spectrum.

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