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Articles

Beyond Content Neutrality: Understanding Content-Based Promotion of Democratic Speech
By Marvin Ammori 273

Scholars and judges generally assume that the cornerstone of free speech doctrine is the distinction between content-based and content-neutral laws. Despite its wide acceptance, the distinction lacks any precedential or normative basis, unless it also accounts for another equally important distinction. The scholars' conventional view of content-analysis overlooks the difference between the government banning a book or recommending it. Content-based laws that suppress specific content, like banning a television show, should be problematic, but content-based laws that promote specific content, such as promoting educational and political shows, should not be.

Precedent and the First Amendment's underlying normative concerns both require this distinction and support content-based laws promoting democratic content. The precedent in almost every area of First Amendment doctrine applies minimal scrutiny to content-based promotion. To reach these results, courts usually claim to apply one of several "exceptions" to content-analysis, but these many exceptions actually add up to a rule: content-based promotion of speech does not receive heightened scrutiny. This rule serves the normative goals of the First Amendment. Exceptions to this rule—the most notable of which applies to emerging electronic media—are a judicial mistake that should be corrected.

An Evaluation of the Proposals in the FCC's Intercarrier Compensation Reform Docket Related to Tandem Transit Services
By John R. Harrington, Ronald W. Gavillet, Matt D. Basil, and Melissa L. Dickey 325

As part of its Intercarrier Compensation Reform Docket, the Federal Communications Commission (FCC) has received many proposals advocating for the adoption of regulations relating to tandem transit services. As transiting affects virtually every carrier in the telecommunications industry, including traditional CLECs, cable telephony providers, wireless carriers, and even traditional ILECs, the industry is sharply divided over which, if any, of those proposals should be adopted. This Article provides an in-depth look at the issues dividing the industry, and the various proposals before the FCC. The

Authors then hypothesize that the FCC should follow the lead of several state commissions who have addressed this exact issue and adopt a nationwide policy that would facilitate the continued growth of competition in the tandem transiting market, as this result would best serve consumers, telecommunications providers, and the industry as a whole.

Reverse Auctions and Universal Telecommunications Service: Lessons from Global Experience
By Scott Wallsten 373

The United States now spends around $7 billion on universal service programs—subsidies intended to ensure that the entire country has access to telecommunications services. Most of this money supports telecommunications service in "high cost" (primarily rural) areas, and the High Cost fund is growing quickly. In response to this growth, policymakers are considering using reverse auctions, or bids for the minimum subsidy, as a way to reduce expenditures. While the United States has not yet distributed funds for universal service programs using reverse auctions, the method has been used widely.

First, reverse auctions are akin to standard government procurement procedures, which call for firms to bid on government contracts to keep prices down. Sending contracts out for bid is common in both simple and complex government contracting. Second, many countries around the world have used reverse auctions for distributing universal funds. This Article reviews global experiences with reverse auctions and discusses their implications for the United States. In particular, this Article reviews reverse auctions in Australia, Chile, Colombia, India, Nepal, and Peru. Not all of the auctions were successful, but they clearly demonstrate that reverse auctions can be an effective tool for revealing information about the true cost of providing universal coverage and for reducing expenditures on subsidies.

Comment

A Fundamental Misunderstanding: FCC Implementation of U.S. WTO Commitments
By Laura B. Sherman..... 395

In bilateral and multilateral trade agreements, the United States has agreed to open the market for telecommunications services to foreign service suppliers, an obligation implemented by the FCC since 1998. In contrast, the United States has made no commitments with respect to broadcasting services or broadcast licenses. This article clarifies the different treatment of telecommunications services and broadcast services in U.S. trade obligations and FCC orders.

Notes

Paying the Price for Sports TV: Preventing the Strategic Misuse of the FCC's Carriage Regulations
By David Hutson 407

Cable companies and sports leagues have embarked upon parallel courses of vertical integration by creating and acquiring interests in cable sports networks. Cable companies carry regional sports networks (RSNs) on basic cable tiers. Some league-owned networks have sought high prices for carriage on basic tiers, causing some cable companies to balk because of the price increase they would have to pass on to consumers. The 1992 Cable Act prohibits cable

companies from discriminating in carriage terms between affiliated and nonaffiliated networks. Cable companies that own RSNs are, therefore, left vulnerable to discrimination complaints by league-owned networks. This Note argues that the leverage given to league-owned networks by the FCC's carriage regulations is contrary to the public interest and is due to an unreasonable interpretation of the 1992 Cable Act. Further, it suggests a variety of responses available to policymakers that have the potential to curtail increases in the price of cable due to the proliferation of cable sports networks.

The RIAA, the DMCA, and the Forgotten Few Webcasters: A Call for Change in Digital Copyright Royalties
By Kellen Myers.....431

Emerging webcasting technology is playing an increasing role in modern society. The ease of use of webcast technology has brought about an increased user base as well as an increased viability for small webcasting businesses. However, the mix-tape genre of independent Internet radio has been financially and legislatively abused as a forerunner of rapidly advancing digital technology and concerns over protecting copyright royalties. This Note argues for a revision of the DMCA to provide a middle ground between protecting copyrighted works and allowing the continued existence of Internet radio.

Business Solutions to the Alien Ownership Restriction
By Greg Snodgrass 457

The alien ownership restriction on broadcast licenses has had a profound effect on the entertainment industry over the past few decades. While the origins of the restriction were based on national security fears that no longer apply, the restriction is unlikely to be repealed without significant lobbying. Given the unlikelihood of repeal, this Note concludes that entertainment conglomerates should apply a two-pronged approach to overcome the barrier imposed by the ownership restriction. First, conglomerates should build powerful non-broadcast superstations. Second, conglomerates should push the FCC to gradually loosen its application of the restriction. While this is not a perfect solution, it does provide a business with alternatives to achieve synergies in the entertainment industry.