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Articles

Adaptive Policymaking: Evolving and Applying Emergent Solutions for U.S. Communications Policy

By Richard S. Whitt..... 483

This Article presents some specific ways that U.S. policymakers should use teachings from the latest thinking in economics to create a conceptual framework in order to grapple with current controversies in communications law and regulation. First, it provides a brief overview of Emergence Economics, with an emphasis on the “rough formula” of emergence and the unique role of technological change in creating and furthering innovation and economic growth. Second, this paper explicates the general concept of “Adaptive Policymaking” by governments and includes some proposed guiding principles, an outline of the public policy design space, and an adaptive toolkit to be used by policymakers. Third, this Article discusses devising a policy design space specifically for communications policy, with an emphasis on the institutional and organizational challenges facing the FCC as it seeks to fulfill the suggested goal of furthering More Good Ideas. Finally, this paper explores the conceptual framework for the fitness landscape, including a searching critique of the notion of “enabling without dictating” evolutionary forces in the marketplace.

Trustworthiness as a Limitation on Network Neutrality

By Aaron J. Burstein & Fred B. Schneider..... 591

The policy debate over how to govern access to broadband networks has largely ignored the objective of network trustworthiness—a set of properties (including security, survivability, and safety) that guarantee expected behavior. Instead, the terms of the network access debate have focused on whether imposing a nondiscrimination or “network neutrality” obligation on network providers is justified by the condition of competition among last-mile providers. Rules proposed by scholars and policymakers would allow network providers to deviate from network neutrality to protect network trustworthiness, but none of these proposals has explored the implications of such exceptions for either neutrality or trustworthiness.

This Article examines the relationship between network trustworthiness and network neutrality and finds that providing a trustworthiness exception is a viable way to accommodate trustworthiness within a network neutrality rule. Network providers need leeway to block or degrade traffic within their own

subnets, and trustworthiness exceptions can provide them with sufficient flexibility to do so. But, the Article argues, defining the scope of a trustworthiness exception is critically important to the network neutrality rule as a whole: an unduly narrow exception could thwart innovative network defenses, while a broad exception could allow trustworthiness to become a pretext that protects a wide range of discrimination that network neutrality advocates seek to prevent. Furthermore, monitoring network providers' use of a trustworthiness exception is necessary to ensure that it remains an exception, rather than becoming a rule. The Article therefore proposes that network providers be required to disclose data regarding their use of a trustworthiness exception. It also offers a general structure for managing these disclosures.

Restraining False Light: Constitutional and Common Law Limits on a “Troublesome Tort”

By James B. Lake 625

The defamation tort is the common law's established remedy for false speech that causes reputational and emotional injury. That tort is subject to intricate constitutional, legislative, and common law rules that have evolved over decades. The false light invasion of privacy tort also provides a potential cause of action in response to injurious falsehood. False light, however, has been subject to much less judicial and legislative scrutiny than defamation. As a result, courts often are uncertain about the proper limits on false light and, in some cases, have countenanced false light claims that would have failed if filed as defamation claims. Allowing such claims conflicts with two important legal principles: (1) the common law principle disfavoring novel causes of action that duplicate established torts, and (2) the constitutional rule of *Hustler Magazine v. Falwell*. These important legal principles require that courts reject false light claims that challenge defamatory speech but fail to meet defamation law's standards.

Comments

Viewpoint Diversity and Media Ownership

By C. Edwin Baker 651

A recent technically sophisticated study of the impact of media mergers on viewpoint diversity that found the impact is contextually variable should be entirely irrelevant to proper policy debates about regulation of media ownership. This Article examines the real reasons to oppose concentrated ownership and considers how the recent study went wrong.

The Role of Theory and Evidence in Media Regulation and Law: A Response to Baker and a Defense of Empirical Legal Studies

By Daniel E. Ho & Kevin M. Quinn 673

We thank Professor Baker for a stimulating response to an Article in which we offered empirical evidence of editorial viewpoint diversity in the face of media consolidation. We appreciate his praise of the Article as “apply[ing] innovative statistical techniques” and as “far superior methodologically to most empirical studies” he has seen. At the same time, Baker “denies the policy relevance” to our Article because empirical evidence is “entirely irrelevant” to the field of media regulation under his preferred normative theory. Baker argues sweepingly that the legal academy's increased willingness to consider the perspectives of quantitative empiricists and positive theorists is “malignant,” and that law is best confined to normative theory and “value-based inquiries”—to the exclusion of positive investigation. Because of the provocative nature of

the specific critiques of our Article and the general across-the-board indictment of positive scholarship and empirical legal studies, we respond.

Notes

Unlocking the Wireless Safe: Opening Up the Wireless World for Consumers

By Adam Clay715

Facing resistance to the use of its Voice-over-Internet Protocol application on mobile phones, in February 2007, Skype Communications filed a petition with the FCC asking for application of the *Carterfone* standards to the wireless phone industry. This Note discusses *Carterfone* and the merits of Skype's petition in light of the recent auction of the C Block, which carries open network requirements, and developments in wireless technology. This Note argues that the FCC should require carriers to provide technical standards for access to their networks, whereby individuals will be able to connect any approved device and application of their choosing.

WHO NEEDS TICKETS? Examining Problems in the Growing Online Ticket Resale Industry

By Clark P. Kirkman739

The Internet has dramatically changed the methods by which people purchase tickets to events. In the past decade, the secondary ticket market has grown exponentially, and today the online ticket resale industry is valued at approximately \$4 billion. Although there are consumer benefits to this industry growth, some of the industry practices have precipitated a consumer backlash. This was typified in 2007 when many parents, hoping to purchase tickets to the Hannah Montana "Best of Both Worlds Tour," watched as tickets sold out online in only a few minutes or less. Coupled with this episode was the *Ticketmaster v. RMG Technologies* case, which dealt with brokers who were using software to aid in purchasing large quantities of tickets to high-profile events. Congress has finally started to pay attention in 2009. This Note argues that the time for national regulation of this growing market is now.

The Never-Ending Limits of § 230: Extending ISP Immunity to the Sexual Exploitation of Children

By Katy Noeth765

In 2006, the U.S. District Court for the Eastern District of Texas extended civil liability to Yahoo! under § 230 of the Communications Decency Act so that it could not be sued for knowingly profiting from a Web site where members exchanged sexually explicit pictures of minors. The court found that the reasoning of the seminal § 230 case, *Zeran v. AOL*, was analogous and that policy considerations mandated its holding.

This Note argues that a multifaceted approach is needed to prevent future courts from following that decision, including an amendment to § 230 that would impose civil liability upon ISPs that knowingly allow the sexual exploitation of children on their Web sites. In the meantime, however, future courts should distinguish *Zeran* and refuse to apply its defamation rationale to child sexual exploitation claims. Future courts should also refuse to extend the immunity to child sexual exploitation claims because doing so does not further the congressional intent behind § 230. Courts should recognize an exception to immunity under § 230(e)(1) in order to protect minors on the Internet.