EDITOR'S NOTE

Welcome to the first Issue of Volume 68 of the *Federal Communications Law Journal*, the nation's premier communications law journal and the official journal of the Federal Communications Bar Association.

In honor of the twentieth anniversary of the Telecommunications Act of 1996, this Issue includes a special compilation of personal reflections from individuals instrumental in crafting, implementing, and litigating this landmark legislation.

Next, a Comment by Harold Furchtgott-Roth and Arielle Roth examines the Telecommunications Act of 1996 by considering four questions: (1) what were the political conditions that enabled the passage of the Act?, (2) to what extent was the implementation of the Act faithful to its intent?, (3) how did the communications sector fare in response to the Act?, and (4) is the Act due to be re-written? Their analysis of the 1996 Act provides useful guidance to future policy makers.

This Issue also contains an Article coauthored by George S. Ford, Ph.D. and Larry Spiwack of the Phoenix Center for Advanced Legal & Economic Public Policy Studies. In their timely piece, the two describe the lessons learned from the United States' unbundling experience. The article explains that the unbundling paradigm outlined in the 1996 Telecom Act contained fundamental defects, which effectively doomed unbundling from its conception. The article also provides guidance to policymakers contemplating future regulatory interventions.

In addition to the pieces described above, this Issue includes two student Notes. In the first Note, Jason Norman describes the dangers of cell-site simulator use and outlines the role the FCC should play in protecting privacy and security. The Note contends that additional FCC regulation of cellular service providers and device manufacturers will enhance their encryption protocols. The second Note, written by Shannon Rohn, explains the burdens broadcasters face regarding the regulations of political speech. The Note argues that the FCC should not expand sponsorship identification requirements for political issue ads.

The Journal is committed to providing its readership with substantive coverage of relevant topics in communications law, and we appreciate the continued support of contributions and readers alike. We welcome your feedback and submissions—any questions or comments about this Issue or future issues may be directed to fclj@law.gwu.edu, and any submissions for publication consideration may be directed to fcljarticles@law.gwu.edu. This issue and our archive are available at http://www.fclj.org.

Rachael Seidenschnur Slobodien
Editor-in-Chief

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Federal Communications Law Journal

The *Federal Communications Law Journal* is published jointly by the Federal Communications Bar Association and the George Washington University Law School. The *Journal* publishes three issues per year and features articles, student notes, essays, and book reviews on issues in telecommunications, the First Amendment, broadcasting, telephony, computers, Internet, intellectual property, mass media, privacy, communications and information policymaking, and other related fields.

As the official journal of the Federal Communications Bar Association, the *Journal* is distributed to over 2,500 subscribers, including Association members as well as legal practitioners, industry experts, government officials and academics. The *Journal* is also distributed by Westlaw, Lexis, William S. Hein, and Bloomberg Law and is available on the Internet at http://www.fclj.org.

The *Journal* is managed by a student Editorial Board, in cooperation with the Editorial Advisory Board of the FCBA and two Faculty Advisors.

Federal Communications Bar Association

The Federal Communications Bar Association (FCBA) is a volunteer organization of attorneys, engineers, consultants, economists, government officials and law students involved in the study, development, interpretation and practice of communications and information technology law and policy. From broadband deployment to broadcast content, from emerging wireless technologies to emergency communications, from spectrum allocations to satellite broadcasting, the FCBA has something to offer nearly everyone involved in the communications industry. That is why the FCBA, more than two thousand members strong, has been the leading organization for communications lawyers and other professionals since 1936.

Through its many professional, social, and educational activities, the FCBA offers its members unique opportunities to interact with their peers and decision-makers in the communications and information technology field, and to keep abreast of significant developments relating to legal, engineering, and policy issues. Through its work with other specialized associations, the FCBA also affords its members opportunities to associate with a broad and diverse cross-section of other professionals in related fields. Although the majority of FCBA members practice in the metropolitan Washington, D.C., area, the FCBA has ten active regional chapters: Atlanta, Carolina, Florida, Midwest, New England, New York, Northern California, Pacific Northwest, Rocky Mountain, and Texas. The FCBA has members from across the U.S., its territories, and several other countries.

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Established in 1865, the George Washington University Law School is the oldest law school in Washington, DC. The school is accredited by the American Bar Association and is a charter member of the Association of American Law Schools. The Law School is located on the GW campus in the downtown neighborhood familiarly known as Foggy Bottom.

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COMMEMORATION OF THE 20TH ANNIVERSARY OF THE TELECOMMUNICATIONS ACT OF 1996

To commemorate the twentieth anniversary of the Telecommunications Act of 1996, the Journal has compiled thirty-two essays by individuals involved in the Act's drafting, implementation, and attendant legal challenges. The essays come from former Chairmen, Commissioners past and present, FCC staff members, federal and state legislators, private attorneys, economists, and more. Their commentaries are diverse in subject matter and scope but all offer unique and valuable perspective on the 1996 Act and insightful lessons for future policy makers.

Commentary examining the Telecommunications Act of 1996 by considering four questions: (1) what were the political conditions that enabled the passage of the Act?, (2) to what extent was the implementation of the Act faithful to its intent?, (3) how did the communications sector fare in response to the Act?, and (4) is the Act due to be re-written? Their analysis of the 1996 Act provides useful guidance to future policy makers.

ARTICLE

The unbundling paradigm contained in the 1996 Telecommunications Act was one of the most ambitious regulatory experiments in American history. Yet, despite high expectations, less than a decade after codification the experiment was over. Without making any consumer welfare claims about the desirability of unbundling or its failure, in this paper we attempt to discern what lessons can be learned from the experience. With the benefit of hindsight, we believe that the demise of the unbundling regime in the U.S.

was driven by three underlying economic causes which policymakers failed to comprehend: (a) the expectations of policymakers for "green field" competitive facilities-based entry into the local wireline market at the time of the 1996 Act were unrealistic; (b) the unbundling regime was incentive incompatible in that the incumbent local phone companies were required to surrender market share to entrants without any (permanent) offsetting benefit; and (c) the rise of new alternative distribution technologies such as cable, wireless and over-the-top services that expanded the availability and quality of competing voice services. Local competition in the U.S., it turns out, was not the result of new entrants constructing new plant, but from the repurposing of the embedded cable television plant and the migration of many households to the exclusive use of mobile wireless services. The study concludes that while unbundling may have been a sensible policy for the monopoly communications world of 1996, the presence of inter- and intra-modal competition and the inherent incentive problems with unbundling make it unsuitable for today's marketplace. As such, the United States needs a new policy regime for the communications market of the 21st century. Hopefully, with the benefit of hindsight and lessons learned from the U.S. unbundling experience, future regulatory interventions in the communications marketplace will proceed with more humility and wisdom.

NOTES

Taking the Sting Out of the Stingray: The Dangers of Cell-Site Simulator Use and the Role of the Federal Communications Commission in Protecting Privacy & Security

The Stingray is a cellular tower emulator technically known as an IMSI catcher. This emulation capability allows law enforcement, or anyone with the technical expertise, to capture cellular data in transit to or from any cellphone within the Stingray's broadcast range, entirely without the person's knowledge or consent. This note argues that the Federal Communications Commission should enact regulation under its Title II authority requiring cellular service providers and device manufacturers to enhance their encryption protocols pursuant to recommendations established by the Communications Security, Reliability, and Interoperability committee, which released its final report in early 2015. Additionally, the FCC should mandate that SIM card manufacturers enable consumer access to already existing security options, which are, as of this writing, permanently disabled during manufacture. This will enable security conscious consumers to more effectively protect their private communications against eavesdropping or theft. This action will help to secure the national wireless infrastructure by adding a stronger layer of cybersecurity to protect against crimes such as identity theft, corporate espionage and against warrantless searches conducted in violation of the Fourth Amendment which are becoming increasingly frequent. In many cases, law enforcement use of this equipment violates existing FCC regulations prohibiting the use of particular broadcast technologies. These security enhancements would not compromise national security or decrease the effectiveness of law enforcement, and can be done in compliance the Communications Assistance for Law Enforcement Act as

well as the Electronic Communications Privacy Act. Taking these first essential steps toward a more secure wireless infrastructure will serve the interests of both privacy and national security by preventing wireless voice and data communications from being easily accessible over the airwaves by widely available interception equipment.

Protecting Political Speech and Broadcasters from Unnecessary Disclosure: Why the FCC Should Not Expand Sponsorship Identification Requirements for Political Issue Ads

The Supreme Court in *Citizens United v. Federal Election Commission* found that the "First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." For this reason, the Court expanded the right of organizations, corporations, and unions, to use independent expenditures for the purpose of express advocacy in political campaigns. This decision and its progeny have led to an influx of political advertisements from outside groups not affiliated with a candidate or a political party. Organizations that are unhappy with the changes in campaign finance reform have turned to the Federal Communications Commission as an avenue to increase transparency in elections. They contend that more information during sponsorship identifications are necessary so that the public can get the "true" identity of those behind these third party political ads. However, convenience, necessity, and the public interest weigh against furthering the sponsorship identification requirements for political advertisements. Broadcasters already provide the public with sufficient information about those behind the ads they air, and expanding those requirements runs the risk of chilling the political speech that *Citizens United* sought to expand and protect.

Correction to Volume 67 Issue 3 page 393:

The first paragraph was misprinted and should have read:

> Next, the Court held that the FCC acted arbitrarily and capriciously when promulgating its final $75 Rule and Default-Off Rule, because the record supported neither the Rules' factual predicate nor reasoning and the agency failed to show its exercise of "predictive judgment" was based on anything more than "sheer speculation."