EDITOR'S NOTE

Welcome to the second Issue of Volume 73 of the *Federal Communications Law Journal*, the nation's premier communications law journal and the official journal of the Federal Communications Bar Association (FCBA). This Issue showcases the breadth of scholarship in telecommunications and technology law, spanning from broadband regulation to information privacy to the regulation of e-commerce.

This Issue begins with an article authored by Jonathan E. Nuechterlein and Howard Shelanski examining proposed broadband regulation, ultimately cautioning that the proposals fail to identify real market failures and are too costly. Nuechterlein and Shelanski argue that the government can address real market problems, such as digital divides by expanding targeted subsidy mechanisms.

This Issue also features four student Notes. In the first Note, Hunter Iannucci illustrates the inability of current legal mechanisms to protect the informational privacy rights of transgender public figures. Iannucci argues that the European Union's right to be forgotten law can be constitutionally replicated in the U.S. to allow transgender public figures to remove online information about themselves inconsistent with their gender identities. In the second Note, Olivia T. Creser addresses consumer harm online and the now common call to break up Big Tech. Creser provides a counterproposal, that Section 5 of the Federal Trade Commission Act can be amended to protect consumers. In the third Note, Brooke Rink discusses the online mugshot industry. Rink argues that Congress may act to limit the release of such images and that exploitative websites may be further regulated through a modification to Section 230. In the final Note, Shuyu Wang describes the challenge of regulating counterfeit merchandise sold through Chinese social media platforms. Wang proposes that those social media platforms with in-app shopping features fall under the regulation of e-commerce platforms to allow better trademark enforcement in China, a model that could shed light on the recent U.S. proposal seeking to combat online counterfeits: the SHOP SAFE Act.

We thank the FCBA and The George Washington University Law School for their continued support. This Issue marks one year into the COVID-19 pandemic which posed unique challenges for the *Journal*, including the cancellation of our 3rd Annual Spring Symposium in 2020, but brought new opportunities, like our partnership with the Berkeley Center for Law & Technology for our joint virtual Spring Symposium in 2021. We thank our all our contributors for their work during this remarkable year.

The *Journal* is committed to providing its readership with rigorous academic scholarship and thought leadership in relevant topics in communications and information technology law. Please send submissions to be considered for publication to fcljarticles@law.gwu.edu. All other questions or comments may be directed to fclj@law.gwu.edu. This Issue and our archive are available at www.fclj.org.

Elissa C. Jeffers
Editor-in-Chief

Federal Communications Law Journal

The *Federal Communications Law Journal* is published jointly by the Federal Communications Bar Association (FCBA) 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 FCBA, the *Journal* is distributed to over 2,000 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 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 FCBA (d/b/a FCBA – The Tech Bar) 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 technology, media, and telecommunications industries. That's 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, DC area, the FCBA has 11 active regional chapters, including: Atlanta, Carolina, Florida, Midwest, New England, New York, Northern California, Southern California, Pacific Northwest, Rocky Mountain, and Texas. The FCBA has members from across the U.S., its territories, and several other countries.

The George Washington University Law School

Established in 1865, The George Washington University Law School (GW Law) is the oldest law school in Washington, DC. The Law School is accredited by the American Bar Association and is a charter member of the Association of American Law Schools. GW Law has one of the largest curricula of any law school in the nation with more than 275 elective courses covering every aspect of legal study.

GW Law's home institution, The George Washington University is a private institution founded in 1821 by charter of Congress. The Law School is located on the University's campus in the downtown neighborhood familiarly known as Foggy Bottom.

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Manuscripts: The *Journal* invites the submission of unsolicited articles, comments, essays, and book reviews mailed to the office or emailed to fcljarticles@law.gwu.edu. Manuscripts cannot be returned unless a self-addressed, postage-paid envelope is submitted with the manuscript.

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ARTICLE

Building on What Works: An Analysis of U.S. Broadband Policy

Issued ten years ago, the FCC's National Broadband Plan was in many respects a case study in regulatory humility. It recognized that broadband progress was "[f]ueled primarily by private sector investment and innovation"; that "government cannot predict the future"; that "the role of government is and should remain limited"; and that policymakers should thus focus not on imposing price controls or behavioral restrictions, but on "encourag[ing] more private innovation and investment." This advice, which the FCC has generally followed, has fared well under the test of time. Ten years and hundreds of billions of investment dollars later, the broadband marketplace now offers consumers more choices and exponentially faster speeds than it did then.

Against that backdrop, this paper analyzes the asserted need for, and likely consequences of, four types of broadband regulation proposals in recent circulation: (1) facilities-sharing obligations; (2) retail price controls; (3) internet interconnection obligations; and (4) amorphous and open-ended ISP conduct rules like those the FCC imposed in 2015. For the most part, we see little merit to any of these proposals under current market conditions. None of them is needed to address any identifiable market failure, and each would impose significant costs, including the investment-chilling prospect of regulatory creep.

That said, government retains a critical role to play in the broadband marketplace. Market forces are unmatched in their power to bring the greatest benefit to the greatest number. But market forces by themselves will not help America close two stubborn and unacceptable digital divides: between rich and poor, and between urban and rural. These are real, universally acknowledged problems that call for real solutions. In particular, they call for expanded subsidy mechanisms—one directed to low-income subscribers and the other to broadband providers that commit to new infrastructure deployment in rural and other high-cost areas. But the challenge of closing these digital divides does not even logically support a call for more intrusive regulation of the broadband industry. To the contrary, such regulation would, if anything, make the underlying problems worse by placing a thumb on the scale against additional broadband investment.

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