Toward a Common Law of Telecom

by Eli Noam

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Columbia Institute for Tele-Information
Graduate School of Business
Columbia University
809 Uris Hall
New York, NY 10027
(212)854-4222

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Eli M. Noam
Columbia Institute for Tele-Information
Columbia Business School
809 Uris Hall
New York, NY 10027
tel. (212)654-4222
fax. (212)932-7816
e-mail: enoam@research.gsb.columbia.edu

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I ‘ve come to praise the 1996 Telecom Act, but also to bury its approach.

What do I mean by that? Yes, Congress and the Pressler and Bliley Committees deserves praise for passing the Comprehensive Telecommunications Act, after many years of trying. The new law is a step in the right direction. But the approach of this law, the approach of a sprawling piece of national omnibus legislation, has reached its limit. It’s done its job for now, but it cannot be the way of doing the communications policy business of the nation in the future. What we need instead in the future is to rely on a “Common Law’ of telecommunications, not on a central *Codex Telecommunicationis*.

All of you who go to international telecommunications events know its rituals. The various countries’ high officials follow each other as speakers, each one describing in great detail the great strides of reform their country has embarked upon.

My own favorite example is from Denmark. In its official published government agreement states boldly: "There will be competition within all spheres of telecommunications in the next few years, apart from telex, ordinary telephony, radio-based mobile services, satellite services, the infrastructure and the use of the telecommunications network for broadcasting radio and television programmes." (Danish Ministry of Communications, 1990).

This kind of newspeak is then followed by a critic gently trying to return the deregulatory P.R. down to Planet Earth.

And this in turn leads to the reply that it is difficult to change century-old ways; that millions of workers are already marching on the boulevards; that government majorities are slim; that international coordination is slow; that issues are complicated.

All this is absolutely true. On the whole, many governments now really do try harder, and politics is the art of the possible. But it is correct, too, that the reforms tend to be timid relative to the pace of change in the telecommunications and information sector. This points to the structural problem of telecommunications policy: The political decision-making system cannot keep up with the rapid realities of technology, marketplace, and globalization.

It's been said that youth is wasted on the young. Similarly, nobody in the telecommunications world realized in the past how easy the going was, so that he could enjoy it. Technical product cycles were slow; planning horizons long; market structure was carved in stone and countable not on one hand but on one finger of one hand; and government policy was a fully owned subsidiary of the operators.

But these parallelisms of purpose and synchronism of pace are no more with us. Policy making is vastly more complex than before, and therefore much slower. Legions of lawyers make a profitable living keeping it that way. But the underlying reality is changing much faster. We are in the midst of a revolution as profound as the Industrial Revolution. It's been said that American government is the attempt to project 18th century political principles for the 21st century, using 19th century tools. This pretty well sums up the dilemma.

What then are we to do?

One major response is to give up on government policy and leave decision-making to the market. As Friedrich von Hayek noted a long time ago, the reason is not just an ethical or political preference, but that the more complex economic reality is, the less likely can a political process come up with sensible solutions.

Markets have worked pretty well in this field. America has invested, at considerable pain,

in creating the most competitive industry structure in the world, in telephone, TV, cable, mobile computers, and satellites. The companies are increasingly efficient. And there is an incredibly creative user community, both within big organizations, and in the computer communications users of the Internet with its mind-boggling growth, creativity, and democracy. These forces will drive the evolution of the American telecommunication superhighways.

But it would be naive or ignorant to believe therefore that there is no role for public policy to play in the long transition to full competition, including in the international realm. There is a track record, both good and bad. Federal telecom involvement goes back to 1843 when it financed the Morse telegraph, just as more recently it got the Internet started. On the other hand, it kept cellular phones on ice for a decade. Today, some purists call for abolishing the FCC. The theory is that regulation of businesses by bureaucrats is due to the latters; insatiable need for something to do. But in fact, much of regulation is due to the demand by business, as staunch free-marketeers like Richard Posner, George Stigler, or Sam Peltzman have long and persuasively argued.

Therefore, getting rid of the FCC may be good for the soul, but reality will not be much affected. The economic interests that want to create advantage for themselves will simply do their policy shopping at another forum, such as the state commissions, Congress, state legislatures, courts, Justice department, Commerce Department, White House, ITU, WTO, Brussels -- wherever. You can abolish an agency, but you can't abolish political pluralism in America.

Doing away with the FCC is therefore one of those acts of meaningless symbolism that confuse substantive policy and process with institutions. It's the kind of confusion that leads

otherwise sensible and well-informed people to say that the airlines have been deregulated--because the CAB has been abolished. Whereas in reality air traffic today is, outside of pricing, the most heavily regulated industry in the United States except for nuclear power.

So, if there is a non-zero regulation remaining, how to structure it? The United States, has pursued two routes. One is the decentralized, step-by-step, often regionalized, uncoordinated approach of commissions and courts, all affecting each other. Basically a common law approach, I'm using the term common law extremely loosely -- not just judge-made law, but a wide assortment of other types of piecemeal and gradual decisions of rulemakings and adjudications, state utility commissions, Congressional hearings, Executive initiatives, etc. This process is very messy and very slow.

The other approach is the centralized, national, coordinated, unified, omnibus approach of Federal legislation. This is what we just got. As it turned out, this process is even messier and slower. It is a great example for what German Chancellor Bismarck had in mind when he said that one should it look too closely at the making of two things: sausages, and laws. We have now exhausted ourselves in passing an omnibus legislation. In the future, I would predict, we will return from the statutory approach to more of a common law approach.

The first element of this gradualism is to return to narrower and more manageable pieces of legislation--less omnibus, more minivan. This would permit, among other things, a much more focused analysis of the implications.

The second element of this common law would be to rely more on agency rulemaking than on specific legislation. Instead of fine-tuning the details of competition among local and long distance companies, of broadcasters and cable, Congress should craft enduring principles

that would be applied in the tumultuous decades to come. Principles about competition, access, universal service, common carriage, interconnection, international asymmetry, inter-operability, privacy and economic development. This would also permit some form of national debate. It would permit Congress and society to look at the interrelations. Congress should decide fundamental issues but leave the details that clutter the legislation to be fleshed out by the expert agency. We have such an agency and leadership.

But this did not happen. One of the reasons Congress has tried to become a kind of super-FCC is divided government. At least since 1980, Congress did not trust an FCC controlled by the other party. Therefore, it set detailed rules itself rather than delegating them.

Another reason was the delightful opportunity to mediate between rival industries, which provides legislators and their staffs with enormous power. In fact, it speaks well for their sense of responsibility that they eventually passed a law now, rather than letting themselves be courted indefinitely.

The third element of such a common law of telecommunications policy is to rely more on multi-level regulatory federalism. Yes, the states can be a real pain. I've been there myself and have no idealistic illusions about the wisdom of the grass roots. But the logic of regulatory decentralization is similar to the logic of ending of the monopoly. Both substitute the dynamism and flexibility of diversity for the uniformity and scale uniformity. Of course, it would be nice to have a single sensible set of rules. But what if these centralized rules are not sensible? Changing them is so much harder, and that cost is rarely factored in by advocates of centralization.

Let's take a look at the real world. Much of what the new law claims to accomplish in

telecommunications has been happening already on the state level, without great fanfare. Take competition in local telephone service, the keystone of the Act. The fact is that local telephone competition has already been instituted around the country by most important states, and with many of the other states well on the way to doing so, too. The new Act merely extends this kind of competition to the slower-moving states. Similarly, various interconnection arrangements have been tried.

And with local phone competition already on its way, the end of the restrictions of the AT&T divestiture decree on the Baby Bell companies was in sight, too. Without a monopoly bottleneck, and with safeguards similar to those now set by the Act, these phone companies would have been let into long distance, video, and full-service provision -- Act or no Act -- by courts, Justice Department, and FCC. The Baby Bell companies like to believe that the new laws would do so much faster, by setting deadlines. But they will probably find themselves disappointed: their rivals will tie them up for years in courts and regulatory commissions anyway, arguing that they have not met the elaborate checklist of pro-competitive steps.

Thus, while there were some instances where it was necessary for Congress to speak, in most cases the same job could have been accomplished by the Federal Communications Commission, the state Commissions, and the antitrust courts. For that is the strength of the American system of telecommunications regulation: its decentralization got the job of transforming monopoly into competition much faster done than the centralized European telecommunications systems where every change becomes an affair of state. In America, in contrast, telecommunications reform was a struggle with many small skirmishes rather than a central all-consuming battle.

Until this Act, that is. Small wonder that it took years to draft a passable bill because so many interest groups had to fit under the tent, in one grand but lengthy bargain. The result is a law that adds over one hundred new and densely packed pages of interlocking rules and conditions. And that is just the beginning. Many of the most complex issues require further elaborate rule-making. For example: how to reform the financing of universal service under competition while still protecting rural phone users and companies; how to price the interconnection of carriers where at present the long distance companies help subsidize the local phone rates of their rivals; how to price the discounts for the resellers of local phone service; how to deal with the convergence of telephone and cable companies that are still treated quite differently even as they compete; how to deal constitutionally and practically with the Internet, as it becomes a major mass medium and platform for financial transactions; how to deal with local media concentration; how to charge for broadcast licenses; how to provide access of advanced services to schools; what to do if phone and cable competition are slow to spread; etc., etc. Once one adds up all of these new provisions the Act, while laudably pro-competitive, cannot be described exactly as deregulatory. What it does is replace one form of regulation -- of industry structure -- by another form of regulation -- of conduct, with the reasonable hope that the latter will become eventually unnecessary.

Even if most of the Act's provisions make a lot of sense today, they will inevitably become in this dynamic field. An example is the already inadequate treatment in the new law of the Internet and its applications. In theory, laws can be altered in the future. In practice, changing an Act of Congress will be extremely difficult, because each clause will be protected by the entrenched interests that will have grown around it.

The fourth element of common Law in telecommunications is its international dimension. Countries must look beyond the national frontiers for policy experience. If New Zealand sets interconnection rules in a certain way, its experience might set a useful non-binding precedent for Illinois as it contemplates reforming its own system, and vice versa. The basic problems become similar as market structures are opened. US regulatory decisions are a particularly useful export article, because (a) many issues arise here first, and (b) there are so many decisions, because there are so many jurisdictions. No other Western country besides the United States has a two-tiered level of telecommunications regulation. The sole exception used to be Canada. In Germany, on the other hand, it's video media that are subject to regulation by the federal states, frequently subject to elaborate national harmonization. This seems the worst of both worlds, a kind of Holy Roman Empire of the air. But now, Brussels has also been creating a multi-level form of telecommunications regulation.

We are likely to see much of this type of international and supranational coordination. Through a large array of deals, alliances, ventures, and entries, we are witnessing the emergence of a new type of telecommunications firm-- supra-national carriers which transcend the traditional national and territorial definition of telecommunications operators.

This leads inevitable to a multitude of new policy issues can be identified that are associated with these supra-national carriers. No doubt, there will be calls for an elaborate system of international regulatory coordination. But the history of these coordination mechanisms bodes ill. It is a history of retarding change by an emphasis on consensus, stability, and harmonization. If anything, telecommunication has historically been cursed with an excess of policy collaboration, and with a compulsion to protect against many hypothetical problems

well in advance. It might be different tomorrow. But today, the world of telecommunications needs more policy experimentation and less harmonization. So here, too, beware of the uniform solution.

The result of all this will be a jumble of telecom rules and principles passed by a wide variety of bodies. The nation-state's traditional telecom regulatory powers will be attacked from multiple directions -- from below by lower jurisdiction; from above by international carriers and regulatory arrangements; from sideways, by other parts of government; and on the whole, by the market. As a result, the nation state will lose much of its control, just as it is already doing for exchange rates and monetary policy.

To conclude therefore: The future is not what it used to be. No longer is telecommunications a giant machine to be optimally designed by electronic and social engineers. Instead telecommunications systems are a mirror of a messy society, cranky economy, and irrational world. The best we can do is to let dynamic forces work themselves out. The first is the market competition. And the second is through a legal arrangement that is based on incrementalism and decentralization.

Thus, Senator Pressler's law will be around for a long time. It took Congress, in 1934, just 16 weeks to write the law. The new 1996 Act, depending on how you count, took six years or so to pass, and that doesn't include the numerous follow-up rule-makings. Extrapolating from that rate of growth, the next Telecom Act in, say, 30 years from now, should take about 60 years to write. So we are already 30 years behind. This isn't exact science, for sure, but it may help make the point that the grand legislation won't work well in the future. So let's toast the Telecommunications Act of 1996, because there won't be anything like it again.