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Relentless Competition Defines Wireless Space, So Regulate Very Lightly

by

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It's safe to say that communications and information services have never been more important to the nation's economy, and to our own personal lives, than they are today. So, as we begin a new year, not to mention the third decade of the twenty-first century, it's a good time to consider proper regulatory policy for these key Digital Age market sectors.

For my purposes here, I have in mind wireless and wireline broadband Internet services and websites, and broadcast, cable, and satellite services. In other words, services that either are currently regulated by the Federal Communications Commission or other regulatory bodies, or which have been in the recent past, or websites like Google, Facebook, Amazon which are the subject of present debates regarding whether their practices should be subject to more or less regulation.

In formulating a regulatory policy fit for 2020, regulators and policymakers should be guided by two irrefutable propositions regarding today's market landscape:

- Communications, information services, and media markets are becoming increasingly competitive. The monopolistic Analog Age marketplace that long prevailed when Ma Bell held a dominant position in supplying basic communications has long ago given way to competitive markets in which wireless, wireline, and satellite providers compete to supply digital broadband services to customers.

- If ever there was an era of media scarcity in the twentieth century, we now live in an age of media abundance. In contrast to the 1960s and 1970s when three major television networks dominated the media landscape, today there are literally thousands of cable and satellite channels with an incredibly diverse array of program choices to satisfy all manner of consumer demands. And consumers have available a rapidly increasing number of online streaming services with a diversity of program offerings, along with access to countless websites with news, information, and entertainment sources that were unimaginable two short decades ago.

With these communications and media marketplace propositions in mind, regulators and policymakers should be guided by these fundamental principles:

- The presumptive default position should be not to regulate absent convincing evidence of market failure and consumer harm. During the monopolistic Ma Bell era, regulation was the presumptive norm. Now, freedom from government intervention should be the presumptive default. To be clear, this is not to say that, consistent with this deregulatory default, that there won't be particular service offerings, such as those in high-cost rural areas or those subsidized and targeted to low income persons, that should be subject to regulation.

- Special attention should be paid to whether continued regulation contravenes the free speech guarantee of the First Amendment. In the past, absent today's media abundance with its diversity of voices, regulatory restrictions that had the effect of restricting speech by broadcasters, cable, and satellite companies arguably were justified as consistent with First Amendment jurisprudence. This should no longer be the case.

Now, I want to apply these propositions and principles, in what necessarily must be a cursory fashion, to a few select "hot topic" policy issues. There are others, given the space, that could be discussed, but these will serve for illustrative purposes.

First, for well more than a decade, regulators and legislators, at both the federal and state levels, have been engaged in vociferous debates regarding whether Internet service providers (ISPs) should be subject to so-called "net neutrality" mandates. In general, these mandates prevent the Internet providers from blocking, throttling, or prioritizing access to websites.

The problem is that strict versions of net neutrality regulation, advocated by many neutrality acolytes, would impose public utility-like regulation on the ISPs. The core components of a public utility regime – rate regulation and non-discrimination requirements – could put ISPs in a straight-jacket that prevents the service and product differentiation that creates incentives in a free marketplace to innovate and invest.

Because the marketplace in which Internet service providers now operate is competitive, and there is no present evidence of market failure or consumer harm, the default should dictate that the ISPs should not be subject to any net neutrality regulation resembling a public utility regime.

Second, in light of the demonstrable evidence of abundant consumer choice with respect to media offerings, it's time for Congress and the FCC to eliminate many of the legacy regulations that impinge on First Amendment rights. These include, for example, laws requiring cable companies to provide third parties with mandatory access to their systems to make available programming not of the cable operator's choosing. And media ownership rules that restrict the number and kind of outlets that may be commonly owned are another example.

Restrictions like these, once justified by a claimed lack of diversity of voices in the marketplace, are no longer consistent with the First Amendment. After the emergence of cable and satellite competitors with hundreds of channels, not to mention the rise of the Internet, such claims lack a factual predicate that supports infringement of free speech rights.

Finally, consider controversies surrounding certain practices of websites like Google, Facebook, and Twitter. The opaqueness and sheer density that typifies their "terms and conditions" may constitute a form of market failure that justifies government intervention aimed at ensuring informed consumer choice. In other words, the default presumption may tilt towards some form of increased regulation. Even in this instance, though, regulation should fit the realities of the Internet marketplace, so, for example, a federal law should preempt the emergence of a patchwork of state privacy laws with unique requirements that exceed those set forth in the national law. Otherwise, the costs imposed by the state patchwork are likely to exceed the benefits, leading to consumer confusion and the availability of less information than consumers otherwise would demand.

There is no doubt that the communications and information services marketplace is much more competitive now than in the Ma Bell era. And there is no doubt there are a plethora of diverse voices in the media marketplace. Consequently, as foundational principles for regulatory policy in the Digital Age, the default presumption should be to avoid imposition of burdensome regulatory mandates and to eliminate restrictions that are inconsistent with the First Amendment's free speech guarantee.

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