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Telecommunication Policy: Communication Act Update

A Policy Review by

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This policy review is a response to the call of the Energy and Commerce Committee for Communications Act Update. The primary body of Communications Act was passed in 1934 and while updated periodically, it has not been modernized in 17 years. The update must fulfill the requirements of the 21st century and rapid changes in telecommunication technology.

The Self Correcting Capability of Capitalism

To discuss regulation one must consider both the context of regulation and the perspective of regulators. Regulation for communications technology as part of an industrial sector cannot be performed without consideration of the American spirit, which is deeply influenced deeply by capitalism. Also, with regard to the great influence of the US economy and industry worldwide, in undertaking an update of the Communications Act, Congress should be mindful of the global impact of the nation's economy and its regulation, particularly the communications sector. The level of American market development and diversity of its products and services have made it a destination for most enterprising, entrepreneurial, and innovative people in the world. The nation has not only the mindset to realize innovation, but the infrastructure and physical communications networks (Layton, 2014, February 19).

Similarly, the US is a pioneer in the media market. While some may characterize the American content players as behemoths, they can also be considered a global force for good. Additionally, the country is a pioneer in evolutionary changes and disruption. Every time the world expects disruptions to harm the US economy, American innovation creates a new paradigm to replace the old. Indeed, if American firms are not getting disrupted, they are doing the disruption themselves. As Steve Jobs observed, "if you don't cannibalize yourself, your competitors will".

When we talk about communications regulation, we talk about setting some limitations for a social phenomenon. Of course it is not bad to set limits to ensure equality, fairness, and competition. But there are some concerns to consider when making so-called regulatory wisdom

a permanent presence and the potential impact to the flexibility and dynamism of the industries, which the regulation purports to deliver.

The Changing Nature of Technology: A Fundamental Conflict of Regulation and Technology

First, communications technology is the construct of human beings. It is subject to growth, change, and renewal. This is an important point that should inform the approach to the regulation of communications. Regulation for communications needs to be built for change.

In addition, regulation requires a deep understanding from different aspects of the subject of regulation. While communication technology evolves quickly, regulation is a slow and deliberated process. Every advance and innovation in technology is an opening of a new opportunity, and it is impossible to know how the regulation will impact—if not deter—possibilities in the future. Essentially, no regulator can ever know all the things they need to know to make a good regulation; for that reason they need to proceed with caution. Do not repair what is not broken.

Another challenge of regulating communication technologies is the emergence of new market elements that are unknown before they appear. In my research about the media market, I observed how new players create value. Many actors emerge with a new technology or in response to a new service development. So as regulations aim to help the market to be more effective and capable for proposing the best value to the costumers, it is also very important to be aware of the vulnerability of the market. This is particularly crucial in instances in which the setting of regulations could neglect aspects that actually have the ability to benefit customers or companies. Lack of ability to predict what the future market needs and what new agencies, companies, services, value chain participators, models of interaction and profit makings, and so on would be, make the process of regulating complicated and challenging. Thus, regulation—because of the restrictions and uncertainties it creates—can make companies and consumers vulnerable, and therefore curtail new technologies and service development from emerging.

Though it is unrealistic to expect perfect competition, the American market reaches closer to any in the world in perfection. In its value chain we find all the factors and elements necessary for competition. If we look at the American market for communications we can find many networks, many customers, many devices, many providers of content, and many applications. Consumers have more ways than ever to access the content of their choice, not only by different content providers, but on different networks, devices, formats, and at different price points.

In one of my studies, I researched the toy industry. In the process of outsourcing the manufacturing of toys to China, the number of Americans who were previously employed in the manufacturing of toys in the US was reduced. However, new jobs were created in toy design and related functions that did not exist before outsourcing. When I recalculated the numbers of losses and created jobs, I concluded that the American market remediated the toy industry upon the situation to provide more space for advances and promotion of industry (Khajeheian, forthcoming).

This regenerative capacity is found in other sectors, especially in communication technologies. When one process or technology is outsourced or decommissioned, it opens a window of opportunity to other sections of market and provides new capacity for innovation, research, and development. Look no further than the market for mobile phones. There are more

mobile phones today than there were traditional telephones in the world. Similarly, today's communication network technologies are more advanced and innovative, delivering an increasing range of data services than was ever conceived from a simple telephone network designed for voice.

Policy Rather Than Regulation

Allow me to make the distinction here between *regulations*, which may consist of hard rules, versus *policy*, which may refer to softer norms. As this policy brief is particularly concerned with "competition policy", it is better that the Communications Act encourage the policy norms than enforcing hard rules. To put it in other words: good regulation should encourage new entrants rather than punish successful companies or prevent them from further progress.

This can be observed in how current communications policy debates are polarized with an artificial dichotomy between networks and edge providers. These debates create needless antagonism, posing a false choice between innovations either within the network or at the edge. The reality is that both of these actors evolve together; and generally, each drives the other's innovation. Thus, it should not be the regulator who chooses the winner. The good policy choice allows the ecosystem as a whole to evolve. That does not happen by placing detrimental rules on players for the seeming benefit of the other. If we respect the American spirit, which is based on admiring the successful for their achievements, government deserves to choose supportive policy for encouraging new comers by lowering entry barriers. This is an entrepreneurial policy that promotes American market and guarantees the competition.

Media Conglomerates and Challenges for Regulations

Let us take the case of the famous "Big Six" studios of Hollywood. A number of academics in media economists have characterized these companies as an oligopoly (Schauer, 2015), suggesting that because of their broad power in the entertainment value chain that they create barriers for other players to enter the market (Gomery, 2004). The evidence of whether this is the case is debatable. In any case, the situation is an interesting one for regulators. Do they punish the Big Six, or do they create an environment where new entrants can create competition?

Historically regulators sought to control the power of the Big Six, but interestingly, they are still around. If the government punishes a company in one area of value-creation, the rational firm will attempt to find another, and that is what happened. However, it needs to be stated that these companies have only succeeded to the extent that consumers have valued their offerings in the marketplace.

Thus, it does not appear that regulation even works to topple "big media". However, the entertainment value chain and media distribution has evolved, whether because of or in spite of regulations. It is highly diverse and disintermediated, and to claim that the Big Six control the entertainment future is nonsense. So what was the point of the heavy-handed regulation? Did it really serve consumers? Was it the best use of citizens' regulatory resources? What could have regulators done differently?

Policy: From Prevention to Support

A better role for government policy is the support of new comers, entrepreneurs, and small companies. The focus of regulation to control and limit the power of conglomerates—which mostly fails—should instead be to encourage and help the new companies enter the market. Support could include lowering of licensing requirements and permits or subsidies for a limited time. My point is that the governmental focus should be a policy for support not a policy of punishment. Regulation should not be concerned about controlling the power of successful companies but rather removing the barriers for entrants and perhaps supporting the development of new business models and innovations.

Therefore, the role of government should be to fill the gaps in an imperfect market. This consists of observing whether all the factors and actors of the value chain are present and working.

Of course, I appreciate the understanding of government regulation as a tool to save the society from anarchy. One way to avoid the danger of regulation is to engage in a scenario planning exercise. Scenarios are ways to explore possibilities without harming the market. Conducting such an exercise could be a valuable effort to inform the policy making process.

Value Creation: A Paradigm Shift from Mean to End

One of the challenges in regulation setting is the intrinsic tendency of regulators in sticking to the regulation and seeing it as the very aim, instead of a means for reaching a goal. This trap is pervasive among bureaucracies and happens when regulators engage in the technical aspects of law making and setting limitations, which betrays from the main intention of regulation setting. In this, the regulation becomes a barrier itself instead of a mean for assisting to get the purpose. To prevent this trap—which is the essence of regulations—changing the focus from “mean” (Regulation) to the “goal” (Value Creation) may be the most important paradigm shift in the strategic landscape of the Commission.

For a better explanation, a brief about media entrepreneurship and effective media market as the context seems required. The keyword of value can play a critical role in our discussion. The key purpose of the market in free economics is to offer “value” to customers. In my definition, value is something that the customer is willing to pay for with money, time, or energy. Those things that are desired include: products, services, know-how, models, pattern, process, and infrastructure—to name a few. The companies that operate in media markets compete on proposing value to their target customers and get paid for it. Companies develop business models based on value. They access customers and deliver the value for which they receive revenue in return. There are many types of business models, and they are an integrated part of effective media market.

In addition, there are a range of agents and facilitators to this process, such as clusters, cooperative entities, venture capitalists, banks, and financial institutions. These actors participate in designing and implementing new ways of offering value to customers. Here I must attest to why the American media market is so effective: there are investors willing to take risks to support new technologies and business models. This risk taking leads to the fostering of entrepreneurship, new venture creation, new business models, space for innovations, and especially user activities.

The goal of regulation and policy should be to assist the “Value Creation”, not preventing value, innovation, or the growth of companies. This goal should be considered in any debate about setting regulation.

When we mention the media convergence as an influencing trend and new emerging concepts such as E- and M-health, E- and M-banking, E- and M- education, E- and M-transport, and so on, the uncertainty and ambiguity of the future situation for regulation is apparent. Therefore, rather than rely on ex ante sector specific regulation for the ever evolving Internet and communication sector, a shift to an ex post general competition regime is preferable.

Some Thoughts about Users

User innovations are an important area for communication policy. This area is frequently neglected both in entrepreneurship and media studies, mainly because of their relatively small portion in content creation. So far, users are mainly the subject of study and attention as consumers of content and consumers who pay for a product and/or service. However, with the emergence of Web 2.0 and a dramatic increase in user generated content, users will have increasing attention in media policy, as well as, for example, privacy, security, content, and competition. Users’ innovation is also a source for media entrepreneurship in digital platforms. Again, scenario planning can play a role in policymaking to explore the challenges and opportunities for greater user agency in the media landscape.

There is no doubt that large American ICT and media companies are a force throughout the world: Google, Apple, Facebook, Microsoft, Amazon, Verizon, AT&T, and so on. Together with communications networks, these companies deliver global access and connection, making life better. They create new goods and services, and their presence brings competition and innovation. There is no doubt that the quality of our ICT and media experience has improved over time. Even though Internet traffic has increased dramatically, prices have fallen. This is the essence of technology evolution and as such, there is no need for regulators to intervene on this natural and good process.

As for the issue of whether content should be free or paid, the fact of the matter is that the web drives content to be “free” (or advertising supported). Indeed, the idea that “zero rating” (e.g., Google Free and Facebook Zero) should not be allowed goes against the digital forces, which tend to bundle content and the general trend for free content (Napoli, 2016). However, if companies can succeed to charge for content, then they communicate a value proposition that customers desire. There is nothing wrong with this. This is only an outcome of supply and demand. Consumers are the natural regulators here. They should choose the packages they want, not a government decree.

Thus, it seems reasonable that instead of punishing and preventing conglomerates with limiting regulations, supportive policies for assisting the new competitors to enter the market are a better solution. I suggest that promotion of competition (market discipline) is preferable to regulation.

Some Thoughts on Net Neutrality

Network access is not the real concern in the US. The country is well-provisioned with multiple next generation networks: mobile, fiber, DSL, cable, satellite, and so on (e.g., Hurwitz & Layton, 2015; Layton, 2014, July 19). But the debates in this issue deeply neglect other aspects of

neutrality, such as search and content neutrality. While Americans have access to some of the best broadband networks, neutrality is not present in search engines, social networks, app stores, operating systems, and so on. Lack of neutrality in access to content by advertised keywords in search engines is an issue. So while Americans have many options for communication networks, the greater concern is with the diversity of content, delivery of it, and its authenticity. Discussions on net neutrality should involve these areas and mention them as challenges of the communication sphere.

Innovative and possible disruptive infrastructure technologies are in the works. Google and Facebook have ambitious projects to develop satellite capabilities for Internet service (Simonite, 2015, December 24). While this mentions as strategic concern by vertical integration at the industry level, at the same time, this is a sign of a paradigm shift in the infrastructures, so that Internet providing changes by new technology and new players. The consequences of such ideas, which even by defeat of this project very likely will continue in the future, change the net neutrality debates with the new landscape that free Internet access out of governments' control provides for nations and new unknown challenges and opportunities will emerge. Similarly, we have seen Google invest in its own wireline fiber network, and Facebook explore the possibility of broadband by drones (Simonite, 2015 July 30).

As such, the government need not punish existing network owners for earning market power. Competition from other technologies is already emerging. There is no need for the government to regulate here, because the natural market forces are working.

In summary, we should be very careful about setting a regulation that may prevent the free movement of market players for proposition of new value. It is almost impossible to understand the future requirements of the market and set rules in advance. Therefore, the emphasis on "Policy" instead of "Regulation" is preferred. While in regulation we need to be precise in details, policy—with scenario planning—can help to set norms such as around competition, infrastructure, content, privacy, security, and governance.

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