

# **Telecommunications Law and Policy**

## **Phil Weiser**

### **Course Description:**

This course surveys the basic principles underpinning our nation's telecommunications laws. In particular, we will examine the legal and regulatory treatment of a number of related technologies—from telephony to cable to the Internet—whose convergence will continue to challenge established principles. The course will focus most intently on administrative and statutory law, paying special attention to the design and implementation of the Telecommunications Act of 1996. In addition, the course will address the role played by antitrust, intellectual property and constitutional law (particularly the First Amendment) in shaping our nation's telecommunications landscape. Finally, the course will consider the important role played by state and federal agencies—antitrust enforcers, state public utility commissions and the Federal Communications Commission—in developing and administering our nation's telecommunications laws and policies.

### **Class Times and Office Hours:**

The class will meet on Tuesdays and Thursdays from 2:00-3:15. I will be available for office hours on Tuesday and Thursday mornings from 10:00 to 12:00 in Room 313. I also can be reached via email at phil.weiser@colorado.edu.

### **Course Expectations:**

Grades for the course will be based on the final, a class project, an optional research paper (if completed), and class participation. Class participation and preparedness are an important part of this course; students will be eligible for an increase/decrease in their grade based on their readiness to answer questions and their performance during an “on call” week. Students will be asked to sign up to be “on call” during two weeks of the semester. During each class, students may also be called on at random to ensure that the class discussion remains focused on areas that are not well understood. This possibility is meant to be a policy of last resort. Hopefully, students will ask questions when they do not understand a subject and obviate the need for such a step.

Other than in-class participation, students can demonstrate their engagement in the material (and earn extra credit) in two other ways. First, as the main teaching text for this course is a work-in-progress, Philip J. Weiser & Jonathan E. Nuechterlein, “Understanding Telecommunications Policy: The Law and Economics of Competition in The Digital Age,” any comments on the text are most welcome. Second, using The Westlaw Educational Network (TWEN), students can participate in on-line discussions (and post related material).

During week 10 of the course, students will participate in a simulation exercise that will involve a number of presentations on behalf of industry groups to a mock panel of the FCC. IN particular, these presentations will advocate future policy directions that suit each industry group. Two-thirds of the class will participate in this endeavor as industry presenters and the other third will participate as FCC Commissioners and Staff. Each group of presenters will be responsible for distributing “white papers” (not to exceed twenty pages), and for answering questions asked by the FCC. Each group acting as the FCC Commissioners and Staff will be responsible for drafting testimony (also not to exceed twenty pages) to be delivered to Congress. Presentations will comprise 1/5 of the course grade. The industry white papers are due on Thurs, October 23<sup>rd</sup> (week 9) and the FCC testimony is due on Thurs, Nov 20<sup>th</sup> (week 13). Finally, students also have the option of writing a paper that will count for 2/5 of their grade (due on Dec 4<sup>th</sup>), provided that the

student does better on the paper than on the final exam (which will count for the other 2/5 of their grade). If the student chooses not to write such a paper, the final exam will comprise 4/5 of the grade.

### **Course Materials:**

The course will be taught from a work-in-progress, Philip J. Weiser & Jonathan E. Nuechterlein, "Understanding Telecommunications Policy: The Law and Economics of Competition in The Digital Age" (Weiser & Nuechterlein) as well as a number of supplemental materials that are available through the Westlaw Educational Network (TWEN). You will note that the syllabus, which lists the reading by each week, separates the reading for each class: (1) for the Tuesday class; and (2) for the Thursday class. In addition to the assigned readings, students should also read the Monday Business section of the *New York Times*, as it reports on the information industries (same-day issue available on the Web at: <http://www.nyt.com>; on Westlaw: NYT database; on Lexis: NEWS lib., NYT file). Other trade publications that are worth reading (for those telecomm aficionados among you) are available online (e.g., *Communications Daily*, available on Westlaw; COMMD database on Lexis; CMPCOM lib., COMDLY file). To access such information and the course website, students must sign up for the Westlaw Network (TWEN), as it will provide access to a number of the supplemental readings as well as will provide for a means for the class to communicate (with one another as well as with the professor). Finally, there are 3 Silicon Flatirons events listed below, which are also required (to the extent that students do not have class conflicts); we will discuss these events in class and they, like other current events that we will discuss, are fair game for the final.

### **Week 1: Introduction, Networks, and Bottlenecks (Aug 26<sup>th</sup> and 28<sup>th</sup>):**

#### **A. Reading**

- (1) Chairman Michael Powell's Testimony to Senate Commerce Committee: "Six Critical Steps for Telecom Industry Recovery," available at <http://commerce.senate.gov/hearings/073102powell.pdf>  
Chairman Michael Powell's Speech to the Progress and Freedom Foundation, "The Great Digital Broadband Migration," available at <http://www.fcc.gov/Speeches/Powell/2000/spmcp003.html>
- (2) Weiser & Nuechterlein, Chp 1.  
Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370 (7th Cir.1986) (Posner, J.) (Supp.)

#### **B. Concepts**

1. Network Effects—
2. Aspects of Network Effects –(a) interoperability/compatibility; (b) installed base; (d) interconnection.
3. Bottleneck—(a) essential facility; (b) standard (open v. closed); (c) switching costs/lock-in;
4. Monopoly power—(a) ability to raise price profitably; or (b) ability to exclude competitors
5. Monopoly Leveraging
6. Platform and Applications

7. Scale Economies
8. Natural monopoly

**Week 2: Convergence, The Basics of Telecom Technology, and The Traditional Model of Regulation (Sept 2<sup>nd</sup> and 4<sup>th</sup>):**

*A. Reading*

- (1) Weiser & Nuechterlein, Chp 2.  
>>> *ATTEND Challenges of Convergence event (Wed, Sept 3<sup>th</sup>, at 3:30 pm)*

- (2) Weiser & Nuechterlein, Chps 3 & 4

*B. Concepts*

- (1) Regulatory Parity –
- (2) Parts of the telephone network—local loop, switching, transport
- (3) Common carrier
- (4) Tariff and tariffed service (filed rate doctrine)
- (5) Interconnection
- (6) Rate of return regulation (classic rate-making formula "R (revenue requirement) = C (operating costs) + Ir (invested capital or rate base times rate of return on capital))
- (7) Regulatory capture
- (8) Cross-subsidies
- (9) Universal service
- (10) (Incumbent) Local Exchange Carrier (LEC or ILEC)
- (11) Interexchange Carrier (IXC)

**Week 3: The AT&T Case and The Background of The Telecom Act (Sept 9th and 11th):**

*A. Reading*

- (1) Weiser and Nuechterlein, Chp 5  
Hush-A-Phone v. FCC, 238 F.2d 266 (D.C. Cir. 1956).
- (2) Weiser and Nuechterlein, Chp 6

*B. Concepts*

*C. Events*

1. Hush-A-Phone
2. Carterphone decision
3. Execunet decision

**Week 4: The Telecom Act (Sept 16<sup>th</sup> and 18th)**

*A. Reading*

- (1) Weiser and Nuechterlein, Chp 7  
AT&T v. Iowa Util. Bd., 119 S. Ct. 721 (1999) (Breyer, J., concurring in part and dissenting in part) (pp. )
- (2) Weiser and Nuechterlein, Chp 8  
Verizon v. FCC, 535 U.S. 467 (2002) (Breyer, J., dissenting) (pp. 539-563)

**B. Concepts:**

- (1) Unbundling Policy and Competitive Entry
- (2) Pricing Wholesale Access and Its Consequences – takings

**C. Concepts**

- (3) Section 2(b) of the Telecommunications Act
- (4) Section 251
- (5) Section 271
- (6) Unbundled Network Elements (UNEs)
- (7) Interconnection
- (8) Pricing of UNEs—long run incremental cost (replacement cost) v. historic cost
- (9) Cream-skimming
- (10) Interconnection agreement
- (11)

**Week 5: The Telecom Act of 1996 Con't (Sept 23rd and 25<sup>th</sup>)**

**A. Reading**

- (1) Allenco, Inc. v. FCC, 201 F.3d 608 (5th Cir. 2000).  
Qwest Corporation v. Federal Communications Commission, 258 F.3d 1191 (2001)
- (2) Weiser and Nuechterlein, Chp 9

**B. Concepts**

1. Intrastate v. interstate service
2. Explicit, competitively neutral universal service support

**Week 6: Telecom Act Wrap-up (Sept 30<sup>th</sup>)**

**A. Reading**

- (1) U.S. Telecom Ass'n v. F.C.C., 290 F.3d 415 (D.C. Cir. 2002).  
James Glassman, Monopolists' Playpen (<http://www.techcentralstation.com/040403D.html>)  
Alfred Kahn, Regulatory Politics As Usual  
(<http://www.aei.brookings.org/policy/page.php?id=127>)

**B. Concepts**

**Week 7: Wireless Regulation (Oct 7<sup>th</sup> and 9<sup>th</sup>)**

**A. Reading**

- (1) Weiser and Nuechterlein, Chp 11

Spectrum Policy Task Force Report (Executive Summary), available at  
[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-228542A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-228542A1.pdf)  
Up In Air, <http://www.newamerica.net/index.cfm?pg=article&pubID=1331>  
The Airwaves Explained,  
[http://www.newamerica.net/Download\\_Docs/pdfs/Pub\\_File\\_1309\\_1.pdf](http://www.newamerica.net/Download_Docs/pdfs/Pub_File_1309_1.pdf)  
(2) Weiser and Nuechterlein, Chp 12  
In re Cellular Communications Systems, 86 F.C.C.2d 469 (1981) (posted – do not read  
summaries of comments)

*B. Concepts*

- (1) The Coase Theorem
- (2) Tragedy of the Commons
- (3) Comedy of the Commons

**Week 8: Broadband Policy (Oct 14<sup>th</sup> and 16<sup>th</sup>)**

*A. Reading*

- (1) Weiser and Nuechterlein, Chp 13 (Background on the Internet)  
Constance Robinson, Network Effects in Telecommunications Mergers (Aug. 23, 1999)  
(Supp.-- <http://www.usdoj.gov/atr/public/speeches/3889.htm>)  
FCC Report to Congress on Universal Service (Separate Statement by Commissioner  
Michael K. Powell, Concurring (Supp.); also available on the Web at  
<http://www.fcc.gov/Speeches/Powell/Statements/stmkp810.html>)
- (2) FTC v. AOL (<http://www.ftc.gov/os/2000/12/aolcomplaint.pdf>)  
Analysis of Proposed Degree (<http://www.ftc.gov/os/2000/12/aolanalysis.pdf>)  
Lawrence Lessig, Innovation, Regulation, and The Internet,  
<http://www.prospect.org/print/V11/10/lessig-l.html>  
>>>ATTEND “Reflections on the AT&T Case: A Twenty Year Retrospective”

**Week 9: Media Policy: Ownership Restrictions and Access Regulation (Oct 21<sup>st</sup> and 23<sup>rd</sup>)**

*A. Reading*

- (1) Brand X v. FCC,  
[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/58AF00C2122345DD88256DB7005BFAA3/\\$file/0270518.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/58AF00C2122345DD88256DB7005BFAA3/$file/0270518.pdf?openelement)  
Ex Parte by Lessig and Wu, [http://faculty.virginia.edu/timwu/wu\\_lessig\\_fcc.pdf](http://faculty.virginia.edu/timwu/wu_lessig_fcc.pdf)
- (2) Fox Television Stations, Inc. v. F.C.C., 280 F.3d 1027 (D.C.Cir. 2002).  
Time Warner Entertainment Co., L.P. v. F.C.C., 240 F.3d 1126 (D.C.Cir. 2001)).

**Week 10: Regulation of TV Cont'd and Simulation Exercise I (Oct 28<sup>th</sup> and Oct 30<sup>th</sup>)**

*A. Reading*

- (1) Statement of Commissioner Powell on Broadcast Ownership Rules  
([http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-03-127A3.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-127A3.pdf))  
Schurz Comm, Inc. v. FCC, 982 F.2d 1043 (7th Cir. 1992).

(2) Deliberation on the Triennial Review appeal

<http://www.naruc.org/programs/trip/usta.pdf>

Hazlett comments et al (available at <http://www.phoenix-center.org/policyb.html>)

Hill comments (available at <http://www.phoenix-center.org/policyb.html>)

Policy Bulletins 5 and 4 (<http://www.phoenix-center.org/policyb.html>)

Allegiance Motion For A Stay,

[http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6515182528](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6515182528)

FCC Response to Writ (posted)

>>>**ATTEND** Address By FCC Commissioner Kathleen Abernathy, “Reflections on New Communication Technologies: Wireless Developments and Beyond,” Tues, Oct 28<sup>th</sup>.

**Week 11: Industry Transitions, Digital Television, and (Nov 4<sup>th</sup> and Nov 6<sup>th</sup>):**

A. *Reading*

(1) Plug and Play Decision (pp. 1-15 ), available at

[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-03-225A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-225A1.pdf)

Ken Ferree Speech To 53<sup>rd</sup> Annual Broadcast Symposium, available at

[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-240054A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-240054A1.pdf)

In re Digital Copy Protection Proceeding (i.e., Broadcast Flag), available at

[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-02-231A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-231A1.pdf)

(2) Discussion on Simulation Exercise

**Week 12: Models of Regulation and IP As A Common Law Alternative (Nov 11<sup>th</sup> and Nov 13<sup>th</sup>):**

A. *Reading*

(1) Weiser and Nuechterlein, Chp 17

(2) **Lotus** Development Corp. v. **Borland** Int'l, Inc., 49 F.3d 807 (1st Cir. 1995) (Supp.)

**Week 13: The First Amendment and Regulation of the Internet’s Content (Nov 18<sup>th</sup> and Nov. 20<sup>th</sup>)**

A. *Reading*

(1) ACLU v. Reno,

Lawrence Lessig, The Laws of Cyberspace

([http://cyberlaw.stanford.edu/lessig/content/articles/works/laws\\_cyberspace.pdf](http://cyberlaw.stanford.edu/lessig/content/articles/works/laws_cyberspace.pdf))

(2) U.S. v. American Library Ass’n, Inc., 123 S.Ct. 2297 (2003)

**Week 14: ISPs and The Common Carriage Concept (Nov. 25th)**

A. *Reading*

(1) **Blumenthal** v. **Drudge**, 992 F. Supp. 44 (D.D.C. 1998) (Supp.)

Schneider v. Amazon.com, Inc., 31 P.3d 37 (Wash.App. Div. 1 2001) (Supp)

**Week 15:    Wrap-Up (Dec 2nd and 4<sup>th</sup>)**

A.    *Reading*

(1) Weiser and Nuechterlein, Epilogue

(2)    Review