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Introduction: A Regulatory Regime for the Internet Age

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INTRODUCTION: A REGULATORY REGIME FOR THE INTERNET AGE

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In November of 2000, then-Commissioner Michael K. Powell spoke at the University of Colorado School of Law to discuss the implications of the "digital broadband migration."[1] The pace of this migration continues to accelerate. Indeed, it seems quite likely that we will look back at the years between 2000-2010 as consumed—at least in telecommunications policy circles—by questions related to how to address the broadband Internet. At present, however, we are only glimpsing the beginnings of broadband deployment, the development of security for an evolving infrastructure, and the relationship between broadband providers and complementary applications (such as Voice over Internet Protocol (VoIP)) that ride on top of them.

The set of papers published in this issue of the *Journal on Telecommunications and High Technology Law* (JTHTL) reflects the effort by the Silicon Flatirons Telecommunications Program to raise the level of the debate on cutting edge technology policy questions. With respect to the questions raised by the broadband Internet, the JTHTL is off to a promising start. Notably, its first issue has spurred an important—and ongoing—debate about the virtues of a layered model for telecommunications policy.[2] This issue continues that tradition by addressing the challenging questions regarding whether regulation

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1. He later published those remarks as delivered to the Progress and Freedom Foundation. *See* Michael K. Powell, *Preserving Internet Freedom: Guiding Principles For The Industry*, 3 J. ON TELECOMM. & HIGH TECH. L. 5, 5 n.1 (2004).

2. *See* Philip J. Weiser, *Law and Information Platforms*, 1 J. ON TELECOMM. & HIGH TECH. L. 1, 12 n.51 (2002); Kevin Werbach, *A Layered Model for Internet Policy*, 1 J. ON TELECOMM. & HIGH TECH. L. 37, 38 (2002); Douglas C. Sicker & Joshua L. Mindel, *Refinements of a Layered Model for Telecommunications Policy*, 1 J. ON TELECOMM. & HIGH TECH. L. 69, 71 (2002); John T. Nakahata, *Regulating Information Platforms: The Challenges of Rewriting Communications Regulation from the Bottom Up*, 1 J. ON TELECOMM. & HIGH TECH. L. 95, 98 (2002); *see also* Richard S. Whitt, *A Horizontal Leap Forward: Formulating a New Communications Public Policy Framework Based on the Network Layers Model*, 56 FED. COMM. L.J 587 (2004) (citing heavily to papers published in Volume 1 of the JOURNAL ON TELECOMMUNICATIONS AND HIGH TECHNOLOGY LAW).

should seek to preserve the Internet's open architecture and how policymakers should approach issues related to Internet security.

The four papers in this issue addressing broadband policy grapple with some of the most difficult and most important questions related to the digital broadband migration. In many respects, the fundamental promise of the broadband era is that all sorts of applications—whether VoIP, video on demand, electronic commerce, or those not yet invented—can be provided over broadband connections. Ideally, the rise of broadband Internet platforms will eviscerate the legacy distinctions between different platforms (wired telephone, wireless, cable, etc.) and facilitate entry by innovative application providers. But this vision is by no means assured, as incumbents might—in an attempt to protect their legacy business models—seek to use regulation or exclusionary conduct to limit entry. As one observer remarked, incumbent broadband providers might respond to the threat presented by Vonage, a leading VoIP provider, by using the "dodgy competitive tactic" of "slow[ing] down Vonage's service" as well as "give network precedence to their own revenue-generating services."[3]

Policing anticompetitive conduct in the broadband Internet age will present regulators with the challenge of reorienting their analytical frameworks for a new technological and economic environment. In particular, as Joseph Farrell and I have explained, the economics of vertical integration in this environment are far more complex than many policymakers appreciate.[4] Recognizing this complexity, Chairman Powell announces—in this issue—an "Internet Freedom" policy that puts broadband providers on notice that any departures from non-discrimination norms (i.e., favoring their vertically integrated affiliates) will be frowned-upon. This "jawboning" and enlightened guidance to the industry is, however, likely only to postpone the day when the Federal Communications Commission (FCC) is forced to evaluate the competitive consequences of discrimination that arises from vertical integration.[5]

In this issue, Christopher Yoo and Tim Wu evaluate the arguments, albeit from different perspectives, that bear on the competitive effects of

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3. Daniel Klein, *Why Vonage Is Just A Fad*, ZDNET (May 19, 2004), *available at* http://techupdate.zdnet.com/techupdate/stories/main/Why_Vonage_Just_Fad.html?tag=tu.arch.link.

4. Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 HARV. J.L. TECH. 85, 105-19 (2003).

5. "Jawboning" refers to statements by policymakers that threaten possible action, as opposed to announcing actual action.

discrimination between applications riding on broadband networks.[6] Indeed, their point-counterpoint effectively illustrates how the Internet Freedom debate often turns on epistemological grounds.[7] By that, I mean that one's basic premise of "How do I know what I think I know?" will often dictate one's approach to the Internet freedom issue. Thus, for those believing that the Internet's modularity and historic openness is critically important to facilitating entry and innovation, the need for FCC action is obvious. By contrast, for those believing that vertical integration generally facilitates valuable efficiencies and spurs new investment, the need for regulatory restraint is equally obvious. For the rest of us (i.e., those uncertain of the primacy of either asserted position), it is far from obvious how to confront this policy challenge.

As a general matter, I resolve the challenge of how to address the competitive effects of vertical integration (and any associated discrimination towards certain application providers) by using an antitrust model of regulation. In this respect, I share Howard Shelanski's endorsement of sector-specific regulation when addressing "the oversight of interconnection and its associated pricing issues."[8] In particular, I endorse an antitrust-like model of regulation as a means of sorting the wheat from the chaff—in terms of identifying exclusionary discrimination—and addressing the questions that the FCC will face when and if it is forced to take a formal stand on the issue (i.e., if the jawboning strategy is not a viable long term approach).[9] In that regard, I must note that there are other possible approaches, such as admonishing broadband providers to adopt clear policies towards application providers and to enforce those policies at the FCC in a manner similar to how the Federal Trade Commission enforces Internet privacy policies.[10] Indeed, both because of the complexity of this issue and the different permutations of possible regulatory responses, Internet Freedom issues are likely to be debated for some time. And regardless of how that debate ends, I am confident that the articles in this issue will elevate that discussion and help point the way towards an effective solution.

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6. *See* Christopher S. Yoo, *Would Mandating Broadband Network Neutrality Help or Hurt Competition? A Comment on the End-to-End Debate*, 3 J. ON TELECOMM. & HIGH TECH. L. 23 (2004); Tim Wu, *The Broadband Debate, a User's Guide*, 3 J. ON TELECOMM. & HIGH TECH. L. 69 (2004).

7. "Epistemological" refers to the branch of philosophy that studies "the nature of knowledge."

8. Howard A. Shelanski, *Competition Policy for Mobile Broadband Networks*, 3 J. ON TELECOMM. & HIGH TECH. L. 97, 118 (2004).

9. *See* Philip J. Weiser, *Toward A Next Generation Regulatory Regime*, 35 LOY. L. REV. 41 (2003).

10. *See* Steven Hetcher, *The FTC As An Internet Privacy Norm Entrepeneur*, 53 VAND. L. REV. 2041 (2000).

Like the issues related to broadband policy, the questions swirling around security policy beg for thoughtful analysis. To date, legal scholars have largely avoided this intimidating set of issues. Thankfully, Peter Swire, one of the leading scholars in this area, is an exception to the rule, as evidenced by his thoughtful analysis of the disclosure of security vulnerabilities.[11] Similarly, Scott Marcus, whose technical training shows through in his article, provides an important analysis discussing how the development of the Internet can address security concerns.[12] These two perspectives, however, reflect only the very beginnings of the debate over the security policy, which is now roughly at the stage that the broadband policy debate was in 2000. In future offerings, the JTHTL will strive to publish more scholarship in this area and help advance what is almost certain to become an increasingly important area of technology policy.

11. *See* Peter P. Swire, *A Model for When Disclosure Helps Security: What is Different About Computer and Network Security?*, 3 J. ON TELECOMM. & HIGH TECH. L. 163 (2004).

12. *See* J. Scott Marcus, *Evolving Core Capabilities of the Internet*, 3 J. ON TELECOMM. & HIGH TECH. L. 121 (2004).