Exposing and Correcting Mischaracterizations of the Law in the Debate on Network Openness

Professor Barbara Cherry
Assistant Professor Julien Mailland
Department of Telecommunications
Indiana University

Matt Pierce
Member of the Indiana General Assembly, and
Lecturer, Department of Telecommunications
Indiana University

Mischaracterizations of Important Bodies of Law

- There have been numerous mischaracterizations or misrepresentations of important bodies of law related to network openness:
  - Reflecting a conflation of common carriage and public utility law.
    - E.g. Assertion that reclassification of a service as Title II imposes public utility regulation.
  - Based on a false assumption that common carriage legal status arises from attributes of market structure.
    - E.g. Assertion that common carriage arises from monopoly.
  - Based on the false assumption that public utility legal status arises from monopoly.
    - E.g. Assertion that public utility regulation applies only to monopolies.

- These mischaracterizations are misleading debate of network openness in both federal and state policymaking forums.

Who Makes These Mischaracterizations?

- There are numerous sources for these mischaracterizations.
  - Some proponents of network openness principles.
  - Most opponents of network openness principles.
  - Some FCC commissioners, both former and present.
  - Many journalists in mass media stories about network openness.

Why are These Mischaracterizations Occurring?

- There are many factors that contribute to these mischaracterizations.*
  - Some mischaracterizations are intentional, to misdirect or confuse policy debates.
  - Some mischaracterizations arise from the conflation of common carriage and public utility laws because historically telecommunications carriers have been both.
  - Given the above, and combined with differences in professional research methods and discourse, mischaracterizations are being made:
    - By lawyers
    - By social scientists
    - By policymakers
    - By journalists
  - Moreover, based on comparative research between the U.S. and Canada (sharing relevant common law histories), these mischaracterizations have particular resonance in the U.S.

  - *Some of these factors are discussed in previous filings by Cherry at the FCC. (See Cherry 2013, 2010b and 2010c.)

What is the Correct Understanding of These Bodies of Law?

- Common carriage
  - Is a legal status, originating under the common law of tort, based on the **type or function of the service offered** – holding out to serve the public to take possession and transport the property – physical or electronic - of the customer.
  - This legal status arose from concerns of public policy, where circumstances underlying provision of service (bailment) creates unique opportunities for economic exploitation.
  - This legal status is independent of market structure.
  - The federal statutory framework codified the legal status of common carriers. Under *NARUC I* and *II,*
    - The legal status of a service, meeting the criterion above, as common carriage is NOT a matter of FCC discretion.
    - However, the FCC has discretion to require that some services be provided on a common carriage basis, as was done in the *Computer Inquiry* framework.
    - In either case, if the legal status of common carriage applies, the FCC can exercise its forbearance powers.

What is the Correct Understanding of These Bodies of Law?

- Public Utility
  - Is a legal status that arises from the grant of governmental privilege to **provide service of public importance or necessity**. This grant is referred to as a franchise.
  - This grant includes privileges and obligations.
    - Examples: Access to public rights-of-way; eminent domain; right and obligation to serve.
  - The franchise may be, but is not required to be, exclusive.

- Thus, the legal statuses of common carrier and public utility are separate. A given entity may meet the criteria of one or the other, or even both.
- Historically, telecommunications carriers have been common carriers under federal law and public utilities under state law, but status as one does not require the status of the other.

These Mischaracterizations Misdirect Policy Debate

Mischaracterizations

Lead to improper analysis

↓

Is monopoly present that justifies regulation?

↓ ↓

Federal issue (Title II)

State regulation

Correct Understanding of Law

Leads to proper analysis

↓

Is or should the type of service offered be classified under Title II?

If so, what regulatory forbearance is appropriate?

↓

Given dual jurisdictional regulation, federal decision also affects, and could preempt, states' jurisdiction

What are the Adverse Consequences of Making Policies Based on These Mischaracterizations?

- Federal policies adopted on the basis of these mischaracterizations create disruptions with other bodies of law (See Cherry, 2010a).
  - Such as legal gaps with antitrust law, and with consumer protection statutes (e.g. AT&T v. Concepcion).
- They also create vulnerabilities to U.S. constitutional challenges.
  - Such as under the First Amendment (see Cherry & Mailland, 2014).
- Federal policies adopted on the basis of these mischaracterizations also disrupt development of related state policies, as described next.
- The result is unsustainable network openness rules or obligations under both federal and state law.

Mischaracterizations are asserted in the States…

- Telecommunications carriers claim that basic state regulation is no longer necessary because:
  - Lack of monopoly power renders common carrier and public utility regulation obsolete.
  - Any service offered with Internet protocol (IP) is the equivalent of the Internet and should receive Title I classification.
  - State laws are unnecessary because consumers and competitors can rely upon federal laws and regulations for protection.

- This presentation supplements earlier FCC ex parte meetings by Barbara Cherry and Matt Pierce regarding state legislative activities. (See Cherry, 2012).

…To Repeal Fundamental Protections for Consumers and Competitors Under State Law

- Telecommunications carriers, led by AT&T, are using these mischaracterizations to argue that states should repeal fundamental protections for consumers and competitors.
- For example, AT&T led the effort to convince the Indiana state legislature to:
  - Eliminate state carrier of last resort (COLR) obligations in 2012, arguing that provisions in § 214(e)(1) as to ETCs were sufficient to ensure all areas are served.
  - In 2014, prohibit the state utility commission's jurisdiction over interconnection disputes from exceeding authority delegated to the states under federal laws and regulations.
- AT&T's legislative strategy to repeal COLR in Indiana is not an isolated occurrence, but part of a trend to dismantle state law obligations in states across the U.S. (See Lichtenberg, 2012).

… While Making Efforts to Dismantle the Federal Laws that States were Counseled to Rely Upon

- Yet, despite assurances that federal laws would remain in place, AT&T has petitioned the FCC to use its powers to eliminate the very federal protections it assured state legislators would protect consumers and competitors upon repeal of state authority.
- For example, AT&T filed comments with the FCC in the Connect America Fund proceedings on Jan. 18, 2012, requesting forbearance and reinterpretation of 47 U.S.C. § 214(e)(1) so that the statute would no longer be enforced.
- In filings with the FCC related to the IP transition, AT&T has argued that federal interconnection laws and regulations should not apply to voice-over-Internet-protocol (VOIP) services.

Concluding Remarks

- Policymakers should not allow mischaracterizations of the law to guide their policymaking.
- Policymakers need to help expose and correct mischaracterizations and misunderstandings of the law, made by both proponents and opponents, in the policy debate related to network openness.
- If these mischaracterizations are allowed to continue on the federal level, they will be amplified at the state level, further skewing state policies.
- By exposing and correcting the mischaracterizations of the law, it is clear that reliance on Title II authority can be used for sustainable network openness and preserve the "virtuous circle of innovation."

References

- Barbara A. Cherry & Julien Mailland (2014), "Toward Sustainable Network-Openness Obligations on Broadband in the U.S.: Surviving Providers' First Amendment Challenges," paper presented at the 42nd Research Conference on Communication, Information and Internet Policy (known as TPRC), Arlington, VA.
- Barbara A. Cherry (2013), Ex Parte Letter, "Reframing Debate of the PSTN-to-IP Transition: Lessons from U.S. v. Canadian Experimentation," Presentation to the Technology Transitions Policy Task Force, GN Docket No. 13-5.
- Barbara A. Cherry (2012), Ex Parte Letter, Memorandum of Ex Parte Presentation, Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208; In the Matter of Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) From Enforcement of Certain Legacy Telecommunications Regulations, WC Docket No. 12-6 [two letters were filed regarding two meetings on the same day and as to the same subject matter].

References

- Barbara A. Cherry (2010a), "Consumer Sovereignty: New Boundaries for Telecommunications and Broadband Access," 34 *Telecommunications Policy* 11-22.
- Barbara A. Cherry (2010b), "Comments," In the Matter of Preserving the Open Internet Broadband Internet Practices, GN Dkt. No. 09-191, WC Dkt. No. 07-52.
- Barbara A. Cherry (2010c), "Reply Comments," In the Matter of Preserving the Open Internet Broadband Internet Practices, GN Dkt. No. 09-191, WC Dkt. No. 07-52.
- Sherry Lichtenberg (2012), "The Year in Review: The Status of Telecommunications Deregulation in 2012," National Regulatory Research Institute, available at http://www.nrri.org/documents/317330/0179150e-ef83-4e94-bf94-80c7af830ab6.