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Interstate Commerce Act (1887)

In 1887 Congress passed the Interstate Commerce Act, making the railroads the first industry subject to Federal regulation. Congress passed the law largely in response to public demand that railroad operations be regulated. The act also established a five-member enforcement board known as the Interstate Commerce Commission. In the years following the Civil War, railroads were privately owned and entirely unregulated. The railroad companies held a natural monopoly in the areas that only they serviced.

Monopolies are generally viewed as harmful because they obstruct the free competition that determines the price and quality of products and services offered to the public. The railroad monopolies had the power to set prices, exclude competitors, and control the market in several geographic areas. Although there was competition among railroads for long-haul routes, there was none for short-haul runs. Railroads discriminated in the prices they charged to passengers and shippers in different localities by providing rebates to large shippers or buyers. These practices were especially harmful to American farmers, who lacked the shipment volume necessary to obtain more favorable rates.

Early political action against these railroad monopolies came in the 1870s from "Granger" controlled state legislatures in the West and South. The Granger Movement had started in the 1860s providing various benefits to isolated rural communities. State controls of railroad monopolies were upheld by the Supreme Court in *Munn v. Illinois* (1877). State regulations and commissions, however, proved to be ineffective, incompetent, and even corrupt. In the 1886 *Wabash* case, the Supreme Court struck down an Illinois law outlawing long-and-short haul discrimination. Nevertheless, an important result of *Wabash* was that the Court clearly established the exclusive power of Congress to regulate interstate commerce. (See Gibbons v. Ogden.)

The Interstate Commerce Act addressed the problem of railroad monopolies by setting guidelines for how the railroads could do business. The act became law with the support of both major political parties and pressure groups from all regions of the country. Applying only to railroads, the law required "just and reasonable" rate changes; prohibited special rates or rebates for individual shippers; prohibited "preference" in rates for any particular localities, shippers, or products; forbade long-haul/short-haul discrimination; prohibited pooling of traffic or markets; and most important, established a five-member Interstate Commerce Commission (ICC).

The law's terms often contradicted one another. Some provisions were designed to stimulate competition and others to penalize it. In practice, the law was not very effective. The most successful provisions of the law were the requirement that railroads submit annual reports to the ICC and the ban on special rates the railroads would arrange among themselves, although determining which rates were discriminatory was technically and politically difficult. Years later the ICC would become the model for many other regulatory agencies, but in 1887 it was unique. The Interstate Commerce Act challenged the philosophy of laissez-faire economics by clearly providing the right of Congress to regulate private corporations engaged in interstate commerce. The act, with its provision for the ICC, remains one of America's most important documents serving as a model for future government regulation of private business.

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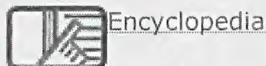

Clayton Antitrust Act

Clayton Antitrust Act, 1914, passed by the U.S. Congress as an amendment to clarify and supplement the Sherman Antitrust Act of 1890. It was drafted by Henry De Lamar Clayton. The act prohibited exclusive sales contracts, local price cutting to freeze out competitors, rebates, interlocking directorates in corporations capitalized at $1 million or more in the same field of business, and intercorporate stock holdings. Labor unions and agricultural cooperatives were excluded from the forbidden combinations in the restraint of trade. The act restricted the use of the injunction against labor, and it legalized peaceful strikes, picketing, and boycotts. It declared that "the labor of a human being is not a commodity or article of commerce." Organized labor was as heartened by the act as it had been dejected by the doctrine of the Danbury Hatters' Case, but subsequent judicial construction weakened the act's labor provisions. The Clayton Antitrust Act was the basis for a great many important and much-publicized suits against large corporations. Later amendments to the act strengthened its provisions against unfair price cutting (1936) and intercorporate stock holdings (1950).

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Clayton

Clayton-Bulwer Treaty

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Welcome to 1927:
The Creation of Property Rights and Internet Domain Name Policy in Historical Perspective

Christian Sandvig
Institute for Communication Research
Department of Communication
Stanford University
Stanford, CA 94305-2050
csandvig@stanford.edu

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Welcome to 1927: The Creation of Property Rights and Internet Domain Name Policy in Historical Perspective [1]

Consider, if you will, the story of a young medium. The medium has fantastic potential to connect us in a vast network across great distances. The medium allows us to communicate in ways that have never before been possible. As a new medium, it seems wild and untamed, new and different. Only the young generation and the technologically-inclined seem to be able to fully understand it. The government has asserted that development of the medium is a national priority. The medium seems to hold great promise in advancing education– with increased availability of the medium, the average person will have access to a wealth of information never before seen. No one is sure how to make money from the medium, but many are trying. As a communication system, it has both military and commercial applications, but the bulk of users seem content to just roam around: exploring, learning, and entertaining themselves.

The medium is radio, the site: the Unites States, the year: 1920– although this description could also be of the Internet today. Both early radio and the present-day Internet share the characteristics above. By understanding the development of broadcasting in the U.S. seventy years ago, we can gain insight into the issues currently pertinent to the Internet today as a communication system. This paper will specifically focus on the creation of *property* in early radio and Internet, and how the creation of property rights functions as a system of control.[2] Both radio and the Internet rely on the commodification of valuable resources, and both systems utilize the marketplace to allocate these resources. The policy decisions surrounding each of these two periods are often unnecessarily constrained by the marketplace, and indeed the choice to use a marketplace model to allocate these resources seems to be not the product of intentional thought with due consideration for the consequences which might result, but merely the

unquestioned, default system. This paper will show through discussion of two instances that the unquestioned, unmediated incentives of the market in each case can lead to outcomes inconsistent with initial goals and place long term constraints on the system's development in the form of property rights. This results in the disenfranchisement of those without the necessary property or capital to participate.

A technical system built with non-technical decisions

The activity of broadcasting in the United States, first systematized in radio and then later inherited by television, can be best understood not as a technological breakthrough, but as a political struggle that defined a scope and a structure for the technological breakthrough. As a series of historical analyses have explained, the early period of radio broadcasting leading to government regulation is one marked by a struggle between competing visions of what "radio" was to become (Douglas, 1987; McChesney, 1993; Smulyan, 1994). This paper will discuss the creation of property in early radio broadcast policy, then use this framework to analyze the creation of property currently occurring on the Internet.

Systems of communication are considered here first and foremost "... as economic entities with both a direct economic role as creators of surplus value through commodity production and exchange and an indirect role... in the creation of surplus value within other sectors of commodity production" (p. 30). As Garnham states, these systems are not isolated in one branch of the traditional trichotomy of relatively autonomous economic, ideological, and political spheres. These systems are economic, but fundamentally constructed through a political process with ideological baggage throughout.

Perhaps contrary to expectations, comparisons of the Internet as a medium to radio (or television) broadcasting are only slightly limited by the differences in the technical

characteristics of each medium. Each medium has some degree of structure that is technically imposed– an example would be the propagation characteristics of radio waves or the (currently) maximum transmission capacity of a fiber-optic cable. As many have noted, atop this base structure of technology lies a framework of decisions often made in deference to technical necessity– but within which, in reality, there is considerable leeway (cf. Hughes, 1983). An example would be the specific size of spectrum dedicated to one AM radio channel (or the specification for the length of a datagram on the Internet). The degree of leeway can very, by decision, from small to large. Some decisions may be heavily influenced by current technological limitations (or perceived limitations), while others are more clearly political choices. Political, economic, and ideological considerations play some role, be it small or large, in each of these decisions.

The creation of property in broadcasting, 1920

Commodifying the Air

Broadcasting is organized in the United States around the commodification of airwaves and audience. This is the structure on which all debates of broadcast policy rest. The government, on the basis of the Radio Acts of 1912 and 1927 and the later Communications Act of 1934, is in the business of creating private property in the form of the broadcast license. Arguments about the value of that property and the rights of property owners are then used in the regulatory system to advance one interest over another. Thomas Streeter's critique of broadcast policy in the United States, Selling The Air (1996), provides this rich framework for understanding the creation of property as a key causal agent in defining the resulting structure of the system of communication we know as broadcasting. As Streeter and other historians as have applied this framework to

early radio, property may be *the* most profound form of control over commercial broadcasting.[3]

Missing from policy discussion about broadcasting is the acknowledgement that the commercial constitution of broadcasting as a property issue is fundamentally artificial– which is to say, political. While popular conception holds that governmental control is in opposition to some "natural" state of the uninhibited market, through a focus on property it can be seen that the "natural" state of the broadcasting market is no such thing. The creation of private property in the spectrum, the audience, and the broadcasting license is an extremely powerful form of control, and one that has created the broadcasting industry in the form that we know it. Control need not mean the control of a central body or the subjugation of the medium to a cogent master plan. Structuring broadcasting in terms of property is controlling because it sets the scope of the industry and the framework within which we consider the broadcast media. The discursive structure of broadcast policy does not acknowledge this form of control, but assumes it as a foundation.

The assignment of value to the electromagnetic spectrum and the licensing/trustee relationship that emerged in which audiences were bought and sold within a governmentally-imposed framework stands out clearly as an artificial system, and one which imposes a structure with far-reaching effects. In the tumultuous world of early radio, circa 1920, the primary participants in the spectrum were amateurs who sought to use the medium for entertainment, military interests who sought to coordinate the fleet, and businesses– which initially only saw radio as a means to relay point-to-point messages. Amateur interests had been severely curtailed the decade before by the Radio Act of 1912, and there was rising commercial interest in radio as a mass medium (Douglas, 1987 p. 236). However, in the twenties the final framework that radio would take was far

from certain. Broadcasting stations were spreading, despite having "... little idea of how to finance either their program needs or operating costs" (Smulyan, 1994 p. 40).

Goals set and abandoned

From this uncertain chapter in the life of radio as a new technology, clear instances of legislative intent and words of caution about the direction of the medium stand out. In perhaps one of the most often-quoted statements made about early radio, "... at the Third National Radio Conference [in 1923], Herbert Hoover declaimed that the quickest way to kill broadcasting would be to use it for direct advertising... " (Smulyan, 1994 p. 41). Indeed, "[m]any observers of early broadcast radio... worried about the influence of commercialism" (p. 125). In the wake of the Elk Hills and Teapot Dome scandals involving public resources (e.g., oil on public lands), conservation-minded activists insisted on adding language to the Radio Act of 1927 that explicitly defined the broadcast license to provide "... for the use of... channels, but not the ownership thereof" (Barnouw, 1966 pp. 195-196). If the aims of the period were to create a medium that was (1) free of direct advertising, (2) not dominated by commercialism, and (3) not based on the private ownership of the spectrum, or "channels," how did what we presently know as broadcasting emerge? The system that arose from these intentions is (1) dominated by "direct" advertising, (2) almost without exception commercial in nature, and (3) based in action if not in statute on the buying and selling of the broadcast license. It is this system that passed intact from radio to television and is still with us today.

Streeter's analysis of the political economy of broadcasting rests upon the idea that to locate and understand the creation of property in broadcasting is to make great strides toward understanding broadcasting as a system. Quite aside from the organization of broadcasting as a monopoly, oligopoly, or competitive system are the needs that must be

met for broadcasting to be commercial in any form. Namely, broadcasting must be constituted as something that can be bought, owned, and sold as property.

Streeter refers to this system as "postmodern property," and it is postmodern in that the existence of the property in question rests solely on our conception of it. We have socially normalized a system wherein the broadcast license, spectrum, and audience are bordered objects. The philosophical urge to view corporate stewardship in cooperation with governmental control as the ideal solution to managing a resource is termed "corporate liberalism" by Streeter. A full review of this philosophy is beyond our scope here, but the key point to note is that the corporate liberal impulse lead to the enactment of property-based policies that, once in place, became normalized, and thus invisible. While contemplating the electromagnetic spectrum as a scarce resource, the government ceded priority to corporate interests because in the face of scarcity they were told that only a well-capitalized private system would lead to full utilization. In this manner the corporate stewards locked out independents and educators.

After the establishment of a fiduciary system of accountability based on a transferable license and a government regulator constrained by property rights, the idea of "owning" a license was normalized. Any backlash against the behavior of business interests was then met by attempts to "regulate the results of the growing commercialism," rather than to "strengthen the alternatives." (Smulyan, 1994 p. 126). Policy initiatives such as the radio acts had set up a system wherein broadcasters were to be corporate interests, and their business was to be the purchase and sale of broadcast licenses and audiences. Structurally, incentives were built into the system for these businesses to be responsive to advertisers who funded their operations, and there is ample evidence of this occurring (Ibid. p. 129; Sterling & Kittross, 1990 ch. 4).

Lessons Learned from Early Broadcasting

What could have changed this situation to bring the results in radio in line with the three expectations for the medium proposed earlier? Clearly, a greater attention to the creation of property during the policy process would have been a great step forward in allowing the architects of modern broadcasting to understand the system they were constructing. The policy process at the time, however, was confused by the aura of expertise surrounding key decisions. Radio was little understood, and the majority of the experts available represented business interests. In hindsight, it is hard to accept that policy-makers did not see that the creation of transferable license properties would tend to systematically push out non-profit, non-commercial, alternative interests. In fact, they may have realized this, but they felt that commercial interests could somehow "rise above" the system of incentives present in the structure. As there were feelings in Congress that educational broadcasting was important and that "direct" advertising was a mistake, this was thought to be the direction that broadcasters would voluntarily choose, although these goals were never clearly codified in law and broadcasters would not be forced by explicit legislation to follow them (cf. Barnouw, 1966 p. 200). We see today that these were not reasonable expectations– in the years of broadcasting since the structure was established that would favor only commercial participants and reward them for commodifying mass audiences, the broadcaster that spurns these incentives to promote diverse programming (and as a result, forsakes profits) is rare to nonexistent. The early expectation that broadcasters, despite the market structure's reward system, would somehow choose to ignore the profit motive is not sound logic. Let us turn now from the past to the present and examine the communication medium of the Internet with property in mind.

The creation of property on the Internet, 2000

There is no direct parallel to licensing on the Internet, as you do not require government permission to transmit, and there is no license to obtain. The case of domain name registration examined here is not meant to *exactly* parallel the fiduciary license system of radio. It is, however, illustrative of the foundation of assumptions about how a communication medium should work that can be inherited across history. There is still little awareness of the forces and incentives unleashed by the creation of a property right.

At the time of early radio broadcast regulation during which this system was established, there was little to no awareness of the future audiences radio would reach. Decisions made very early in the process of radio broadcasting had large consequences as the decades passed. In the current excitement surrounding the Internet, we have the opportunity to discover and address the marketplace as an assumption relatively early in the medium's development process. Domain name registration is useful, then, as an example of a system for the allocation of resources that is still young and very much in flux. It allows a case where (like radio broadcast licensing) control was ceded to the marketplace with little reasoned discussion, and it allows us to see how little, in many respects, our approach to new media has changed over the last seventy years.

The Early Domain Name System

Briefly, the story of the domain name as property begins twenty years ago, when the Internet consisted of about 20 interconnected research networks, of which ARPANet was the oldest (Leiner et al, 1998). As the fledgling network continued to expand and add nodes, it became clear that for each computer to have a unique name was impractical as the words left available for new nodes became scarce. In 1981, a system of "name domains" was proposed (Mills, 1981).

Only the features of the domain name system and surrounding debates that are salient to this analysis will be discussed here. For a broader overview and background, see Mills (1981), Su & Postel (1982), Mockapetris (1983, 1987), Postel (1983, 1994), and Postel & Reynolds (1984). For a discussion of Internet histories, see Guice (1998).

In 1983, the engineers under government contract to develop the network proposed the establishment of six top-level domains (TLDs). "The motivation," explained a memorandum, "is to provide an organization[al] name that is free of undesirable semantics." (Postel & Reynolds, 1984 p. 1). All addresses on the network would be divided into six domains: government (gov), education (edu), commercial (com), military (mil), organization (org), and older DARPA hosts (formerly "arpa"). If an organization had over fifty computers, and could demonstrate that it possessed the technical ability to manage its own network address table, it could register with the publicly-funded Network Information Center at no charge (p. 5). The organization would choose one of the six TLDs, and pick a unique word within that domain to identify itself (e.g., "stanford" within the TLD "edu").

Provision was also made at this time for the use of two-letter TLDs based on the International Standards Organization Codes for the Representation of Names and Countries: United States = us, France = fr, Japan = jp, etc. (p. 7). These domains, later called "geographic" or "country code" domain names, represented an additional hierarchy within which organizations could list themselves, but this second system tied to physical places would prove slow to develop, and comparatively unpopular. It may be that as the Internet promised to make geographic distances irrelevant, referents to geography went against the grain– from the early pioneers to the users of today. Restricting the Internet to geographic addressing boundaries may make it seem less potent; as historian Carolyn Marvin stated of past communication media, "The more any medium triumphed over distance, time, and embodied presence, the more exciting it was" (Marvin, 1988 p. 194).

It is important to stress that as this process developed, it seemed to be a clear-cut technical matter. The network continued to grow over the next decade, and after the advent of the World Wide Web in 1992, it began to creep into the public's awareness. Over time, two additional TLDs were added: "net" for computers of network service providers, and "int" for organizations "established by international treaty" (Postel, 1994 p. 2). The DNS architects perceived that everything had been resolved, permanently. In 1994, an engineering document proclaimed boldly, "It is extremely unlikely that any other TLDs will be created" (p. 1).

Privatization and Commercialization

During this period, military sites spun off the publicly-accessible network (to become "milnet"), DARPA ceded control to the National Science Foundation (NSF), and the NSF began to implement policies for commercialization (Hart, Reed, & Bar, 1992). NSF prohibited commercial traffic on the "backbone," or long-distance portion of the network, but actively encouraged it on the local and regional hubs. By blocking business from the NSF backbone, this strategy successfully stimulated private investment by companies such as PSI, UUNET, and ANS CO+RE in long-distance network capacity to get around the backbone restrictions, as hoped by the NSF. Later, the NSF ceased to underwrite the backbone network entirely and turned its attentions to issues of interconnection, among others.

In January of 1993, NSF privatized the domain name system by granting little-known Network Solutions, Inc. a five-year contract to provide registration and other DNS-related services (Network Solutions, 1993). Network Solutions was to administer domains under the "generic" (or non-geographic) TLDs "gov", "edu," "com," "net," and "org." Although Network Solutions was initially paid directly by the NSF for these services, a

cost-plus-fixed-fee price for the registration of a second-level domain name was eventually introduced to defray costs (Network Solutions, 1995). Effective September, 1995 all would-be registrants must pay $50 per year, with two years payable upon initial registration. Procedures to transfer the domain names between parties had been in place for some time, cementing the nature of the names as commodities– if something can be exchanged, it can be bought and sold. At the time, no one predicted that this somewhat arcane technical addressing system, government contract, and its related fee would soon become so important.

A New Real Estate Born

The popularity of the Internet rose dramatically in the mid-nineties. Commercial enterprises began to pour onto the network, and every business wanted a name for itself. Unwilling to be associated with the geographic hierarchy, businesses sought second-level domains like "cbs" under the only generic TLD of the possible seven provided explicitly for commerce, "com". By 1997, one million unique words (or combinations of words, like "americascheeseexperts") were registered as second-level domains under by Network Solutions. Three years later, ten million domains have been registered (Network Solutions, 2000).[4] While the fairly arbitrary $50 fee per year of registration had seemed reasonable in 1993, with the large increase in demand, Network Solutions' projected revenue under the NSF contract went from $6.5 million in 1995 to $44 million for 1996 to a projected $70 million in 1998 (Clausing, 1998b).

Industry began to realize the value of these domain name "properties," in a marketplace that was termed "cyberspace real estate" (Aguilar, 1996). Corporate interests with deep pockets began to buy not only a domain name for every product line they carried, but also any word they might conceivably have need of in the future. In one

example, consumer-product giant Proctor & Gamble "... launched a flurry of domain name registration[s]... that included not only many of its prized brand names, including clearasil.com and charmin.com, but also a host of generic names, like babydiapers.com and cough.com" (Dunn, 1996). The company collected over 100 names in all (including "diarrhea" and "pimples") in a manner that the press termed a "land grab" (Aguilar, 1996).

Smaller entrepreneurs were not to be left out. Any far-sighted individual with $100 could profit if he could think of a name anyone might need in the future. Entrepreneurs set up domain-name "brokerage houses" where pooled capital allowed the purchase of thousands of names, with the profits split among investors.[5] Domain name speculation has even spilled over into the geographical hierarchy, with brokers purchasing the names of cities. When a non-Internet-savvy municipality awakens and attempts to establish a presence on the network, it found its name already taken, and held by a party looking to sell to the highest bidder (Silberman, 1997).

Scarcity has drastically inflated prices above the $50 fee initially charged by Network Solutions, if inflation is even a reasonable construct to use in this situation– as the concrete value of a second-level domain name is arguable. Brokers often set "minimum bids" of $500, while at the upper end of the spectrum, several agreements have been reached for amounts over $1 million. Table 1 lists a sample of domain name sales reported by the press that were considered noteworthy at the time reported.

Table 1. Sample domain name sale prices considered noteworthy by domain brokers at the time of offering.

Year	Domain	Price
1996	slate.com	$10,000
1996	television.com	$50,000*
1997	business.com	$150,000
1997	porno.com	$42,000
1998	altavista.com	$3,300,000
1999	business.com	$7,500,000
1999	wine.com	$3,000,000
1999	wallstreet.com	$1,030,000
2000	loans.com	$3,000,000

* Price offered, not taken.
Note. Figures from Hakala & Rickard, 1996; ".com," 1996; Wingfield, 1996; Lee, 1999; Pollack, 1999; Associated Press, 2000.

Normalizing the DNS, With Property Comes Power

During the explosion of "cyberspace real estate," it was clear to some that there was little reason for the present scarcity of the ethereal domain names. A monopoly by Network Solutions on the basis of a U.S. Government contract seemed increasingly absurd in the context of a global Internet. A consortium of companies and user groups secured a partnership with the World Intellectual Property Organization and the International Telecommunications Union and formed an international body that planned to introduce several additional top level domains.[6] Confusing the issue slightly was the fact that the international body had no authority to do so, but the counter-argument made was that Network Solutions also has no justifiable international authority over a global infrastructure to register domains (Harmon, 1998a). Still, the technical function of translating domain names to the IP addresses that allow data to be routed to the appropriate computers would need to be performed and integrated across these groups.

In the controversy that ensued at the end of the 1990s over the control and organization of the domain name system, the ending of Network Solutions monopoly and

protection of the rights of property owners took center stage.[7] Although this was surprising to many, it is entirely consistent with the history of radio policy.

Playing for the "Control of Cyberspace"

While the ending of scarcity by increasing the number of available TLDs seemed to many to be of paramount importance (Froomkin, 1999), in February, 1998 the Clinton administration issued a proposal to introduce only one new domain name, and forced the international consortium to back down by refusing to acknowledge its authority to participate in the naming system (U.S. Dept. of Commerce, 1998). It is extremely illustrative that the debate surrounding this issue was phrased as a battle for "the control of cyberspace," although control over the handful of generic top-level domain names does not imply actual control over the network– only over the ability for data to reach hosts registered under those domains (Harmon, 1998b).

The discursive framework surrounding property rights is so prevalent in our culture that this issue seems to be one of crucial control, even in it is of less technical or practical significance. In examining the case of the Internet's DNS, we see another example of the largely unintended creation of property on a grand scale, and then surprise being expressed by many parties at the actions of actors in the system who are merely following incentives set up by the system. Reliance on property as a model is so naturalized to us that it permeates our lives and we immediately consider speculation in Internet address codes to be "real estate." These domain name registrations are merely agreements to direct data to specific computers upon receipt of a series of words and punctuation characters. They have no physical form, and are transferred among owners by asking the registering body that they be transferred. Yet the price of the registration fee (which, even when set at today's price of about $30, some have described as arbitrarily

high considering the actual work involved by the registrar) is multiplied many times because of the evocative, symbolic, or connotative meanings corporations hope these names will bring them. By instituting a structure for these names based on a property system of commodification, just as occurred in radio, non-profit, non-commercial users are relegated to second-class Internet addresses because first, they are priced out of the system of value and second, those who secure a domain name first can reap the monetary rewards as value accrues to the name due to scarcity– all reminiscent of the radio broadcast license.

At the beginning of the century, corporate liberalism lead legislators to assume that full utilization of a scarce resource could only be realized by sufficiently capitalized and expert private entities. At the end of 1998, U.S. officials had reached the same conclusion about a new medium: the private sector would administer name registration, as envisioned by a Department of Commerce (1998) proposal (also see Clausing 1997a, 1997c, 1998c; U.S. House of Representatives, 1998 pp. 203-300). In 1998, the director of the American Intellectual Property Law Association testified approvingly before congress that:

> any effort to design the Internet of the future should involve... a recognition that the private sector is best equipped to administer and maintain the domain name system... we are pleased that the [Department of Commerce] Green Paper is largely consonant with [this] principle... (U.S. House of Representatives, 1999a p. 236)

The creation of an impartial international body (The Internet Corporation for Assigned Names and Numbers, or ICANN) was advanced to organize the system that would evolve, but the primary goals of the system would be to protect two property interests: the property rights of current domain name holders, and the property rights of those who hold another type of property, the trademark.

Trademark Law: Accelerant of the Tendency Toward Corporate Control

Trademark law provides a form of property ownership that overlaps the ownership of domain names in the DNS. Although this has no clear parallel in radio broadcast licensing, it is of sufficient relevance as an intervention for property rights to address here.

Trademark concerns grew in the late 1990s to consume more and more domain name policy attention. After the heady speculation of the early days, courts of many nations have begun to apply trademark rights to the DNS, ICANN implemented a dispute resolution policy to address claims by trademark owners, and in the U.S. a 1999 amendment to the Lanham Act provided statutory relief for "bad-faith" registration of trademarked names. Further, concerns of trademark holders are often cited to quash proposals to introduce additional TLDs to alleviate scarcity (U.S. House of Representatives, 1999a p. 216, 258; 1999b p. 213).

In this manner, a major goal of domain name policy has been the protection of trademark property rights; yet this goal as it has been addressed is irrational when considered in a broader context. First, direct conflation of trademarks and domain names makes little sense: domain names have fallen into the role of a directory system, and this combined with scarcity drives much of the inflation in value noted earlier. In even a small local area, company and service names are not expected to be unique (Mitchell, Bradner, & Claffy, 1997 p. 264), this is why trademarks are justifiably limited to geographic areas and (ideally) particular product types. Generic TLDs, on the contrary, are not limited by product domain or by geographic area. More important, however, the Internet has more than one function. While it may be an emerging electronic marketplace, it is also a medium for a broad range of other forms of communication, and these different forms of communication imply different policy goals (Heiskanen, 1999 p. 34). Even if we acknowledge that the protection of intellectual property rights such as trademark is a

legitimate goal of government regulation of the marketplace, the Internet can be more than a marketplace. Any given word or string that might be registered as a domain name might be conceptualized in a commercial context, but it might also be used in another way. In the U.S., when policymakers assign trademark rights priority in discussions of domain names, this conflicts with the freedom of speech right of those who do not own trademarks and non-commercial communicators.

We can see, then, that the trademark property right in this instance only accelerates the force of the marketplace to consolidate control among those with capital– the capital and legal resources to register trademarks in many countries and enforce them through lawsuits. Although early radio had nothing comparable to trademark, trademark as applied to date on the Internet reinforces the notion that this is a medium for commerce and a place for commodification of the audience.

While we imagine that the Internet is not like the one-way media of the past, the dominant frame of policy debate to date places the user of the Internet as a consumer of commercial messages, exactly like television and radio.[8] As the President of the International Trademark Association testified before the U.S. congress:

> The fundamental question... is how to protect consumers' interests in locating the brand or vendor of their choice on the Internet without being misled or confused, and how to protect companies from having their brand equity eroded or commandeered in an electronic environment. (U.S. House of Representatives, 1999a p. 243)

Alarmingly, even those on the opposite side of the debate from corporate interests use the language of consumerism (e.g., Ralph Nader's objections to ICANN; see U.S. House of Representatives, 1999b p. 134). Broadly, many objections to a corporate agenda are more often phrased in terms of consumerism than as appeals to the interests of "citizens" or "the public."

Conclusion

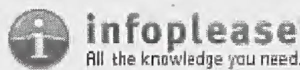
In the 1920s, property rights were constructed in the ether, and any policy debate about radio is now constrained to what these rights allow or do not allow. Today, property rights have been constructed in the domain name system of the Internet, with preference is being given to those that own another form of property– trademark. Yet the grand hopes many have held out for the Internet's future do not seem compatible with a network where participation devolves quickly into a questions of what propertiesyou own.

Surely the NSF did not intend to exclude those with less financial resources from prime addresses on the Internet, just as it seems the U.S. government did not particularly intend to produce the system of broadcasting we have today when constructing it in the 1920s. The power of grand assumptions about the marketplace and property is great, particularly in the United States– it is an imperative that we now learn to step outside these assumptions. Our goals should drive the structures that constrain our plans, and not vice versa. As Streeter states,

> At this point in history, the principal question for media policy in the United States should be, How do we, as a matter of democratic choice, want to organize our popular communications, our means of producing and distributing culture and information? (Streeter, 1996 p. 318)

If we allow the lessons of early radio and the present day Internet to inform policy decisions in the future, it is still possible to construct a communication system that excels where past media have fallen short, and meets our goals– whatever they may be. Unlike the long established broadcast media, it may not be too late to implement policy goals for the Internet independent of the market structure now in place with only a minimum of effort rather than a radical restructuring. A communication system organized around the ownership of various forms of constructed property and dominated by the interests of the owners is not the best result, the inevitable result, or even a more rational result, it is

instead the default that will persist if we do nothing. One can only hope that it is not too late to set our goals for the Internet independent of the market structure now in place.



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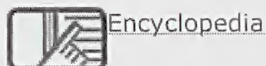

Sherman Antitrust Act

Sherman Antitrust Act, 1890, first measure passed by the U.S. Congress to prohibit trusts; it was named for Senator John Sherman. Prior to its enactment, various states had passed similar laws, but they were limited to intrastate businesses. Finally opposition to the concentration of economic power in large corporations and in combinations of business concerns led Congress to pass the Sherman Act. The act, based on the constitutional power of Congress to regulate interstate commerce, declared illegal every contract, combination (in the form of trust or otherwise), or conspiracy in restraint of interstate and foreign trade. A fine of $5,000 and imprisonment for one year were set as the maximum penalties for violating the act.

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See R. Posner, *Anti-Trust Law* (1976); R. Bork, *The Antitrust Paradox* (1978).

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Sherman

Sherman Silver Purchase Act

The Sherman Anti-Trust Act of 1890

SECTION 1 Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding ten million dollars if a corporation, or, if any other person, three hundred and fifty thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

SECTION 2 Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding ten million dollars if a corporation, or, if any other person, three hundred and fifty thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

A Brief History of The Sherman Anti-Trust Act

A. **Historical Background:** The Sherman Anti-Trust Act and the body of case law that it has generated over the past 100+ years should be seen in the broader context of the traditional concern that government has always had with monopolies. Prior to the 19th century, governments typically granted monopoly rights over some portion of the economy in return for a cash payment. In England, this practice was stopped by Parliament with its famous **1624 Statute of Monopolies** that took away the power of the Crown to grant monopolies. This action was essential for an efficient economy to develop in England. A point well documented by Douglass North and Robert Paul Thomas in their great book ***The Rise of the Western World***.

   In the 19th century (c. 1830 - 1875) what modern Americans now call an "economy" emerged. *Prior to roughly 1840 there was no such thing as **big** business*! The first "big" businesses were the Railroads. Prior to the railroads the largest businesses were the textile mills in New England. The railroads fundamentally changed how people lived and worked. They were the first form of ***mass transportation***. The rapid spread of the telegraph after 1844 resulted in the first form of ***mass communication***. For the first time in human history action could be coordinated at great distances *in real time*! Businesses could run year around and the pace of human life literally *speeded up*! The railroad, the telegraph, and an abundance of cheap coal revolutionized the American economy and American life. Alfred Chandler's great book ***The Visible Hand*** documents these changes in great detail.

   The emergence of what we now call an "economy" in the 19th Century was not well understood by people living at the time. Some simple basics of competition had been well understood since Adam Smith's time but the nature of industrialization and the competition between large factory based businesses was not well understood. Competition was cutthroat with large output, quick sales, and small profits. For example, Railroad leaders grappled throughout the 19th Century with their competitive environment with its ***unique economics*** and only "solved" their problems late in the Century through consolidation.

   Pools, Trusts, and Holding Companies seemed to many business leaders to be the solution to the "curse" of cutthroat competition. The aim was to control price competition through cooperation

and coordination of rival businesses. All these mechanisms were, in effect, forms of monopolization. In the case of Standard Oil ***John D. Rockefeller*** "solved" the problem by merging with his rivals and bringing their more capable managers into his organization.

B. **The Invention of the Trust:** On **2 January 1882** the Standard Oil Trust was formed. Attorney Samuel Dodd of Standard Oil came up with the idea of a Trust. A Board of Trustees was set up and all the Standard properties were placed in its hands. Every stockholder received 20 Trust certificates for each share of Standard Oil stock and all the profits of the component companies were sent to the nine trustees who determined the dividends. The nine Trustees elected the directors and officers of all the component companies. This allowed the Standard Oil to function as a monopoly since the nine Trustees ran all the component companies. Later, Standard pioneered the Holding Company which had the same effect as a board of trustees.

C. **Congressional Action:** By 1888 public discontent was so strong that both political parties put anti-trust planks into their Presidential platforms. Legislative action was a foregone conclusion. The Sherman Anti-Trust Act was passed by a 51 - 1 vote in the Senate on 8 April 1890 and by a unanimous vote of 242 - 0 by the House of Representatives on 20 June 1890. The bill was signed into law by President Benjamin Harrison on 2 July 1890.

D. The Sherman Anti-Trust Act was a popular piece of legislation but it was poorly drafted and very vague. The act did not define "restraint of trade", "combination", or "monopolize". These terms may appear to be *obvious* to the layman but were not so to the Courts who were charged with enforcing the Act. As a result, the Courts have been free to interpret the Act. This problem was well stated by Chief Justice Stone in 1940:

> ***The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself does not define them. In consequence of the vagueness of its language, perhaps not uncalculated, the courts have been left to give content to the statute, and in the performance of that function it is appropriate that courts should interpret its words in the light of its legislative history and of the particular evils at which the legislation was aimed.***

E. The problem with Justice Stone's argument is that the legislative history of the Sherman Act is not simple nor clear. There is no question that nearly everyone wanted to outlaw monopolies and create competition. However, there was serious disagreement about what part of the Constitution -- the Commerce Clause, the Judicial Clause, or the taxing power -- was the legal basis for outlawing illegal restraints of trade. In addition, in the Senate, there were two completely different bills at one point.

The result has been that Anti-Trust law changes according to the prevailing mood of legal opinion. Because legal opinion is in part a function of the politics of the day, Anti-Trust law has always been one of the most politicized portions of the legal code. What was illegal in the early 20th Century may not be illegal today. Other than a general agreement by everyone that monopoly is generally not a good idea, Anti-Trust law shifts constantly in time. Something that Microsoft Corporation is now discovering.

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[Keith Poole's (K7MOA) Home Page]
[American Economic History]

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[Railroads, The First Big Business]
[Entrepreneurs and American Economic Growth]

Houston Railway vs. United States- 1916

Hughes C. J. These suits were brought in the commerce court . . . to set aside an order the Interstate ,Commerce Commission dated March 11, 1912, upon the ground it exceeded the Commission's authority . .
The gravamen of the complaint, said the Interstate Commerce Commission, was that carriers made rates out of Dallas and Houston Texas points into eastern Texas which much lower than those which they extended into Texas from Shreveport. The situation may be briefly described: Shreveport is about 40 miles from the state line, and 231 miles from Houston Texas, on the line of the Houston, East & West Texas and Houston and Shreveport Companies; it is 189 miles from Dallas, on the line of the Texas & Pacific. Shreveport competes with both cities for the trade of the intervening territory. The rates on these lines from Dallas and Houston rerely, eastward to intermediate points as, were much less, according to distance from Shreveport westward to the points. It is undisputed that the deference was substantial, and injuriously affected the commerce of Shreveport....
The Interstate Commerce Commission that the interstate class rates out of Shreveport to named Texas points were unable, and it established maximum class rates, and it established maximum class rates for this traffic.... The point of the objection to the order is that, as the discrimination found by the Commission to be unjust arises out of the relation of intrastate rates, maintained under states authority, to interstate rates that have been upheld as reasonable, its correcvas beyond the Commission's power. The invalidity of the order is challenged upon two grounds:
1. That Congress is impotent to control the intrastate charges of an interstate carrier even to the extent necessary to prevent in jurious discrimination against interstate traffic. . ..
Congress is empowered to regulate,—that is, to provide the law for the government of interstate commerce; to enact "all appropriate legislation" for its protection and advancement . . . As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard, or destroy it. The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter, or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carries are so related that the government of the one involves the control of the other it is Congress, and not the state, that is

Federal Trade Commission
September 26, 1914
An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes.

Be it enacted . . ., That a commission is hereby created and established, to be known as the Federal Trade Commission (hereinafter referred to as the commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years. . . . The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission.

SEC. 3. That upon the organization of the commission and election of its chairman, the Bureau of Corporations and the offices of Commissioner and Deputy Commissioner of Corporations shall cease to exist; and all pending investigations and proceedings of the Bureau of corporations shall be continued by the commission....
The principal office of the commission shall be in the city of Washington, but it may meet and exercise all its powers at any other place. The commission may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States.

SEC. 5. That unfair methods of competition in commerce are hereby declared unlawful.
The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.
Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon

such person, partnership, or corporation
a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition....
If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such persons partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show
to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its

recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code. Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside....

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or judgment of the court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the antitrust acts.: . .

SEC. 6. That the commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers
subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing....

(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any

corporation.
(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law..
(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.
(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.
(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

SEC. 8. That the several departments and bureaus of the Government when directed by the President shall furnish the commission, upon its request, all records, papers, and information in their possession relating to any corporation subject to any of the provisions of this Act, and shall detail from time to time such officials and employees to the commission as he may direct.
SEC. 9. That for the purposes of this Act the commission or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation.... Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence....
No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter,

or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena
issued by it: Provided, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

SEC. II. Nothing contained in this Act shall be construed to prevent or interfere with the enforcement of the provisions of the antitrust Acts or the Acts to regulate commerce, nor shall anything contained in the Act be construed to alter, modify, or repeal the said antitrust Acts or the Acts to regulate commerce or any part or parts thereof.
Approved, September 26, 1914.

entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the state, and not the nation, would be supreme within the national field....
It is for Congress to supply the needed correction where the relation between intrastate and interstate rates presents the evil to be corrected, and this it may do completely, by reason of its control over the interstate carrier in all matters having such a close and substantial relation to interstate commerce that it is necessary or appropriate to exercise the control for the effective government of that commerce. It is also clear that, in removing the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard fair to the carrier and to the public. Otherwise, it could prevent the injury to interstate commerce only by the sacrifice of its judgement as to interstate rates. Congress is entitled to maintain its own standard as to these rates, and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes.

Having this power, Congress could provide for its execution through the aid of a subordinate body; and we conclude that the order of the Commission now in question cannot be held invalid upon the ground that it exceeded the authority which Congress could lawfully confer.
Decree of the Commerce Court affirmed. Justices LURTON and PITNEY dissenting

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Robinson-Patman Act

Robinson-Patman Act, passed by the U.S. Congress in 1936 to supplement the Clayton Antitrust Act. The act, advanced by Congressman Wright Patman, forbade any person or firm engaged in interstate commerce to discriminate in price to different purchasers of the same commodity when the effect would be to lessen competition or to create a monopoly. Sometimes called the Anti-Chain-Store Act, this act was directed at protecting the independent retailer from chain-store competition, but it was also strongly supported by wholesalers eager to prevent large chain stores from buying directly from the manufacturers for lower prices.

See studies by D. J. Baum (1964) and R. Posner (1986).

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Robinson, Theodore

robin's plantain

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the United States in the district in which the defendant resides or is found, without. respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

Sec. 8. That the word "person," or " persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Approved, July 2, 1890.

[Endorsements]

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Encyclopedia

Clayton Antitrust Act

Clayton Antitrust Act, 1914, passed by the U.S. Congress as an amendment to clarify and supplement the Sherman Antitrust Act of 1890. It was drafted by Henry De Lamar Clayton. The act prohibited exclusive sales contracts, local price cutting to freeze out competitors, rebates, interlocking directorates in corporations capitalized at $1 million or more in the same field of business, and intercorporate stock holdings. Labor unions and agricultural cooperatives were excluded from the forbidden combinations in the restraint of trade. The act restricted the use of the injunction against labor, and it legalized peaceful strikes, picketing, and boycotts. It declared that "the labor of a human being is not a commodity or article of commerce." Organized labor was as heartened by the act as it had been dejected by the doctrine of the Danbury Hatters' Case, but subsequent judicial construction weakened the act's labor provisions. The Clayton Antitrust Act was the basis for a great many important and much-publicized suits against large corporations. Later amendments to the act strengthened its provisions against unfair price cutting (1936) and intercorporate stock holdings (1950).

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Clayton

Clayton-Bulwer Treaty

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See R. Posner, *Anti-Trust Law* (1976); R. Bork, *The Antitrust Paradox* (1978).

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Sherman

Sherman Silver Purchase Act

land that they would spend billions upon billions of money and rivers and rivers of the best blood to preserve it, I ask you where the man is who will stand up here and curse it and say it is not responsible for the circulation of the country? Why, sir, men who have by their attacks indirectly assailed the character and credit of this American Government have sinned against the enlightenment of this age.

But Senators still cry against pledges unfulfilled. Why, sir, the country does not ask you to fulfill them now in our present condition. I have heard of no one that has asked for these pledges to be fulfilled now, except a few Senators on this floor have asked it, and a few bankers and moneyed men, when they found that Senators would advocate it, sent in a petition here, said to represent $500,000,000, not so many honest citizens, as every one has a right to petition, but dollars. Well, I like that. I like in a free country to see gentlemen get up and say, "We represent so many dollars." Under the Constitution every citizen of the United States has an equal right to petition the Congress of the United States, no matter whether he has a dollar or whether he has not. On this theory, I suppose, if a man was going to vote, he would be asked how much money he had; if he petitions Congress, how much money have you got? A petition representing money weighs more with certain Senators than a petition representing muscle, industry, and brains. Well, sir, if we have got to that point in this country, that petitions are weighed by the amount of money they represent, I think John Randolph's expression about the man who owned a jackass where it required $250 of property to allow a man to vote would be applicable. Said he, "Suppose the jackass died before the election, you could not vote, could you?" "O, no." "Which would vote, then, you or the jackass?" That would be the question; which is petitioning here, the money or the man? If you present a petition representing money, and you do not pay attention to one that does not represent money but do to the one that does, it is a marvelous affair, it is a wonder it had not been framed and a resolution passed to hang it upon the wall of the Senate for future ages to gaze upon and see how much money was represented in a petition at one time to ask the passage of a law giving them greater power to continue their extortion upon the people. Would not that read well in the future history of this great Republic? And yet certain gentlemen seem to think that money and wealth is all that has a right to be legislated for in this Chamber. Is its influence greater than brains, than muscle, than honesty, than industry, than justice—ay sir, than all things else? If this is to be our future policy, may God help the Republic.

Sir, in our boasted Republic of equal rights, as a principle which is the very mainspring of our life and prosperity as a nation, I desire to see that equality applied to that which is the life of our business and commerce—the currency, the money of our country. The principle of equality in man, and the same principle of equality in rights to do business in this land, should apply to all its citizens.

I have, sir, with others on this floor been contending for the masses, against the concentration of the monetary power of the country in the hands of the few. With them I have used whatever power and influence I have to break the strength of the moneyed monopoly which mistaken legislation has already made, and which the contraction policy would further strengthen. With them I have battled against that policy which would swell the volume of our national interest-bearing debt, and deprive the people of a currency which they approve and with which they are satisfied.

Sir, the people know their wants. They also know their rights; and if we prove recreant to our duty they will take the matter in their own hands and put those here who will strike down the feature of monopoly now connected with national banking; and if national banks must continue, they can only do so by removing the restrictive monopoly feature. If that is not done, they must go down, and the defenders of their grasp upon the people must go down with them.

Railroad Monopoly.

SPEECH OF HON. W. S. HOLMAN,

OF INDIANA,

IN THE HOUSE OF REPRESENTATIVES,

March 17, 1874.

The House having under consideration the bill (H. R. No. 1385) entitled "An act to regulate commerce by railroads in the United States"—

Mr. HOLMAN said:

Mr. SPEAKER: I have listened with great pleasure to the very interesting and ingenious argument of the gentleman from New Jersey, [Mr SCUDDER.] But I think, sir, the arguments submitted, especially in the concluding remarks, are much more specious than sound. There is always a disposition, in discussing a proposition involving even remotely constitutional powers, to indulge in brilliant generalizations. Gentlemen are reluctant to come down to the

I do not agree with the gentleman from New Jersey upon the main questions involved in this bill. I wish to call the attention of the gentleman and of the House to the real question. What is the scope and purpose of this bill? The answer to this inquiry, I think, will show how absolutely irrelevant are most of the arguments against the pending measure that gentlemen have advanced.

If it were true, as the gentleman has argued, that this bill proposed to delegate to the commissioners referred to in the bill legislative power, there would be but one answer: "It cannot be done; legislative power is vested in Congress by the Constitution; it is a power that admits of no delegation." But, sir, is there any approach to a delegation of power here? Is there in this bill anything more than the prescription of certain principles of law and rules of evidence that shall prevail in the courts of justice in litigation between the citizen and railroad companies engaged in the commerce between the States of the Union? If there were anything more than this involved in this bill I should be apprehensive that we were trenching upon doubtful powers. But let us take up this bill and look at its provisions, and I think it will be apparent how irrelevant the eloquent speeches on constitutional power, which gentlemen have indulged in, are to the measure before the House. Let me read the few lines that involve the real gist of this measure, that express the real substance of the bill:

> That each and every line of railroad extending into or through two or more States, and employed in carrying freight or passengers between points or places in different States, and whether owned or operated by one company, corporation, or person, and known by one name, or owned and operated by several companies, corporations, or persons, and known by several different names, shall be regarded as employed in commerce among the several States.
>
> That no such company, corporation, or person so engaged in operating a line of railroad into or through two or more States, as aforesaid, shall charge, collect, demand, or receive more than *a fair and reasonable rate of toll or compensation* for the transportation of freight of any kind, or of passengers, or for the use or transportation of any railroad-car upon its track, between places in different States.

This is the fundamental provision of the bill, that railroads engaged by combination of lines in the interstate commerce shall transport passengers and freight at *"a fair and reasonable rate."* Can gentlemen question the soundness of that proposition? The bill merely proposes that Congress shall adopt, with reference to common carriers in interstate commerce, the principle of the common law; nothing more, nothing less. The common carrier is bound to transport at fair and reasonable rates. The regulation of commerce among the States—*interstate commerce*—would seem to be exclusively within the control of Congress. If regulated at all, it would seem that it must be done by Congress. Among the powers delegated by the States to the Federal Government and vested in Congress is the power—

> To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

And if Congress has the power to regulate commerce between the several States, Congress has unquestionably the power to adopt the principle of the common law with reference to common carriers, where those carriers are engaged in commerce among the States. Therefore, when Congress says that these railroads, which by combination are carrying freight or passengers into or through more than one State, shall transport this freight and these passengers at fair and reasonable rates, thus asserting the well-known principle of the common law, will gentlemen contend that Congress is overstepping its authority? Will they assert that we are assuming a doubtful power when we propose the re-enactment of a principle of the common law, a law regulating common carriers, recognized as a just rule for centuries?

Mr. ELDREDGE. Will the gentleman allow me to suggest an answer to that?

Mr. HOLMAN. Certainly.

Mr. ELDREDGE. The common law required common carriers to fix reasonable rates; there is no doubt about that proposition. But the common law never assumed to fix in advance the rates at which common carriers should carry freight or passengers.

Mr. HOLMAN. I fully agree with the gentleman. The common law did not and could not fix the rate of compensation, except that it should be reasonable.

Mr. ELDREDGE. The common law recognized the right of the courts to set aside the rates fixed because they were either fraudulent or unreasonable to such an extent that the contract itself—being so hard a bargain—was void at common law, on the ground of its being unreasonable, unjust, inequitable.

Mr. HOLMAN. My friend from Wisconsin will excuse me; he and I agree on that point. I am not now considering the question as to how this reasonable rate should be ascertained. I am merely laying down the proposition (and neither my friend from Wisconsin nor any other lawyer will, I think, controvert it) that Congress possesses, as to transportation among the States, the power of enacting the common-law rule that that transportation shall be at fair and reasonable rates. If my friend from Wisconsin or the gentleman from New Jersey controverts that proposition, I should be glad to know it, because this principle lies at the foundation of the bill. It does not contain a provision that is not designed to give practical effect to that manifestly just proposition of the common law.

Chapter 22

Net Gain: The Use of Satellites at MCI

by Adam L. Gruen

[283] From 1983 to 1987, MCI used satellites to enhance its national telephone network during a critical period in the corporation's history, even though MCI realized that using satellites for voice transmission was a bad idea and that other technical alternatives were available. In 1985, MCI knew that it was acquiring a money-losing operation called Satellite Business Systems. MCI's use of satellites during the 1980s was not at all a mistake, however, but rather a necessary part of greater and deliberate business schemes.

The Background

The MCI that exists today began in 1968 with a key decision by the U.S. Federal Communications Commission (FCC) affirming the right of telephone users to connect private communications equipment to the AT&T network. This was the so-called Carterfone decision of June 1968.[1] In August 1968, William G. McGowan established Microwave Communications of America, which changed its name to MCI three years later.[2]

A later decision in May 1971, called the Specialized Common Carrier Services decision, affirmed the right of corporations to offer only specialized services.[3] Carriers were only supposed to connect to the AT&T system; nobody had said anything about allowing anyone to compete with AT&T by offering basic phone service. This formula was a recipe for shenanigans. What exactly was a specialized service? Also, what was to prevent AT&T from gouging customers trying to connect to the system?

McGowan loved the potential of satellites for two reasons. First and most important, he saw them as a way to bypass the existing AT&T network. Second, he believed that satellites would be a cheap and effective way to reach remote areas without the necessity of building microwave towers every thirty or sixty miles (forty-eight or ninety-six kilometers) from one point to another. In October 1970, therefore, even before MCI had actually finished setting up its towers between Chicago and St. Louis, McGowan set up a subsidiary corporation called MCI Satellite Incorporated. Three months later, MCI and Lockheed Missiles & Space Company formed a joint venture called the MCI Lockheed Satellite Corporation. [284] The plan was to build a $168 million satellite communications system. MCI Lockheed indeed was one of the first companies to request FCC authorization for domestic satellite-based communications.

The problem was that $168 million back then was really big money, the equivalent of about $400 million today. In 1972, MCI Lockheed needed cash and acquired a new partner called the Communications Satellite Corporation, known as Comsat. At that point, the enterprise became a three-headed joint venture called CML Satellite Corporation.[4] During the following two years, 1973 and 1974, however, MCI was in deep financial trouble. Undercapitalized to begin with, it had managed to survive by selling stock and borrowing money. To make matters worse, AT&T decided to pull the plug on interconnection, meaning that MCI could not use the existing network to offer its services. Ultimately, this was the kind of monopolistic behavior that was the basis for AT&T's defeat in the antitrust suits brought against it, but that was six to seven years in the future. In the meantime, all that MCI could see was that it had a lot of cash going out, but very little coming in. Therefore, MCI sold its third of CML Satellite Corporation to IBM in late 1974. Lockheed, which also had hit hard times, did the same. IBM and Comsat added a new partner, the Aetna Satellite Communications Company, and the entire enterprise was renamed Satellite Business Systems (SBS) in 1975.[5]

What Comes Around Goes Around

During the following seven years, MCI survived mostly by winning court decisions. There was a joke around town that MCI was actually a law firm with an antenna on its roof. The first victory came in 1977 and 1978, when MCI bypassed the FCC and won the right essentially to offer common carrier services.[6] The second major victory came in 1980, when MCI won a massive antitrust case against AT&T.[7] After exhausting the appeals process, AT&T agreed in 1982 to divest itself of most of its local holdings by 1 January 1984.[8] These victories meant that MCI could compete head-on with AT&T for voice, data, and video communications customers. MCI had a one-shot, roughly five-year chance at building a new nationwide coast-to-coast network in the period from 1979 to 1984 and grabbing as much residential market share as possible.

[**285**] Building a coast-to-coast network was a daunting proposition. Three new kinds of technologies could be employed as part of a network: microwaves, satellites, and fiber optic cables. Microwave repeaters could carry only so much traffic before the quality of transmission suffered. For example, an analog FM radio could carry 2,100 circuits. Using a technique called single sideband radio, engineers could boost this to 5,400 circuits with some loss of transmission quality. Digital radios, although providing a much cleaner signal, could carry only 1,344 circuits. It was obvious that digital technology was better for transmitting data, but MCI at this point needed to build a nationwide network for voice as quickly and as cheaply as possible. Therefore, the old analog microwave technology, supplemented by single sideband radio, had to suffice.

To accommodate the growth in network capacity that surely would be needed following 1982, MCI had two alternatives: satellites and fiber optics. Each technology had its advocates within the corporation, and in the end, as with most institutions struggling with a choice between two options, MCI decided to pursue both.

McGowan and his chief of corporate development, H. Brian Thompson, favored satellites for two reasons. Ostensibly, the main argument in favor of satellites was an argument against fiber optics: fiber optics was an untried, untested technology unavailable in large quantities. Ignoring internal advice to the contrary, in 1979 McGowan stated that it would be generations before fiber optics became significant

for long-distance point-to-point transmission. Perhaps the real reason he favored satellites was that they had sex appeal from a marketing perspective. Using satellites made MCI a space age company instead of one with just boring microwave towers.[9]

However, MCI's chief operating officer, V. Orville Wright, and the chief of transmission systems, Thomas Leming, contended that satellites were not appropriate for domestic voice transmission.[10] Satellites were appropriate for international voice, because it was the only obvious alternative to undersea cables. Also, satellites would be terrific for digital video and data because of its "bursty" nature, but in 1982 these markets were just opening up for MCI. Leming and Wright argued against using satellites for voice on the very simple basis that they caused a delay and an echo, which most customers would find unacceptably irritating.

Acknowledging the logic of that argument, but unwilling to abandon the allure of satellites altogether, Thompson pushed the notion that even if satellites were not ideal for voice, they offered network redundancy, which was critical to overall network operations. In other words, Thompson felt that customers would be willing to suffer the indignity of a delay or an echo rather than face the outright loss of service in the event of a partial network failure.

In the final analysis, it was McGowan's decision to make, and he decided in favor of satellites. In February 1983, MCI announced the largest purchase of satellite transponder capacity in telecommunications history: twenty-four transponders, carrying 48,000 circuits, were to be purchased for the Galaxy II and Galaxy III spacecraft under construction by Hughes Aircraft. MCI planned to spend between $200 and $300 million for the satellite portion of its network. In September 1983, and again in August 1984, two Delta launchers worked perfectly, and the two spacecraft began to operate.[11] Neither Leming nor Wright had given up on the belief that single-mode fiber optic cable was the pipeline of the future, however.

[**286**] Bell Laboratories had invented--and AT&T already had deployed--multimodal optical cable. Single-mode optical cable theoretically was cheaper: it did not need to use as many repeaters. This could only be proven over fairly long distances. Leming reasoned that if MCI deployed single-mode cable over a long enough stretch of distance for a high-traffic-volume route--for example, from Washington, D.C., to New York City--then the economies of scale would bring the cost of the new technology down to the point of profitability.[12] This was a gamble, probably the biggest gamble MCI made in the 1980s. MCI's Washington-to-New York City fiber optical system was operational by March 1984, and by the end of that year, MCI proved that single-mode cable was enormously profitable.

Meanwhile, as Leming and Wright had predicted, in 1984 the number of customer complaints about delayed voice transmission skyrocketed. In 1985 and 1986, even McGowan had to acknowledge defeat. MCI eventually leased back some circuits to Hughes and rented out some transponders to other companies.[13] This brings us to the curiosity of the MCI decision to purchase SBS in June 1985, a full year after the decision to deploy fiber optic cable had proved itself.

Satellite Business Systems

Back in early 1984, MCI executives did not know that the fiber optic gamble would work. McGowan set

up a corporate development group, code-named "Orbit," to study candidates in the satellite industry for possible acquisition. One of the candidates was SBS. During the eight years from 1975 to 1983, SBS produced no profits and demanded periodic infusions of cash. Orbit discovered that SBS in fact had lost exactly $120 million for the last three years in a row. By July 1984, as SBS was on its way to losing another $120 million, Comsat finally backed out, selling off its one-third interest to IBM and Aetna.[14]

IBM kept a 59-percent share of SBS, because the satellites' digital data capacity was useful to IBM internally. In East Fishkill, New York, IBM had a laboratory devoted to computer modeling of semiconductor interaction and surface physics interactions. Anyone in IBM designing a semiconductor chip communed with the Fishkill laboratory. This required a huge amount of bandwidth for data, which SBS transponders satisfied. IBM paid cheap bulk rates for the bandwidth, and SBS took the loss. Meanwhile, Aetna and Comsat lost big, in effect paying for two-thirds of what would have been IBM's costs. In 1984, then, IBM found itself stuck with a majority interest in what one journalist called "a dog it did not know how to make grow." According to Richard Liebhaber, then IBM's director of business policy and development, IBM realized it had three options: shut the whole thing down and write it off as a loss; continue to lose $120 million a year; or sell it to someone.[15]

If MCI knew that SBS was losing money, then why did MCI want to acquire SBS? The answer has to be understood within the context of the larger business picture at the time. The 1980s was the decade of the takeover, the corporate raider, and innovative financing tactics, such as the issuance of unsecured corporate bonds or raids on pension surpluses. McGowan and other MCI executives realized that MCI was vulnerable to a hostile takeover. What MCI needed, they realized, was an alliance with a company so big that no one would dare attempt a raid. McGowan called this "shark repellent."[16] An arrangement.....

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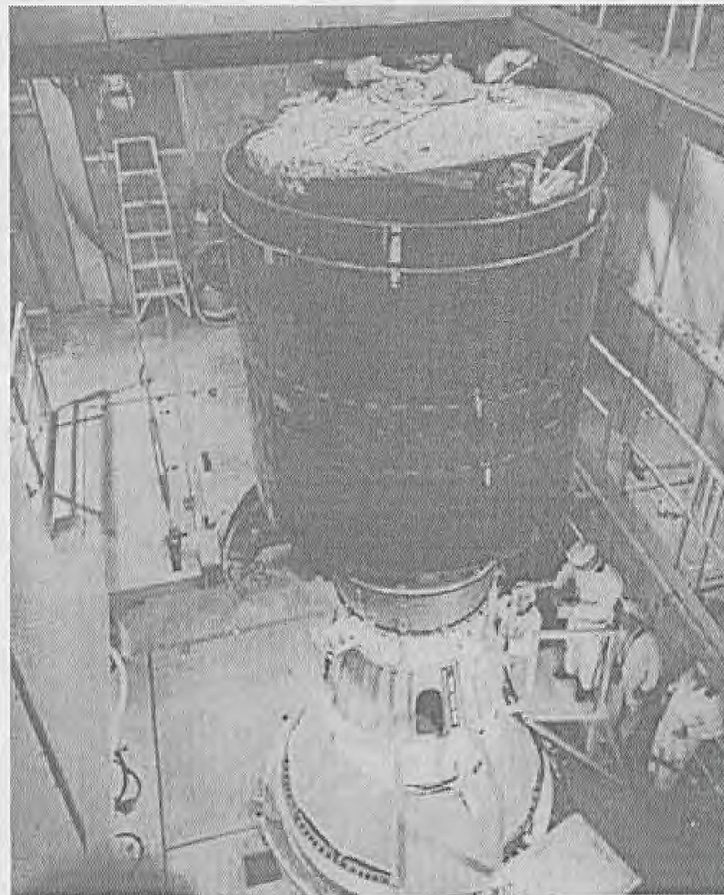

Figure 36. The first of three Satellite Business Systems (SBS) satellites designed solely to serve the communications needs of U.S. business and launched by NASA. MCI purchased an interest in Satellite Business Systems in 1975 in the hopes of acquiring needed carrier services. (Courtesy of NASA, photo no. 80-H-873)

[**288**] ....with IBM was the perfect "shark repellent." By selling off a chunk of its stock to IBM and announcing the possibility of joint ventures and partnerships, MCI gained capital and, perhaps more important, instant credibility with Wall Street and potential business clients. In fact, two days after the alliance was announced, MCI's stock price jumped more than 30 percent.[17]

Meanwhile, IBM also gained. It purchased 16 percent of MCI stock. Many analysts expected Big Blue to purchase the rest of MCI within a few years. However, whether by partnership or acquisition, it seemed evident that IBM had gained an important toehold in the telecommunications industry, thereby hedging against the very real threat that AT&T posed as it moved into computers. Finally, a very specific part of the overall deal was that IBM would finally get to unload SBS on someone else.

By the time this deal was consummated in March 1986, MCI was well aware that satellites did not compare with fiber optics for either voice or data. The reason MCI wanted SBS was not for its transponders in space, but for its business customers on Earth. By this time, the battle for access to residential customers was waning, and MCI was beginning to chart out a new direction for its business policy during the rest of the 1980s. While it would continue to scrap for residential market share, MCI decided that its future lay with obtaining business and government contracts. Here, the rolodexes of the

SBS sales representatives were golden. That was the theory behind the acquisition. As it turned out, MCI swallowed SBS whole, but it had trouble digesting the meal. Contacts were one thing, but business arrangements for new telecommunications services were another. Eventually, SBS was dismantled, and the unprofitable pieces were written off as losses. Some people stayed on with MCI; most left to find new jobs elsewhere.[18]

Conclusion

MCI got out of the satellite business as much as it possibly could after 1988. Only recently has the firm expressed interest in getting back into the game.[19] The reason why, again, has to do mostly with context. MCI is moving away from its traditional long-distance voice transmission business into the business of packaging, distributing, and owning digitized content. Its alliance with News Corporation was one step in this direction. MCI recently expressed an interest in purchasing rights to direct-broadcast satellite technology. The lesson in all of this is a simple one. Private industry will embrace unprofitable technologies because companies do not see them as unprofitable, even if they lose money. One has to be willing to expand one's definition of profitability from the narrow frame of return-on-investment to the bigger picture.

END NOTES

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1. Federal Communications Commission (FCC) Docket 16942, "Carterfone Device," Decision, 26 June 1968, 13 FCC 2d, 420.

2. Minutes, MICOM Board of Directors, Special Meeting of 27 August 1968, Minute Book A, MCI Corporate Archives, Washington, DC. MICOM changed its name to MCI Communications Corporation on 19 July 1971. Philip L. Cantelon, The History of MCI, 1968-1988: The Early Years (Dallas: Heritage Press, 1993), pp. 117, 570, fn. 10. The History of MCI is the property of MCI; the work is not available to the general public. All of the files and documents collected for the work are located in the MCI Corporate Archives, which is not open to members of the public.

3. FCC Docket 18920, "Specialized Common Carrier Services," First Report and Order, 3 June 1971, 29 FCC 2d, 872.

4. Cantelon, The History of MCI, p. 341.

5. Telecommunications Reports 51(26) (1 July 1985): 4.

6. In the so-called Execunet decisions, the U.S. Court of Appeals of the District of Columbia overruled the FCC's decision to prohibit MCI from offering Execunet, a shared private-line service. See Cantelon, The History of MCI, pp. 250-56. In effect, the original ambiguity of the Specialized Common Carrier Services decision had finally come back to haunt the FCC. The federal court argued that if Execunet was a specialized service similar to a regular long-distance service, that was too bad. Once the FCC had

come out in favor of competition and innovative services, it could not dictate the validity of specific offerings.

7. The 1980 case of MCI v. AT&T began in 1974, when attorneys of Jenner and Block filed a suit for damages on behalf of MCI in the U.S. District Court for Northern Illinois on the grounds that AT&T had violated the Sherman Antitrust Act of 1887. On 13 June 1980, a twelve-member jury found AT&T guilty of abusing monopoly power in a relevant market, and it awarded MCI the astounding sum of $600 million in damages, which under federal law had to be trebled to $1.8 billion, making it the largest monetary award in U.S. history. However, this amount subsequently was reduced to $113 million on appeals. The real damage to AT&T was not monetary, but in public policy; having lost such a suit in civil court, there seemed to be no real hope of defending against pending antitrust action brought by the U.S. Department of Justice. See Ibid., pp. 297-313.

8. AT&T and the U.S. Department of Justice agreed to implement divestiture of twenty-two local operating companies--about two-thirds of AT&T's assets--on 24 August 1982. This agreement modified the Consent Decree of 1956 (known also as the Final Judgment). This agreement, which became known as the Modified Final Judgment, set the boundaries and conditions of divestiture that were to take effect on 1 January 1984. See Ibid., pp. 326-27.

9. McGowan quoted in F.I.R. Associates Inc., Corporate Conference, MCI Communications Corporation, 15 February 1979, p. 18, History Project Files, MCI Corporate Archives.

10. Thomas Leming, interview with Philip Cantelon, 24 February 1988, San Francisco, CA, pp. 84-86, MCI Oral History Volumes, MCI Corporate History Archives.

11. MCI Press Release, 3 February 1983; Washington Times, 4 February 1983, MCI Corporate Archives.

12. Leming interview, 24 February 1988, pp. 84-86.

13. Cantelon, The History of MCI, p. 343.

14. Telecommunications Reports 51(26) (1 July 1985): 4; see also The Economist, 29 June 1985, pp. 69-70.

15. Richard Liebhaber, interview with Philip Cantelon, 1 and 13 April 1992, Washington, DC, p. 8, MCI Oral History Volumes, MCI Corporate Archives.

16. Cantelon, The History of MCI, p. 434.

17. Ibid., p. 436.

18. Ibid., pp. 437-44.

19. MCI wanted to bid in an FCC auction for licensing direct-broadcast satellite television service. On 29 September 1995, the Senate unanimously agreed to direct the FCC to proceed with an auction, and on 16 October 1995, the FCC announced that it would do so. "MCI Wins Round in Satellite TV License Battle," Washington Post, 30 September 1995, p. A14.