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Media Ownership Rules

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Panelists:

MARK COOPER, Director of Research, Consumer Federation of America

DAVID REINHARD, Associate Editor, *The Oregonian*

RAYMOND L. GIFFORD, President, Senior Fellow, Progress and Freedom Foundation

HON. STEPHEN WILLIAMS, Judge, D.C. Circuit Court, *moderator*

JUDGE WILLIAMS: We now turn to the billed panel discussion. I will very briefly introduce the three panelists in the sequence in which they speak. Then we will proceed.

First is Mark Cooper, who is Director of Research at the Consumer Federation of America. I learned from his resume, which is as long as the proverbial arm, that he has a PhD from Yale. On top of that, in his resume the word consumer appears innumerable times as an adjective. My colleague, Judge Silberman, once said in an opinion that in the media, the adjective consumer normally means favoring more government regulation. I think you will find that Mark will not disappoint.

The next speaker is the one nearest to me, David Reinhard, who is an Associate Editor of *The Oregonian* and has, therefore, been in a position to perceive the impact of the rules in question on the media from the media's perspective.

Finally, the third speaker is the one sitting in the middle, Ray Gifford, who is incidentally head of the Progress and Freedom Foundation, and has been the chief regulator of natural monopolies in the state of Colorado for four years. His resume is unique in my experience in that it contains a favorable illusion to the Kose Theorem, which will perhaps give you a clue as to the nature of his remarks.

First Mark. The speakers will speak about 12 minutes each.

MR. COOPER: Can I do 12 minutes on what the Chairman said first, and then do 12 minutes on the media stuff?

Let me stick to the topic at hand. I think we'll have this debate about broadband and interstate commerce and whether it should be open or private, but so be it.

They said I could plug my book first, *Media Ownership and Democracy*: The *Digital Information Age*. You can download it at no charge under a creative commons

license from Cyberlaw.Stanford.edu/blog/cooper, or you can purchase paper from Amazon. I'd love to tell you what the license means, but I don't want to waste my 12 minutes on that. It provides about 300 pages of documentation for the arguments I'm about to present.

A federal agency is supposed to implement the law as Congress intended by applying reasoned analysis to the facts before it. The FCC's rewrite of the media ownership rules does none of the above. It abandoned the bold aspiration for the First Amendment repeatedly expressed by the Supreme Court in the principle that the widest possible dissemination of information from diverse and antagonist sources is essential to the welfare of the public, that the public interest in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public, and the right of the people to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences.

In its place, we get the leak-out theory of the First Amendment. That's the broadcaster's expression. The order states, in the context of evaluating view point adversity, this approach reflects the measure of the likelihood that some particular view point might be censored or foreclosed, i.e., blocked from transmission to the public.

Gone is the proposition that the greater the diversity of ownership in a particular area the less chance there is that a single person or group can have an inordinate effect in a political, editorial, or similar programming sense on public opinion at the regional level. Gone with it is the obligation to promote diversity on the theory that diversification of mass media ownership serves the public interest by promoting diversity of programming and service view points, as well as preventing undue concentration of economic power.

Like Mike Powell, I'm reading from Supreme Court cases here, if you hadn't noticed. In its place we get an elitist theory of voice under the First Amendment. The order states, "nor is it particularly troubling that media properties do not always or even frequently avail themselves to others who may hold contrary opinions. Nothing requires them to do so. Nor is it necessarily healthy for public de fete to pretend as though all ideas are of equal value, entitled to equal airing."

Gone is the speaker's analysis in which public discussion is a political duty and ignored is the fact that where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast, a fact that still means that broadcasters do not have a right to hold a broadcast license where it would not satisfy the public interest on reason of diversity and competition in recognition that such a limitation significantly furthers the First Amendment interests in a robust exchange of view points.

Never once did the Commission present an analysis that looks at the population as potential speakers, preferring instead to "point to in addition to traditional broadcasts, television stations offered the air, 281 nationally distributed non-broadcast networks available, 80 non-broadcast networks," almost all of which the Commission failed to note, are owned and controlled by a handful of entities.

Gone is the recognition that truth and understanding are not wares like peanuts and potatoes; that Congress may in the regulation of broadcasting constitutionally pursue values other than efficiency, including, in particular, diversity in programming for which diversity of ownership is perhaps an aspirational, but surely not an irrational, proxy.

Each of the existing rules was overturned because it impeded the efficiency gains from greater concentration of ownership. The Commission refused to resurrect those rules in pursuit of diversity.

So we have a grassroots rebellion in America, because the leak-out elitist-economic-above all view of the First Amendment offends the sense and sensibility of the American people on the left and the right. They may not believe that all ideas are of equal value, but they certainly do believe that their social, political, aesthetic, moral, and other ideas should have an equal opportunity to be aired. That is what sticks in their craw on the left and the right.

Now, having redefined the public interest standard of the Communications Act contrary to congressional intent and Supreme Court jurisprudence, the FCC excused itself from the duty to deal with the facts before it. The agency assumes, contrary to fact, that all outlets within a medium have equal audiences. It weights the outlets in a manner that gives radio an importance it has not had in 25 years and the Internet an importance it may not have in the next 25 years.

The result is a surreal map of media space. In New York City, for example, the Home Shopping, Incorporated TV and the Duchess County Community College TV stations are each 50 percent more important than the *New York Times*. They are each as important as ABC and CBS. Multi-cultural radio broadcasting with three radio stations also has more importance than the *New York Times*. Radio and weekly newspapers are equal to television in importance. The Internet counts more than the top eight TV stations combined. Now if the Internet were that powerful, why does President Bush raise hundreds of millions of dollars to campaign, almost all of which will be spent on TV ads? He can just let his smiling image leak out over the Internet. Why is central command complaining about uncensored broadcasts of the tough slog in Iraq when those images can leak out over the Internet?

If the Internet really is that important, then the eight leading stations in New York can give back their licenses and distribute their programming over the Internet. There are 15 million other people in New York who have never had, and might like a turn, as a broadcast licensee.

The Internet is great, but it has not come anywhere near replacing television as the dominate means of political communication in our society. Until it does, and with an adequate period for the legacy of licensing to be eroded, a public interest obligation will and should attach to the extremely economically valuable and politically powerful licenses that the broadcasters enjoy.

Now, with the law reinterpreted and the facts ignored, we get a radical virtual elimination of limits on media ownership. No amount of euphemizing about rebalancing and surgery can hide that fact. We get a no-questions-asked before-the-fact green light to a wide range of mergers. A ban on holding a TV license and holding a newspaper in the same market is replaced by blanket approval of all combinations in 180 markets serving 97 percent of the American people.

On average, the dominant firm combination in that market would hold about two-thirds of the newspaper circulation and 40 percent of the TV circulation. The number two firm in that market would be one-third the size. Talk about undue concentration of economic power and inordinate effect on public opinion.

In markets where one-quarter of the people in this country live, a single entity would be allowed to hold three TV licenses. In another set of markets where half of the people in this country live, a single entity would be allowed to hold two TV licenses. When in fact there are so few TV licenses available that 99.99999 percent of the people don't have the opportunity to have them, that is scarcity in broadcast voice.

So there is a grassroots rebellion in America among the public who firmly and rightly believe that the media is too concentrated, too powerful, and unresponsive to their local needs and diverse community makeup. Fortunately, the order not only misreads the law, ignores the facts, and produces irrational results, but it also is riddled with internal contradictions and was adopted in a process that denied the public a chance to comment on the specific content of a major change in the rules.

We have no doubt that the Court will make it go away. We know that the Congress would make it go away if it could, but for the obstruction of a small minority in the House, powerfully located in the leadership.

Over the course of 75 years in the quotes I read to you, the courts have articulated a bold aspiration for the First Amendment. The goal is uninhibited, robust, vigorous debate about all important issues among citizens who have access to the necessary information beyond what would merely be provided by commercial interests whose voices can be heard free of undue concentration of economic power or inordinate affect of editorial opinion. The number of broadcast licenses remains vastly smaller than the number of citizen speakers the public interest continues to demand, and among other things, the dispersion of ownership. That's our First Amendment, and we intend to reclaim it in the courts, in the Congress, and at the polling booths.

Thank you.

MR. REINHARD: I'm Dave Reinhard. I'm an associate editor with *The Oregonian*, which is a rather glorified title I'd rather not have. Basically I'm an opinion writer. I always mention that. In fact, I'm a minority opinion writer at *The Oregonian*. I'm a conservative on a very liberal editorial page in a very liberal area of the country, which makes me one of the few white heterosexual males who can consider himself a token.

I always say I'm in the media but I'm not of the media. I stress that today, because I'm not speaking as someone who has worked himself up through a newsroom and through editorial offices to the editorial board of *The Oregonian*. They had to go outside *The Oregonian*, indeed outside the profession, to get me, because they wanted to add some balance to their editorial page. Their idea of balance was about nine to one.

I do feel compelled, however, to represent my colleagues a bit on *The Oregonian*. My colleagues generally in the media, although this is not confined to the media by any means, are very worried, concerned, fearful about giantism in the media business. They talk endlessly about media conglomerates.

I had one colleague who wrote an article on the FCC rule changes saying that if these rule changes went into effect, she could not write the column she was about to write in opposition to them. So there's this fear that has seized my colleagues. They're worried that their sense of freedom, their sense of creativity, their objectivity will be lost if these rules go into effect.

This is not an opinion that I share. In fact, I am rather mystified by it. I have the same concern, and I think most conservatives, and I am a conservative, about large

institutions and giantism and the loss of control. But it is only a fear. It hasn't risen to hysteria or panic. I am more in the position of wanting to trust in these rule changes, but verify and look at them.

I think the FCC has had the better of the argument. In fact, they have made the argument based on changes in the telecommunications field. I'm always struck by how in these screeds against the FCC rules these changes are never addressed. I've heard them addressed here today with some clarity for the first time. But mainly they are ignored. We talk instead about the fears of media conglomerates stepping on these poor reporters and editors who are just going to try to do their job for the benefit of the public.

I think if you look at the changes in telecommunications, in the media business, we are in a place where we can change rules that have been in place for up to 60 years. That's not a radical notion, it seems to me; it is a prudential notion. We have rules that were not in existence when there was no cable. We have rules that are in existence that were started when there was no satellite TV. On and on it goes.

I look at some of the studies that have been done about owner-operated stations. They provide as much news content, if not more, and public affairs programming. Their awards are as significant. The number of awards is as significant. They are doing good work. I look at the cases and the studies of television stations that are owned by newspapers. If you look, you'll see that their treatment of the 2000 presidential campaign, for example, is different. The treatment from the newspaper is different from the treatment that the television station offers, in five of 10 cases. In the other 10 there's no appreciable difference at all.

I think the FCC record has the better of the argument, which I think explains why you don't find many in my business actually addressing those arguments or looking into that.

I'll wrap up here and be brief because we're kind of moving beyond. But I will say I am worried about a homogenization of news and just lousy news judgments and unobjective reporting. But to me the issue is not so much who owns the newspaper or who owns the media outlet. It is the result of two things: a commitment to craft, often, and also a kind of homogenization of the news business that I think you see it in politically correct newsrooms. I think you see in newspaper people, media people, editors, who basically have the same world view. In my view, they don't get out much.

For example, my attendance at this conference is viewed as some kind of radical act, because of course those of us who listen to, forgive me, NPR and read the *New York Times* know that the Federalist Society is somehow linked to right-wing politics. It must be an awful thing to be involved in. That's been a surprise to me.

So I think more often than not it is a matter of mindset. It's a cultural affliction. It is the result of a certain educational process, a certain inclination of people to move into journalism. I don't think it is the result of the changes in the media. In fact, I think if I look at the changes in the media, to me, as an opinion writer, they have actually improved. There is more diversity of thought than there was certainly in the early '80s.

The Internet is a wonderful tool. I wouldn't want to get in the way of it. Thank you.

MR. GIFFORD: I'd like to talk about the media ownership rules a little bit. Then I'd like to also, hopefully, take a little time to add some comment to the Chairman's remarks.

"Big is bad." That is about the level of the cry that we've heard, and the level of the debate, over the media ownership rules. In fact, the media ownership rules debate took place in three contexts that I think we have to remember: a legal context, a marketplace context, and an administrative regulatory context. What we had in the paranoia and hysteria that erupted after the media ownership rules is a loss of all three of those contexts very quickly.

The first one is the legal context. From the talk of it, the FCC basically allowed the entire media industry, if there is such a thing, to consolidate overnight. Actually, there were six major decisions made in the media ownership rules that showed, frankly, a great deal of incrementalism and hardly any radical stuff. The dual network ownership prohibition for local markets was kept. The local TV ownership limit was altered slightly. The national TV ownership limit was altered slightly. The local radio ownership limits were tightened. A lot of people forget that. The cross media ownership rules were relaxed.

What the FCC did was take a very intense fact-based look at the media marketplace and altered, frankly, around the edges, the rules that are involved in media ownership. They did this in a legal context, too. Which is to say, guess how many times since the '96 Act which commanded the FCC to undertake this review, the FCC had succeeded in keeping those old media rules in place through the courts? None. The FCC lost five appeals keeping the old media rules in place.

Second, there is a marketplace reality that's been obscured. The marketplace reality is these rules date from the 1940s, the 1950s, and the 1960s. They date from the days of Uncle Walter and three broadcast networks. We now have five broadcast networks and the most remarkable medium that lowers barriers to entry, that lowers entry costs more than you can imagine: the Internet.

In the last year or two, a phenomenon called blogging has broken out on the Internet where any halfwit, me, Mark—Mark's not a halfwit; he's probably a full wit—can get on the Internet and tell the world what our opinions are. Blogging was identified as one of the things that brought down Trent Lott.

Now, to pretend that the media marketplace and the entry barriers in getting into the media have not changed dramatically is to put your head in the sand. Mark uses 500 pages of analysis, or 300, to show how the marketplace has changed and how it hasn't and so forth. I think it totally ignores the context that the entry barriers to get into the media, the entry barriers and the outlets that people have, have been simply proliferated.

The last thing I want to talk about is, I think there's a very strong case to be made that there should be no media ownership rules. Why does the FCC get to impose media ownership rules? That's a pretty peculiar thing if you think about it. We have antitrust laws that prohibit concentration. The reason the FCC gets to do it, if all of us remember back to our First Amendment class, was a 1960s case called Red Lion that said scarcity gives the FCC a rationale to regulate for diversity of viewpoints and the things they currently do. The scarcity rationale is why the FCC gets to engage in something that otherwise the government could never do, which is to say who can own what, and who can say what, and how they can say it, and micromanage the playing field to make sure all the right voices are there.

Well the Red Lion rationale was last visited by the Supreme Court in '94 where they affirmed it, but they said, "This is eroding." I would submit in '94 to 2003 it has

eroded further. The scarcity rationale is crumbling before our very eyes. So constitutionally—and it's going to take the Supreme Court get the issue—the Red Lion doctrine is falling apart.

Even folks who are associated with the left, like Larry Lessig for instance, have said that the Red Lion doctrine's days are numbered. If the Red Lion doctrine's days are numbered, the FCC does not have the authority to engage in this First Amendment micromanagement.

Lastly, I want to talk about the institutional capabilities of the FCC. First of all, doing anything, but specifically as to the media ownership rules, why would we think that the FCC, an agency that can't survive appeals on the media ownership rules in the courts, that doesn't do well elsewhere, has the ability to micromanage the media marketplace of ideas, to weigh what voices should and shouldn't be there, and decide who should and who shouldn't own media properties?

In fact, the history of the FCC is that these types of rules and their license transfer authority have been used to great public detriment in a very corrupt manner. You want to know why Lyndon Johnson got really rich? Because the FCC gave him radio stations.

Now I'm not condemning Lyndon Johnson and his political mastery, but what I'm saying is, why do you want all of this power in deciding who says what and where in the media marketplace to reside in a regulatory institution that's history and that's capability has shown it is not competent to do that.

So I would say what we should be examining is why are there any media ownership rules out of the FCC, not how the old rules need to stay or be tightened down. I think it finally gets to a question that I would have asked Chairman Powell about his remarks—I think it's consistent, and I'll end quickly. I agree with him that we need move to a system where there is a uniform federal regulation. I think it leads to the diminishment of state regulation. That is inevitable and that is probably a good thing.

But the question is, why do we need that power to then reside in this plenary-powered regulator called the FCC? If we really believe in markets and we really believe in the power of the Internet to bring great things to our society, why aren't we, or how do we get on a course to get it out of the administrative regulatory realm altogether and into a world where normal common law property and contract backed up by statutory fraud and antitrust take care of it?

That's really another question, but I think it does relate to how do you get out of the progressive area of institutions that we're not saddled with. Thanks.

JUDGE WILLIAMS: Thank you. We'll now have dialogue with the audience. Dave talked about this woman on The Oregonian who had said that if media rules like that stand she would not be able to write the very editorial she was writing. So I inquired what the market share of The Oregonian was. It's apparently 100 percent, give or take a few points.

MR. GIFFORD: We're working on the other points.

JUDGE WILLIAMS: Questions? Attacks? I see one right there.

AUDIENCE MEMBER: Thank you. With respect to the cross-ownership rule, I find it difficult to understand how it can be criticized because it's enforcement is reposed in the incompetent FCC since it's about as clear a rule as you can get? On that subject, I find it interesting that when the cross-ownership rule was adopted, the typical city had several newspapers. Not only did the typical city have several newspapers, but it was surrounded by suburbs that had a proliferation of suburban weeklies.

We now have a situation in which the typical city has a monopoly newspaper. One of the interesting developments of the last 10 years is that the monopoly newspapers in most cities have been without hindrance from the antitrust division absorbing all these suburban weeklies. The rationale of that is that the media market is all one market, and newspapers compete with the Internet, radio, broadcasting, and so forth. I'm rather dubious of this proposition, because there are rather politically important things as to which newspapers are far more important than these other media. But when you have the argument made that we should be unconcerned about the ownership of multiple radio and TV stations by one entity, because now we have this proliferation of satellite, cable, Internet, and so on, that argument does not fit well the argument the FCC expressly made in support of its new rule which was precisely that broadcast media did not compete with newspapers and therefore relaxing this ownership rule is not damaging.

But you have the antitrust division at the same time permitting newspaper mergers on the basis that newspapers do compete with broadcast media. So what you have is a situation where you have monopoly newspapers in each metropolitan area that absorb all the suburban weeklies and that now are to be allowed to absorb radio stations and television stations also.

You have two totally inconsistent rationales being used to justify this development. I wonder if you would have any comment on that?

MR. COOPER: Let me do facts. Someone did a study of the citations of the top six commentors at the FCC. We were number one. We had 275 citations to the academic literature. Fox was number six. They had 15. This notion that somehow or another we screamed and shouted and didn't cite any facts, and the Chairman says we didn't provide complex analysis, is a lie. It's stated over and over again.

Let me take this proposition here. In 1975, the average city in America had slightly under four TV stations that did local news. By local news we mean things like school boards and local congressional elections, which you don't see on CNN or the national networks, and you can't find on the Internet. It turns out there's almost no local content on the Internet.

So we had four TV stations and two newspapers in 1975 when Richard Nixon, who hated the press, finally got his way and imposed these rules on them. We had two newspapers. Today we have slightly fewer than four TV stations and one-and-a-half newspapers to provide that local information. Congress has said that localism is what this is about. The Supreme Court has upheld localism.

So the facts of the case are, there has been no revolution in information and access to influence about school board elections or congressional elections. Those are the facts.

Actually it turns out that the Commission did not rely on the Internet in the actual writing of its rules. The one thing that did most damage was to consider radio to be equal

to 85 percent of newspapers and 75 percent of TV in its influence on the public, when in fact the number of radio stations doing news has collapsed.

So the factual basis of this order is non-existent. It's this image that 300 channels, none of which do news, will provide information about politically relevant topics.

MR. GIFFORD: A couple of things that you need to realize. It's a very strange thing that we're assuming here, that ownership of media correlates somehow to viewpoint, correlates somehow to localism. In fact, in the FCC record, one of the things that they actually did some fairly precise study on is that locally owned TV stations that are owned by national conglomerates actually had more local news.

So to simply take ownership as a rough proxy for viewpoint is a very, very questionable correlation to make.

AUDIENCE MEMBER: I really like that point, too, although I'm going to address it to the gentleman who writes for *The Oregonian*. I'm going to ask you to play social psychologist here a little bit. The reason I ask that is because I truly do not understand the argument of Mr. Cooper.

When I look at the media that is available to me, both locally and nationally, it seems to me it already is an oligopoly. That doesn't mean one firm. That means several firms—four or five big firms. They compete with each other. They all, to varying degrees, will reflect the general popular currents of diverse opinion that are in the society. That's true on the local level. These oligopolies will compete with each other on the national level. Mainstream opinion is all going to be reflected.

Given the fact that I truly can't sympathize with anything that you've said, Mr. Cooper, in terms of this being a real issue that would strike tone to anyone, I have to ask, I'm trying to think, so why is there such an uprise about this? What is it really about?

One of the strings that I heard in the discussion is that the local people who run the media currently think all their stations are going to be acquired by Fox News or by Rupert Murdoch and, therefore, a liberal media elite, sort of the bastion of liberalism in the local media, if that's true, are afraid that they are going to have to potentially bend to the actual popular will and become a little bit more conservative.

Is that anywhere near the reason?

MR. COOPER: The comment was addressed to me. The movement took off when the right joined us.

The movement actually took off when the right joined us, when the Christian Coalition and the NRA decided that they would join the fray and produce cards and letters.

One simple observation: there is a tight oligopoly of four or five firms that control all five major national broadcasts and 75 to 85 percent of the prime time hours, et cetera. The proposition is that in the old days we used to think 10 was what we needed for real competition.

The oligopolies sort of homogenized toward the middle. If we had 10 firms out there, we actually might get some non-mainstream ideas that got an airing.

I will give you one statistic.

AUDIENCE MEMBER: We used to think that about auto companies, too. We learned --

MR. COOPER: Absolutely. But auto companies don't involve free speech.

MR. GIFFORD: When we have 10 national media firms, though, and lose those economies of scale, Mark's going to start complaining about cable rates going up.

MR. REINHARD: I think your question was addressed to me, but I could be wrong. I think you're right in some ways. I'm not speaking for Mark at all, but I do think there is actually an unholy alliance that's at play here and it's beyond some organizations on the left and some organizations on the right who are able to gin up postcard responses and do it for their own particular reasons, which differ from left to right.

But I also think that you have got a very vocal or verbal group of writers, editorial writers, columnists, for the most part, who are often in a state of fear and trembling or shock and appall about one thing or another. They are feeling very much under siege because of the political currents in this country. They see this as a reflection of that.

I think in all of this you see a desire to return to the good old days of the fairness doctrine. It seems to me that the world has been, the nation has been improved since the fairness doctrine went by the boards.

MR. COOPER: Let me tell you what they have in common, the left and the right. This is very important. All of those groups that sat up there with Commissioner Kopps and Adelstein are minorities, extreme minorities in some sense, small minorities in some sense. They all believe that they do not get a fair area. That is, they do not get equal opportunity, which is exactly what the Commission says they don't have a right to, to get their ideas out.

It turns out that America is a nation of minorities. That's what they share, a perception that they do not have a fair chance to circulate their ideas through the homogenized, centralized commercial management.

MR. REINHARD: And they might be right. But I don't think it is necessarily a problem of ownership. It is a problem of—I'll use the term in another way—an elite culture that exists not only in our entertainment business but in our media business.

JUDGE WILLIAMS: Yes.

AUDIENCE MEMBER: With respect to the antitrust laws, I have two questions. One is for Mr. Cooper. Why aren't the antitrust laws enough to solve your concern about market concentration, assuming that we could do some tinkering, for example, to eliminate the newspaper exemption which exists, which is what allowed the newspapers to merge? That was enacted, by the way, in response to newspaper decline following broadcasting.

Then for Mr. Gifford, if we're going to treat it like every other industry and just make it subject to the antitrust laws, why shouldn't the broadcast licenses be re-auctioned to recoup the additional value that they now have without having the restrictions on them?

MR. COOPER: I am certain that when Congress passed the Sherman Act they did not intend to repeal the First Amendment. So, antitrust laws deal—it didn't have to be this way, but it certainly has been this way in the last 20 or 30 years—with economic deficiency and antitrust authorities don't do democracy. They have no framework for dealing with the question of diversity and democracy. So if you believe that the First Amendment is something other than the merely commercially successful, then the antitrust authorities don't have the charge to deal with that issue. If you look at radio, they have been incapable of dealing with the radio market.

The Congress created the abortion and they hope that the antitrust authorities would prevent it from happening. It hasn't, and the Congress is looking at all kinds of things. So the simple fact of the matter is that unless you believe that the Sherman Act repeals the First Amendment, then there's something more that needs to be done. That is the public interest standard of the Communications Act.

They can't do it. They don't know how to deal with it. They don't understand the currency of truth and understanding, which is what the First Amendment is about, versus profit and efficiency, which is what the Sherman Act is about.

MR. GIFFORD: A quick comment on Mark. Mark has a very definite view of the First Amendment. It is not a view of the First Amendment that is ratified or held by courts. I think that's pretty significant.

On the issue of the broadcast licenses, really what you have here is a public choice problem. Licensing and the re-auctioning of broadcast licenses, just frankly, will never happen. In fact, recent history of digital TV shows that we give things to broadcasters. We never even dare to take them away.

On some of those things you're just going to have to swallow hard and try and get the best forward looking system and realize that you've had some major welfare shifts and redistribution to people, but you're just going to have to live with it. Regulation has it tied up.

MR. COOPER: The solution to licensing is at hand: unlicensing. There are people who are arguing that we need to simply unlicense the spectrum. Let me run over NBC's signal as I see fit. Or impose upon me the obligation not to interfere with intelligent computing and so forth.

So Ray and I really ought to agree. I am a big advocate of simply unlicensing the whole spectrum, not just the junk bands, because that is limited to things that won't go through walls and don't work very well. But there is the possibility to allow us to unlicense the whole thing.

We ought to make an alliance, left and right, that that spectrum should be available for anyone to speak. That is the highest First Amendment purpose, as long as you obey some rules about non-interference. But nobody gets the first bite. You don't say NBC gets it, and then you have to behave around NBC. We all have to work out a way to use it in an unlicensed fashion. That's the revolution. Just like the unlicensing of the Internet.

JUDGE WILLIAMS: If someone wants to take up that issue, I'd be glad to hear from them. If not, I'd like to make a couple of observations, because I've been on panels and I've thought about that problem.

It seems to me that it's largely a technological proposition. That is, if, given any particular state of technology, the spectrum is spacious enough that its use can be treated the way the ocean is treated for freighters and ocean liners, then clearly what Mark is proposing is correct. Because you can have, with comparatively simple traffic rules and no ownership, abundant use.

On the other hand, if the technology is such that there will be endless accidents—imagine the beltway. Of course you do have rules, which are sometimes observed, but I think Mark contemplates. I don't think the beltway image works very well, because you can't channel things the way you do on the beltway. But certainly, picture more a road in the city of Beijing where if people want to make a left-hand turn, they make a left-hand turn then and there. If the technology is such that there will be endless accidents, then Mark's solution doesn't work.

I don't know the answer. I'm told by a former clerk who's up to the minute on these things that in fact the ocean full of freighters analogy is quite plausible, at least.

MR. COOPER: It seems like we're getting there. You do have, again, a public choice problem, which is the incumbents on the spectrum, which are very powerful, are going to have a plausible stranded cost claim since they've invested enormous amounts of money in reliance on this spectrum. Not a property right in it, but a licensing right.

So, to make that happen, to go to the spectrum commons if it's technologically possible, you're going to have to deal with the legitimate and illegitimate claims of incumbents who have that spectrum now, which is to say it's going to be expensive.

MR. REINHARD: Well, there are different ways to do it, but that I think is your other big impediment, Judge --

JUDGE WILLIAMS: Right.

MR. REINHARD: -- is what do you do with your incumbents because they have a great deal of resources and in a not illegitimate way.

MR. COOPER: I agree. When I talk about eroding the legacy of licensing, if we could institute the commons tomorrow, I still have the fact that that licensee had 75 years to build up a certain amount of tremendous cache. I was greatly encouraged by the Supreme Court's ruling on affirmative action, in which they actually said, "We would hope that in a quarter of a century as we work through the continuation of this, we won't need this stuff anymore."

In my community, when you start talking about unlicensed spectrum, you then have to give up the public interest obligation that adheres in the license. Because it's now no longer scarce. If you read our comments, we wrote 800 pages to the FCC, we never mentioned scarcity once. I know it's an eroding base, so I wasn't going to advocate there.

I mention it here because actually in the speaker's analysis it still works. So what I have said, and I said this at one of Larry Lessig's conferences, is exactly that. If we do

get unlicensed spectrum, we need a period of transition both for them to migrate their business to the Internet and for us to balance the scale of 75 years of discrimination against the poor citizen who didn't have the license.

That's a paradigm for going forward. Important things have to be done in order to go forward. One thing, and we may disagree on this, is to not create permanent property rights in the spectrum today.

JUDGE WILLIAMS: I'd like to ask a question about that. We were talking about protecting the broadcasters and putting momentarily aside the particularly political issue, which probably makes everything impossible anyway, but putting that aside. Of course, the law is clear that nominally a license is a property interest. Is there some kind of invasion of their regulatory expectation or something like that simply because the rules are changed so that lots of other people, as technological matter, without interfering with them at all, will create competition with them? Or is it a claim relating to technological interference? If it's just that their government granted monopoly is going to be eroded, I'm not sure if I see much of a legal problem.

MR. COOPER: I didn't raise that. If it's not interference, they can't complain. Our proposal at the FCC was every time one of those licenses expire, it's first and highest use should be unlicensed. At the end of the term of that license, they probably never had a property claim to it anyway, but clearly at the end of the term of that license, there is no future claim. They had no right for an expectation. The first and highest use at that point ought to be unlicensed.

Today that's eight years. Well, that's not that long. If you think about it we're almost eight years out from the Communications Act. We would like to see that transitioned. Again, left and right, you know, actually tend to agree. I think we do share certain types of things

JUDGE WILLIAMS: Ten years from now there will be no need for a meeting of the Communications Regulatory Practice Group.

AUDIENCE MEMBER: I just have one question. If you do go with the unlicensing, don't you run into the traditional problem with the comments, the overuse, the purchasing of the entirely, by these large conglomerates? Why don't they just buy up the bands then? You don't have the FCC regulations anymore over the bandwidth, because it isn't regulated by the government. Don't you run into those troubles with the comments if you unlicensed?

MR. REINHARD: It's really a technological issue. I'm not a good enough technologist to explain it. Newer uses of spectrum and frequency jumping and smart radios and so forth potentially have the ability to make it. There could be no tragedy of the commons, it would be a comity of the commons that there is simply such a surfeit and such smart devices that everyone has plenty of room to get their communication through.

It's a technological issue. The spectrum policy taskforce that the FCC has is really moving on parallel toward a property and a commons model. It's very exciting.

MR. COOPER: For every tragedy of the commons, there's a comity of the commons and the difference between the two is stupidity. Frankly, many commons get managed very well for the benefit of those people who share it. Many get destroyed because the rules are not applied, not thought out, et cetera.

Here we have an aggressive effort to technologically and legally figure out a way to produce a comity of the commons in the most important space of our economy, the First Amendment space of speech. My proposition is that once that becomes possible, that should become the compelling vision of the First Amendment in the information age. Find a way to make everybody a speaker in that space.

JUDGE WILLIAMS: Thank you.

CONFERENCE ORGANIZER: I want to thank all of our panelists and also our moderator who I neglected to introduce. We were very lucky to have the Honorable Stephen Williams from the D.C. Circuit.

Thanks very much.