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EDITOR’S PREFACE

The recent passing of TMT pioneer Steve Jobs provides an appropriate moment for reflecting on the impact that innovation in the sector has had on our lives, and how it also has driven – and outpaced – the development of the law.

Dramatic advances in microchips have fuelled the digital revolution, spawning a wide range of devices and services that our parents never could have imagined. The iPhone, the iPad, iTunes and the iPod are but a few examples of technological changes that have challenged old ways of doing business, and also have changed society. We are connected to our work and our social circles anywhere we go; we instantaneously access vast information resources from mobile devices; and we watch films and TV programmes, and listen to music, of our choosing, whenever and wherever we want.

Similarly, the Internet has changed the way people communicate, and has altered our preferences for receiving information and entertainment. Internet-based businesses have challenged traditional media businesses, such as print newspapers, print magazines, and television and radio broadcasting. Internet media delivery is now challenging more recently developed forms of media—cable and satellite delivery of subscription video programming. As a result, the legal constructs once put in place to govern media outlets are changing.

The existing telecommunications infrastructure is becoming outmoded. ‘Twisted pair’ (copper) is being bypassed in favour of fibre and wireless, as existing phone lines cannot readily support the increasing demand for broadband speeds and throughput. A robust wireless communications infrastructure is necessary to support the booming demand for mobile broadband connectivity to smart phones and tablets. As a result, government policy is evolving to support the deployment of broadband infrastructure, and to facilitate the growth of mobile services; but regulatory change never seems to occur fast enough. While nations are making significant investments to deploy high-speed broadband services to their citizens, significant private investment is still needed for tomorrow’s critical telecommunications and information infrastructure.

Historical spectrum planning did not provide for the current wireless boom. As a result, no incumbent user of spectrum is safe in the refarming of existing spectrum bands. The transition from analogue to digital signal forms is leading to more efficient use of the spectrum, and also is facilitating new approaches to sharing radio spectrum.
Regulators are coming under increasing pressure to capture the value associated with the spectrum bands that are being opened for these new purposes.

The broadband revolution has eliminated one information bottleneck that once existed when consumers had to rely on a few newspapers, TV stations and radio stations. Now they are able to use Internet-based services such as Facebook and Twitter – albeit sometimes in the face of governmental attempts to stem the free flow of information to and from their jurisdictions. Other ‘gatekeepers’ are developing in the distribution chain as application service providers seek to constrain access to certain content, whether by using their influence to cause broadband providers to block access to that content entirely, or to prioritise one information source over another.

We are being monitored, and our personal information is being collected, stored and mined, in a manner that regulators never envisioned and that the law is not well-suited to constrain. Virtually every Internet access and wireless device we use knows were we are, and tracks what we do. While this personal information can be used for purposes that some may find desirable (such as targeting products and services to us), gathering and storing that information virtually eliminates any expectation of privacy. In many jurisdictions, the law is inadequate to manage the chances for abuse and the consequences of security breaches.

This second edition of The Technology, Media and Telecommunications Review expands to 30 the jurisdictions in which we provide an overview of the legal constructs that govern these types of issues. While the authors cannot fully address every one of these topics in the following articles, we do hope this book provides a helpful framework for your analysis.

John P Janka
Latham & Watkins LLP
Washington, DC
October 2011
LIST OF ABBREVIATIONS

3G Third-generation (technology)
4G Fourth-generation (technology)
ADSL Asymmetric digital subscriber line
ARPU Average revenue per user
BIAP Broadband Internet access providers
BWA Broadband wireless access
CATV Cable TV
CDMA Code division multiple access
CMTS Cellular Mobile Telephone System
DAB Digital audio broadcasting
DDoS Distributed denial-of-service
DoS Denial-of-service
dsl Digital subscriber line
DTH Direct-to-home
DTTV Digital terrestrial TV
DVB Digital video broadcast
DVB-H Digital video broadcast – handheld
DVB-T Digital video broadcast – terrestrial
ECN Electronic communications network
ECS Electronic communications service
EDGE Enhanced data rates for GSM evolution
FAC Full allocated historical cost
FBO Facilitates-based operator’
FTNS Fixed telecommunications network services
FTTC Fibre to the curb
FTTH Fibre to the home
FTTN Fibre to the node
FTTx Fibre to the x
FWA Fixed wireless access
Gb/s Gigabits per second
GB/s Gigabytes per second
<table>
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<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>GSM</td>
<td>Global system for mobile communications</td>
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<tr>
<td>HDTV</td>
<td>High-definition television</td>
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<tr>
<td>HITS</td>
<td>Headend in the sky</td>
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<tr>
<td>HSPA</td>
<td>High-speed packet access</td>
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<td>ICT</td>
<td>Information and communications technology</td>
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<td>IPTV</td>
<td>Internet protocol television</td>
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<tr>
<td>ICP</td>
<td>Internet content provider</td>
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<tr>
<td>ISP</td>
<td>Internet service provider</td>
</tr>
<tr>
<td>kb/s</td>
<td>Kilobits per second</td>
</tr>
<tr>
<td>kB/s</td>
<td>Kilobytes per second</td>
</tr>
<tr>
<td>LAN</td>
<td>Local area network</td>
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<tr>
<td>LRIC</td>
<td>Long-run incremental cost</td>
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<tr>
<td>LTE</td>
<td>Long Term Evolution (a next-generation 3G and 4G technology for both GSM and CDMA cellular carriers)</td>
</tr>
<tr>
<td>Mb/s</td>
<td>Megabits per second</td>
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<tr>
<td>MB/s</td>
<td>Megabytes per second</td>
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<tr>
<td>MMS</td>
<td>Multimedia messaging service</td>
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<tr>
<td>MMDS</td>
<td>Multichannel multipoint distribution service</td>
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<td>MSO</td>
<td>Multi-system operators</td>
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<td>MVNO</td>
<td>Mobile virtual network operator</td>
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<td>MWA</td>
<td>Mobile wireless access</td>
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<td>NFC</td>
<td>Near field communication</td>
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<td>NGA</td>
<td>Next-generation access</td>
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<td>NIC</td>
<td>Network information centre</td>
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<td>NRA</td>
<td>National regulatory authority</td>
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<td>PNCTS</td>
<td>Public non-exclusive telecommunications service</td>
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<td>PSTN</td>
<td>Public switched telephone network</td>
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<td>RF</td>
<td>Radio frequency</td>
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<td>SBO</td>
<td>Services-based operator</td>
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<td>SMS</td>
<td>Short message service</td>
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<td>STD–PCOs</td>
<td>Subscriber trunk dialling–public call offices</td>
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<td>UAS</td>
<td>Unified access services</td>
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<td>UASL</td>
<td>Unified access services licence</td>
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<tr>
<td>UHF</td>
<td>Ultra-high frequency</td>
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<tr>
<td>UWB</td>
<td>Ultra-wideband</td>
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<td>UMTS</td>
<td>Universal mobile telecommunications service</td>
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<td>USO</td>
<td>Universal service obligation</td>
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<tr>
<td>VDSL</td>
<td>Very high speed digital subscriber line</td>
</tr>
<tr>
<td>VHF</td>
<td>Very high frequency</td>
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<td>VOD</td>
<td>Video on demand</td>
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<tr>
<td>VoB</td>
<td>Voice over broadband</td>
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<tr>
<td>VoIP</td>
<td>Voice over Internet protocol</td>
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<tr>
<td>WiMAX</td>
<td>Worldwide interoperability for microwave access</td>
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I OVERVIEW

This chapter provides an overview of telecommunications and media regulation in the United States. Given the complexity of such regulation – which is constantly evolving in response to technological advances, market shifts, and political dynamics – this chapter is not intended to be comprehensive. Rather, it is intended to demonstrate the nature and scope of such regulation, and to identify some of the more significant legal and policy developments of the past year – including attempts by the federal government to subject Internet access services to increased regulation.

II REGULATION

i The regulators

Regulation of telecommunications and media in the United States is governed primarily by the following authorities, within parameters established under federal and state statutes and constitutions.

The Federal Communications Commission

The Federal Communications Commission (‘the FCC’) is an independent US regulatory agency established by the US Congress pursuant to the Communications Act of 1934, as amended (‘the Communications Act’). The FCC is charged with regulating all non-federal government use of the radiofrequency spectrum, all interstate telecommunications, and all international telecommunications involving an end-point in the United States. Together with the US State Department Office of Communications and Information Policy, the FCC participates in international spectrum negotiations.

* John P Janka is a partner and Jarrett S Taubman is an associate at Latham & Watkins LLP.
The National Telecommunications and Information Administration

The National Telecommunications and Information Administration (‘NTIA’) is an executive agency of the federal government within the US Department of Commerce. NTIA has primary responsibility for regulating all use of the radiofrequency spectrum by federal government users, and works with the FCC to coordinate spectrum use between federal and non-federal users. NTIA also administers the Broadband Technology Opportunities Program, which, together with the Rural Utilities Service of the US Department of Agriculture, administers a funding programme to promote broadband deployment pursuant to the 2009 American Recovery and Reinvestment Act.

State regulators

Telecommunications within a single US state are governed by individual state regulatory agencies, typically having jurisdiction over telephone companies and other ‘public utilities’ providing services within the state, as well as the siting of telecommunications facilities and many consumer protection matters. The jurisdiction of state public utility commissions (‘PUCs’) over intrastate telecommunications is limited by state constitutions and statutes as well as by federal supremacy. For example, in case of a conflict between the FCC and state regulations, the state typically would be preempted, unless the US Congress or the FCC expressly permits the states to enforce divergent regulations. The FCC has effectively exercised exclusive jurisdiction over most matters involving Internet access services, due to the interstate and international nature of the Internet. CATV operators also are subject to franchising by state or local authorities for the use of public rights of way.

The Federal Trade Commission

The Federal Trade Commission (‘the FTC’) protects consumer interests in such areas as online marketing and telemarketing, among other things. Both the FTC and the FCC have oversight over certain telemarketing matters. Both the FTC and the US Department of Justice (‘the DoJ’) Antitrust Division police market concentration by examining mergers and other major transactions in the sector, along with the attorneys general of the states.

Sources of federal telecommunications and media law and policy

In the US, federal telecommunications law is derived principally from statutes enacted by Congress (and signed by the President) as well as administrative regulations, orders, and policies adopted by the FCC.

The Communications Act

The FCC’s governing statute, codified in Title 47 of the United States Code, establishes the framework for federal regulation of telecommunications and media in the United States. The Communications Act consists of seven major Sections, or ‘Titles’. The most significant of these are Title I (establishing the FCC and defining the scope of its authority), Title II (governing the activities of telecommunications carriers), Title III (governing the use of radio spectrum, including by wireless carriers and mass media broadcasters) and Title VI (governing the provision of cable television services). The Communications Act
was substantially amended by the enactment of the Telecommunications Act of 1996, which opened communications markets to greater competition in many respects.

Ancillary authority
Section 4(i) of the Communications Act provides that the FCC ‘may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions’. In recent years, the FCC has attempted to use this ‘ancillary authority’ to regulate subject matter outside of the traditional scope of its jurisdiction (e.g., Internet services) although, as discussed below, these attempts have met with mixed results.

FCC regulations and orders
In fulfilling its statutory mandate, the FCC plays a quasi-legislative role by promulgating administrative regulations, after providing notice to the public and an opportunity for public comment, as required by the Administrative Procedures Act. The FCC also plays a quasi-judicial role in interpreting existing law in evaluating any number of disputes and applications (e.g., licence applications or petitions for interpretation of the law). The resulting orders and regulations constitute an extensive body of administrative law governing telecommunications and media in the United States.

Judge-made law
The judicial branch of the US government also plays an important role in US lawmaking, at both the state and the federal level, reviewing administrative agency decisions for consistency with the governing statutes, and reviewing statutory law for compliance with the federal and state constitutions. Any interested party may seek review of an FCC action in a federal court of appeals. The courts review FCC decisions for consistency with its governing statutes and the US Constitution. In general, the FCC is entitled to deference in interpreting the Communications Act where it is ambiguous and capable of more than one reasonable interpretation. In addition, the courts review FCC decisions to ensure that are not ‘arbitrary or capricious’ – for example, the FCC may not depart from its own precedent without a reasoned basis for doing so, and more generally must have a reasoned basis for its decisions.

The FCC’s National Broadband Plan
The FCC’s National Broadband Plan (‘the Plan’), published in 2010, is intended as a comprehensive blueprint for US broadband policy, and includes a number of recommendations for expanded access to broadband services in areas deemed ‘unserved’ or ‘underserved’ by the FCC’s standards. Initially, the Plan recommends that all Americans should have dedicated Internet access at speeds of at least 4Mb/s downstream and 1Mb/s upstream. The Plan also recommends that all Americans should have access to 100Mb/s transmission capability within 10 years, and seeks to facilitate the deployment of wireless broadband services in particular. The Plan makes only recommendations; the FCC must seek public comment before adopting any new rules to implement the Plan, and in some cases the recommendations could not be implemented without new legislation by the US Congress. The FCC currently is seeking comment on numerous proposals to achieve these goals.
iii Regulated activities

Among other things, the Communications Act requires a party to obtain authority from the FCC prior to constructing or operating an ‘apparatus for the transmission of energy or communications or signals by radio’ or engaging in the provision of interstate or international telecommunications services. The specific procedures for obtaining such authority vary based on a number of factors, including the nature of the underlying authorisation, the nature of the proposed service, and the subdivision of the FCC with primary responsibility for that service, etc.

In most cases in which an applicant must file an application to obtain authority from the FCC, that application must be placed on ‘public notice’, giving interested parties an opportunity to comment during a specified period (e.g., 30 days). Certain types of application (e.g., many non-common carrier wireless applications, requests for short-term authority or experimental licences) are subject to more streamlined processing, that may circumvent the need for public notice and comment in the first instance. Notably, the FCC now permits most applications to be filed electronically, and also allows the public to track the status of such applications through electronic filing systems (databases) accessible over the Internet.

The FCC has granted certain types of operating authority by rule, obviating the need for individual users to seek and obtain separate authority from the FCC. For instance, the FCC has authorised all common carriers to provide domestic interstate telecommunications services. The FCC also has permitted certain operations to proceed on an ‘unlicensed’ basis, provided that the equipment used in such operations has been evaluated and authorised in accordance with the FCC’s procedures.

iv Ownership and market access restrictions

Foreign ownership restrictions

Sections 310(a) and (b) of the Communications Act restrict foreign ownership of common carrier, aeronautical and broadcast spectrum licences, and of US entities holding those licences. Foreign individuals and entities may not hold more than 20 percent of the equity or voting interests in a licensee. In addition, foreign individuals and entities may not, directly or indirectly, hold more than 25 per cent of the equity or voting interests in the US parent company of a FCC licensee. These restrictions generally do not apply to the foreign holding of debt, stock warrants or stock options in US licensees or their parent companies. The FCC has authority to permit foreign equity ownership in excess of the 25 per cent limit on indirect ownership of a parent company, and often has permitted up to 100 per cent foreign ownership of common carriers. The FCC has found that higher levels of foreign ownership from WTO member states presumptively serves the ‘public interest’. However, the FCC generally will not waive the 25 per cent limit with respect to broadcast licensees.

In addition, transactions may be scrutinised by the Executive Branch’s Committee on Foreign Investment in the United States, an interagency group that reviews significant foreign investments to ensure that they do not raise national security or law enforcement concerns. Transactions also may be reviewed by ‘Team Telecom’, an informal group made up of staff from the DoJ, the Federal Bureau of Investigation, and the Department
Market access
Generally, the FCC does not authorise facilities located outside of the United States to serve the US market. An exception arises with respect to foreign satellites, which may serve the US if (1) the satellite is licensed by a foreign jurisdiction that permits US satellites to serve that jurisdiction without undue restrictions (such access is presumed where the foreign jurisdiction is a WTO member), (2) the satellite complies with the same FCC technical and service requirements that apply to US satellites, and (3) the satellite’s operation would not give rise to any national security, spectrum policy or other policy concerns.

Multiple ownership
With the exception of its broadcast licences, the FCC generally does not limit the number of spectrum licences that may be held by or ‘attributed’ to (i.e., deemed to be held by) a single individual or entity. However, in evaluating the likely competitive effects of significant wireless transactions, the FCC has utilised a ‘spectrum screen’ to identify local markets that merit closer scrutiny by looking at the total amount of spectrum that would be controlled by one individual or entity. The FCC also has imposed certain limitations on the ability of authorised parties of one type to hold licences or authorisations of another type. For example, the FCC’s rules prohibit cable service providers from holding an attributable interest in the incumbent local exchange carrier serving the same market, and vice versa.

The FCC does impose explicit limits on the number of broadcast stations (radio and TV) an individual or entity can own in a given local market, as well as the percentage of households nationwide that can be covered by television stations attributable to a single individual or entity. The FCC also has adopted rules limiting the cross-ownership of radio and television stations, as well as the cross-ownership of broadcast stations and newspapers. Several of these rules are under review by the FCC and the courts.

Transfers of control and assignments
Under Section 310(d) of the Communications Act, FCC approval must be obtained prior to assigning most types of radiofrequency-based licences, permits or authorisations from one party to another, or transferring ‘control’ of a radiofrequency licensee, permittee or authorisee from one party to another. There are exceptions for certain pro forma transactions, and certain types of licences. Similarly, under Section 214 of the Communications Act, FCC approval is required prior to an assignment of interstate or international telecommunications authorisations or transfer of control of a US carrier providing interstate or international telecommunications services. In reviewing such applications, the FCC typically attempts to gauge whether the application will serve the ‘public interest, convenience, and necessity’ by weighing the expected benefits of the proposed transaction against its expected harms, including the effects on competition and consumers. Most states have similar requirements applicable with respect to intrastate activities, and some require prior approval or notice regarding the issuance of debt by,
or changes in the debt structure of, entities that are subject to their jurisdiction. State statutes sometimes require that other factors be considered as well, such as the expected effect on jobs in the state.

The time frames for obtaining FCC approvals in connection with mergers, acquisitions or other major transactions vary widely. The FCC’s non-binding goal is to process combined applications for major transactions within six months. The FCC has exceeded this time frame on many occasions, typically when a transaction poses competitive concerns, or is contested by third parties, in which case approval can take nine to 12 months, or possibly longer. More routine transactions often are processed in a shorter period, but there can be no assurance that the FCC will act by any deadline.

Within the past year, the FCC has completed its review of several major telecommunications and media transactions. Most notably:

a In January 2011, the FCC approved the merger of NBC Universal, Inc and Comcast Corporation. The merger combined NBC’s two broadcast television networks (NBC and Telemundo), 26 local owned-and-operated broadcast television stations, national cable programming networks, film studio, international theme park businesses and online content businesses with Comcast’s regional sports networks, other programming networks, cable television distribution networks, and certain online businesses.

b In March 2011, the FCC approved the acquisition of Qwest Communications, a large, full-service telecommunications provider by CenturyLink, also a full-service telecommunications service provider. The deal created the third-largest telecommunications company in the United States.

c In June 2011, the FCC approved the acquisition of Hughes Network Systems, a satellite broadband services provider, by EchoStar, a satellite services provider and equipment manufacturer.

The FCC also has initiated but not yet completed its review of several other major transactions. Specifically:

a In March 2011, AT&T and Deutsche Telecom filed applications seeking FCC consent for AT&T to acquire T-Mobile USA from Deutsche Telecom. The proposed transaction – which would combine the second and fourth-largest wireless telecommunications services providers in the US – has met with stiff opposition on multiple fronts from parties raising competitive and other concerns. In August 2011, the US DoJ filed suit in federal court to block the proposed transaction on antitrust grounds. It is unclear whether the deal will move forward in light of this action.

b Also in March 2011, Cumulus Media and Citadel Broadcasting – both of which operate numerous radio stations throughout the United States – filed applications seeking FCC consent for Cumulus to acquire Citadel. The proposed transaction would combine the two largest radio broadcasters in the US.

c In April 2011, DISH Network Corp (an affiliate of EchoStar) and DBSD North America (formerly ICO North America) filed applications seeking FCC consent for DISH to acquire DBSD. In August 2011, DISH and TerreStar Networks filed applications seeking FCC consent for DISH to acquire TerreStar. Both DBSD
and TerreStar hold valuable spectrum assets in the 2GHz MSS band, which DISH wishes to use for mobile broadband services.

In May 2011, Global Crossing and Level 3 Communications – both providers of wireline communications services and Internet ‘backbone’ connectivity – filed applications seeking FCC consent for Level 3’s acquisition of Global Crossing. The deal has been opposed by certain other providers, and currently is under review.

III TELECOMMUNICATIONS AND INTERNET ACCESS

i Internet and Internet protocol regulation
Thus far, the United States has used a relatively light touch with respect to the regulation of ISPs and BIAPs, relying largely on market forces instead of prescriptive regulation. By many accounts, this ‘hands-off’ approach has contributed to the rapid growth of the US Internet-based sector over the past 15 years. Nevertheless, recent activity at the FCC suggests that it may soon be playing a more active role in the regulation of Internet-based services.

ii Universal service
The Communications Act directs the FCC to take steps to facilitate the universal availability of essential telecommunications services through, among other things, the use of a federal universal service fund (‘USF’). The USF supports various programmes that seek to promote the availability of quality telecommunications services at just, reasonable and affordable rates on a nationwide basis. The USF is funded through contributions from all providers of interstate and international telecommunications and interconnected VoIP services, as well as certain other providers of ‘telecommunications’. Universal service programmes and contribution obligations are administered by the Universal Service Administrative Company (‘USAC’) – an independent legal entity that is subject to the FCC’s oversight.

Among the most significant regulatory changes proposed in the National Broadband Plan is the recommendation that the FCC modify existing ‘universal service’ subsidy programmes to target broadband expansion into areas where the FCC asserts BIAPs would not find it economically viable to provide broadband service, in the absence of this type of financial support. The FCC has proposed to establish a ‘Connect America Fund’ to support the deployment of broadband infrastructure to areas that are currently ‘unserved’, and to phase out legacy universal service support mechanisms in the process. These changes would be coupled with changes to the existing – and exceedingly complex – ‘intercarrier compensation’ scheme by which carriers pay or receive compensation for traffic carried on each others’ networks. Many details remain to be decided – including the methodology used to select the support recipient, whether incumbent providers would receive a funding preference, whether more than one provider in a market would be eligible for funding, whether all technologies would be equally eligible for support, and whether and how the requirement to contribute to the universal service fund would be extended to BIAPs. Regardless of exactly how these questions are resolved, the FCC’s decision to subsidise broadband Internet access services may provide a foundation for the eventual regulation of such services – whether or not supported with universal service funds.
Restrictions on the provision of service

Common carriage

The Communications Act subjects all providers of ‘telecommunications services’ to common carrier regulation (i.e., the duty to provide service to all members of the public, including other carriers, without unreasonable discrimination). ‘Telecommunications services’ are defined to include the provision of ‘telecommunications’ to the public for a fee. ‘Telecommunications’, in turn, is defined to include the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received. Notably, this definition does not encompass the creation or publication of mere ‘content’. Telecommunications carriers tend to be heavily regulated by both the FCC and the state PUCs.

In contrast, ‘information services’ are defined to include the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilising or making available information via telecommunications. These services typically involve what is called a ‘net protocol conversion’ – essentially, a change in the form, structure, or substance of the underlying communication. Providers of ‘information services’ are not subject to common carrier regulation and are traditionally have been lightly regulated at the federal level. State PUC jurisdiction over Internet services is severely circumscribed, as they are considered ‘interstate’ for most purposes.

As communications technologies have continued to evolve, the lines between ‘telecommunications services’ and ‘information services’ have blurred, and the FCC has been slow to classify new service offerings. The FCC thus far has declined to classify VoIP services, creating uncertainty as to which regulations apply at both the federal and state levels. This uncertainty has been exacerbated by the FCC’s attempted use of its ‘ancillary’ authority to extend a number of common carrier-type requirements to such services.

Because the classification of a service is of critical importance in determining the regulations applicable to that service, the reclassification of a service can have significant consequences. The FCC’s treatment of Internet access services provides a vivid illustration of this fact. Broadband Internet access services require, among other things, the transmission of data between an end-user and an ISP, and any number of other individuals or entities. For years, the FCC viewed this transmission capability as a ‘telecommunications service’, and required BIAPs to offer it to competitors on a stand-alone, common carrier basis. However, in a series of orders issued during the 2000s, the FCC reclassified broadband Internet access services as ‘information services’ functionally integrated with a ‘telecommunications’ component, such that BIAPs are no longer required to make the transmission capability available to competitors (unless that capability is offered to the public voluntarily on a non-integrated, stand-alone basis).

More recently, the pendulum has begun to swing in the opposite direction. As noted above, the FCC has attempted to use its ‘ancillary’ authority to impose certain common carrier regulations (e.g., emergency calling (911) and outage reporting requirements, USF contribution obligations) on Internet access services without reclassifying those services as ‘telecommunications services’. While some of these attempts (e.g., with respect to the FCC’s initial ‘net neutrality’ regulations) have been rejected by the courts, the scope of the FCC’s authority over ‘information services’ generally, and Internet access services specifically, remains unclear. Moreover, there are indications that the FCC may attempt to reclassify
certain services that have been treated as ‘information services’ as ‘telecommunications services’ subject to common carrier regulation. If it occurred, such reclassification could provide the FCC with a legal basis upon which to impose ‘net neutrality’ and other regulations on BIAPs. There are some practical and legal challenges associated with engaging in that type of reclassification, but the possibility reflects the belief of some that a ‘hands-off’ approach to the Internet is no longer tenable given the shift from traditional voice networks to broadband networks in many parts of the country.

**Price regulation**

The Communications Act gives the FCC the authority to regulate the rates charged by common carriers in connection with the telecommunications services they provide, and ensure that those rates are ‘just and reasonable’. Prior to the passage of the Telecommunications Act in 1996, rate regulation was accomplished through the filing of tariffs with the FCC and state PUCs. More recently, the FCC has eliminated much of its tariffing regime and instead relied upon market competition (backed by a complaint mechanism) to ensure that rates are ‘just and reasonable’. Notably, the FCC’s authority to regulate rates does not extend to ‘information services’ – including Internet access services.

**Net neutrality**

In recent years, one of the most significant policy debates at the FCC has focused on an ‘open Internet policy’ or ‘net neutrality’. Although the meaning of ‘net neutrality’ is itself a subject of debate, net neutrality advocates generally aim to constrain the rights of broadband network providers to block, filter or prioritise lawful Internet applications, websites and content.

The FCC’s direct involvement with net neutrality policy began in 2005 with the issuance of its Broadband Policy Statement. Although the FCC’s authority under the Communications Act to regulate the Internet was not clearly articulated, the Broadband Policy Statement expressed four principles that the FCC intended to preserve the ‘open’ nature of the Internet for consumers, without discouraging broadband deployment by network operators. The FCC stated that consumers are entitled to (1) gain access to the lawful Internet content of their choice; (2) run applications and use services of their choice, subject to the needs of law enforcement; (3) connect their choice of legal devices that do not harm the network; and (4) benefit from competition among network providers, application and service providers, and content providers, all subject to a service provider’s right to engage in ‘reasonable network management’.

In 2008, the FCC ruled that Comcast, the largest US CATV company, violated the Broadband Policy Statement by inhibiting users of its high-speed Internet service from using BitTorrent and other file-sharing software – a practice Comcast claimed was a type of ‘reasonable network management’ designed to block pirated content and alleviate network congestion. Comcast appealed this decision, arguing, among other things, that the FCC lacked the statutory authority to adopt or enforce net neutrality requirements. In early 2010, the US Court of Appeals for the District of Columbia Circuit agreed with Comcast and vacated the FCC’s order. In doing so, the court rejected the FCC’s attempt to rely on its ‘ancillary’ authority as a basis for its enforcement of the Broadband Policy Statement against Comcast, insofar as the FCC had failed to identify a source for such authority in the Communications Act.
In December 2010, the FCC adopted new rules, applicable only to ‘mass-market retail services’, that would:

\( a \) require broadband providers to disclose the network management practices, performance characteristics, and terms and conditions of their broadband services;

\( b \) prohibit fixed broadband providers from blocking lawful content, applications, services, or non-harmful devices;

\( c \) prohibit mobile broadband providers from blocking lawful websites, or applications that compete with their voice or video telephony services; and

\( d \) prohibit fixed broadband providers from unreasonably discriminating in transmitting lawful network traffic.

Although the FCC’s jurisdictional analysis is not entirely clear, it appears to have relied upon some combination of explicit and ‘ancillary’ authority as the basis for these new rules. These rules have not yet taken effect (pending the completion of certain procedural steps by the FCC), but almost certainly will be appealed once they do.

**Network access**

If the FCC’s net neutrality rules are ultimately upheld, the FCC still will need to resolve what tools BIAPs may use to ‘reasonably’ manage their networks (e.g., to address network congestion) and whether BIAPs may negotiate private agreements to offer ‘managed services’ and other ‘special arrangements’ that prioritise some types of traffic over others. BIAPs seek the right to charge a premium to high-volume users that threaten to slow transmission speeds for others and cause network congestion. The FCC consistently has acknowledged that ‘open Internet’ rights only are required for lawful uses of the Internet and lawful content. It remains to be seen how much the FCC’s net neutrality rules will constrain the ability of network operators to police their own networks.

**iv Security**

**US regulatory approach to emergency preparedness**

Because US commercial communications networks are privately owned, the FCC’s role in ensuring emergency preparedness primarily is one of gathering and disseminating information and coordinating among different governmental agencies. For more than 15 years, the FCC also has required facilities-based telecommunications service providers to participate in industry-run working groups focused on developing best practices to ensure network reliability, to report network outages, and to be prepared to restore network services as rapidly as possible in the event of an outage. The recommendations of this group do not have the binding force of law, but have played an important role in shaping industry practice and have prompted some limited FCC rulemaking activity. For example, FCC rules now require all wireline and wireless telecommunications service providers to maintain on site a back-up power source (typically, a generator) capable of keeping networks functioning for a minimum number of hours. In addition, under the Telecommunications Service Priority (‘TSP’) programme, service providers must afford priority service to federal, state and local governments and other critical institutions.
The FCC also is responsible for the emergency preparedness of US network operators, the radiofrequency spectrum needs of public safety ‘first responders’ (police, fire, ambulance and emergency medical teams), and coordination among network operators and various governmental organisations to address cyber-security concerns. Much of this activity has focused on ensuring adequate spectrum for public safety users, and ensuring the interoperability of different public safety networks. The FCC recently proposed to create a ‘nationwide interoperable public safety broadband wireless network’, funded in part through a national grant programme, to permit first responders to communicate with one another when other networks are inoperable. The FCC also is examining ways to update the Emergency Alert System (used to distribute critical messages in times of emergency) and expand it to include wireless service providers, in addition to broadcasters and cable operators.

The Communications Assistance for Law Enforcement Act
The Communications Assistance for Law Enforcement Act (‘CALEA’) requires ‘telecommunications carriers’ to implement specific capabilities in their networks to permit law enforcement agencies to intercept call identifying information and call content pursuant to a lawful authorisation. For this purpose, the term ‘telecommunications carriers’ is defined broadly to include facilities-based BIAPs and interconnected VoIP providers. CALEA establishes both minimum capacity requirements and capability requirements. CALEA does not specify the means by which providers must comply with these capability requirements, but creates a safe harbour for carriers that implement industry standards. CALEA does not grant law enforcement agencies any surveillance authority beyond what otherwise exists under US law.

Cybersecurity
US cybersecurity policy following the completion of the federal government’s Cyberspace Policy Review has sought to create or enhance shared situational awareness of network vulnerabilities, threats, and events and the ability to act quickly to reduce current vulnerabilities and prevent intrusions; enhance US counterintelligence capabilities and increase the security of the supply chain for key information technologies; and strengthen the future cybersecurity environment by expanding cyber education, coordinating and redirecting research and development efforts, and working to define and develop strategies to deter hostile or malicious activity in cyberspace. Consistent with these goals, the FCC has explained that one of its core objectives is ‘to strengthen the protection of critical communications infrastructure’. In August 2010, the FCC proposed development of a two-year plan to address ‘vulnerabilities to communications networks or end-users and to develop countermeasures and solutions in preparation for, and response to, cyber threats and attacks’ in coordination with other US federal agencies such as the Department of Homeland Security, and the Federal Bureau of Investigation.

Online protections for children
The Children’s Online Privacy Protection Act of 1998 (‘COPPA’) restricts the ability of website operators to collect personal information from children under 13 years of age. The type of ‘verifiable parental consent’ that is required before collecting and using information provided by children under 13 is based upon a ‘sliding scale’ set forth in a FTC regulation
that takes into account the manner in which the information is being collected and the uses to which the information will be put. While children under 13 can legally give out personal information with their parents’ permission, many websites altogether disallow underage children from using their services due to the regulatory burdens involved.

**Protection of personal data and privacy**

The Communications Act protects the privacy of ‘customer proprietary network information’, which includes the date, time, duration and location of a call, type of service used, and other details derived from the use of a telecommunications service. US law also protects the contents of any telecommunications message from eavesdropping, recording, use or disclosure by a third party without a user’s consent. Users of online services enjoy similar protection from eavesdropping or disclosure of their communications. Exceptions apply where access to, or use or disclosure of such information is necessary for law enforcement, which in most cases requires prior approval by a judge. In addition, the NTIA has formed an Internet Policy Task Force to conduct ‘a comprehensive review of the nexus between privacy policy and innovation in the Internet economy’. Already, the Task Force has recommended the adoption of voluntary codes of conduct for service providers, content providers, and advertisers, and raised the possibility of providing the FTC with expanded authority to regulate Internet privacy matters.

**IV SPECTRUM POLICY**

i Flexible spectrum use

In recent decades, the FCC increasingly has adopted a flexible approach to defining the uses to which a particular radiofrequency band may be put, or the optimal scope of licence to meet their business needs. For example, the FCC has granted many licensees (but not broadcasters) flexibility to redefine their own service territory, dividing or combining geographically bounded licences, and to subdivide their assigned spectrum and sell or lease a portion to another user. The FCC also has adopted more fluid service definitions, for example, permitting fixed and mobile operations, or terrestrial and satellite operations, in the same band.

The FCC has been examining ways to increase flexibility and efficiency in the use of available spectrum resources. It has recognised that one key failing of its spectrum policy is that administrative rigidities historically have prevented more efficient use of this spectrum resources. As a result, the FCC’s spectrum policy has evolved towards more flexible and market-oriented regulatory models.

For example, in order to facilitate the development of secondary markets in spectrum usage rights involving terrestrial radiofrequency-based services, the FCC has adopted rules to facilitate two types of leasing arrangements: a ‘spectrum manager’ lease, in which a lessee is permitted to use spectrum subject to the oversight and control of the initial licensee; and a ‘de facto transfer’ lease, in which the lessee assumes many of the obligations of a licensee, and exercises control over its own spectrum operations. The FCC also has examined ways to facilitate unlicensed use of certain spectrum bands, provided that such use does not interfere with licensed operations (if any) in those bands. Among other things, the FCC has adopted rules permitting certain devices to operate
on a secondary, unlicensed basis in unused broadcast television spectrum, also known as ‘white spaces’.

ii  Broadband and next-generation mobile spectrum use
A significant focus of the National Broadband Plan is encouraging the growth of mobile broadband networks, including through access to additional spectrum. The plan recommends allocation of at least 500MHz of spectrum for this purpose. In the past year, the FCC has scheduled auctions of additional spectrum in the ‘AWS’ and 700MHz bands – which can be used for mobile broadband applications – to take place in 2012.

The FCC also has identified 120MHz of spectrum that could be reallocated from broadcast television to mobile broadband use, and additional spectrum in other services that could be similarly reallocated (e.g., the 2GHz mobile-satellite service band). This could be accomplished using ‘incentive auctions’, in which current licensees would surrender spectrum voluntarily in return for a share of the proceeds from the auction of that spectrum for mobile broadband use. The FCC may not have sufficient authority under the Communications Act to hold such auctions, absent further action by Congress.

iii  Spectrum auctions and fees
Where spectrum is to be assigned to an individual licensee, and more than one party applies to use such spectrum (i.e., mutually exclusive applications are received by the FCC), the FCC may choose from several mechanisms under the Communications Act by which to designate the ‘winning’ licensee. Most new spectrum assigned since 1993 has been licensed through the use of competitive bidding (i.e., spectrum auctions). The statute excludes certain specific types of spectrum licences (international satellite, public safety, non-commercial broadcast, etc.) from the scope of the FCC’s auction authority. The FCC has completed or scheduled over 90 radiofrequency spectrum auctions to date. Proceeds from the auctions go to the US Treasury.

V  MEDIA

i  Regulation of media distribution outlets generally
The regulation of media distribution outlets and content varies depending on the business model and technology being used. As previously noted, Internet-based content delivery is very lightly regulated in the US. More traditional media outlets historically have been regulated more heavily by the FCC.

Regulation of content and content providers
The First Amendment to the US Constitution guarantees the freedom of speech, and sharply limits the ability of the government to regulate the content of a broadcaster’s programming, or content providers directly. Several decades ago, the courts recognised the FCC’s authority to prohibit ‘indecent’ programming by terrestrial broadcasters, based on the government’s interest in ensuring that scarce spectrum rights are used in a manner that serves the public interest, and the unique pervasiveness of broadcast media in lives of Americans and their children. It is unclear whether the FCC’s rules remain constitutional in today’s media-rich market.
In recent years, the FCC has fined stations that aired ‘fleeting expletives’ (incidental words or gestures that are broadcast despite the reasonable precautions taken by the licensee to avoid indecent broadcasting). In July 2010, the US Court of Appeals for the Second Circuit rejected this policy as unconstitutionally vague and overly broad. In June 2011, the US Supreme Court agreed to review the case on appeal. The court’s eventual decision could have dramatic implications for media regulation in the United States.

Terrestrial broadcasting
Television and radio stations broadcasting video content for free to listeners and viewers via terrestrial radiofrequency spectrum are subject to extensive regulation by the FCC, which has exclusive licensing authority for such stations in the United States. Among other things, the FCC has adopted detailed technical rules governing this type of broadcaster, restricted their ability to air ‘indecent’ or ‘obscene’ programming, imposed political broadcasting and other ‘public interest’ obligations on them, and adopted multiple ownership restrictions. These regulations are largely premised on the idea that radiofrequency spectrum is a scarce resource, and thus the FCC should promote localism, diversity of ownership, and service in the public interest. The FCC also tends to apply the foreign ownership restrictions discussed above most rigidly to over-the-air broadcast services.

Subscription media
Entities providing electronic media services by subscription – CATV, direct-broadcast satellite (‘DBS’) service, subscription radio, or even subscription over-the-air TV stations – generally are subject to less restrictive content regulation than terrestrial ‘free over-the-air’ broadcasters (‘obscene’ material is prohibited, but not material that is merely ‘indecent’). Because subscribers pay for their service, by definition, arguments that they must be protected from unwittingly accessing ‘indecent’ content are less convincing. Subscription satellite radio providers and multichannel video programming distributors, such as DBS and cable TV providers, remain subject to FCC regulation with respect to their use of radio frequency spectrum and certain other matters. Moreover, terrestrial CATV operators also are subject to franchising by state or local authorities for the use of public rights-of-way.

ii Digital switchover
In 1996, Congress authorised the distribution of an additional terrestrial broadcast channel to each terrestrial broadcast TV station licensee for digital broadcasting, with the understanding that existing analogue broadcasting channels would be surrendered and reallocated for other users following a reasonable transition. Congress subsequently established 12 June, 2009 as the last day for full-power TV stations in the US to broadcast in analogue. Since that date, all full-power TV stations have been transmitting in digital only.

The reallocation of the spectrum thus recaptured from the analogue broadcast service remains a high priority of the FCC, which has stated its intention to maximise the availability of spectrum for broadband communications (such as Internet access) as well as to set aside a band of spectrum for public safety use. Notably, the compression facilitated by digital transmission allows broadcasters to transmit in multiple streams,
or repurpose a portion of their allocated spectrum for non-broadcast use. As previously discussed, the FCC currently is considering whether and how to reclaim some of this spectrum for mobile broadband use, through ‘incentive auctions’ or other mechanisms.

iii Internet-delivered video content

The regulatory status of Internet-delivered video content turns in part on whether it can be considered ‘video programming’ under the Communications Act. This term encompasses ‘programming provided by, or generally considered comparable to programming provided by, a television broadcast station’. Much online video content does not fall into this category, and as such lies outside of the FCC’s jurisdiction.

Also significant is the manner and form in which ‘video programming’ is delivered to the viewer. For example, ‘video programming’ may be subject to minimal regulation if it is incorporated into an ‘information service’ by virtue of the use of the Internet or other broadband technologies as a delivery mechanisms. Moreover, the FCC also has identified a category of ‘interactive television’ services – defined as ‘a service that supports subscriber-initiated choices or actions that are related to one or more video programming streams’ – but it has not decided what requirements, if any, should apply to such services.

Notwithstanding general uncertainty with respect to the regulatory status of Internet-delivered video content, IPTV services delivered by telecommunications companies have been subject to franchising as ‘cable’ systems under some state and local requirements. In order to expedite competitive entry into the IPTV market, to facilitate competition to entrenched cable TV operators, several states have adopted state-wide franchising, and preempted separate approval requirements in individual municipalities. The FCC encourages rapid approval of competitive franchising requests and has indicated that it may preempt states that do not promptly act on such requests.

iv Mobile services

Consumer demand for access to audio and video programming through mobile platforms is one of the primary drivers of increased demand for mobile broadband access generally. As noted above, the National Broadband Plan aims to free additional spectrum resources for such services. The advent of these services, many of which would not use ‘broadcast’ spectrum, reflects increasing convergence in the communications industry, and could lead to increased pressure to reconcile regulatory frameworks that treat similar services differently.

VI CONCLUSIONS AND OUTLOOK

The implementation of the National Broadband Plan will continue to be the driving force in US communications regulation for the foreseeable future. In doing so, the FCC is likely to continue its efforts to repurpose certain spectrum for mobile broadband use. This approach is likely to generate conflict between wireless service providers and incumbents. The FCC will need to reconcile these competing interests, while deciding whether and how to ensure that incumbents are compensated for the value of their lost spectrum assets.

Universal service and intercarrier compensation reform is likely to occupy both the FCC and Congress over the coming year. In implementing reform, the FCC will
need to balance a number of competing policy interests within a heavily politicised environment. Regardless of how the FCC moves forward, there will be winners and losers. For this reason, and given the amount of money at stake, these issues almost inevitably will occupy the courts as well.

Looming over the horizon, the possibility remains that Congress will substantially modify the FCC’s authority with respect to broadband services through a significant amendment (or even a rewrite) of the Communications Act. Such action could provide the FCC with the authority that it needs to regulate the provision of Internet access services, while shoring up the unsure foundation of existing regulations (e.g., of net neutrality and VoIP services). Even in the absence of such action, the FCC is likely to attempt to expand the scope of its authority to regulate such services – at least until that attempt is affirmatively checked by Congress or the courts.
Appendix 1

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Mr Janka has served as a United States delegate to an ITU World Radio-communication Conference in Geneva, and as a law clerk to the Honorable Cynthia Holcomb Hall, United States Court of Appeals for the Ninth Circuit. Mr Janka holds a JD degree from the University of California at Los Angeles School of Law, where he graduated as a member of the Order of the Coif, and an AB degree from Duke University, where he graduated *magna cum laude*.

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