The Practice Group

The Participants:

Antoinette Cook-Bush¹
Jeffrey P. Cunard²
Robert L. Hoegle³
William S. Reyner, Jr.⁴
Melodie A. Virtue⁵
R. Clark Wadlow, Moderator⁶

The Event:

The Practice Group is a concept developed in honor of the centennial year of the Columbus School of Law at The Catholic University of America. The purpose of this first-annual event was to give six expert communications practitioners from the Washington metropolitan area the opportunity to discuss current issues in the practice of communications law in a relaxed, closed-door setting. The event took place over dinner on March 11, 1998 at The University Club, 1135 16th Street, Northwest, in Washington, DC. The questions asked were written by staff members of the CommLaw Conspectus, with revisions by the moderator, R. Clark Wadlow. Professor Harvey L. Zuckman, faculty advisor to CommLaw Conspectus, was also in attendance. The dinner began at 6:30 p.m., with the discussion commencing at 7:40 p.m.

The session was opened by Christopher Boam, Editor-in-Chief of the CommLaw Conspectus.

MR. BOAM: I would like to thank all of you for coming. Again, the editorial board of the CommLaw Conspectus is thrilled that you are able to embark on this new project with us. The Practice Group was a concept that developed over the summer and we were lucky to have such a great response from Washington area practitioners and enthusiastic student members of the Communications Law Institute at Catholic University to draft questions for you this evening. I hope that each of you get as much out of this discussion tonight as I'm sure our readers will.

MR. WADLOW: And thank you for inviting us.

I'd like to thank everybody else for being here as well. I guess we should just jump right in and kick off the discussion. Why don't we start with the '96 Act which last month had its second birthday. It's now two years old. At the time it was adopted, it was heralded as the great rewrite of the '34 Act. The question I'd like to throw out for the National Law Center at Georgetown University in 1977, where he graduated Phi Beta Kappa.

4 Mr. Reyner is a partner in the Washington, DC office of Hogan & Hartson, L.L.P. and provides legal services in the communications, commercial transactions and sports and entertainment law practice areas. He received his B.A. from Yale University in 1967 and his LL.B. from Yale Law School in 1970.

5 Ms. Virtue is a member with the law firm of Haley Bader & Potts P.L.C. in Arlington, Virginia, providing legal services to companies involved in new and developing technologies, with particular emphasis on all phases of the communications industry. She joined the firm in 1982 after receiving her education at the Washington College of Law of American University (J.D., 1982) and George Washington University (B.A., Public Affairs, With Distinction, 1979).

6 Mr. Wadlow is a partner in Sidley & Austin in Washington, DC. He has practiced communications law since 1972 and is the current President of the Federal Communications Bar Association. He graduated magna cum laude from Dartmouth College and received his J.D. from Harvard University in 1971, where he graduated cum laude, Phi Beta Kappa. Mr. Wadlow also served as law clerk to Chief Justice George F. Boney, Alaska Supreme Court and was adjunct professor at the Columbus School of Law, Catholic University of America from 1982-1987.

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² Mr. Cunard practices in the area of on-line services, intellectual property and transactions in and regulation of the telecommunications sector. He is a partner in the Washington, DC office of Debevoise & Plimpton, which has its principal office in New York, European offices in Paris, London, Moscow and Budapest and an office in Hong Kong. He graduated summa cum laude in English and Political Science from the University of California at Los Angeles in 1977 and received a J.D. in 1980 from the Yale Law School, where he was an Editor of the Yale Law Journal. After graduation from law school, he clerked for U.S. District Judge Wm. Matthew Byrne, Jr., in Los Angeles, California. He speaks widely on and is the author of and a contributor to various articles on communications law and intellectual property, a contributor to The Future of Software (1995), published by MIT Press, and is a co-author of two books on international telecommunications law, From Telecommunications to Electronic Services (1986) and The Telecom Mosaic (1988), both published by Butterworths.

³ Mr. Hoegle is a partner in the Washington, DC office of Carter, Ledyard & Milburn and practices administrative law with a specialization in telecommunications. He received his A.B. from Georgetown University in 1974 and his J.D. from

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a starter is: Has it been a success? Has it realized its vision of shifting the paradigm from regulation to competition?

MS. VIRTUE: It’s way too soon to tell. Everyone thought it was going to be the great panacea, but first you have to get through all of these rule makings the FCC has to implement and that’s going to take at least a year more. And, it will take additional time for people to develop business ventures. So, I think it’s really too soon to tell.

MR. REYNER: But wouldn’t you agree it’s been disappointing?

MS. VIRTUE: Oh, absolutely, except on the radio side.

MR. WADLOW: What do you think the disappointments have been, Bill? What do you specifically have in mind?

MR. REYNER: Well, you know, when the Act was being debated, the cable industry was trying to get into the telephone marketplace. The telephone industry was also trying to get into cable and there was the widespread idea that everyone was going to start competing with other businesses through expansion of their own businesses, and it obviously hasn’t happened.

Now, to my way of thinking, one of the primary reasons is that it was foolish to think that anyone would go out and spend the money that it would cost in today’s world to duplicate local networks, whether it was the telephone company trying to duplicate the cable network or vice versa. It just didn’t make sense. It still doesn’t make sense. Maybe years from now it will happen. I happen to be a pessimist about it though.

Today you do see some duplication of facilities for the business customer, but can it ever reach out to the residential customer? And, what we see is a lot of retrenching, obviously some of these companies are not serving the residential market. I think the mistake was not trying to find a way to—or failing to find a way to—encourage the providers to build additional facilities. Everything’s premised now on the local exchange carriers making their facilities available and, of course, that’s what we have all the litigation about. It’s beyond my knowledge as to what is, you know, really cost based, which kind of methodology should be used, and whether it’s going to make sense, but I think that’s the real roadblock. There wasn’t enough in that Act to create real choices for consumers and possibilities of multiple providers using different networks.

MR. CUNARD: I think it’s fundamentally a problem of the content business really being quite different from the carrier business in terms of cost structure. Acquiring program is a very different sort of business than carrying information delivered by someone else. And, neither the cable industry nor the telephone industry has particular experience or finesse in moving into the other’s lines of business. I think it is a bit disappointing, but only if you believe the “bill of goods” that the industry was selling at the time. It’s not as if this was a vision that was constructed out of whole cloth by Congress and policy makers, but they were, as Bill’s suggesting, reacting to arguments made to them that each should be able to get into the other’s business. Indeed those arguments were made all the way up to the Supreme Court. So I think it is too early to tell, but I think it’s going to be quite a while before we see convergence take place here.

MS. COOK-BUSH: Unfortunately, I think Congress is not a good predictor. When I worked in the Senate, Congress enacted the Cable Act of ’92. And at the time of the Cable Act of ’84, Congress anticipated that regulation was going to be unnecessary because of imminent competition from the phone companies which did not come. Then in the Cable Act of ’92, we were going to phase out cable regulation because there was going to be competition from the phone companies, and it’s still not materialized on a significant scale. On the other hand, the Cable Act of ’92 access to programming provisions have given a big boost to the DBS industry and some of the other competitors to the cable industry. So you have seen some competition. While it’s still on a smaller scale than I think people would like, it’s from a new technology that was not the primary focus of the legislation. And, I think the same thing is true with the ’96 Act: that Congress was misdirected in its focus, and that local competition, once again, is coming from a new technology, in this case from wireless competitors, not the existing cable or long distance companies.

It is going to be wireless companies like Telisent and Windstar who are going to provide facilities-based competition to the RBOCs. They, have negotiated hundreds of interconnection
agreements with RBOCs all over the country and are preparing to provide wireless local service along with the possibility of PCS and cellular.

And then we also have an unlimited number of satellite systems in the works. Any one of those systems could be another source of competition. I think that Congress has proven to be a very bad—and even the FCC to some extent—predictor of where competition is going to come from.

MR. WADLOW: Do you think Congress was surprised, disappointed or upset that one of the reactions to the Act has been mergers among carriers who are already in a similar business, like the Bell Atlantic/Nynex merger for instance? We've gone from seven RBOCs to five and there may be some mergers among the long distance carriers. Do you think that's inconsistent with what Congress foresaw?

MS. COOK-BUSH: Well, Congress may not have expected consolidation on as large a scale, but I think there are a lot of us in private practice who fully expected this when we saw the Act. There certainly were many predictions, for example, that the CLECs were going to be gobbled up, and for the most part, they have all been gobbled up by bigger players. I also think Congress did not expect it to happen so quickly. I think they were particularly shocked by what happened in the radio industry.

MR. HOEGLE: I would not discount Melodie's initial observation. To call the '96 Telecom Act a failure at this point in time is premature. Having said that, though, I think that there is some substance to Bill's comments as well. It seems to me that, before a telephone company builds a new infrastructure which essentially is what would be necessary for broadband video, it is going to maximize the return from its existing infrastructure. And the way to do that is to provide Inter-LATA long distance service. Long distance service is the initial substantial revenue opportunity, and that is where the fighting has focused in terms of implementing regulations and interpreting the statute.

There is a limit to how much you can expect a telephone company to pursue effectively in the near term in order to go after both the long distance business in a big way, and essentially, the cable television business simultaneously. That is expecting quite a bit when the game plan and the regulations are not in place.

To the extent that a telephone company has pursued cable, it is interesting that Ameritech has been building cable systems rather than an infrastructure to be used for dual means.

MR. WADLOW: You mean for both telephone and cable?

MR. HOEGLE: Yes.

MR. WADLOW: What about the aspect of the Act that it was a deal, at least in part, among the affected industries and still the RBOCs then took it to court before Judge Kendall in the Northern District of Texas, in Wichita Falls. What do you think of a party to the agreement now challenging the conditions as a Bill of Attainder? Is that going to have a long-term impact in terms of Congress feeling like that industry went back on its word? Any thoughts on that?

MS. VIRTUE: I think it was a bad decision.

MS. COOK-BUSH: To appeal?

MS. VIRTUE: Well, no. The decision that it was a Bill of Attainder is not a good decision because the Section 271 provisions codified a judicial decree. So, it wasn't as though Congress was trying to legislate in an area that was reserved to the judiciary, because the provisions were based on the modified final judgment. And, it's not like the RBOCs were being penalized in the long-term because they had the ability to get out of it if they complied with the provisions. As far as my understanding of Bill of Attainder case law is, if there's an escape provision, then it's not a Bill of Attainder. So, I think it was a bad decision.

MR. WADLOW: What about the tactical decision to pursue it in the first place—the tactical decision by the RBOCs to pursue the case in Bill of Attainder form?

MS. COOK-BUSH: While some Members of Congress may feel that there was a pact that was broken, they're all big boys and girls and this is how the game is played.

MR. CUNARD: I think the analysis of the decision is probably a correct one, but I believe that it's essentially a blip on the radar screen. Even if this decision were sustained, the FCC is not going to be allowing, in my view, the RBOCs into the inter-LATA market without going through a fairly thorough regulatory process which would involve a fairly substantial input from others in the Administration. So, I don't think the practical consequence of this is that you would immediately see inter-LATA service originating out of an RBOC's
area. And, as we look at this over time, the decision won't have much of a practical effect.

MR. WADLOW: I think Melodie would predict that it will be overturned on appeal, wouldn't you?

MS. VIRTUE: I would think so.

MR. WADLOW: Anybody feel differently about it? Was the decision a correct one? Well, what about the impact of the '96 Act on the practice of communications law? Is the practice noticeably different today from what it was like in '95 as a result of the '96 act?

MR. REYNER: I'm going to take a swing at that. That's an easy one. It's phenomenally different almost anywhere you look. On the radio side you've had tremendous consolidation so that there are fewer clients, and many lawyers chasing those clients' different issues, primarily dealing with competition levels that are being looked at by the Justice Department within these local markets.

In terms of Telecom, the entire regulatory process that has sprung up, that was supposed to bring competition, has brought obviously a new wave of regulation. The litigation surrounding Section 271 and related matters is all very, very new. Kind of everywhere I look I see, if you will, different regulation, more regulation, new issues that I think are changing the practice quite a bit. I think you see antitrust law playing a much bigger role than at least I had ever seen in my practice.

MS. COOK-BUSH: I would agree with everything Bill said. And, I would also add to that that the Act has created an expanded practice at the state level. The state PUCs oversee the negotiation of interconnection agreements and the arbitration process and the Section 251 pricing issues. The Act has created a great demand for local lawyers to handle these issues.

MR. CUNARD: Notwithstanding what I said earlier, the Act has opened up certain market opportunities which, of course, creates opportunities for new clients. That is to say, there's investment money out there to fund some small entrants. They give lawyers who are starting out chances to nurture essentially very small entrants who they hope will grow large, as well as those of us in more established practices to be representing folks who want to acquire some of those smaller entrants.

The other thing that it has done, I think, has made some of the business issue conflicts a little tougher. That is to say, prior to the Act, I think it was often the case that you'd be pretty sure that if you were representing a telephone company, then you were doing telephone work, and maybe you could also represent a cable company, and be doing cable work. Now, you're seeing — at least in some firms — folks who are concerned about a client that had been traditionally in one sector looking at or actually playing in another sector: people are focused on the conflicts that that representation might raise.

MS. COOK-BUSH: I also find that clients are much more willing to use a variety of lawyers. Whereas you used to do all the work for a particular company, now you may do the broadcast work and another firm handles labor issues. You find you're working with many other lawyers.

MR. REYNER: You're sure that's not just happening at Skadden?

MS. COOK-BUSH: Ha, ha, I don't think so. You find that clients are looking for people with expertise in particular areas. If they have an antitrust issue, they're not willing to just take any antitrust lawyer that you may dish up. You've got to provide somebody with real expertise, otherwise they'll look at another firm.

MR. REYNER: Is that another way of saying that we're becoming more specialized within the communications practice area?

MS. COOK-BUSH: Yes; I think that's right.

MR. WADLOW: They want expertise.

MR. HOEGLE: Well, particularly when the law is changing as it has between the '92 Cable Act and the '96 Telecom Act, you are not just talking about expertise, you are talking about predictive judgments because the answer may not be out there in the books. The question may not have been decided yet. What businesses are facing is a potential application of a statute and judgments presenting a mix of legal and business issues. These kinds of questions necessarily direct inquiries to more senior and experienced counsel, and also perhaps more specialized counsel.

Specialization is there in part because I have en-
countered the experience where you are not talking about a communications lawyer. You are not talking about a cable television lawyer. You are talking about a cable television distribution lawyer versus a cable television programming lawyer.

MR. CUNARD: It’s certainly off the point, but the country was paying attention to the 1996 Act, and the country has paid attention to communications and communications law issues ever since then. Obviously we’ve all been paying attention to these issues for decades in some cases.

But now, it’s easier to attract the best law students to this practice area. You have lots of clients who weren’t in communications previously looking at communications, either at the margins or very seriously. Frankly, we get a lot more respect within our firms, those of us who are in large general practice firms. People are really sitting up and taking notice and saying this is a core, important area for the country and for the legal practice. I think that is one of the successes, from my standpoint, of the ’96 Act.

MS. COOK-BUSH: It’s hard to find a firm now that’s not developing a communications practice if they don’t already have one.

MR. CUNARD: That’s right.

MR. WADLOW: Let’s try to focus in on an industry or a cluster of industries and talk about some issues. I’d like to start with the broadcasting/satellite/video industry generally. We talked a little bit about competition a few minutes ago and, Bob, I know you do a lot in the Satellite Home Viewer’s Act area. What sort of issues are people facing there and what kind of impact are they having?

MR. HOEGLE: Well, as you know, the focus of my attention has been on the white area dispute. That dispute is being generated basically by competition in some sense between three technologies. You have the over-the-air broadcaster that wants to protect a distribution system and advertising revenues associated with that. You have the DBS or C-band delivery mechanism bringing in potentially distant signals which would siphon away viewers from the local affiliate and the advertising dollars associated with that. But you also have pressure on that DBS operator to provide some type of network signal in order to compete more effectively with the cable television operator.

The white area dispute is basically centered around the copyright law which provides that you cannot bring a distant signal to a residential household except where that residential household cannot receive the local network signal. The standard for reception is a very esoteric one — to receive a grade B intensity signal through the use of the conventional roof top antenna, and no one around this table, much less the normal viewer, would be able to determine whether or not they can do that.

MR. WADLOW: So this really brings the satellite industry, the cable industry and the broadcasting industry all into conflict, doesn’t it?

MR. HOEGLE: I think certainly to some extent it does; yes.

MR. WADLOW: Is this an area where the Commission can step in and play a greater role, or is this Congressional or copyright territory?

MS. COOK-BUSH: I think it’s going to be a long time coming before Congress resolves this issue.

MR. REYNER: It’s a good example, though, of kind of what we face. Can anyone here explain to me the public interest rationale for not allowing a satellite provider to transmit a local signal solely into an area that is served by that signal in the same exact manner that a cable system does? And yet, that is the big issue before Congress. It’s very unlikely that you will see it go anywhere very quickly.

MR. HOEGLE: I think the key words in your response there were “in the same exact manner.” What you are talking about there is the extent to which requirements such as ‘must carry’ and syndicated exclusivity should apply to satellite delivery of local into local signals — concepts like that. My understanding is that the NAB, for example, would be fully supportive of local into local in the same manner.

MS. VIRTUE: I know that’s the issue for some of our clients—if they’re in the 100-plus markets. I’m not sure that the technology is there yet, and I’m not sure when it will be developing. The problem they’re facing is when they’re out in a rural area, they’re trying to serve their areas with translators over the air and then those people who can get a fuzzy picture off the air can subscribe to the DBS service and get a really good picture. But, the DBS system is perhaps transmitting the networks out of Denver; thus, that local affili-
ate in Montana isn’t going to have the viewers. This is certainly a real pocketbook issue for them.

Until we get to the point where DBS or the satellite services are capable of feeding true local into local, it’s going to be a real problem for these providers. I’m not sure that that’s possible because if you look at the top 200 markets times, say, the top four networks in every market, and we do the math, it’s close to 2,000.

MR. WADLOW: That’s a lot of transponders. With digital it’s about one-third or one-sixth of the number that existed before, but it’s still a lot. What about digital? What about high definition television? Bill, I know you’ve represented clients who have a lot of interest in those developments. What’s the future hold on high definition television?

MR. REYNER: Well, I guarantee you you’ll get different views from me on this. I’ve never been a believer in DTV or high definition television. Maybe it goes back to the years when I was involved in the proceeding of the Commission involving quadraphonic FM sound.

MR. WADLOW: There’s a word that’s fallen out of currency, quadraphonic.

MR. REYNER: Yes, and it was not a great idea. You had four speakers around a room, and if you were seated right in the middle of the room and you had better hearing than I have, you could hear better sound. Of course it went nowhere. And, along comes digital and a lot of people are very excited, but you’re just starting to see some of the problems.

First of all, what are we really going to see on that screen? What are the networks going to use for a transmission technology? As we alluded to earlier, I think you’ll see a lot of the networks just follow up some of the networks using simple 420 interlace format—not really true digital—then they’ll throw in some movies, maybe with 1080 progressive or 720 progressive, but of course, no one will have sets to see them anyway.

As you look at these different formats, one is better than the other to some extent, but the differences are very slight in my view. And so, we have a trade-off in terms of whether you’re going to see a significantly better picture using the full six megahertz, or multiple channels crammed or compressed into the same band with a slightly better main channel. Who knows how all this is going to develop?

Maybe seven to ten years from now, we’ll see a real meaningful difference, but I really am a pessimist. As much as the FCC has pushed so hard to have the larger markets roll DTV out very quickly, I don’t think we’re going to have sets out there. I don’t think we’re going to see people running out to spend the money on the sets when they are available, and I don’t believe that the quality of the enhanced programming coming through the sets will justify those expenditures for some time. This brings me to my chief criticism which is: who is the big beneficiary in all of this? I happen to believe it’s the equipment manufacturers. It will be a tremendous part of our economy for a good number of years, and a lot of money is being spent on it now without a lot of benefit coming in the short-term.

As the years go by and people find different ways to use this spectrum we will see some real differences. But in this haste to push the roll-out forward, we’re just now starting to see some of the problems. UHF people realize they have a real power problem. So, the Commission’s way of fixing that in the reconsideration to the sixth Report and Order that was released last month was to say you can increase power up to 200—I think it was 200 KW or higher—as long as you don’t cause more than two percent interference to any other station.

But the way they did that raises some really significant problems because what they said is, you can go ahead as step one, increase to 200 KW at this time, but no further until there’s been a “significant roll-out of DTV” at which point you can then increase it further. And somebody over there must be thinking there’s a little switch somewhere you flip or a little knob you turn to make this happen and they don’t understand that in many, many, many, cases it will require a new antenna, new transmitter, new facilities. And so, you’re looking at these broadcasters who don’t realize yet that they’re not only going to have to build digital, then they have to build it a few times, and that’s, again, just from doing things too quickly.

And then you come to the problem where someone realizes that now the trial digital operations are causing some interference to medical devices, or that maybe digital notwithstanding the fact that it’s been testing, oh, going back many years in Charlotte really has some modulation
problems and multipath problems and people first thought it was this power problem. But now in the urban environments it's multipath problems, so maybe the modulation isn't right. And I hate to sound terribly pessimistic, but that's a long answer trying to tee up some concerns for the rest of you to take a swing at.

MR. WADLOW: Other thoughts or responses?

MS. VIRTUE: Well, I kind of think the FCC really caved in on the standards issue. The whole industry would have been better served had they come up with a standard that people could build and adhere to. I know that's not real forward thinking because technology changes and improves, but from the roll-out that they're trying to adhere to, it makes it a lot easier if everyone knows what kind of set they're going to need and what they need to build.

I think back to AM radio when they also didn't set a standard, and no standard developed. I would hate to be the person that bought eight track stereo when the cassettes became the thing to have. I'd like to know what I'm buying as a consumer, that it will work. And, not just work for just a year or two, but for some time to come.

MR. WADLOW: Do you think that standards setting is an important role for the FCC?

MS. VIRTUE: Yes. I think they should set standards at least in this area. In not every area is it required or is it necessarily beneficial, but where there's something that is so consumer intensive, like everyone's TV set, they really ought to do it—set the standard.

MR. CUNARD: Do you think they would have been able to establish a standard as between progressive and interlaced?

MS. VIRTUE: Well, it would have been a hard decision for them to make, but no one was really willing to make that decision.

MR. WADLOW: Or even to mandate high definition television or —

MS. VIRTUE: Multichannels, right?

MR. WADLOW: Yes; I guess there is a danger that there's going to be so much variety out there that it won't work at all which is what you're saying, right?

MR. REYNER: Yes; or the costs are going to be prohibitive. I mean, that's part of it. The fact that you've got to build these sets to accept different transmission modes —

MS. VIRTUE: Four or five different transmission modes. And, then when you're talking about multiple channels, that's when you're talking about the multiple standards problem. How many off-air television signals can a particular market support is a whole other question.

MR. WADLOW: Either way the broadcaster is damned because if they have to simulcast digital and analog signals, they create —

MS. VIRTUE: Two different programs; right.

MR. WADLOW: Well, and no new advertising availabilities ("avails"). And if everybody goes to six channels or whatever, they each may have more availas, but the whole market is saturated with availas.

MS. VIRTUE: At the same time.

MR. WADLOW: Yes.

MR. CUNARD: And, the larger question that perhaps everyone's been putting on the table is really, what's the future of the traditional over-the-air terrestrial broadcaster in about 15 or 20 years? As cable moves to digital, it may not have some of the spectrum scarcity problems that Bill talked about.

If you've got direct satellite that goes into white areas and black areas and gray areas and maybe there's must carry and maybe there isn't must carry, what really is the traditional over-the-air broadcaster going to see as his or her niche? It can't deliver the 70 or 150 or 300 signals that Direct TV can deliver.

MS. COOK-BUSH: Ever since I've been practicing law, terrestrial television was on its way out, dead, gone, and, today TV station prices keep going up and up and up.

MR. WADLOW: Certainly our policy makers are afraid that there's always going to be some percentage whether it's 30 percent or whatever who won't subscribe and they shouldn't be disenfranchised. There's also the concern about local news and public affairs. And, certainly I think some of the more successful broadcasters have established that local niche whether it's local sports, local news, whatever. Those that don't establish that niche may not have a future.

MR. REYNER: I've always said I've been lucky to have been practicing in a communications revolution. And revolutions don't last decades, but it seems like we really have been fortunate to have that experience throughout this time period. But right now probably more so—and I do remember, Toni, in the 70s saying, "Oh, cable is going to just
tear television up. What is television going to do?"
And, of course, as you said, one crisis came after
another.

MS. COOK-BUSH: And there was DBS in the
80s that was going to just destroy television, and
television is going strong.

MR. REYNER: Right now television is facing
more problems, more questions, more issues than
I certainly can remember at any time. One of the
realities of today is that the network business is no
longer a good business.

MR. WADLOW: Why do so many people want
to get into it then?

MR. REYNER: I’m talking over-the-air television
networking, namely the four networks plus the
two new networks. Those entry decisions were
made before the business started to change. Just
in the last year, you have seen sports rights costs
go up tremendously. The rights for hit shows like
E.R., as you all noted, went right through the
roof.

If you look at those network companies, you
can see what they make off the network side ver-
sus their owned and operated stations. They just
aren’t making money in network television. And
where is that going to take us? How is that going
to change the model? The network shares have
continued to erode quite significantly and cable’s
share continues to grow.

I was surprised. I’m involved in a television sta-
tion in a local market, and I never really thought
cable television systems being out there com-
peting for local advertising dollars. It is a tremen-
dous part of the business now. And I think I read
today that CTAM was estimating that revenues in
the cable area went up 26 percent last year. It is a
phenomenal growth.

MS. VIRTUE: They’re finally learning how to
sell advertising on cable channels.

MR. REYNER: That’s exactly right. And, in a
recent experience I had, I needed to hire some
local sales people and ended up hiring half of
them from the cable television companies. No
matter where you look, the business is changing.
It doesn’t mean it’s not still a good business, but it
takes a much more nimble broadcaster to take ad-
avantage of those opportunities.

MR. HOEGLE: I think that the strengths and
the concerns which Clark identified a few mo-
ments ago are such that broadcasters have man-
gaged to maintain very effective statutory and regu-
atory protection for their business and
government support for their business using
those strengths and concerns. So, I would not
pronounce them dead quite yet.

MS. COOK-BUSH: What I see as a threat to tel-
evision and cable and direct broadcast satellite as
we know it today is computers. Not so much for
our generation, but our children are used to an
interactive computer environment. This may re-
ally be the impetus for the significant change in
the role of broadcasting.

MR. HOEGLE: The Internet will be the next
phenomenon with the accompanying regulation
to extend Bill’s communications revolution for a
few more years.

MS. VIRTUE: The Internet is going to compete
for viewers and audience share, because not as
many people will be watching TV. They will be
doing something on their computers.

MS. COOK-BUSH: Right.

MR. HOEGLE: Including watching TV.

MS. VIRTUE: Yes, including watching TV.

MR. WADLOW: Well, I heard somebody re-
cently say that the use of the computer and the
use of the television are a very different phenome-
on. That a computer is a sit forward device and
a television is a sit back device and that we want to
use them in different ways.

MS. COOK-BUSH: But the question is: when
you say we, do you mean us here, or our children?

MR. WADLOW: That’s a good question.

MS. COOK-BUSH: Because I think children
have a difference in attitude towards the TV and
computer. I understand that there was recently a
study involving kids where the question was asked:
“Would you rather have your TV or computer?”
And they all said, “my computer.”

MR. CUNARD: And there are some very sub-
stantial players who are betting on this conver-
gence, and I wouldn’t bet against them. There
are folks who are thinking that there will be a
home entertainment unit that will be centered on
the PC, even if the PC may be in a different room.
There are personal computers that have NTSC
outputs. I think interacting with a TV and a PC
are very different experiences. You don’t sit back
with a beer and look at your personal computer.
But when a personal computer can drive a screen
that’s a lot bigger than today’s traditional televi-
sion monitor, and when you can put DVD ROM
drives into computers and have them play on
monitors in the way that DVD players are going to be hooked up to 80-inch television sets, I think convergence is coming. It will be just a matter of time before people don't really distinguish very much between over-the-air television and a Web cast. We see already that conversion in an early phase with products such as Web TV.

MR. WADLOW: Certainly broadcasters are getting into web casting. Look at Web TV. There are broadcasters who have done these digital cities deals with on-line service providers and they seem to be crossing over a great deal.

There is one last area to cover on this broadcasting cluster. Public service obligations, children’s television, free political air time. I think we ought to toss that set of issues around a little bit. The President, in the State of the Union address, called for free political broadcasting time and the Chairman of the FCC came out in favor.

There’s the same Commission that’s looking into public service obligations as they should attach to digital television. Two years ago the Commission increased broadcasters’ kidvid responsibilities. What’s going on here? Are we getting more and more into government regulation of the content of broadcasters, or is there a perception that broadcasters need to do these things as the trade-off for the spectrum?

MS. VIRTUE: I think it’s frightening. I really do. We should be very concerned about the whole content regulation aspect from the First Amendment perspective. I’m not sure that if someone had brought a good appeal of the Children’s Television Act it would have passed Constitutional muster. And now, when we look at these notices of proposed rule making—public service and public interest requirements with special service programming—then you’re really sliding down that slippery slope. We should be concerned about it.

What happened to broadcasters’ discretion and programming diversity? I guess I tend to be more of a first amendment absolutist in this regard and I don’t like what I see. Now, it definitely fuels my business—I profit off of it because that’s what I do in my practice. But as a citizen of the United States, I think we ought to be concerned about government intrusion in this area.

MR. REYNER: It’s hard to understand what’s driving it, at least for me. Looking at it through the digital lens for a second, why should the public interest requirements be different? Basically, broadcasters have six megahertz of spectrum now, they have been providing public services and they are being loaned, if you will, another six megahertz to make this transition to digital. Then they’ve got to give back six megahertz. So, at the end of the day they’re still going to have six megahertz, the same amount as they have now. Why should anyone be asking whether the requirements for digital should be different than for analog?

MS. COOK-BUSH: I’m not going to disagree with you. But, on one hand, broadcasters want must-carry because they are serving the public interest. And on the other hand, they don’t want public interest obligations. And I’ve always felt that it’s a tension that the broadcasters have never been able to resolve.

MR. REYNER: I don’t have a problem with the concept that broadcasters should have public interest obligations. I mean, I think it’s hard to disagree with that. It’s when they are getting to the point of being told how they have to discharge those public interest obligations that it’s become difficult—in other words, do you have to do children’s programming as opposed to elderly programming or as opposed to programming for minorities and on and on. I think that’s where the system really breaks down and causes the kind of concerns that Melodie expressed.

MR. CUNARD: To quote or paraphrase the editorial page of Broadcasting and Cable magazine, which does not leave this issue off the table for more than a week at a time, why haven’t the broadcasters been more aggressive when children’s television regulation or the V-chip comes down the pike?

MS. VIRTUE: Well, it’s because deals have been made. They’re hoping that if they accept this much then that much won’t happen. The thing is, like Tom said earlier, if you’re in this business long enough, it’s only as good as the day that that deal was made because the individuals change. People don’t remember the political pacts that were made. So, once you start accepting fewer First Amendment rights and say well, “I’ll give up this much,” then it’s that much easier to give up that much more on down the line.

MS. COOK-BUSH: I think there’s also another factor. I worked on a Children’s Television Act in 1990 when I was in the Senate, but I also now have
children and I'm glad that there is more programming that my children can watch as a result of the Children's Television Act. I also think that broadcasters recognize that there are a lot of parents out there like me. And that, yes, while they don't like it, to some extent it makes good business sense because people do want programming for their kids to watch, and they want programming that's not just reruns of 30-year-old movies.

MR. WADLOW: But if those social judgments are made, why shouldn't Congress fund children's programming on public television stations? Why mandate that commercial, privately owned broadcasters provide that service?

MS. COOK-BUSH: Well, then I go back to my question from before. Why do we have must carry? What is must carry based on?

MS. VIRTUE: I don't disagree with the concept that a broadcaster is a public trustee and should operate in the public interest, but I don't want anyone from the government being real specific as to what that public interest obligation is. I don't want them to say that I have to have at least three hours a week of educational informational children's programming. We don't know who's going to decide whether a particular show is educational/informational, and we'll get into this issue again when renewals start coming up again for TV. I don't want the government telling me what is educational and what is informational.

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MR. WADLOW: Wait until the government starts to try to say who qualifies for free political time. That will be a hot ticket.

MS. VIRTUE: I think that one is doomed. It has to be doomed. I'm not sure the FCC itself can require free air time.

You look at the '96 Act and there are a lot of unintended things that happened. Likewise, if you require broadcasters to provide two hours of free time to each party or each race or whatever, then are the broadcasters going to sell additional time to candidates? And then, are we still going to have the same provisions for lowest unit charge and equal opportunities?

But if you say, all right, you only have to do your two hours of free time, then you're going to have the political action committees really buy up additional time. Where does that leave individual candidate when there are political action committees that are unrestricted? Then you can justifiably say the political action committees can only buy so much time? Then you've got real First Amendment problems.

MR. HOEGLE: We represent broadcasters, and I share these concerns. I also look at a lot of these issues from the perspective of cable, the other distribution technology. And one of the provisions in the '92 Cable Act was a four to seven percent capacity set aside for DBS operators for educational programming. The cable operator, which is not the beneficiary of any public spectrum has must carry requirements. It has leased access requirements. It faces the authorization of PEG requirements. Channel occupancy limits have been imposed.

It's not as though these are particularly pernicious activities directed at broadcasters. I think this is a problem which cuts across all industries. I understand you started to talk about the difference in degree, but you have also got to look at the difference in what has been appropriated to some extent with some of the other industries.

MR. REYNER: The Commission is the cause of some of these dilemmas. If we go back to the 70s when the Commission had processing guidelines, and if the station had X percent news, public affairs and other nonentertainment programming, the renewal was processed routinely. If the station didn't, it had a problem. I didn't have a problem with that because there was a nice, you know —

MR. WADLOW: Safe harbor.

MR. REYNER: Yes. And if the stations chose to put religion on, news programming or public affairs features, it was their choice. Nobody was telling them what kind of programming to put on. But as long as you came within this pretty large basket of programming, you could choose what you wanted. You knew where the line was. That was fine. Then the Commission decided to do away with that — kind of a backlash to regulation and we went through that cycle. That's kind of where we were when the children's requirements came in 1990, and now we're facing these additional intrusions, if you will, for very specific types of programming. That's where the system breaks down I feel. Tell the broadcasters that they have public interest obligations and let them know what level they have to get to. But, let them choose how they serve those public interest mandates.

MR. HOEGLE: I don't think you'll find any dispute with any viewer around this table.
MR. CUNARD: How sustainable are those regulatory requirements in the long run given, for example, Web casting on the Internet, which is completely free from political broadcasting rules, children's television rules, and now, indecency obligations?

MR. WADLOW: Well, I guess they're all premised on the scarcity doctrine.

MR. CUNARD: Cable is not premised on scarcity, but it has must carry obligations and it has some obligation to adhere to the political broadcasting rules.

MS. COOK-BUSH: Well, nobody thought must carry would survive a Supreme Court challenge because of all the same arguments.

MR. WADLOW: Certainly nobody who attended the oral arguments thought they were going to survive.

MR. CUNARD: Right, except for a few justices.

MS. COOK-BUSH: I think that there would be some sympathy amongst people if Bill's approach of saying what the obligations are came to pass. But I do think it's interesting that people generally feel that broadcasters should have the public interest obligations.

MR. WADLOW: I'd like to spend just the last few minutes we have talking about generally the practice of law in law firms. Not so much just communications law, but questions like: Is there still a meaningful partnership track in law firms? And what's our perception of legal education today and how well prepared are the students that are coming out and joining our law firms. How well prepared are they for the practice of law?

Somebody said earlier, I think it was you, Jeffrey, that the buzz about communications law has meant that we can recruit maybe a higher quality student. What do you think about these other issues?

MR. CUNARD: Well, I didn't mean to suggest that those of us who were students long ago were lower quality. I think we've done very well in attracting excellent students, and I think we can offer them interesting attractive work. Now, the question is, when they come to us, how schooled are they in the work that we actually do as communications lawyers?

Unless they come from Catholic University or some program that is very focused on communications law as a discipline, I don't think they have had specific training in the subject. Nevertheless, we're still looking for people who write well and who speak well; those who have all the traditional skills that your best lawyers have. Then, we can train them in communications sectoral issues over time.

MR. WADLOW: Is it your sense that students are coming out of law school able to write? I mean, able to engage in those generalized skills in an effective way?

MR. CUNARD: Well, it's harder and harder to vie for the best students because there are so many other great law firms going after them. I think we get our fair share, as does every other law firm represented around this table.

MS. COOK-BUSH: The dilemma that we find is that it's hard to keep them. Students come to firms for a couple of years, but especially here, there's much more back and forth into government—the FCC, the Department of Justice, the Hill. The FCC has also been much more successful in attracting very high quality people. I also find that law firms are competing with companies. It used to be that people left the FCC and they came to the law firms. Now they leave the FCC and they can go to any one of the hundred or so companies. I find it's generally a more competitive environment, but I find that we're still getting very high quality students from law school.

MR. WADLOW: Do you think they're leaving for these other opportunities because they see greater professional growth opportunities, or because they feel like they don't stand a reasonable chance to become a partner at the firm?

MS. COOK-BUSH: Well, certainly being at Skadden, Arps I hear that. But on the other hand, we continue to make people partner and continue to make partners. What I do find is that the hours for associates at Skadden are really not that different from other law firms, even though we have a reputation for being much worse. You find that people leave both the FCC and law firms and say that they're going someplace where they think they're going to have a better quality of life. They want to go home in the evenings at an earlier hour than traditional associates do. When I was a young associate, I worked late almost every night, and I wasn't at Skadden, Arps.

MR. CUNARD: It just goes back to the point I was making earlier that there's actually a lot more interesting opportunities in small start-up aggressive companies. It's no longer simply a question
of going to an RBOC. There is a wide spectrum of excellent opportunities.

MS. COOK-BUSH: Even at the RBOC there are interesting non-traditional opportunities.

MR. REYNER: I come at it a little bit differently. From my perspective, the kids who are coming out of law school are as talented or more talented, especially when it comes to computer skills. They go far beyond any skills that I have in that area. Therefore, they can do research better. They are more facile and can complete projects better than associates could years ago and, of course, the computer resources are there to use.

This returns us to something we were talking about earlier. The practice has become so specialized within itself that it's not reasonable to expect a young lawyer to come into a communications group, do a broadcast assignment one day, go into the telecom area the next week and into the international area the following week. We can't do it. At least I can't do it. And so, typically, these multiple demands in many firms cause the associate to have a higher chance of failure than I had seen some years ago. This all comes down to a management issue—which is our responsibility. It takes more management and training for an associate that has the same skills we may have had or better skills to have an equal chance of doing well.

MR. WADLOW: And at the same time, the clients don't want to pay for young associates to be learning on their dollars, right?

MR. REYNER: That's right.

MS. VIRTUE: It's kind of interesting for me coming from a smaller firm. We've really benefited from Catholic University's communications law program. When I graduated, there was no such thing as communications law. New associates were left wondering—what's a megahertz?

The students we're getting out of Catholic, and we rely heavily on Catholic for students—we usually have interns and if they work out they end up coming on as an associate, are able to hit the ground running and they do have that broad base of knowledge. While I may focus on broadcast or auction issues, I can go to an intern or an associate with a universal service issue and they're able to at least get the basic information for me.

But the trade-off with that is, having relied so heavily on the Catholic program, we're wondering if we're getting too insular. While we appreciate the skills that Catholic can train into the associates, we wonder about a broader client base out there saying, "hey, why's everyone from Catholic?" Why aren't you more diversified in the geographic area where you're getting your new attorneys from? So, there is that tension.

But for now, I can easily say that we've really benefited from the Catholic program because they do come in with a broad base of working knowledge, and they're very well grounded in the communications area. One of the areas we'd like to see improvement in is persuasive writing. While their writing tends to be very good from a scholarly perspective, persuasive writing is something we have to work on with them. They are not always ready to be an advocate.

MR. WADLOW: Any other thoughts? Well, I think I'd like to close by thanking everybody. I think this has been an enlightening discussion, and I appreciate each of you taking the time to be a part of this evening.