ENFORCEMENT OF SPECTRUM USAGE RIGHTS: FAIR AND EXPEDIENT RESOLUTION OF "INTERFERENCE" DISPUTES

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*Nothing herein necessarily represents the views, opinions, thinking or positions of the author's former, current and future employers. An earlier version of this paper was originally prepared as a contribution to the Univ. of Colorado Silicon Flatirons Summit on "Efficient Interference Management: Regulation, Receivers, and Right Enforcement" held on October 18, 2011.

Issues/Motivation

- How should procedural "rights" be defined in disputes alleging "*harmful interference*"?
  - Whether enforcement/dispute resolution *processes* involving spectrum usage rights (SURs) are *fair, open and expedient*?
- What should happen if/when negotiations over *radio operating rights* or *interference disputes* fail or are otherwise futile?
  - What are the "elements of the claim" of *harmful* interference and what are the defenses to such claims?
  - Who has the *burden* of presenting/rebutting or proving/disproving the "facts" of each claim/defense?
  - Whether alternative *venues, default rights or remedies* should be available?
- What is an appropriate framework for evaluating case studies to help answer these questions and identifying best/worst practices and alternative solutions?
  - **How can I get others to do the research/analysis for me?**

Premise/Conclusions

- Way too much attention is being given to clearly defining SURs, especially those related to “harmful interference”
- Enforcement/adjudication of SURs is equally, if not more, important but receives relatively scant attention
- In a Coasian utopia, maybe substantive SURs need not be well-defined *ex ante* by spectrum regulators before negotiations among parties can take place so long as:
  - fair and expedient processes are available to any aggrieved party (whether new entrant or incumbent) to get the regulator to resolve dispute or
    - some other adjudicator, mediator, arbitrator, etc. who
      - would establish, modify, interpret or adjudicate undefined, current or ambiguous rights if and when negotiations fail or are otherwise futile
- Starting Point: taxonomy/framework for empirical case study analysis

Policy Implications/Options

- Process shortcomings more easily addressed than complex substantive/technical issues
  - Example: simply establish specific procedures for the receipt, review, resolution of interference complaints or declaratory rulings on expedited basis (like a “rocket docket”).
  - FCC (or Bureau(s)) could implement and likely without rulemaking; Key questions: Adequate resources? Reporting/digest system? Will anybody come? Does it matter?
- Alternative/supplemental approach: Congress could modify/remove FCC's *de facto* exclusive/primary jurisdiction over these disputes
  - Examples: State enforcement of hearing aid compatibility requirements
  - Expert tribunal(s) or mediation bodies
- Default substantive rights (*i.e.*, if parties cannot agree to a solution)
  - aid in identifying which party will have burden(s) of pleading, proof & remedy in each case
  - enabled by system-wide (including receiver) performance standards or criteria, developed/imposed in first instance through industry standards organizations
- Wide range of potential/reasonable remedies
  - reject “injunctive” relief as primary remedy
  - cases/negotiations will develop alternative remedies or interference mitigation approaches (temporary and permanent) based on empirical evidence and advanced technological solutions

Categories of SUR Disputes

Category 1: Establishment of *new* rights
- new entrant(s) vs. incumbent(s)
- *ex ante* rulemakings
- sometimes start as Category 2 or 3

Category 2: Modification of *existing* rights
- incumbent(s) vs. incumbent(s)
- *ex ante* rulemakings and *ex post* "adjudications" (informal)
- like zoning variance (*ex post*) *or* changing zoning rules (*ex ante*)

Category 3: Enforcing *existing* rights
- regulator vs. interferer (interferee victim not a "party")
- *ex post* "adjudications" ("formal" or "informal")
- may turn into a Category1 or Category 2 dispute
- relatively under-evaluated area deserves more attention

Proposed Approach/Methodology

Content analysis: systematic reading/empirical analysis used by legal scholars to gather/analyze "data" from the texts of judicial opinions

- Develop a less subjective understanding of a body of law
  - data breach litigation
  - climate change disputes
  - patent law jurisprudence

  [See references in nn. 18-21 of paper]

Four components/steps:

1. Select/collect cases
2. Develop/apply coding scheme to record features from the text of each selected case
3. Count case contents by observing/quantifying features, relationships, patterns
4. Analyze case coding to test assumptions, observations, empirical claims

Case Studies and Questions

Case Study Selection

- wide range – across all three dispute categories and multiple services/bands, but also include relatively routine, mundane and unknown cases (not just the headline grabbers)
- cases from U.S. (FCC) and other national/international regulators (if data available)
- each dispute centered around allegations that "interference" has occurred/will occur unless remedial/enforcement action is taken

Questions/Elements/Factors to Evaluate

- procedural context, parties, timing, resolution
- venue, other entities involved
- band/service orientation, geographic scope/orientation
- other technical characteristics (similarities/differences)
- service/user characteristics

Substantive Analysis

Analysis of “substantive” interference/coexistence issues in each case limited to those that affected process/result.

• Focus on whether – and, if so, how – decision makers (explicitly or implicitly):

- – applied definition of “harmful interference”
- – included *ex post* procedures/requirements in *ex ante* rules
- – assigned burdens to particular party or parties
- – defined/redefined SURs
- – imposed certain mitigation obligations/responsibilities

Expected Results (1)

- No predictable or fair process(es) for resolving *complex* interference disputes
  - even *simple* disputes (*e.g.*, where the substantive rights of the parties are crystal clear) are often subject to mysterious paths
- Vast majority of disputes (at least the major ones) are eventually resolved through *ex ante* rulemaking procedures
- Resolution of such disputes take a very long time (*i.e.*, several years)
- Procedural rights, obligations and burdens of proof are usually undefined or unclear
  - in most cases, harmful interference to incumbents implicitly presumed
  - those urging co-existence (new entrants) typically bear the burden of rebutting this presumption or implementing remedial provisions to protect incumbents from interference

Expected Results (2)

- Other than existing definitions, no apparent "elements" have been articulated to make or defend a case of harmful interference.
- New entrants face most difficulties in gaining access to spectrum, being unable to survive rulemaking/licensing processes or overcome incumbent challenges based on allegations of harmful interference.
- Incumbent spectrum users, especially Federal agencies, face their own difficulties in resolving interference issues or in changing existing rights.
- There is no one-size-fits all approach to coming up with *ex ante* rights or *ex post* remedies.

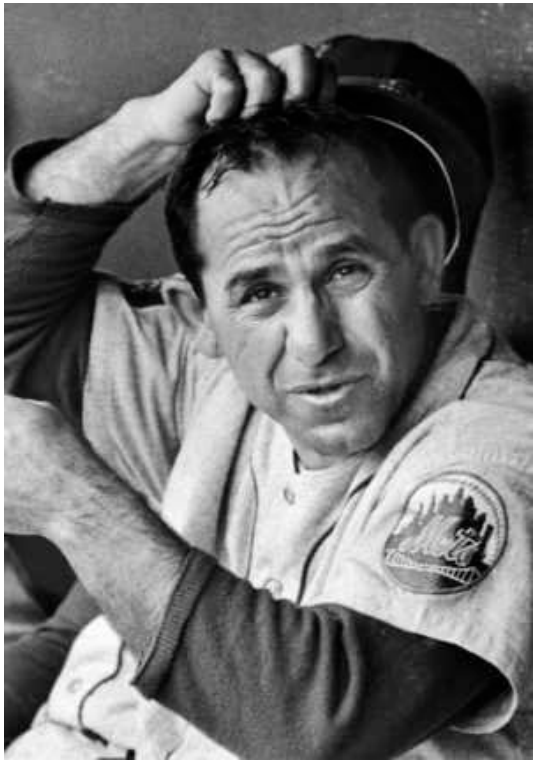
Summary

"YOU CAN SEE A LOT BY OBSERVING"

"PITCHING ALWAYS BEATS BATTING – AND VICE VERSA"

"SLUMP? I AIN'T IN NO SLUMP… I JUST AIN'T HITTING"

Yogi Berra, who recovered from slumps by focusing on the fundamentals as opposed to experimenting with wholesale changes.



thanks!