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

TPRC 2012
40th Research Conference on Communication, Information and Internet Policy
Saturday, September 22, 2012

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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
  o 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 Category 1 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.
“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!