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Avoiding a Tech Train Wreck

Some companies create networks and platforms – other companies rely on them. Neither side trusts the other, and both are right. How can they all just get along, without re-creating the dysfunctions of the regulatory era?

WASHINGTON, D.C. -- “The technology industry is consumed by disputes eerily similar to those that roiled American politics . . . in an earlier industrial age,” writes James V. DeLong, in “Avoiding a Tech Train Wreck,” published in the May/June issue of [THE AMERICAN](#), a flagship publication of the [American Enterprise Institute](#).

DeLong, who is Vice President & Senior Analyst at the Convergence Law Institute, LLC, says that current disputes over telecommunications networks, antitrust, patents, search engines, and distribution systems have a common theme -- “They involve situations in which one company controls a resource upon which other firms must rely to pursue their own businesses.”

Most of these “networks” require high initial investment but have low operating costs. Their builders, inevitably, wind up with significant power over those who rely on them. But the network companies are also vulnerable to political counter-offensives to limit their power. The result can be stasis; dependent firms hesitate to invest because they fear the network companies will grab the lion’s share of the returns, while networks hesitate to invest because they fear that committing their capital is an invitation to expropriation.

The article notes that these problems are not new. They re-create the dilemmas that led to government regulation of railroads, telephone companies, utilities, and other network industries in the 19th and 20th centuries. These regulatory regimes solved some problems, but they also promoted sclerosis, inefficiency, and political gamesmanship. They had to be substantially revamped by the deregulation movement of the 1970s and 1980s.

Dependent companies have legitimate concerns, and, “if society values innovation, a world of large integrated firms is a poor way to promote it.” So the current dilemma is how to address the real needs of dependent companies without re-creating the dysfunctions of the regulatory era.

DeLong argues that both private actors and the government are developing some ingenious tools to accomplish this, including:

Public commitments by network companies, such as Microsoft’s Interoperability Principles;

Use of basic common carrier doctrines that increase certainty and limit discrimination;

Government policies, such as the Federal Communications Commission’s four principles of net neutrality; and

The tech industry’s reliance on RAND (reasonable-and-non-discriminatory) terms for licensing technology.

The article as published is [HERE](#). A version with hyperlinks to sources inserted is [HERE](#).

The [Convergence Law Institute LLC](#), is a consulting firm located in Washington, DC, affiliated with the DC office of the Denver law firm Kamlet Shepherd & Reichert LLP.