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# THE UNITED STATES RECORD COMMUNICATIONS INDUSTRY DICHOTOMY—TIME FOR CHANGE

## I. INTRODUCTION

Western Union Telegraph Company (Western Union), the United States domestic monopoly in public message telegraph service,<sup>1</sup> with the introduction of its new mailgram<sup>2</sup> service in the early 1970s, renewed its attempts to enter the international record communications market, currently the domain of the international record carriers.<sup>3</sup> Western Union has since 1943 been prohibited from competing in the international record communications market.<sup>4</sup> In the international market the international record carriers offer three types of services: telegram (similar to Western Union's domestic public message telegraph service); teletypewriter, and switched narrowband and broadband data; and leased line services.<sup>5</sup> Western Union's mailgram service is a record, rather than a voice, service.<sup>6</sup> It closely resembles the telegram that the international record carriers offer.<sup>7</sup> The record carriers, quite naturally, fear that if Western Union is allowed to provide the public with mailgram service at the international level, the international re-

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1. Strassburg, *Introduction, The Common Carrier and Regulation*, 28 FED. COM. B.J. 116 (1975).

2. For an explanation of mailgram service, see text accompanying notes 96-100 *infra*.

3. The major international record carriers are ITT World Communications, Inc. (ITT World Com.), RCA Global Communications, Inc. (RCA Globcom), and Western Union International (WUI) (an entity separate from Western Union Telegraph Company). The smaller international record carriers include the United States-Liberia Radio Corporation and the French Cable Company (the only non-United States IRC operating in the United States international record communications market). Ashley, *International Communications: What Shape to Come?*, 34 LAW & CONTEMP. PROB. 417, 419 (1969).

4. See text accompanying notes 55-69 *infra*.

5. PRESIDENT'S TASK FORCE ON COMMUNICATIONS POLICY, *Organization of the United States International Communications Industry* 16, in FINAL REPORT (1968). The international record communications market should be distinguished from the international voice communications market. In the latter, the American Telephone and Telegraph Co. (AT&T) has a monopoly while the international record carriers compete in the former. AT&T is also the principal domestic voice carrier. The domestic record field is monopolized by Western Union. Grad & Goldfarm, *Government Regulation of International Telecommunications*, 15 COLUM. J. TRANSNAT'L L. 384, 431 (1976).

6. Western Union Telegraph Co., 55 F.C.C.2d 668, 671 (1975).

7. *Id.* at 671, 5674.

cord carriers will suffer a decline in the use of their telegraph services.

This is not the first instance of conflict between Western Union and the international record carriers. Western Union has long alleged an infringement by the record carriers on Western Union's domestic monopoly due to expansion of the number of "gateway" cities<sup>8</sup> open to traffic from the international record carriers. In the past the record carriers were allowed to deliver and receive international telegrams only in certain specified United States cities.<sup>9</sup> But in the past twenty years, under pressure from the international record carriers, the Federal Communications Commission (FCC) has increased the number of record carriers operating in existing gateway cities and made moves to increase the number of gateway cities.<sup>10</sup>

This paper will explore the battle between Western Union and the international record carriers in the record communications field. It will trace the development of the United States record communications industry from the early history of electric telegraphy, through the enactment of the Communications Act of 1934<sup>11</sup> and the Western Union divestiture of 1943, the gateway and mailgram cases of the second half of the twentieth century. It will examine the diverse solutions proposed—ranging from free competition between Western Union and the international record carriers in both the domestic and international markets to the creation of a single monopolistic entity in the international sphere. This paper will also offer a reasonable alternative to the present situation in light of the industry structure today.

## II. THE EARLY HISTORY OF ELECTRIC TELEGRAPHY

Electric telegraphy in the United States was invented by Samuel F. B. Morse.<sup>12</sup> By 1842 Morse had demonstrated the possibility of communicating by means of a submarine telegraph cable,<sup>13</sup> and by

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8. See note 72 & text accompanying notes 72-75, 84-91 *infra*.

9. See text accompanying notes 74-75, 84-91 *infra*.

10. See note 91 & text accompanying notes 84-91 *infra*.

11. Pub. L. No. 416, 48 Stat. 1064 (1934) (current version at 47 U.S.C. §§ 151-609 (1970)).

12. G. CODDING, *THE INTERNATIONAL TELECOMMUNICATION UNION* 6 (1972). In England, Wheatstone and Cooke were responsible for important early experimentation. *Id.*

13. *International Communications Services: Hearings on the Need for an Improved and Expanded System of International Telecommunications Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign*

1844, his overland telegraph cable was working<sup>14</sup> with a line functioning between Washington and Baltimore.<sup>15</sup> The Western Union Telegraph Company, organized<sup>16</sup> and chartered in 1851<sup>17</sup> soon became the first nationwide monopoly.<sup>18</sup> In 1861, Western Union, at the request of President Lincoln, completed the first transcontinental telegraph line.<sup>19</sup> Morse later collaborated with Cyrus W. Field,<sup>20</sup> the organizer of the British Anglo—American Telegraph Company.<sup>21</sup> In 1866,<sup>22</sup> the steamship *Great Eastern*,<sup>23</sup> under the auspices of the Anglo—American Telegraph Company and Cyrus W. Field,<sup>24</sup> laid the first successful transatlantic telegraph cable between Ireland and Newfoundland,<sup>25</sup> thus linking North America and Europe.<sup>26</sup> The world cable networks in early years were dominated by the British; then there was a great increase of American activity.<sup>27</sup>

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*Commerce*, 95th Cong., 1st Sess. 467 (1977) [hereinafter cited as *1977 Hearings*].

14. W. HINCHMAN, *THE INTERNATIONAL LAW OF COMMUNICATIONS* 21 (E. McWhinney ed. 1971).

15. G. CODDING, *supra* note 12, at 6.

16. *1977 Hearings*, *supra* note 13, at 89 (statement of Earl Hillburn, President, Western Union Telegraph Co.).

17. Trebing, *Common Carrier Regulation—The Silent Crisis*, 34 *LAW & CONTEMP. PROB.* 299, 303 (1969).

18. *Id.*

19. *1977 Hearings*, *supra* note 13, at 89.

20. *Id.*

21. Ashley, *supra* note 3, at 419.

22. *1977 Hearings*, *supra* note 13, at 89.

23. *Id.* at 467.

24. Ashley, *supra* note 3, at 419.

25. *1977 Hearings*, *supra* note 13, at 89.

26. *Id.* at 467.

27. "American companies first entered the international communications field when the American Telegraph & Cable Company laid two cables between Canso, Nova Scotia, and Penzance, England, in 1881 and 1882. These cables were leased to The Western Union Telegraph Company. Commercial Cable Company, organized in 1883, also entered the field in competition with Western Union and British interests with the laying of two cables between Nova Scotia and Ireland in 1884. All American Cables & Radio, Inc., entered the field in the 1880s and along with Western Union rapidly developed service between the continental United States and the West Indies, Central America, and South America. In 1902, The Commercial Pacific Cable Company laid a cable between San Francisco and Hawaii, which was extended to the Philippines in 1903. In 1910 Western Union laid a cable between New York and Penzance, England, via Newfoundland, but was forced to sell this cable to Anglo-American because of the latter's exclusive rights in Newfoundland. In 1911, Western Union leased this cable, and four other transatlantic cables owned by Anglo-American, for a period of ninety-nine years.

Growth of the telegraph in the nineteenth century came at a time when a system of rapid communication was desperately needed. Initially the telegraph contributed to national defense and solidarity; later its use was truly transnational.<sup>28</sup> The industry's growth has three major inducements:

1) a desire to have the state knit together by a rapid and reliable means of communication, 2) the recognition that the telegraph was an indispensable asset for the safe and rapid functioning of the railroads which were being introduced to the civilized world in this same epoch, and 3) the desire of commercial interests to utilize telegraph for their professional purposes. In regard to the latter, both governmental administrations and private enterprises engaged in telegraph exploitation were quick to see that therein lay the major source of revenue.<sup>29</sup>

In the United States an early executive reaction to the new industry occurred in 1869 when President Grant halted a cable landing by the French Cable Company until the company renounced its exclusive rights to operate in France, thus allowing United States cable companies to land cables on French soil.<sup>30</sup> Presidents exercised power over cable licenses for the next few decades, but in the twentieth century the Congress would take over that function.<sup>31</sup>

It appeared that Western Union's strong position faced a major threat in 1876, when Bell patented the telephone.<sup>32</sup> In 1879 an agreement was reached, however, between Bell and Western Union—neither company would compete in the other's market.<sup>33</sup> Thus, a dichotomy between record services and voice services was created. Record services transmit information and result in some form of "hard copy," such as the basic telegram or telex message.<sup>34</sup> Alternatively, voice services transmit information through oral input or output.<sup>35</sup> Voice services include ordinary telephone service, called message telecommunication service, and private—line telephone service.<sup>36</sup>

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It was not until 1921, when regenerators were developed, that American companies laid cables directly to Europe." Ashley, *supra* note 3, at 419-20.

28. G. CODDING, *supra* note 12, at 4.

29. *Id.* at 7.

30. 1977 Hearings, *supra* note 13, at 468.

31. *Id.*

32. Trebing, *supra* note 17, at 303.

33. *Id.*

34. 1977 Hearings, *supra* note 13, at 469.

35. *Id.*

36. *Id.*

### III. THE COMMUNICATIONS ACT OF 1934

The federal government's concern in telecommunications began in the mid—nineteenth century when the Post Office Department offered the first commercial telegraph service.<sup>37</sup> The government's interest in the young telecommunications industry was sporadic, however, throughout the nineteenth century. In the early twentieth century the government's involvement in the industry took the form of ad hoc responses to new problems.<sup>38</sup> One such response came in 1921, when Western Union brought suit<sup>39</sup> challenging the right of the Executive to regulate cable landings. Western Union had been denied a Presidential permit to land a cable between Barbados and Miami, Florida.<sup>40</sup> In reaction to Western Union's suit, Congress passed the Cable Landing License Act of 1921<sup>41</sup> which made the unlicensed operation of submarine cables illegal, unless wholly within the United States. Further, the President was given the authority to grant, condition, deny, or revoke submarine cable landing licenses.<sup>42</sup>

Eventually, Congress was forced to enact regulatory legislation to replace these early stopgap measures.<sup>43</sup> In 1933, the House Interstate and Foreign Commerce Committee made a major study of the communications industry. The study, known as the Splawn Report, examined the tendency toward and advisability of mergers in the communications industry.<sup>44</sup> The Splawn Report was followed by the Communications Act of 1934.<sup>45</sup> The Act created the Federal Communications Commission (FCC), an independent

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37. PRESIDENT'S TASK FORCE ON COMMUNICATIONS POLICY, *The Roles of the Federal Government in Telecommunications 2-3*, in FINAL REPORT (1968).

38. *Id.* at 3.

39. *United States v. Western Union Telegraph Co.*, 272 F. 311 (S.D.N.Y. 1921), *aff'd per curiam*, 272 F. 893 (2d Cir. 1921), *rev'd* 260 U.S. 754 (1922).

40. 1977 Hearings, *supra* note 13, at 468.

41. Act Relating to the Landing and Operation of Submarine Cables, ch. 12, 42 Stat. 8 (1921). 47 U.S.C. §§ 34-39 (1970).

42. *Id.* § 2 (codified at 47 U.S.C. § 35 (1970)). 1977 Hearings, *supra* note 13, at 468. An executive order dated May 11, 1954, delegated this authority to the FCC, subject to the Secretary of State's approval of the grant of cable landing licenses. Exec. Order No. 10,530, § 5(a), 3 C.F.R. 192 (1961), *reprinted in* 3 U.S.C. § 301 (1976).

43. Ende, *International Communications*, 28 FED. COM. B.J. 147, 151 (1975).

44. H.R. REP. No. 69, 78th Cong., 2d Sess. 3, *reprinted in* [1943] U.S. CODE CONG. & AD. NEWS 2-2, 2-4.

45. Communications Act of 1934, ch. 652, 48 Stat. 1064 (1934) (current version at 47 U.S.C. §§ 151-609 (1970)).

agency with regulatory powers over communications carriers.<sup>46</sup> Thus, "electronic telecommunications evolved along the lines of private ownership but with governmental oversight of rates and services."<sup>47</sup> Telegraph services were provided by private corporations under both federal regulation by the FCC and local regulation by state public service commissions.<sup>48</sup>

There were, however, gaps in the regulatory scheme:

1. [C]arriers were not required to obtain Commission permission to raise new capital or to make additions to plant, other than the communications lines themselves;
2. the Commission was given no direct authority over procurement of communications equipment or facilities by regulated carriers, over their affiliations with manufacturers of such equipment, or over inter-carrier contracts;
3. nor was [the FCC] given authority to approve mergers or consolidations of international . . . telegraph carriers, should they be needed.<sup>49</sup>

The problem of mergers were recognized by the Act in section 4(k), which directed the FCC to "make a special report not later than February 1, 1935, recommending such amendments to this act as it deems desirable in the public interest."<sup>50</sup> The FCC responded by recommending to Congress proposed amendments to the Act. The most important proposal was a new section 222 providing for permissive consolidation of telegraph companies. Congress failed to take formal action on the proposal.<sup>51</sup>

The original Act was too broad and too general. The Act established vague substantive standards by which the Commission was to regulate. For example, the Commission was to act for "the public interest, convenience and necessity."<sup>52</sup> Congress realized that the Act was not complete, and included in most sections of the Communications Act a statement that the Commission would study the matter and report to congress its findings and recom-

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46. *The Roles of the Federal Government in Telecommunications, supra* note 34, at 4. Formerly, the Mann-Elkins Act had given the Interstate Commerce Commission jurisdiction over interstate and foreign telegraph service. *Id.* at 3.

47. *1977 Hearings, supra* note 13, at 469.

48. *Id.*

49. *The Roles of the Federal Government in Telecommunications, supra* note 37, at 4.

50. Communications Act of 1934, ch. 652, § 4(k), 48 Stat. 1064 (1934), repealed by Act of July 16, 1947, Pub. L. No. 180-193, 61 Stat. 327.

51. H.R. REP. No. 69, *supra* note 44, at 3.

52. *1977 Hearings, supra* note 13, at 343-44.

mendations concerning the need for additional legislation.<sup>53</sup> This broad, general, and incomplete regulatory statute failed even to establish an agency to "coordinate federal research and development in telecommunications or the procurement of communications services and equipment by federal agencies, or otherwise to act as a focal point for the Executive Branch interest in the communications field."<sup>54</sup> The Act did not remain broad and general for long. The following years brought much change to telecommunications regulation.

#### IV. WESTERN UNION'S MERGER WITH POSTAL TELEGRAPH CO. AND SECTION 222

As early as 1935 the FCC recommended that Congress amend the Communications Act of 1934.<sup>55</sup> The FCC prepared a 1935 report<sup>56</sup> favoring a merger of the two major domestic telegraph carriers, Western Union and Postal Telegraph Co. (Postal), and a separate merger of the international telegraph carriers. During the Great Depression, Postal was on the verge of financial collapse.<sup>57</sup> Congress did not act on the 1935 report, but in 1939 the Senate adopted Senate Resolution 95 proposing a study of the telegraph industry.<sup>58</sup> Also in 1939, the FCC renewed its recommendations in a report on domestic and international telegraphy.<sup>59</sup> Senate Resolution 95 resulted in a study of the telegraph industry,<sup>60</sup> which recommended permissive merger of international carriers into another entity. These recommendations did not permit merger between or common control of domestic and international communications carriers.<sup>61</sup> Merger of Postal into Western Union would give the latter a monopoly in the domestic market. Western Union already had large international operations. To prevent Western Union's new stature from causing harm to competing international

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53. Ende, *supra* note 43, at 157.

54. *The Roles of the Federal Government in Telecommunications*, *supra* note 37, at 5.

55. H.R. REP. NO. 69, *supra* note 44, at 3.

56. For the text of the 1935 report, see *Hearings on S. Res. 95*, 76th Cong., 1st Sess., at 13-21 (1939) [hereinafter cited as *1939 Hearings*].

57. See *Western Union International, Inc. v. F.C.C.*, 544 F. 2d 87, 90 (2d Cir. 1976).

58. See *S. Res. 95*, 76th Cong., 1st Sess., 84 CONG. REC. 7455 (1939).

59. For the 1939 domestic report, see *Hearings on S. Res. 95*, 76th Cong., 1st Sess. (Part 2) 394-450 (1941) [hereinafter cited as *1941 Hearings*]. For the 1941 international report, see *id.* at 451- 81.

60. S. REP. NO. 769, 77th Cong., 1st Sess. (1941).

61. *Id.* at 25.



carriers, the study proposed that legislation define "domestic" and "international" carriers. These terms were to be defined to enable all existing operations of any domestic carrier, which may be engaged partially in international telegraph communications, to be included in the merged domestic enterprise. Further, the Federal Communications Commission was empowered to restrict merged domestic carriers solely to domestic telegraph operations if found to be in the public interest.<sup>62</sup>

The Communications Act of 1934 was finally amended in 1943 by the passage of section 222.<sup>63</sup> Former FCC Chairman Richard E. Wiley said:

From a regulatory standpoint, the modern era of international record communications almost begins and ends with the year 1943. Basic policies were framed in that year which persist to this day although numerous developments have rendered many of those war-time decisions anachronistic.<sup>64</sup>

Section 222 made many changes in telecommunications regulation and in the industry, but it did not effectuate the merger of the international telegraph carriers. The United States was in the middle of World War II, and the Department of the Navy advised that any international merger be postponed for fear of interrupting crucial war-time communications.<sup>65</sup> Section 222, subsection (b) did, however, provide for the merger of Postal into Western Union.<sup>66</sup>

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62. *Id.*

63. Act to amend the Communications Act of 1934, ch. 10, 57 Stat. 5 (1943) (codified at 47 U.S.C. § 222 (1970) (amended 1974)). Previous attempts at merger legislation occurred in 1940, 1941, and 1942. *See, e.g.*, H.R. REP. No. 2664, 77th Cong., 2d Sess. (1942); S. REP. No. 1490, 77th Cong., 2d Sess. (1942); *Hearings Pursuant to S. 2598 Before the Subcomm. of the House Comm. on Interstate & Foreign Commerce (Consolidations and Mergers of Telegraph Operations)*, 77th Cong., 2d Sess. (1942); *Hearings on S. 2445 Before the Subcomm. of the Senate Comm. on Interstate Commerce (Consolidations and Mergers of Telegraph Operations)*, 77th Cong., 2d Sess. (1942).

64. Address by Richard E. Wiley, Armed Forces Communications and Electronics Association National Convention (June 3, 1975).

65. *Ende, supra* note 43, at 170.

66. (1) It shall be lawful, upon application to and approval by the Commission . . . , for any two or more domestic telegraph carriers to effect a consolidation or merger; . . . *Provided*, That, except as provided in paragraph (2) of this subsection, no domestic telegraph carrier shall effect a consolidation or merger with any international telegraph carrier, and no international telegraph carrier shall effect a consolidation or merger with any domestic telegraph carrier.

(2) As a part of any such consolidation or merger, or thereafter upon application to and approval by the Commission . . . , the consolidated or

The merger of Western Union and Postal proceeded under section 222.<sup>67</sup> Under section 222(c) (2) Western Union was forced to divest itself of the international telegraph operations "theretofore carried on"<sup>68</sup> by Western Union and Postal. As a result, another dichotomy in the communications industry was created. Telegraphy was split into domestic and international spheres. Western Union, a congressionally approved monopoly, dominated domestic telegraph operations, while three record carriers dominated international operations.<sup>69</sup>

While section 222 eliminated duplication of facilities and expenditures in the domestic telegraph industry, it "conditioned the consolidation in several ways which both altered the industry, and influenced the manner in which the FCC would regulate it."<sup>70</sup> In addition to allowing the Western Union-Postal merger, section 222 changed telegraph law in three ways that have had far-reaching effects. First, subsection (e) (1),<sup>71</sup> created an international distri-

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merged carrier may acquire all or any part of the domestic telegraph properties, domestic telegraph facilities, or domestic telegraph operations of any international telegraph carrier.

47 U.S.C. § 222 (b) (2) (1970).

67. See Application for Merger Western Union and Postal Telegraph, 10 F.C.C. 148 (1943).

68. Section 222 (c)(2) reads:

Any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger, within a reasonable time to be fixed by the Commission, after the consideration for the property to be divested is found by the Commission to be commensurate with its value, and as soon as the legal obligations, if any, of the carrier to be so divested will permit. The Commission shall require at the time of the approval of such consolidation or merger that any such party exercise due diligence in bringing about such divestment as promptly as it reasonably can.

47 U.S.C. § 222(c)(2) (1970).

It took Western Union several years to complete its divestment under subsection (c)(2). See, e.g., Western Union Tel. Co., 25 F.C.C. 35 (1958); Western Union Divestment, 30 F.C.C. 323 (1961). The divestment was over in 1963 when the American Securities Corp. formed a new subsidiary, Western Union International, Inc. (WUI), to take over Western Union's divested international operations. WUI, which became one of the major international record carriers, is in no way affiliated with Western Union. 1977 Hearings, *supra* note 13, at 90.

69. Grad & Goldfarb, *supra* note 5, at 416-17. Several small firms shared certain segments of the market. *Id.* The trio of international record carriers were ITT, RCA, and Western Union Cables (later to be WUI). *Id.* at 416.

70. *Id.* at 415.

71. Section 222(e)(1) reads as follows:

In the case of any consolidation or merger of telegraph carriers pursuant to

bution formula for unrouted telegraph traffic, telegrams which the sender did not designate a particular record carrier to handle. This formula preserved the relative 1942 market share of the IRC by a system of "overages" and "deficiencies." A carrier had "overages" if it received an increase in market share of routed traffic. This would be offset by reducing the amount of unrouted traffic it would receive under the formula. Alternatively, a carrier had a "deficiency" if it did not acquire a proportion of routed traffic comparable to its 1942 market share. Under the formula, the carrier would receive a larger proportion of unrouted traffic. As a result, an active international record carrier would be penalized for successfully competing for traffic, while an inactive record carrier would be rewarded. The international formula, therefore, reduced the amount of competition that was supposed to typify the industry.<sup>72</sup>

Second, subsections (a)(5) and (a)(6) to section 222 defined "domestic telegraph operations" and "international telegraph operations" in such a way that international record carriers could deliver international telegrams to and from North America only through certain gateway cities to be designated by the FCC.<sup>73</sup> Once

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this section, the consolidated or merged carrier shall . . . distribute among the international telegraph carriers, telegraph traffic . . . destined to points with the continental United States, and divide the charges for such traffic, in accordance with such just, reasonable, and equitable formula in the public interest as the interested carriers shall agree upon and the Commission shall approve: *Provided, however,* That in case the interested carriers should fail to agree upon a formula which the Commission approves as above provided, the Commission, after due notice and hearing, shall prescribe in its order approving and authorizing the proposed consolidation or merger a formula which it finds will be just, reasonable, equitable, and in the public interest, will be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers, and will effectuate the purposes of this subsection.

47 U.S.C. § 222(e)(1) (1970).

72. 1977 *Hearings*, *supra* note 13, at 397-98. See also *Application for Merger Western Union and Postal Telegraph, Separate Report of the Commission on Formulas for the Distribution of International Traffic*, 10 F.C.C. 184 (1943).

73. Section 222 (a) provides in part:

(5) . . . "domestic telegraph operations" . . . either originate or terminate at points within the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, or Newfoundland and terminate or originate at points within the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, or Newfoundland, and includes acceptance, transmission, reception, or delivery performed within the continental United States between points of origin within and points of exit from, and between points of entry into and points of destination within, the continental United States

a telegram arrived at a gateway city from a foreign source, Western Union delivered it to its United States destination. Conversely, when Western Union wished to send a telegram to a point outside the domestic scope, it would deliver the telegram to an international record carrier located in a gateway city and the record carrier would deliver the telegram to its foreign destination. The FCC gave the three largest international record carriers<sup>74</sup> three gateway cities: New York, San Francisco, and Washington; a smaller record carrier was given the gateway cities of Miami and New Orleans.<sup>75</sup> The term "gateway" has not been defined by the Act.<sup>76</sup>

Third, under subsection (a)(10), the "continental United States" was defined as the states of the Union and the District of Columbia.<sup>77</sup> Consequently, United States possessions such as Hawaii, Guam, Puerto Rico, and the United States Virgin Islands were foreign points for purposes of telegraphy. These areas were not allowed to receive record communications directly from Western Union. Instead, telegrams originating in the United States

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with respect to record communications . . . which either originate or terminate outside the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, and Newfoundland, and also includes the transmission within the continental United States of messages which both originate and terminate outside but transit through the continental United States: *Provided*, That nothing in this section shall prevent international telegraph carriers from accepting and delivering international telegraph messages in the cities which constitute gateways approved by the Commission as points of entrance into or exit from the continental United States, under regulations prescribed by the Commission, and the incidental transmission or reception of the same over its own or leased lines or circuits within the continental United States.

(6) . . . "international telegraph operations" . . . either originate or terminate at points outside the continental United States, Alaska, Canada, . . . , but does not include acceptance, transmission, reception, and delivery performed within the continental United States between points of origin within and points of exit from, and between points of entry into, and points of destination within, the continental United States with respect to such communications, or the transmission within the continental United States of messages which both originate and terminate outside but transit through the continental United States.

47 U.S.C. § 222(a)(5), (6) (1970).

74. These international record carriers were ITT, RCA, and Western Union Cables (later to become WUI).

75. Grad & Goldfarb, *supra* note 5, at 416. Tropical Radio Telegraph, the predecessor to TRT Telecommunications, was that smaller international record carrier. *Id.*

76. Ende, *supra* note 43, at 172.

77. 47 U.S.C. § 222(a)(10) (1970).

traveled by Western Union to a gateway city for delivery by an international record carrier.<sup>78</sup> This distinction was important when Hawaii became a state and still received treatment as a foreign point.<sup>79</sup> Therefore, although section 222 solved a major problem when it was enacted—saving the domestic telegraph industry—it created future problems.

## V. THE INTERNATIONAL RECORD CARRIERS

International record communication service is provided by international record carriers. The three principal record carriers are Western Union International (WUI); ITT World Communications, Inc. (ITT World Com.), a subsidiary of International Telephone and Telegraph Corporation; and RCA Global Communications, Inc. (RCA Globcom), a subsidiary of Radio Corporation of America.<sup>80</sup> A growing fourth international record carrier is TRT Telecommunications Corporation (TRT),<sup>81</sup> formerly Tropical Radio Telegraph Company which operated primarily to Central America.<sup>82</sup> Additional international telegraph communications are provided by the French Cable Company, the only non—United States—owned carrier in the United States industry, and by the United States—Liberia Radio Corporation, a subsidiary of the Firestone Tire & Rubber Company.<sup>83</sup>

Under section 222, the record carriers are limited to certain gateway cities in the United States where they interconnect with the domestic record communications monopoly, Western Union, for delivery and pickup of international record traffic.<sup>84</sup> The international record carriers may also solicit business directly within the gateway cities.<sup>85</sup> In recent years the record carriers have made efforts to increase the number of gateways. In 1972, RCA Globcom petitioned the FCC to create eighteen new full service gateways for

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78. 1977 Hearings, *supra* note 13, at 344.

79. In 1960 subsection (a)(10) was amended to read: "The term 'continental United States' means the District of Columbia and the States of the Union, except Hawaii." Act to amend certain laws of the United States in light of the admission of the State of Hawaii, Pub. L. No. 86-624 § 36, 74 Stat. 421 (1960) (codified at 47 U.S.C. § 222(a)(10) (1970)).

80. Ashley, *supra* note 3, at 419.

81. 1977 Hearings, *supra* note 13, at 113.

82. Ashley, *supra* note 3, at 419.

83. *Id.*

84. 1977 Hearings, *supra* note 13, at 388.

85. *Id.*

delivery and receipt of international telegrams.<sup>86</sup> The FCC has not given a final answer to RCA Globcom's request.<sup>87</sup> Other international record carriers made similar requests, and the FCC responded with a tentative statement of FCC policy that seemed supportive of the requests.<sup>88</sup> The FCC's final statement opened all existing gateway cities to all international record carriers.<sup>89</sup> The FCC has yet to create additional gateway cities.<sup>90</sup> The Commission, however, contends that the public interest would be served by authorizing new gateway cities.<sup>91</sup> Accordingly, there is reason to believe that more gateways will be authorized.

International record carriers have also made substantial gains with respect to the international record communications. The formula is more than thirty years old, and was unchanged for many years except for minor revisions when WUI was created in 1963 from the Western Union divestment.<sup>92</sup> The FCC reviewed the matter in 1972,<sup>93</sup> and in 1975 favored termination of the formula.<sup>94</sup> Until the formula is abolished, the international record carriers will be governed by an interim formula allocating the unrouted traffic.<sup>95</sup>

## VI. WESTERN UNION'S MAILGRAM SERVICE

Western Union, the domestic telegraph monopoly, has not been idle since the enactment of section 222. Western Union invented the mailgram, which combines the qualities of common carrier switching and transmission with the cost-effective delivery capability of the Postal Service.<sup>96</sup> Mailgram is a form of electronic mail which transmits messages via Western Union teletypewriters to a

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86. International Record Carriers' Operations, 38 F.C.C.2d 543 (1972).

87. 1977 Hearings, *supra* note 13, at 52.

88. 42 Telecomm. Rep. No. 30, at 7-8 (July 28, 1975).

89. International Record Carriers' Operations, 54 F.C.C.2d 909, 922 (1975).

90. Grad & Goldfarb, *supra* note 5, at 416.

91. "Since the existing gateways were approved some 30 or more years ago, there have been significant changes in the operations of the IRCs and technological advances in the provision of communications service which may have rendered obsolete a gateway framework suitable to another era." International Record Carriers' Operations, 54 F.C.C.2d 532, 533 (1975).

92. 1977 Hearings, *supra* note 13, at 509.

93. International Record Carriers' Operations, 38 F.C.C.2d 543 (1972).

94. International Record Carriers' Operations, 57 F.C.C.2d 190 (1975).

95. See, e.g., 42 Telecomm. Rep. No. 9, at 16 (Mar. 1, 1976); *id.* No. 2, at 33-35 (Jan. 12, 1976); *Id.* No. 1, at 12-14 (Jan. 5, 1976).

96. 1977 Hearings, *supra* note 13, at 92.

receiving teleprinter in a designated Serving Post Office (SPO).<sup>97</sup> At the SPO, the message is removed from the teleprinter and is generally delivered in the next regular mail delivery. The service standard for mailgram, therefore, is between that for a telegram and regular mail.<sup>98</sup> At present, mailgrams exceed the volume of regular telegrams,<sup>99</sup> and a great future is expected.<sup>100</sup> Western Union has further attempted to expand its new service to a larger market—Hawaii and points international. The move has been opposed by the international record carriers.

Interestingly, the first mailgram case, *United Telegraph Workers, AFL-CIO v. FCC*,<sup>101</sup> was not initiated by the international record carriers. It was brought by Postal Service employees who charged that the mailgram project violated an "'historic telecommunications policy' of Congress which forbids cooperative service furnished jointly by Western Union and the Post Office Department."<sup>102</sup> The court said:

There has never been a policy against *any* cooperation between telegraph companies and the Post Office. Indeed, Mailgram is not much of a step beyond the common and traditional practice of delivering copies of telegrams through the mail.<sup>103</sup>

The court also said that mailgram was not a government takeover of the telegraph industry.<sup>104</sup> The court's holding, however, was based on the experimental nature of the mailgram project; the court refused to decide on the legality of a permanent mailgram undertaking. Judging from dicta and the lapse of eight years since the decision, it is doubtful that a court would today prohibit continuance of this now no longer experimental project.

In 1972 Western Union applied for FCC authorization to extend domestic mailgram service to Hawaii.<sup>105</sup> The international record carriers opposed the application on the basis that 1943 divestment legislation prohibited Western Union from operating in the inter-

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97. A. OETTINGER, P. BERMAN, & W. READ, *HIGH AND LOW POLITICS: INFORMATION RESOURCES FOR THE 80s* 30 (1977).

98. *1977 Hearings*, *supra* note 13, at 511 n.69.

99. Strassburg, *Introduction, The Common Carrier and Regulation*, FED. COM. B.J. 113, 116 (1975).

100. *See, e.g., Butkus, Getting the Message at Western Union, Dun's Review and Modern Industry* 39, 42 (1971).

101. 436 F.2d 920 (D.C. Cir. 1970).

102. *Id.* at 922.

103. *Id.* at 923.

104. *Id.* at 922.

105. *1977 Hearings*, *supra* note 13, at 512.

national market, and because, for purposes of section 222, Hawaii was an international point.<sup>106</sup> The FCC rejected the record carriers' argument and read section 222 to prohibit Western Union from providing internationally only those services that Western Union had offered prior to and during 1943. Mailgram was obviously not such a service. The FCC said:

[T]he precise issue . . . that is the effect of the divestment clause on proposals to provide a service not covered by the express statutory language, presents a case of first impression . . . [w]e find nothing in the statute or its legislative history which mandates a broad interpretation of the divestment clause such as to disqualify [Western Union] from providing the proposed Mailgram service to Hawaii. From our reading of the statute and its legislative history, we conclude that Congress is enacting Section 222 did not intend to divide the communications market between international and domestic carriers. If it had, then certainly Section 222 would have applied to all carriers present and future, and not just [Western Union]. Rather, it simply was seeking to remedy the problems which were facing the troubled telegraph industry in 1943.<sup>107</sup>

The FCC finding did not guarantee that Western Union would provide mailgram service to Hawaii. It was merely a denial of the international record carriers' petitions to dismiss Western Union's application.<sup>108</sup> The FCC left open the possibility of denying Western Union's application to provide Hawaii with mailgram service, and of allowing, instead, either telepost, a service of RCA, ITT, and WUI, or lettergram, a service of the Domestic Satellite Corporation.<sup>109</sup> The FCC did arrange for an interim offering of Mailgram service to Hawaii.<sup>110</sup>

On appeal the United States Court of Appeals Second Circuit reversed, ruling against the Commission.<sup>111</sup> The court construed broadly the section 222 prohibition against Western Union's involvement in international operations "theretofore carried on." The court did this by stretching "theretofore" to mean before, during, and after. The FCC appealed the decision<sup>112</sup> contending that

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106. Western Union Tel. Co., 55 F.C.C.2d 668, 668-70 (1975).

107. *Id.* at 671-72.

108. *Id.* at 673, 676.

109. *Id.* at 673.

110. *See*, Establishment of Interim Mailgram-Type Service, 57 F.C.C.2d 657 (1975).

111. Western Union Int'l, Inc. v. F.C.C., 544 F.2d 87 (2d Cir. 1976).

112. 1977 Hearings, *supra* note 13, at 399.



the correct meaning of "theretofore" was "[u]p to that time; until then; before then."<sup>113</sup> Certiorari was denied.<sup>114</sup>

## VII. RECENT PROPOSALS

President Johnson created a Task Force on Communication Policy in April 1967 to consider the possibility of merger of the international record carriers.<sup>115</sup> The Task Force recommended a merger into a single entity of all the facilities of the international record carriers. The proposal was based on the belief that such a merger would 1) promote system optimization and allow for economies of scale; 2) further United States foreign policy objectives; 3) resolve the problems of the international record communications industry; and 4) improve the effectiveness of government regulation.<sup>116</sup> The Task Force's recommendation of merger was attacked in an appendix to the final report<sup>117</sup> for not considering the problem in sufficient depth. Consequently, the report has carried little weight. The concept of merger of the international record carriers has been rejected by many commentators.<sup>118</sup>

A second proposal is to increase the number of gateway cities available to the international record carriers and to enlarge the record carriers' area of control within the gateway network.<sup>119</sup> In support of such a change, FCC Commissioner Glen O. Robinson has said:

[T]he more basic question which must be considered is, why do we have gateway restrictions at all? I am not at all confident that "present conditions" do in fact justify the retention of gateway restrictions. . . . But it should be emphasized that protecting Western Union is not sufficient reason to retain these cumbersome restrictions on international services. . . . We are by no means bound to preserve and protect monopoly against competitive inroads where, as here, those inroads lead to a more efficient service.<sup>120</sup>

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113. WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, SECOND EDITION, UNABRIDGED, (W. A. Neilson ed. 1955).

114. 434 U.S. 903 (1977).

115. H.R. Doc. No. 157, 90th Cong., 1st Sess. 8 (1967).

116. PRESIDENT'S TASK FORCE ON COMMUNICATIONS POLICY, *Organization of the United States International Communications Industry* 20-36, in FINAL REPORT (1968).

117. *Id.* at app. C.

118. See, e.g., Ende, *supra* note 43, at 175.

119. See, e.g., 1977 Hearings, *supra* note 13, at 53.

120. International Record Carriers' Operations, 54 F.C.C.2d 532, 535 (1975) (separate statement of Commissioner Glen O. Robinson).

Commissioner Robinson's statement, although forceful, is unfair. Abolishing the gateway provision without allowing Western Union to complete in the international market would leave Western Union at a severe disadvantage. International record carriers would be able to compete against Western Union in the domestic market, perhaps by offering low prices subsidized by their international operations. Western Union could be undercut and left without an international operation.

The FCC and former Chairman Richard E. Wiley have suggested that section 222 be abolished.<sup>121</sup> They feel that the section has halted all but the absolutely essential moves by international record carriers to improve services. They claim that the international formula is no longer necessary. Today, Western Union is not operating in the international market. Any fear that Western Union would prefer its own international operation over the international record carriers has evaporated. The FCC has made interim plans to distribute unrouted traffic in proportion to routed traffic.<sup>122</sup> Elimination of section 222 would remove the need for gateway cities and allow more efficient transit of international telegrams. Further, under the FCC-Wiley plan, Western Union would no longer be barred from international operations, but could offer mailgram service in the international market, including Hawaii. Unfortunately, there is a flaw in the scheme—Western Union has built up a domestic system that would not easily be countered by the international record carriers. Western Union would be able to favor its own international operations—exactly what section 222 was intended to prevent. The record carriers, then, unable to compete successfully, in the domestic market would not be in a position to counter Western Union's new stature.

A growing number of the Congress favor amending section 222 of the Communications Act of 1934 to make Hawaii a domestic point.<sup>123</sup> Should the movement be successful, Western Union would be able to provide Hawaii with permanent mailgram service. International record carriers would no longer be able to operate in Hawaii unless a city in the state were named a gateway. It has been unreasonable to treat Hawaii differently from the other states of the Union; it is time for change.

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121. 1977 Hearings, *supra* note 13, at 446-50.

122. *Id.* at 447.

123. See, e.g., S. 1866, 95th Cong., 1st Sess., 123 CONG. REC. S 13859 (1977); S. REP. NO. 389, 95th Cong., 1st Sess. (1977).

### VIII. CONCLUSION

The United States record communications industry has been bifurcated since 1943. War-time considerations and economic crises led to a division into two separate industries—the domestic monopoly of Western Union and the international competitive market of the international record carriers. Some of the reasons for the split no longer exist; some of the statutory framework is no longer necessary. A complete removal of section 222, however, would result in chaos within the domestic industry and unfair advantages in the international field. The integrity of the domestic industry under Western Union must be maintained, but not at the expense of the international record carriers. Three changes must be made to the regulatory scheme of the international record carriers.

First, the international formula for the distribution of unrouted telegraph traffic must be drastically altered. The present system, by rewarding the poorer carrier and penalizing the industrious and innovative carrier, has impeded progress in the industry and has robbed the public of the most efficient international record communications service possible. The new international formula should be based on the FCC-Wiley Model: unrouted traffic should be allocated in direct proportion to the routed traffic of the international record carriers, rather than in inverse proportion as it is now allocated. This reform will do much to encourage improvement in international record communications service.

Second, the number of gateway cities available to the international record carriers must be increased. The gateway cities should be open to all record carriers. It is wasteful to force record carriers to route all traffic through only a few cities. It is unfair to put an international record carrier at a disadvantage vis-a-vis another international record carrier. Western Union will suffer a loss of traffic that has been formerly routed through it merely to satisfy the gateway requirement. It is more important that telegrams be delivered promptly and inexpensively without unnecessary delay or cost. The international industry will operate more efficiently once the number of gateway cities is expanded.

Third, section 222(a)(10) should be amended to include Hawaii in the definition of the continental United States. Hawaii will thereby become a part of the domestic record communications market and receive record service from Western Union. Western Union will consequently be allowed to deliver mailgrams to Hawaii as it does to the other forty-nine states. The State of Hawaii will no longer be treated as a second-class state, and Western Union

will be compensated for the loss of traffic due to the increase in number of gateway cities. If subsequent studies show a need, Honolulu can be made a gateway thus providing Hawaii with excellent record service, both domestic and international, and giving the international record carriers a chance to recoup a small part of their loss of traffic. When these three changes are made in the regulatory scheme, we will have a record communications system that will last.

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