

“十二五”重点图书规划项目：电信法系列丛书

电信法原理（中英文对照）

The Theory of Telecommunications Law

姜耀雄 / 著



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序

人类的发展离不开对稀缺资源的依赖。当科技把人从对一种稀缺资源的依赖中解放出来后，人类就会陷入对另一种稀缺资源的依赖。于是，一个哲学问题出现了：科技真的能带给人自由吗？我们看到的满眼都是科技带来的资源依赖症！我们已经离不开石油、空气清洁剂、高楼大厦、瓶装饮用水了。如果说，摆脱对人的依赖的代价是对自然资源的依赖，那么，面对资源有限、欲望无穷的现实，争抢无法避免。这时，法律就要出场了，它可以被看作是对稀缺资源的一种权威性分配技术，受到公平、平等、效率等价值目标（统称为正义）的约束。

以电信法为例，当有线电话依赖于电信管网资源时，分配这种资源的法律表现为共建共享、地理唯一通道的强制开放、接入和互联互通的制度设计；当无线通信技术把人类从对管网资源的依赖中解放出来后，如何分配稀缺的频谱带宽和卫星轨道又成为了法律不得不面对的难题，于是频谱和卫星轨道分配制度应运而生。面对管网有限、频谱带宽和卫星轨道稀缺的现实，电信从诞生之日起就无法摆脱自然垄断的特征，法律能做的只是通过制度设计——通常表现为将规制经济学的研究成果固化为电信管制规则，在自然垄断的环境下最大限度地模仿竞争的效果。

在技术的推动下，法律从来就不缺少话题。技术可以改变人类所依赖的资源，但无法改变人类对资源的依赖。于是，面对科技刺激出来的更大的欲望和资源日益稀缺的矛盾，作为分配、流转、利用资源和协调利益的工具，法律必须日日新、又日新。

相对于传统法学的“问题推动”，科技法学往往是“技术推动”的。如果说传统法学格局已定、能研究的话题已被无数人咀嚼过，那么，科技法通常表现为科技发展引发的前沿问题的预防性研究，它只有雏形、没有定势，往往实验室的一个新动向，就会引发制度的前瞻性探讨，为科技发展可能引发的问题留下制度变革的空间。比如，3D 打印技术带来的知识产权问题在这项技术尚未成熟之时就被广泛探讨；而十几年前“三网融合”刚一提出，法律课题已经跟进。

规制经济学喜欢使用“激励”一词，它也是电信法学发展的动力。电信法在两条路径下被“激励”着：既定法律关系在新技术挑战下面对问题的迫切性激励，

以及技术发展可能引发的法律问题的前瞻性激励。前者是现实的法律问题,后者是建构的法律问题。从技术发展引起的主体关系变化中发现“法律问题”,既是电信法研究的客体,也是研究的起点。

在人类的发展史中,人们追求速度和远方的努力,既靠电信来实现,又靠电信来记录,电信技术的历史是人类近代史的缩影。然而,在技术话题层出不穷的大背景下,如何选择电信法的研究客体是需要斟酌的。并不是每一项电信“大事”,都值得电信法研究。面对市场驱动下的新技术炒作,电信法必须清醒地认识到有所为、有所不为的边界,以免侵入经济学或管理学的领地。浮躁是面向市场的技术盈利的特点,保守却是面对问题的制度变革的基调。无论多炫,或者从技术本身看多么“飞跃”,技术如果带不来法律关系的变化——引起法律问题,就不值得电信法关注。比如,去年热炒的“量子通信”的概念,以及我国正在布局开展的5G技术,并不会引起权利义务的变化——量子通信只是利用量子的纠缠态进行加密,不是传输,更不是超光速通信;5G也只是传输速率和带宽的增加,不会引起既有电信法律关系的变化。相反,能引起法律关系变化的技术应用是电信法研究的兴趣点。比如,微信增加的免费视频聊天和语音聊天功能,引起了权利义务关系的变化:当数据和语音的差别变模糊后,法律关系随之改变,一方面,监管机构行政许可的标准会调整,甚至推倒重来;另一方面,消费者与OTT(over-to-top)之间的电信服务合同的客体,又增加了一项IP电话服务。又如,Uber等O2O(online-to-offline)电子居间的兴起,直接引发了电信居间是否应承担超越传统居间的担保责任,即与其居间业务相关的连带责任的法律问题。

本书是中英双语的电信法教材,适用对象为法学研究生。其中中文内容曾经在2010年以《电信法问题研究》为名,由北京邮电大学出版社出版,其英文翻译是我在给外国研究生用英语讲授电信法的基础上翻译的。

姜耀雄

2016年3月5日于纽约曼哈顿

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电信法的概念和研究方法

The Concept of Telecommunications Law and The Research Method

【电信法是指对以电、磁手段传递信息过程中形成的社会关系进行调整的规范总和。当人类文明进入到工业社会，通过电、磁手段传递信息越来越便捷、即时、保真、低成本，围绕着这种信息传递方式，形成了广泛的社会关系，对其规范的总和即电信法。】

【在烽烟、信鸽、驿站传递信息的时代，并没有相应的烽烟法、信鸽法、驿站法，为什么到了电磁传播信息的时代，就要建立电信法？这涉及技术与法律的关系，如果技术引起的社会关系变革超越了原有规范的框架，就要修改规范，或者建立新的规范，如果技术只是单纯地提升了生活的方便性，并未引发新的社会关系，或者改变已有的社会关系，就不会产生法律问题。法律问题的产生是旧有社会规范无法规制技术引发的新社会关系或对已有社会关系的改变引起的。】

电信，虽然只是一种信息传播手段，

批注：Telecommunication law refers to the assemble of rules adjusting all of the relations formed in the process of transmission of information by electromagnetic way. After mankind entering industry society, the way of information transmission in electromagnetic form is more and more convenient, instant, high fidelity, cheap, so around this kind of information transmission, extensive society relationship is formed. The sum of rules adjusting the above relationship is referred to as telecommunication law.

批注：In the era of transmitting information by the way of beacon fire, pigeon and courier station, there were no beacon fire law, pigeon law, or courier station law, however when it is in the era of transmitting information by electromagnetic way, we legislate telecom law. Why? The reason hides behind the relation between technology and law. If the relation incurred by technology goes beyond the frame of old law, we should modify the old law or establish a new law. If the consequence of new technology is only to make our life convenient, and does not incur new relation or alter the existing relation, there is no law

但却引发了广泛的社会关系的变革,因此需要建立专门规范以规制这种信息传播方式,这些规范统称为“电信法”。非法律专业人士经常问的一个问题就是, [我国没有“电信法”,为何要研究“电信法”,还要写一部《电信法》的书?] 我们讲的电信法渊源,是散见于行政法规、部门规章、地方规章等多层次的有关电信法律关系的全部规范,而不仅仅指哪部“电信法”法典,正如,我国没有一部法律叫作“民法”,也没有一部法律叫作“行政法”,但却有《民法》和《行政法》。中国的“电信法”的立法已经开始了三十多年了,起草始于1980年,但命运多舛,至今没有结果,但对“电信法”的研究一直没有中断。] 在此,我们从其调整对象、价值目标、与相邻学科的研究客体区别、随技术发展的变化等方面来理解电信法。

problem occurred. The law problem is caused by the inability of old law, which cannot regulate the new relation, or the modification of old relation, triggered by technology.

批注: China has no telecom law, why should we research telecom law and write a book named telecom law? The origin of telecom law includes not only the law named Telecom Law, but also all of other rules adjusting telecom relation and passed by a diversity of legislation hierarchy, which are scattered in administrative law, ministry regulation and local regulation. This phenomenon likes that, China has no the law named Civil Law or Administrative Law, however it has civil law and administrative law research and books. China has been on the process of establishing the law named “telecom law” for over 30 years, starting from 1980, but it suffers from many mishaps and no outcome until now. However, the research about telecom law has never stopped.

第一节 电信法的概念

Section 1 The Concept of Telecommunications Law

1. 电信法的调整对象

[人们在利用电信技术传播信息过程中形成的特定关系即电信关系,这种关系是在电信管制者、电信服务提供者、电信服务消费者之间发生的,主要涉及电信管制、电信经营、电信竞争、电信消费及消费者保护、信息安全。] 电信法是调整电信法律关系的规范,其调整对

批注: The specific relationship, formed in the process of information transmission by means of telecom technology, is telecom relation, formed among subjects as telecom regulator. Telecom relation is between telecom service provider and telecom service consumer, which mainly involves telecom regulation, management, competition, consuming, consumer protection, information security.

象是电信管制机构、电信企业与电信用户三者之间的关系^[1]。

概括起来，[电信法律关系包括四个方面：电信管理部门之间的关系、电信管理部门与电信企业和用户之间的关系、电信企业之间的关系、电信企业与用户之间的关系^[2]。]其中电信管理部门之间的关系之所以成为电信法调整的对象是因为随着“三网融合”的出现，[电信管制机构出现了多个部门联合监管的趋势，明确各部门之间的权力界限成为必须，电信管理部门与电信企业和用户之间的关系属于行政监管关系，是电信法的重要研究领域，包括入门许可、价格管制、普遍服务、信息安全、电信标准和设备入网等内容；电信企业之间的关系围绕竞争和互联互通展开；电信企业与电信用户之间的关系属于平等主体间的服务合同关系。]可以看出，电信法具有平权型法律关系与隶属型法律关系共存的特征，兼具公法与私法的属性^[3]。

2. 电信法的价值

在现代法经济学影响下，大量经济学研究成果需要定格为制度，这是经济法律规范的起因。[大量电信法律规范源于规制经济学的研究成果，电信法较多地呈现出对效率和利润的关注。然而，这种关注只是作为电信制度对规制经济学的回应，是电信权利义务关系产生的经济原因。作为一种具有内在价值的规

批注：The telecom legal relation involves 4 aspects, relation among or between regulators, relation between telecom regulator and enterprise, relation among or between enterprises and relation between enterprise and consumer.

批注：It's a trend for telecom regulators to be organized to jointly supervise. Therefore, one of them should demarcate its obligation from others'. The relationship between regulators and enterprises, as well as the relationship between regulators and users, belonging to administrative supervision relation, and being the focus research area in telecom law, includes the following direction: access permission, price regulation, universal service, information security, telecom standards and network access license for device. The relationship among telecom enterprises is concerning competition and interconnection. The relationship between telecom enterprise and consumer belongs to service contract relation between equal parties.

批注：A lot of telecom legal norm derive from research achievements of regulation economics, so telecom law demonstrates concerns to effectiveness and profits. However, this kind of concern is as the consequence of telecom legal system's responding to regulation economics, and being the economic reason for the generation of telecom rights and obligations. As a kind of norms with intrinsic value, in the meanwhile of caring of effectiveness, telecom law should not neglect other values as fairness and justice, as well as the connection with other legal branch, such as reference to or restatement of concept, rule and principle from other legal branch.

[1] 何晓行, 王剑虹. 论加入 WTO 后的中国电信立法 [J]. 重庆邮电学院学报 (社会科学版), 2004 (2): 60.

[2] 王敏. 论电信法的概念与特征 [J]. 北京邮电大学学报 (社会科学版), 2005, 7 (1): 67.

[3] 陈新森. 论我国电信市场竞争中的新型法律关系 [J]. 市场周刊·商务, 2004 (7): 71.

范,电信法在关注效率的同时,不应当忽略了公平、正义等其他法律价值,以及与其他法学部门的联系,包括对其他法学部门的概念、规则、原则的借鉴和重新解释。]

批注: The institution stemming from economic requirement faces a general problem, not only in telecom law, but also in any other branch of economic law, which acquires the balance between effectiveness value of economy and justice value of rules.

其实, [起源于经济需要的制度,一直面临着经济的效率价值和规则的正义价值的平衡问题,这不仅是电信法的问题,也是经济法的一个普遍问题。]任何源于经济要求的利益分配,在规范化过程中,即在立法层面,必须考虑超越效率价值之外的其他价值。利益分配或权利配置必须兼顾公平、正义的要求而不仅仅是效率或经济分析^[4]。

法的规范价值在于其从形式上确立了实现公平、正义等价值的规则体系,没有规范的内在价值就无法实现法律关系主体间的公平、正义乃至效率^[5]。电信法律规范中的很多制度设计都直接反映了对公平、正义等其他价值的关注:普遍服务、价格管制制度源于公平价值;信息内容管制制度源于国家利益和公共利益;不对称管制制度追求的虽然是公平竞争的效益价值,但其方式却反映了杀富济贫的正义价值。还有一些电信制度设计,似乎完全出于经济需要,但规则本身的内在价值一样应受到关注:比如,出于竞争需要的接入制度和以方便用户为出发点的互联互通制度,其中包含的接入义务的设定、互联规程的制定、互联争议的解决,都体现了对弱者保护和强者限制的正义价值观;再比如,出于总量控制需要的入门资格许可、稀缺资源使用权许可,在许可程序、招标程序中必须关注程序自身的合理性;又如,关注电信建设效率的电信建设制度,必须考虑土地和建筑物所有人的物权,其制度设计必须平衡电信建设效率和公民私权利等多元价值,在利益平衡过程中,利益分配规则不能局限于效率本身。从这个意义上讲, [电信法律制度的价值体系超越了经济学,而带有了效率以外的多重价值。]

批注: The telecom legal value system extends beyond economy and possesses diversity values, as well as effectiveness.

3. 与相邻学科研究客体的区别

由于“电信”的技术外延不同,电信法的研究客体存在广义和狭义之分。

[广义的电信指以电磁方式传递或接收信

批注: The telecommunication, in generally, refers to communication by means of transmission and reception information with electromagnetic way.

[4] 王压非,张剑军.法律经济学效率理念缺陷分析[J].商场现代化,2009,2(5):272.

[5] 张文显.法理学[M].3版.北京:法律出版社,2007:293-350.

号的通信方式,包括广播、电视、电话、互联网等各种使用电磁方式的通信手段,]而不论传播路径是由发信者选择收信者(如电话、电子邮件),还是由收信者选择发信者(如广播、电视、互联网网页浏览);不论传输路径是单向的(如传呼),还是双向的(如电话);不论传输介质是双绞线、五类线,还是光纤;也不论传输内容是语音(如电话),还是数据(如计算机通信)。[广义的电信也称为通信,包括狭义电信、广播、电视、网络。狭义的电信,是指由发信者选择收信人和信息内容的电磁传输,比如电话(固话、移动电话、卫星通信)和电子邮件,而排除了发信者向不特定公众传输、由收信者选择接受的信息传播方式,如广播、电视、互联网网页浏览^[6]。]需要特别说明的是,电子邮件属于狭义电信范畴,因为收信人由发信人指定;但互联网网页浏览不属于狭义电信,因为其路径不是由发信者选定,而是由收信者选择,其类似于广播,是向不特定的人发送并由接收者选择路径或内容接收的。

[各国电信法律规范一般采纳“电信”广义外延,比如我国《电信条例》^[7]以及美国1996年电信法。以后者为例,其定义的“电信(telecommunications)”“是指在使用人(user)指定的两点或多点之

批注: The general telecommunication concept, also called communication, includes narrowly defined telecommunication, as well as broadcast, television and internet. The narrowly defined telecommunication refers to the electromagnetic communication, in which sender designates the recipient and transmission content, such as telephone (line phone, mobile phone and satellite phone) and E-mail, excludes the way of the sender broadcasting to non-specific public and the recipient choosing the transmitted content, such as broadcasting, television and internet web browsing.

批注: Telecom law of various countries applies the concept of Telecommunication as its general denotation, such as Chinese Telecommunication Regulations and the Act of Telecommunications (1996) of USA. We use the latter as an example. In Act of Telecommunications, “The term ‘telecommunications’ means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”(47 USC sec 3(a)(2)(48))

In the definition above, ‘User’ includes not only sender, but also recipient. This definition show us 3 characteristics about general definition of Telecommunication as following. (1) the transmission route is designated by users, either sender or recipient; (2) the transmission content is designated by users, either sender or recipient; (3) the form and content of the information is not changed before transmission and after receipt.

[6] Charles H. Kennedy. An Introduction to U.S. Telecommunications Law. 2nd ed. Massachusetts: Artech House, Inc., 2001.

[7] 我国《电信条例》第二条“本条例所称电信,是指利用有线、无线的电磁系统或者光电系统,传送、发射或者接收语音、文字、数据、图像以及其他任何形式信息的活动。”

间传输由使用人 (user) 选定的信息, 发送和接受的信息在形式上或内容没有改变^[8]。”其中使用人 (user) 既包括发信者也包括收信者。上述定义表明了广义电信的三个特征: 其一, 发送路径为使用人 (发信者或收信者) 指定的两点或多点之间; 其二, 发送的信息内容由使用人 (发信者或收信者) 选定; 其三, 发送和接受的信息在形式上或内容没有改变^[9]。] 在“电信”做广义解释的语境中, “电信服务”自然也有了广义的外延, 如美国 1996 年电信法将“电信服务 (telecommunications service)”定义为:

“无论使用何种设备, 直接向公众, 或者如同直接向公众一样可以被有效获得地向某用户群体, 有偿提供电信^[10]。”其具有三个特征: 有偿、向公众提供、无论使用何种设备^[11]。

批注: Taiwan researchers tend to separate telecom apart from broadcast according to the following criterion: telecom is bi-directional (two-way) and one-to-one transmission, and broadcast is unidirectional (one-way) and one-to-many transmission. In the traditional regulation framework, which makes dual separation between telecom and broadcast. Any form of one-way and one-to-many transmission is classified into broadcast domain, and accepted the jurisdiction of Radio Television Law, Cable Television Law, Satellite Television Law, according to its transmission mode. Any form of two-way and one-to-one transmission is classified into Telecom domain, and accept the jurisdiction of Telecom Law.

[台湾学者倾向于根据传输是“双向、一对一”还是“单向、一对多”来区分电信和广播, 将后一种传输模式归类为传播、前一种传输模式归类为电信, “在传统的电信/传播二元化的管制框架下, 凡是属于单向、一对多的通信媒介均被归类为传播的范畴, 并且照其所使用平台的性质分别接受无线广播电视法、有线广播电视法、卫星广播电视法的管制。而凡是属于双向、一对一的通信媒介则被归类为电信的范畴, 须接受电信法的管制^[12]。”]

[8] 47USC sec 3(a)(2)(48) “TELECOMMUNICATIONS- The term ‘telecommunications’ means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”

[9] Sharon K, Black. Telecommunications Law in the Internet Age. San Francisco: Morgan Kaufmann Publishers, 2002: 62.

[10] 47USC sec 3(a)(2)(51) “TELECOMMUNICATIONS SERVICE- The term telecommunications service’ means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”

[11] Sharon K, Black. Telecommunications Law in the Internet Age San Francisco: Morgan Kaufmann Publishers, 2002: 62.

[12] 黄宗乐. 数位汇流趋势下之竞争法与竞争政策 [M] // 范建得. 电信法制新纪元——全国资讯通信法律研讨会论文集. 台湾: 台湾元照出版公司, 2003: 82-83.

【电信法教材一般采纳电信的狭义解释，故其不包括广播法、有线电视法、网络法内容。广播法、有线电视法属于传播法或媒体法研究的客体，而网络法的研究客体独立出来由专门的网络法研究。然而，这种界限在三网融合的背景下面临模糊化的趋势。在传统上，通信业是按照不同的技术平台、不同的产业部门而建立相应的法律秩序的^[13]。三网融合后，广义电信（通信）和狭义电信的区分变得模糊，技术的发展对以传播平台为基础的归类管理提出了挑战。】

批注：Most of telecom textbooks adopt the narrow definition of Telecom concept. So they might not involve the content of Broadcast Law, Cable TV Law, Cyber Law. Broadcast Law and Cable TV Law is the research object of broadcast law or media law, meanwhile, the research object of cyber law is owing by a separate branch--cyber law. However, this kind of demarcation is becoming increasingly blurred, in the background of three networks convergence, which means integration of telecom network, cable TV network and internet network. Traditionally, the communication business establishes corresponding legal order according to the different technology platform and transmission sector. After the convergence of three networks, the demarcation between broad and narrow Telecom concept would became blurred. The development of technology challenges the system of classified management based on transmission platform.

批注：Telecom service refers to physical access service to telecom network hardware, meanwhile, according to Telecommunication Act of USA (1996), "The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system

另外需要说明的是，虽然电信服务和信息服务都属于电信法律规范的客体，但二者具有独立的范畴^[14]，区别在于：【电信服务指提供电信网络硬件的物理接入服务；而信息服务，按照美国 1996 年电信法的解释^[15]，是有关信息本身的生产、获取、存储、改变（存储形式和代码方式）、处理、检索、使用的服务。电信法学仅将电信服务纳入其研究客体，而将信息服务留给信息法或大众传播法学研究^[16]。】

4. 电信法随技术发展的变化

电信规范应当与电信技术变革产生

[13] 荷爱华. 论我国反垄断法在三网融合中的适用 [J]. 南京财经大学学报, 2009 (1): 5-8.

[14] Charles H. Kennedy. An Introduction to U.S. Telecommunications Law [M]. 2nd ed. Massachusetts: Artech House, Inc., 2001: 118.

[15] 47USC sec 3(a)(2)(41) INFORMATION SERVICE- The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

[16] Charles H. Kennedy. An Introduction to U.S. Telecommunications Law [M]. 2nd ed. Massachusetts: Artech House, Inc., 2001: 139.

良性互动, 发挥制度对技术和市场的促进作用^[17]。[电信法, 作为调整电信技术引发的社会关系的规范, 必须对电信技术的发展变化做出回应。]电信法律关系的基本结构是稳定的, 但具体的制度规则又是随技术发展而变化的。监管者和运营商之间以管制为基础的行政法律关系、运营商之间的受到政府管制的竞争法律关系、运营商和消费者之间的合同法律关系是稳定的, 这是电信法的基础法律关系。另一方面, 具体的电信技术规范又是变化的。[电信技术的发展可能产生新的电信法律关系, 比如无线通信引发了频率使用权许可的法律关系、互联网技术催生了网络法律关系, 需要建立专门制度(如频率使用权拍卖、网络侵权归责原则)用以规范之; 电信技术的发展也可能改变了原有的电信法律关系, 需要修正原有规范以应对技术发展, 比如, 波分复用技术的出现使得电信网络资源不再稀缺, 甚至严重过剩, 原有的电信资费模式所依据的租赁权理论不再适用新技术条件下的电信网络环境, 电信网络使用权表现出准物权属性, 建立于准物权理论之上的电信网络使用权许可制度, 即包月制, 是制度对技术发展的回应。]

or the management of a telecommunications service.” (47USC sec 3(a)(2)(41))

Telecom law includes telecom service in its research field, and excludes information service, which Information Law or Mass Communication Law takes in as their object.

批注: As a kind of norm, adjusting social relationship initiated by telecom technology, telecom law should response to the telecom technology development.

批注: The development of telecom technology could generate new telecom legal relationship, such as radio communication incurring legal relation concerning permission of the right to use of frequency, internet giving birth to cyber law relation, which requires as to establish specific system, such as selling the right to use frequency in auction, the principal of liability attribution for internet tort. The development of telecom technology could alter the existing telecom legal relationship, which requires modifying the existing norm to response to the technology development. For example, the technology of wavelength-division multiplexing (WDM) makes the telecom network resource no longer scarce, and even badly surplus, which causes that, the leasehold (rental right, right of lease) theory, based by telecom service price mode, is no longer fit for the telecom network environment created by new technology. The right of use of telecom network has the nature of quasi-property (similar to *jus ad rem*, or real rights). The system of permission to apply (access permission) to using the telecom networks, i.e. flat-rate system (fixed rate plan), based on the theory of quasi-property, is the system's response to technology development.

特别是进入 21 世纪后, 电信技术的飞速发展不仅使得电信传输效率剧增, 也使得电信产业的边界进一步模糊。脉冲编码 (PCM) 技术可以实现在一对电线中同时传送多路呼叫。网络的出现模

[17] 陈新森. 论我国电信市场竞争中的新型法律关系 [J]. 市场周刊·商务, 2004 (7): 69.