



1-1-1993

# Private Networks, Public Speech: Constitutional Speech Dimensions of Access to Private Networks

Allen S. Hammond IV

*Santa Clara University School of Law*, ahammond@scu.edu

Follow this and additional works at: <http://digitalcommons.law.scu.edu/facpubs>

---

## Recommended Citation

55 U. Pitt. L. Rev. 1085

This Article is brought to you for free and open access by the Faculty Scholarship at Santa Clara Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact [sculawlibrarian@gmail.com](mailto:sculawlibrarian@gmail.com).

PRIVATE NETWORKS, PUBLIC SPEECH: CONSTITUTIONAL  
SPEECH DIMENSIONS OF ACCESS TO PRIVATE  
NETWORKS

*Allen S. Hammond\**

TABLE OF CONTENTS

I. Introduction .....	1086
II. Networks and Closed User Groups Defined .....	1095
A. General Characteristics .....	1095
B. The Network Lexicon .....	1096
1. Public Switched Network: "Open Network" ..	1096
2. Virtual Private Networks .....	1097
3. Private Networks .....	1097
4. Closed User Groups .....	1098
5. Hybrid Networks .....	1099
6. Other Networks Distinguished .....	1099
C. Convergence and Metamorphosis: From Cable and Telephony to Broadband Networks .....	1099
III. The Current Scope of Network and User Group Access and Speech Restrictions .....	1100
A. Owner-Imposed Limitations on Access—Sub- scriber/User Initiated to Third Party Users and Networks .....	1101
1. Network Owner/Employer Restrictions on Outgoing Calls .....	1101
2. Third Party Access to Private Network or VPN Facilities .....	1102

---

\* Associate Professor of Law and Director of the Communications Media Center, at the New York Law School. Special thanks are due to the Board of Trustees and Administration of the New York Law School which provided a summer research grant to support the work on this article. Thanks also are due to my colleagues Michael Botein and Eli Noam and my wife Linda who provided valuable insights, as well as my research assistants Anjali Singhal, Jonathan Vitarelli and John McGill who provided excellent support.

Earlier drafts of this article were presented at the 21st Annual Telecommunications Policy and Research Conference, Solomon Islands, Md. October 2-4, 1993, and at the Private Networks and Public Objectives Conference presented by the Columbia Institute for Tele-Information, at Columbia University, December 6, 1991.

3.	Restriction on Membership in Closed User Groups: Control of the Jointly Owned Network Asset .....	1104
B.	Network Owners' Exercise of Content Controls ...	1105
IV.	The Constitutional Dimension .....	1108
A.	Network as Business Asset or Tool .....	1109
1.	Employer/Employee Relationships .....	1109
a.	Public Employer/Employee .....	1110
b.	Private Employer/Employee .....	1110
2.	Closed User Group and Members (Actual and Potential) .....	1111
B.	Network as Product or Service: Relationships between Network Owner/Providers and Users .....	1112
1.	Network Owner/Provider and Subscriber Users (Common Carriage) .....	1112
2.	Network Owner/Information Provider and Consumer/Subscribers .....	1115
a.	Telephony and Telecommunications .....	1115
b.	Computer Networks .....	1117
c.	Constitutionally Based Access and Speech Rights in Traditional Media: Broadcasting and Cable TV .....	1118
V.	Regulatory Shifts in the Age of Convergence and Privatization: Some Preliminary Answers .....	1122
A.	Network as Asset .....	1122
1.	Private Firms and Closed User Groups .....	1122
2.	Public Firms .....	1123
B.	Network as Product or Service .....	1124
1.	Convergence and Change: The Evolution of Speech Regulation in Traditional Media and Telecommunications .....	1124
VI.	Conclusion: Shift in Paradigms? .....	1133

## I. INTRODUCTION

The current multiple network environment in the United States is undergoing significant change as a result of the phenomena of network and media convergence and the provision of network services outside the heretofore traditional rubric of common carriage via the public switched network. The convergence phenomena can be seen in the merger of fiber optic, telephone and computer technologies into broad-

band telecommunications networks technology. Convergence is also evident in the disintegration of distinctions between video distribution and public switched networks as technology, government policy and user demand combine to introduce inter-industry competition into the nation's video distribution, inter-exchange and local exchange markets.<sup>1</sup> The movement from service provision via common carrier to private carriage can be seen in several developments as well. They include private and common carrier responses to the growing demand for specialized communication services. It is estimated that as much as a third of the nation's total yearly telecommunications investment is channelled into private networks, virtual private networks and related hybrid services.

Reliance on private investment in the construction and servicing of the public switched network infrastructure is also the chosen vehicle for building the broadband electronic super-highway, which many believe will be the logical evolution of the public switched network and its more private analogues.<sup>2</sup>

---

1. The speed with which various industry firms seek to joint venture or combine to enter new markets underscores this fact. See Alan Deutschman, *The Next Big Info Tech Battle*, FORTUNE, Nov. 29, 1993, at 39; John Greenwald & John F. Dickerson, *WIRED! Bell Atlantic's Bid for Cable Giant TCI is the Biggest Media Deal in History*, TIME, Oct. 25, 1993, at 50; John Huey & Andrew Kupfer, *What That Merger Means for You*, FORTUNE, Nov. 15, 1993, at 82; *Policing the Information Highway*, CHI. TRIB., Nov. 26, 1993, § 1, at 30; Julie Solomon, *Big Brother's Holding Company*, NEWSWEEK, Oct. 25, 1993, at 38; Sandra Sugawara & Paul Farhi, *Merger to Create a Media Giant*, WASH. POST, Oct. 14, 1993, at A1; and *The Tangled Web They Weave*, THE ECONOMIST, Oct. 16, 1993, at 21.

2. For instance, the Clinton administration has made clear that they have resolved the question of who will build the electronic highways in favor of private industry. The Clinton administration's report entitled, *National Information Infrastructure: Agenda for Action (NII)* identifies four principal policy goals and five major action areas. The four principal policy goals are: (1) reliance on private sector investment; (2) support for universal service; (3) promotion of technical innovation and new applications; and (4) promotion of a seamless user driven NII. These goals are to be accomplished via reformation of government regulatory policies concerning: information security and network reliability; improved spectrum management; protection of intellectual property rights; increased domestic and international inter-governmental coordination; and enhanced access to government information concomitant with improvement of the procurement process. See *The National Information Infrastructure: Agenda for Action*, Info. Infrastructure Task Force, Sept. 15, 1993, at pp. 1-2, 4-16. See generally John Holliman, *Vice President Gore Press Conference on Info Highways*, Transcript No. 267-1 of live report, CNN News, Dec. 21, 1993; Ronald Brown, Secretary Brown on Three Goals for Our New National Information Infrastructure, Address at the Telecommunications Policy Briefing—Roll Call (Nov. 15, 1993); Brooks Boliek, *U.S. Data Superhighway Project Short on Concrete*, THE HOLLYWOOD REP., Sept. 16, 1993, at 1, 31.

The Clinton administration's reliance on private sector investment and privatization of network infrastructure is a pragmatic policy developed in a time of decreasing public revenues. Sole reliance on pro competition policies, however, will not adequately protect individual and group speech and related activities fostered by broadband intelligent networks or existing telecommuni-

As these changes occur, one of the critical questions for First Amendment theorists and scholars concerned with mass media and telecommunications is what access and speech rights will network owners and users have after the convergence and privatization of the mass media and telecommunications networks?<sup>3</sup>

As the convergence phenomenon intersects with the growing reliance on private as opposed to public common carriage provision of network services, there are potential dangers to access and broad-based speech opportunities. Privatizing the ownership of the technologies and networks can lead to the concentration of control over content in the hands of private network owners. As a result of the historic tendency to equate speech rights with ownership of the means of transmission, privatizing the merging of technology, network function and informa-

---

tions networks. In the process of managing market entry and firm competition, current U.S. competition policies run the risk of ceding creation and control of speech activities to private firms. This is particularly true to the extent the First Amendment is read as a negative bar to government action rather than an affirmative protection for speech activities.

Pro-competitive privatization policies do not directly address the need for preserving and expanding electronic speech activities as a valid goal, and thus there is a significant risk of losing opportunities for electronic speech and its related activities. Consequently the definition, preservation and expansion of electronic speech and its related activities must be elevated to a priority policy goal and incorporated within the broader policy framework of the government's NII policy.

Many states have made the same decision in their pursuit of similar pro-competitive telecommunications policies. For instance, the state of New York has recently published a document developed by the Governor's Telecommunications Exchange. The document, entitled "Connecting to the Future," identifies numerous policies which it is suggested that the state pursue in acquiring the economic benefits of an advanced telecommunications infrastructure. Among the key recommendations is reliance on a competitive market to ensure greater consumer choice and higher quality service. Unlike the federal government's NII report, however the New York report acknowledges that the state retains an obligation to ensure a free flow of information and ideas. *CONNECTING TO THE FUTURE: GREATER ACCESS, SERVICES, AND COMPETITION IN TELECOMMUNICATIONS*, REP. OF THE N.Y. TELECOMMUNICATIONS EXCHANGE, Dec. 1993, at xii, 18-21, 28-29.

3. As fiber optic distribution and switching technology is introduced, the distribution functions and information streams of broadcasting, cable and telephony are merging. As they merge, the access, speech and related activities that received varying degrees of constitutional protection when conducted over the antecedent technologies will come to reside on the merged networks. Nevertheless, the fate of such rights in an advanced, intelligent, broadband network context is unsettled because the apportionment of these constitutionally recognized rights was made in the specific context of antecedent technologies and relationships. See generally *Electronic Media Regulation and the First Amendment: Future Perspective*, DATA CHANNELS, Feb. 3, 1992, at 4; Joshua Quittner, *Online To A Revolution: The Amazing—and Some Say Ominous—New World of TV, Telephone and Computer Is Heading Your Way*, NEWSDAY, July 18, 1993, at 4. This uncertainty is exacerbated by the growing number of private networks.

Some scholars have begun to address this question. See EDGE, Dec. 2, 1991, at 6, 7; *Special Report: Universal Telephone Service; Ready for the 21st Century?*, 1991 ANNUAL REVIEW OF THE INSTITUTE FOR INFORMATION STUDIES (a Joint Program of Northern Telecom and the Aspen Institute).

tion streams could effectuate a transfer of the current shared control over access and speech from the current public/private constitutional arrangement to private/contractual arrangements.<sup>4</sup> Such a result could be detrimental to the potential speech and access opportunities of existing and future network users of video, voice and data network information services.<sup>5</sup> Private owners may not be motivated by public interest considerations of access and inclusion. Instead, their major motivation to provide access and speech to their employees is utilitarian, and their major motivation to serve a particular individual or group of customers depends (in the most ideal sense) upon the desirability of that individual or market as a customer base and their ability to pay. These decisions are private, and thus there is arguably less op-

---

4. Inherent in the status of the ownership is an underlying bundle of property rights which include control over who may have access to the network owners' facilities and/or services. While the degree of control over access varies with the type of owner, ultimately, as long as ownership includes the right to decide access, some segment of potential users are likely to be excluded for a variety of oft-times unrelated reasons ranging from particular pricing or service configurations, to equipment requirements, information format, capacity needs, or discrimination based on economic or normative value considerations such as content of speech.

5. Users may be divided into two major groups composed of those who own network facilities (facilities based users) and those who do not own facilities (non-facilities based users). The vast majority of users are non-facilities based. These individuals, firms or groups purchase access to some of the networks (telephone) over which they may interact. They are most often semi-passive recipients of information transmitted one way over other networks (broadcasting and cable). The communications needs of these users vary substantially, and are evolving at different speeds and in multiple directions. For instance, many businesses already have significant needs for high speed, high capacity broadband communication networks. See Michael L. Dertouzos, *Building the Information Marketplace*, 94 *TECH. REV.* 28, 31-32, Jan. 1991; and Gilder, *infra* note 10, at 96; Michael L. Dertouzos, *Communications, Computers and Networks*, *SCI. AM.*, Sept. 1991, at 62, 64; Al Gore, *Infrastructure for the Global Village*, *SCI. AM.*, Sept. 1991, at 150, 151. By comparison, there is still significant uncertainty about what the general public's needs will be regarding demands for greater network speeds and capacities. Current projections of consumer use of the networks slated to comprise the information superhighway anticipate significant high end (business) use given the wealth of enhanced and information services the network architecture is likely to provide. But there is doubt that residential users will find the services desirable or affordable. See Gary Yaquinto, *The Information Superhighway; Construction Ahead: What Regulators Should Ask About the Information Superhighway*, *PUBLIC UTILITIES FORTNIGHTLY*, June 15, 1994, at 31. For example, a significant portion of the services which have been provided to date in the state of New York have benefitted business as opposed to residential users. Consumer Advocates on Guard to Keep Telecom Bills Strong, *State Telephone Regulation Report*, May 5, 1994. While some question the superhighway's utility to residential users, others are concerned that residential users not be required to pay for services they don't use. See Testimony of Mark Cooper Director of Research Consumer Federation of America, Before the Senate Commerce Telecommunications Improvement, *FDCH Congressional Testimony*, May 18, 1994. By comparison, the general public has not yet generated needs sufficient to precipitate demands for greater network speeds and capacities. Customer-users include residential as well as business customers.

portunity to rest the justification for access and speech rights upon constitutional grounds given the alleged absence of state action.<sup>6</sup>

Under such circumstances it is reasonable to ask: Will privatizing the post-convergence, multi-functional, multi-media networks result in speech rights only for network owners and those they elect to employ or to serve under contract? Who will serve people who own no network? In an era of privatized carriage in the provision of network services, what ability will the government have to assure access and speech rights for the non-facilities-based public?

This article defines private networks and closed user groups and examines the current practices by which they limit the access and

6. Several scholars have criticized the current state/private dichotomy established by the Supreme Court in light of the continuing trend toward privatization in American life. See Rodney A. Smolla, *The Bill of Rights At 200 Years: Bicentennial Perspective: Preserving the Bill of Rights in the Modern Administrative-Industrial State*, 31 WM. & MARY L. REV. 321, 358-359 (1990) (arguing that since restraints on human thought and action are the same whether applied by public or private entities, protection of constitutional freedoms should be maintained in the private as well as the public sector); Clyde W. Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law*, U. ILL. L. REV. 689, 702 (1989) (arguing that as more public functions are performed by private entities there is a critical need to protect constitutional rights heretofore protected from government control in the public sphere from private control in the private sphere).

Generally, absent a showing of an independent nexus of involvement by the state, however, neither the chartering, funding, licensing, regulating or tax exemption of a corporation by the government constitutes state action. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (regulation); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (licensing); *Trageser v. Libbie Rehabilitation Ctr.*, 590 F.2d 87 (4th Cir. 1978), cert. denied, 442 U.S. 947 (1979) (funding); *Aasum v. Good Samaritan Hosp.*, 542 F.2d 792 (9th Cir. 1976); *Cohen v. Illinois Inst. of Technology*, 524 F.2d 818 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976); *Weis v. Syracuse University*, 552 F. Supp. 675, 522 F.2d 397 (2d Cir. 1975) (N.D.N.Y. 1982); *Naranjo v. Alverno College*, 487 F. Supp. 635 (E.D. Wis. 1980); *Manning v. Greenville Memorial Hosp.*, 470 F. Supp. 662 (E.D. Va. 1979); *Stewart v. New York Univ.*, 430 F. Supp. 1305 (S.D.N.Y. 1976); and *Sament v. Hahnemann Medical College and Hosp. of Phila.*, 413 F. Supp. 434 (E.D. Pa. 1976), *aff'd mem.*, 547 F.2d 1164 (3d Cir. 1977) (charter).

Where the private entity exercises powers traditionally reserved to the state, state action may be found. See *Evans v. Newton*, 382 U.S. 296 (1966) (municipal park); *Marsh v. Alabama* 326 U.S. 501 (1946) (company town); and *Nixon v. Condon*, 286 U.S. 73 (1932) (election).

Government regulation of broadcasting has not been deemed sufficient justification for finding that the editorial decisions of broadcasters constitute state action. See *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973). Decisions by regulated telephone companies to deny billing services to information providers of government regulated indecent communication has not been deemed to constitute state action. The weight of precedent would tend to support a conclusion that activities of regulated entities such as cable operators and telephone companies which would be constitutionally proscribed if conducted by the government are constitutionally permissible. Recently, however, statutorily required efforts by cable operators to limit or ban indecent programming on leased and/or public access channels have been deemed to constitute state action. See *infra* note 106.

speech activities of potential and actual customers and subscribers as well as employees on their networks. It then identifies and addresses some of the potential constitutional questions raised by such practices. The article concludes that current government efforts to rely on network privatization to assure the development of network infrastructure will continue. Even as this trend continues over time, however, the government retains ways in which it may act to ensure access and speech rights for potential private network users, whether they are subscribers or employees, while acknowledging the access and speech rights of network providers.

The application and enforcement of libel, indecency and obscenity laws can serve to encourage some network owners to relinquish editorial control over content in order to avoid liability. This assumes that the government relinquishes its strategy of imposing responsibility and liability on both the network owner and the subscriber. Ultimately, absent the assertion of editorial control by the network provider, responsibility and liability for speech should reside with the speaker.

Similarly, the removal of government-sanctioned limitations on carrier tort liability would encourage network owners to eschew private carriage for the protection that public common carriage affords. Tort liability under state law would attach whenever the private carrier negligently handles subscriber information. Private carrier and closed user group attempts to exempt themselves from such liability via exculpatory contract clauses or tariff language would be deemed unconscionable and unenforceable as a matter of law where it could be established that the subscriber does not possess equal bargaining power. Only carriers providing service to the general public or substantial interconnection with public networks should enjoy the protection from tort liability. Like the imposition of libel and criminal liability, the application of tort liability would also serve as an incentive for private networks to eschew control over content or, at the very least, provide access via interconnection between other networks.

The government should continue a qualified reliance on the anti-trust laws<sup>7</sup> and structural safeguards<sup>8</sup> to assure access to network facil-

---

7. Information providers who find their access to network or their communication over the network constrained by the network owner, may be able to establish that an antitrust violation has occurred. If an information provider can successfully establish that the network provider either possess and seeks to maintain monopoly power, or owns essential facilities or is attempting to monopolize a market segment, the network provider's activity may be prohibited *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

Newspaper publishers, cable programmers and broadcasters which would comprise a signifi-



ities. In addition to the use of these strategies, the government may

---

cant portion of the potential information providers on a telecommunications carrier provided broadband network, have alleged that the local telephone companies will in fact engage in anti-competitive activities if they are allowed to vertically integrate into the market for providing information services. For instance, broadcasters and cable operators oppose limited local telephone company entry into video distribution services market via FCC's video dial tone proposal absent significant safeguards. See generally Harry A. Jessell, *Video Dial Tone Advances at FCC: Commissioners Propose to Establish Regulatory Framework for Telcos to Deliver TV Services*, BROADCASTING, Oct. 28, 1991, at 26; *Cable Attacks VDT, Rural Exemption Extension*, TELEVISION DIG., Oct. 19, 1992, at 1. See also Charles Mason, *Who Are the Real Monopolists? Telcos, NCTA Trade Charges*, TELEPHONY, Dec. 26, 1988, at 10; Elizabeth Sanger, *Battle For The Information Highway, Digital Dealing; Companies Seeking Fortunes in Tomorrow's Technology Race to Join Forces*, NEWSDAY, July 19, 1993, at 19; *Quello's Concerns: Bell Atlantic Says Telcos in Cable Will Improve Video Delivery Service*, COMM. DAILY, Feb. 1, 1989, at 2. Moreover, anti-competitive activities of local telephone carriers have been cited as well. See Brian Kaberline, *Cable TV Ties Telecom Titans Into Fiber-Optic Knots*, KANSAS CITY BUS. J., May 15, 1992, at 21; Edmund L. Andrews, *'Baby Bell' Fights Cable Law, Citing Right to Free Speech*, N.Y. TIMES, Dec. 18, 1992, § D, at 1; Edmund L. Andrews, *Foes Are Softening Stands Against Phone-TV Links*, N.Y. TIMES, Feb. 29, 1992, § 1, at 37; Paul Farhi, *FCC Favors Phone Firms Providing TV Service*, WASH. POST, Oct. 25, 1991, at A12; Alan Pearce, *Is Path Cleared for RBOCs To Offer Into Services?*, N.Y.L.J., Oct. 18, 1991, at 5.

Some parties allege that the Regulated Bell Holding Companies have been slow to implement ONA because the RBOCs seek to minimize the possible economic advantage their competitors might gain in providing information services before the telephone companies are allowed to compete. Alan Pearce, *Problems Continue to Postpone the Information Age*, NETWORK WORLD, May 29, 1989, at 27.

Newspaper publishers opposed judicial removal of the prohibition to telco entry into the information services market by supporting introduction of legislation to restrict telco entry. See *Reaction to Court Decision; RHCs Assail Cooper Bill on MFJ as Anti-Competitive*, COMM. DAILY, Oct. 9, 1991, at 1. Efforts by legislators and the local telephone industry to have telco entry into the video distribution market become the legislative fix for recent anti-competitive activity by cable operators, were unsuccessful. See *U.S. Congress Set to Re-Examine Ban on Cable-Telephony Cross-Ownership*, FINTECH TELECOM MARKETS, Jan. 24, 1991, at 2.

Prior activity by cable operators, a group of vertically integrated network owner/information providers, lends substantial credence to those concerns. See generally *Quello's Concerns: Bell Atlantic Says Telcos in Cable Will Improve Video Delivery Service*, supra..

Most industry observers, scholars and commentators have suggested that some portion of the future broadband network infrastructure may be composed of essential facilities. An antitrust violation will arise where such facilities are: (1) extremely difficult if not impracticable for competitors to duplicate; (2) owned by one or a group of firms; and (3) not made available to competitors of the network facilities owner without an appropriate business justification or apparent efficiency, especially where the network owner is also an information provider. See John M. Stevens, *Antitrust Law and Open Access to the NREN*, 38 VILL. L. REV. 571, 575, 584-85. Aside from the significant cost of litigation, the difficulty in establishing the relevant market at a time of fluctuating market boundaries is substantial.

8. In telecommunications, the term "structural safeguards" refers to the separation of a vertically integrated firm into corporate segments based upon whether they provide basic network services or enhanced services. The FCC defines enhanced services as services "which employ computer processing applications that act on the format, content, code, protocol or similar aspect of the subscriber's transmitted information; provide the subscriber additional, different, or restruc-

pro-actively encourage access and speech by creating regulatory poli-

---

tured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a) (1993). Enhanced services include data processing services as well as videotext, audio-text, database retrieval and other computer and communications technologies applications. See Robert J. Butler, *In the Aftermath of California v. FCC: Computer III Remand Proceedings Pose Difficult Policy Choices For the Enhanced Services Industry*, THE COMPUTER LAW., May 1991, at 24; Barbara D. Khait & Andrew S. Elston, *RHCs and Information Services: Gateways to Opportunity?*, ONLINE, Sept. 1989, at 27.

The goal of open networks architecture policies, of which "structural separations" was a part, is to prevent the ability of the RBOCs to underwrite their provision of competitive enhanced and information services with monies garnered from their basic network monopoly. For an explanation of the rationale for open network architecture and related policies see *Memorandum Opinion and Order In the Matter of Filing and Review of Open Network Architecture Plans*, 8 FCC Rcd 2606; 1993 FCC LEXIS 1514; 72 Rad. Reg. 2d (P & F), Mar. 29, 1993, at [\*3]; and Dawn Bushaus, *Enhanced Services—ONA and AIN on Collision Course*, COMM. WK., June 17, 1991, at 32L. See also *FCC Plays Its ONA Cards*, DATA COMM., Feb., 1991, at 50; Marshall Yates, *The Volatile World of Telecommunications*, PUB. UTIL. FORT., Aug. 3, 1989, at 50.

In *Computer III*, 104 F.C.C.2d 958 (1986) the FCC reversed its previous requirement that the RBOCs could provide enhanced services only through a structurally separate subsidiary corporation. See *Computer II*, 77 F.C.C.2d 384, *recon.*, 84 F.C.C.2d 50 (1980), *clarified on further recon.*, 88 F.C.C.2d 512 (1981), *aff'd sub nom.*, Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); BOC Separation Order, 95 F.C.C.2d 1117 (1983), *aff'd sub nom.* Illinois Bell Tel. Co. v. FCC, 740 F.2d 465 (7th Cir. 1984), *recon. denied*, 49 Fed. Reg. 26,056 (1984), *aff'd sub nom.* North Am. Telecommunications Ass'n v. FCC, 772 F.2d 1282 (7th Cir. 1985).

In adopting the Open Network Architecture Plans, the FCC determined that it would be sufficient for the RBOCs to provide enhanced services as integrated entities and offer their "unbundled" basic network functions to other enhanced service providers on a tariffed, nondiscriminatory basis. *Computer*, 104 F.C.C.2d at 964-65, 1063-66; *Filing and Review of Open Network Architecture Plans*, 4 F.C.C.R. 1 (1988), *recon.*, 5 F.C.C.R. 3084 (1990), *amended plans conditionally approved*, 5 F.C.C.R. 3103 (1990). The FCC concluded that the requirement to unbundle the network functions, combined with accounting and other non-structural safeguards would obviate the need to rely on the separate subsidiary requirement to prevent the RBOCs from engaging in access discrimination and anticompetitive cross-subsidization which would favor their enhanced service operations. *Computer*, 104 F.C.C.2d at 964, 1012, 2 F.C.C.R. 3035, 3039.

The U.S. Court of Appeals for the Ninth Circuit vacated and remanded the FCC's *Computer III* rulings. *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990). *Id.* at 1238-39. The Ninth Circuit held that the FCC had not provided sufficient support in the record for its conclusion that structural separation was no longer needed to prevent RBOC attempts at cross subsidization and that accounting safeguards alone would be sufficient. The court concluded instead that the FCC's proposed policy to allow the telephone companies into the enhanced services market on a vertically integrated basis would increase the BOCs' incentives to engage in anti-competitive activity to maintain or increase their market share for enhanced services. *Id.* at 1234. See also *Public Service Commission Paper Attacks Computer III Ruling*, 5 WORLDWIDE VIDEOTEX TELE-SERVICE NEWS (July 1993).

In the FCC's *Computer III* proceedings, subsequent to the court decision, the comments were predictable. "The Bell regional holding companies (RHC) endorsed and enhanced service providers (ESP) opposed the FCC's attempts to slightly modify its accounting and non-discrimination rules." See *Boc Week*, RHCS, Esps, States Form Familiar Lines In *Computer III Remand*, Mar. 18, 1991 Section: No. 11, vol. 8.

cies and tax incentives that favor the building of open, switched, interconnected networks incorporating distributed intelligence. Such networks, whether public or private, could provide the opportunity for large numbers of users to engage in broadband, multi-media interactive speech.<sup>9</sup> They also provide a preferable alternative to multi-channel, uni-directional distribution systems in which network architecture and functionality preclude two-way, broadband interactive communications while facilitating the network owners' exercise of private editorial control.

When combined with the regulatory strategies outlined above, selection of a switched network architecture would also ensure that neither network owners or users forfeit meaningful access or speech rights. In a switched broadband interactive network environment, the capacity for carriage of information is substantial, and thus the notion of scarcity upon which the constitutional and regulatory policies concerning antecedent technologies is based should become a less viable justification for limiting access and speech rights.<sup>10</sup>

---

Subsequent to the court's decision, the FCC quickly reinstated its ONA requirements including its waiver of the structural safeguards. It required that the RBOCs implement their plans to offer unbundled services regardless of its ultimate decision on structural separation. See *Computer III Remand Proceedings*, 5 F.C.C.R. 7719 (1990) and 6 F.C.C.R. 174 (1990). Pending the ultimate decision, the RBOCs were allowed to continue offering enhanced services (previously approved by the FCC), as fully integrated companies.

The FCC's decision in the Remand Proceedings was not well received in some quarters. For instance, in response to the FCC's decision, the District of Columbia Public Service Commission took issue with the FCC's justifications for removing the separate subsidiary requirement. The DCPSC argued that "it is clear that a separate subsidiary structure for the provision of new (competitive) services by the RBOCs ("Regional Bell Operating Companies" or Telcos) does not inhibit the introduction of new services, does not impede competition in certain markets and does not cause consumer disruptions." See *Public Service Commission Paper Attacks Computer III Ruling*, WORLDWIDE VIDEOTEX TELE-SERVICE NEWS, July 1993.

At least one court was highly skeptical of the ONA plan's efficacy whether in its *Computer II* form or its subsequent *Computer III* form. See *United States v. Western Electric et al.*, 673 F. Supp. 525 (1987), *aff'd in part and rev'd in part*, 900 F.2d 283 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 911 (1990). Ironically, the same mechanisms of the ONA plans which Judge Harold Greene found so ineffective in 1987, are the very mechanisms the FCC proposes to implement under its post *California v. FCC*, modified *Computer III* regulations.

9. There is significant uncertainty regarding how the public may ultimately react to and use the broadband multi-media capabilities which may be provided by the electronic superhighway. Nevertheless there is also substantial concern that, left to the vagaries of discernable short market demand, industry will not provide an infrastructure capable of extending broadband, multi-media interactive capabilities and services to most if not all network users.

10. Several arguments have arisen with regard to the viability of scarcity as a justification for future regulation of communication and telecommunication media. Some argue that choice of the appropriate technology can enhance opportunities for innovation and obviate the need for regulatory responses to access concerns raised by the existence of scarce transmission capacity.

In the area of employee access and speech rights on employer networks, a pragmatic judicial or legislative balance must be struck between the network owners' legitimate business needs, employees' access, speech and privacy rights, and public policy concerns including the public's right to know. Ultimately, employee speech rights should not turn on whether they are employed by public or private firms. Rather, at minimum, employee speech rights should encompass concerns regarding wages and working conditions, as well as safety and product quality issues about which the public may have interest.<sup>11</sup>

## II. NETWORKS AND CLOSED USER GROUPS DEFINED

### A. *General Characteristics*

In their most basic manifestation, networks are collections of interconnected users.<sup>12</sup> Networks have numerous characteristics, including:

---

We need to develop an information network architecture that supports the "garage shop" creative talents in terms of access to the network, and the best way to do this is opt for a switched, rather than a channel, architecture. Switched systems, whereby information is routed to a given address on demand, reduce the amount of bandwidth required to the home—thus allowing copper wire to be perfectly adequate for the last 1,000 feet. Channel architectures, in which all channels are fed to the set top decoder, require greater bandwidth and will always result in channel scarcity.

See generally Rockley L. Miller, *Digital World*, MULTIMEDIA & VIDEODISC MONITOR, July 1993 (quoting Mitch Kapor, Chairman, Electronic Frontier Foundation).

For different reasons, one noted commentator argues that spectrum scarcity as well as the current inability to build fiber to the home is a political rather than a technical or economic problem due to poor regulatory policy choices. See George Gilder, *TELECOSM: The New Rule of Wireless*, FORBES, Mar. 29, 1993, at 96.

One possible combination of the two above observations on scarcity is evident in the recent observations of Professor Edwin Baker. He emphasizes what Kapor implies and Gilder states explicitly, that government choices regarding structural regulation can create transmission scarcity. Baker goes on to note that the scarcity is then managed by use of other structural regulation which seeks to manage the impact of the scarcity consistent with first amendment values. See C. Edwin Baker, *Merging Phone and Cable*, Presented at the CITI Conference on Cable Television and the First Amendment (Feb. 21, 1994) (citing C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989)).

11. See generally Cynthia L. Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921, 925, 935-36, 960-64 (1992) (arguing that the general public has an equal interest in the product quality and safety concerns of public and private employees, and that public employees have work place concerns similar to those of their private employee counterparts and ought to enjoy the same protections for work place related expression and association).

12. For the purposes of the article, networks are defined as collections of interconnected users. NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, NTIA INFRASTRUCTURE REPORT: TELECOMMUNICATIONS IN THE AGE OF INFORMATION, at 13-20, 92 (1991). The type of transmission and the receive/send machinery employed varies. These points may or may not be capable of engaging in interactive communication. This definition acknowledges that

(a) technology [spectrum, wire, fiber]; (b) information [video, voice, data]; (c) ownership [private or public]; (d) control of content [editor, hybrid, common carrier]; and (e) control of network access or functionality. This article discusses networks primarily in terms of ownership of facilities, control of network access or functionality, and, ultimately, control of content. In the process, it acknowledges the various characteristics as they apply in addressing the impact of owner control on the user subscriber and third parties.

## B. *The Network Lexicon*

### 1. *Public Switched Network: "Open Network"*

The commercial common carrier network owners own the network facilities and retain control of all levels of network functionality.<sup>13</sup> There are no predetermined limits on who may or may not join the network. All who timely pay the subscription fee [e.g., tariff rate for the particular class and volume of service] may gain access and enjoy

---

cable and broadcast television systems may be deemed to be networks just as the public switched inter-exchange and local exchange systems constitute networks. This definition also facilitates the exploration of the broader array of access solutions presently employed and likely to be employed in the regulation of future networks.

The paper assumes that interconnection between networks or potential users of networks can and does take place. It does not address directly the need for common languages, protocols and conventions, speeds, as well as procedures of machine interaction, all of which are critical technical issues involved in network interconnection. For an excellent lay explanation of network interconnection and nomenclature, see Dertouzos, *supra* note 5, at 62; Vinton G. Cerf, *Networks*, SCI. AM., Sept. 1991, at 72. These issues are addressed, if at all, solely from the perspective of the network facilities, pricing and service configurations which the network owner(s) may choose in providing services and the impact such choices may have on the potential user class. It is recognized that choices made regarding network functions and features in significant measure can determine the likely class of users. See note 5 *supra*. See also Thomas J. Duesterberg & Peter Pitsch, *Pot Hole Alert for the Information Superhighway; Communications: Requiring Universal Access Would be Premature and a Drag on the Interactive TV Revolution*, L.A. TIMES, Jan. 11, 1994, at B-7; Thomas A. Stewart & Patty de Llosa, *Boom Time on the New Frontier*, FORTUNE, Sept. 27, 1993, at 153; Michael Botein, *Toward an Information Superhighway/Let's Get Going on a Data Highway. . . It Is Coming, But Don't Rush It*, N.Y. TIMES, Mar. 14, 1993, § 3, at 11.

Finally, the range of services that a network owner may provide are assumed to include, *inter alia*, transmission, switching and routing, storage and/or manipulation of user information, access to 3rd party and/or network provider information, and enhanced services. A network provider need not provide all of the functions listed above, or be limited solely to those listed.

13. A network's functionality is the combination of the various hardware and software defined functions the network performs. A network's functionality is determined by its hardware and software architecture and by the network standards or documents which specify network protocols. Network protocols allow hardware of various manufacture to communicate with one another. See generally Peter Fetterolf, *Connectivity: The Sum of Its Parts*, BYTE, Nov. 1991, at 197.

usage.<sup>14</sup> The network is available to virtually all potential users,<sup>15</sup> and thus it may be defined as being “open.”<sup>16</sup> These networks are the long distance, regional and local public switched networks.

## 2. *Virtual Private Networks*

In contrast to the public switched networks, virtual private networks (VPNs), offer their customers access to reserved private line capacity on the public switched telephone network (PSTN).<sup>17</sup> VPN is essentially a long-distance service in the United States. In the case of VPNs, the user manages network applications while the carrier manages all other levels of network functionality.<sup>18</sup> It is anticipated that by 1997, VPN services will account for 17 per cent of the domestic service revenues of the three biggest US long-distance carriers—AT&T, MCI and Sprint.<sup>19</sup>

## 3. *Private Networks*

In the case of private networks, all telecommunications facilities

---

14. A tariff is a published set of rates charged and conditions under which various classes of service are offered by common and private carriers.

15. The notion of network and service availability is subsumed within the definition of universal service. Universal Service was a government and industry policy that encouraged AT&T (then a monopoly) to make telephones and service available to the American public at reasonable rates. Subsidies of less profitable (or unprofitable) provision of service to rural and poorer areas were built into the business and long distance charges. See David Coursey, *Battle of the Bandwidth*, INFOWORLD, Jan. 14, 1991, at 34, 39. The traditional goal of universal service was to assure that “all but the poorest Americans could afford to make and receive telephone calls, even if they lived in remote, expensive to serve areas.” *Special Report: Universal Telephone Service; Ready for the 21st Century?*, supra note 3. As such, universal service operated as a kind of equality in access and likeness in service offerings. In the current era of increased competition and privatization, however, universal service may no longer mean likeness (or comparability) of service or equality in technical access. *Id.*

16. The term “open,” as used here to describe essentially, non-discriminatory access to communicate on the network as configured by the owner, should not be confused with the Federal Communications Commission’s “open network architecture” policy. In theory, the F.C.C.’s open network architecture policy is an attempt to provide enhanced service providers such as voice messaging, on line data and bulletin boards fair and non-discriminatory access to the local telephone companies’ transmission networks. See Dawn Bushaus, *Enhanced Services—ONA and AIN on a Collision Course*, COMMUNICATIONSWEEK, June 17, 1991, at 32L, 6.

17. See generally Mark Luczak, *Tapping the Hidden Savings in Virtual Networks; Hybrid Networks*, TELECOMMUNICATIONS, Mar. 1991, at 45; Robert Violino, *A Network of Their Very Own*, INFORMATIONWEEK, Jan. 14, 1991, at 16; and *VPNs Set to Challenge Private Networks and PSTN During Nineties*, FINTECH TELECOM MARKETS, Apr. 15, 1992 at 31.

18. See generally supra note 13.

19. *VPNs Set to Challenge Private Networks and PSTN During Nineties*, supra note 17, at 31.

are owned by an entity other than a government certified commercial common carrier, or, the user leases dedicated lines from certified carriers but maintains control over both ends of the communications channel. In the case of the latter, the user typically owns facilities on its premises [local area networks or private branch exchanges—i.e., “intra-building private networks”] and leases from carriers anything that crosses public rights of way. For example, the company may lease a dedicated T-1 between two privately owned private branch exchanges (PBXs). Network usage is confined to the owner and its affiliates and is not usually shared or aggregated on a commercial basis.<sup>20</sup>

#### 4. Closed User Groups

A private network may be open or closed. Most closed user group networks, however, are based on privately owned or dedicated facilities. Thus, most closed user group networks are private.<sup>21</sup> Closed user groups are large volume users that tend to communicate with each other “intensely.” They combine to form alternative network associations for much of their communications needs. Associations’ networks may have specialized performance attributes related to group needs.<sup>22</sup>

---

20. The networks typically are created to meet the needs of their respective users for transmission of high speed data, information processing, voice traffic or security. Consequently, they serve closed sets of users with relatively cohesive sets of needs, as well as eligibility, procurement and financing criteria. There are some firms which sell their excess network transmission capacity commercially.

21. This definition does not include closed networks established without the use of private or dedicated facilities.

22. Closed user group networks may be local, regional, national or international in scope. Examples of closed user group networks include those owned by: ad agencies, media firms, printers, insurance agencies, hospitals, record rooms, police, automobile manufacturers, parts suppliers, dealers, financiers and computer networks. See generally James I. Cash, Jr. & Benn R. Konsynski, *IS Redraws Competitive Boundaries*, HARV. BUS. REV., Mar. 1985/Apr. 1985, p. 134; Venkatraman, *IT-Enabled Business Transformation: From Automation to Business Scope Redefinition*, SLOAN MGMT. REV., Jan. 1994, at 73N. See also John Helliwell, *Networks Provide a Critical Competitive Edge for Airlines: Reservation-System Leaders Reap Diverse Benefits*, PC WEEK, Jan. 19, 1988, at C1 and Salvatore Salamone, *Airline Reservation Network Flies Into New Age of LANS; Software Front End, QIK RES, Speeds Terminal Termination at American Airlines*, NETWORK WORLD, Nov. 26, 1990, at 34 (regarding airline closed user networks and usage) and *More Shared Networks Approved Under § 4(c)(8)*, BANKING EXPANSION REP., Aug. 1, 1983, at 11 (regarding banking). See also Rita Marie Emmer, Chuck Tauck, Scott Wilkinson & Richard G. Moore, *Marketing Hotels Using Global Distribution Systems; Use of Electronic Listings and Computers in the Hospitality Industry*, 34 CORNELL HOTEL & RESTAURANT ADMIN. Q., 80 Dec. 1993, at 80 (regarding hotels).

For instance, the European Commission defines closed user groups as groups of companies with “similar business interests,” such as oil or airline firms. Such closed user groups may include “business associates—wholly or partly-owned subsidiaries and suppliers of products and ser-

### 5. *Hybrid Networks*

A large number of U.S. users have now opted for hybrid networks combining leased lines between particular locations with VPNs. Users prefer private networks for sensitive business information (in the form of encrypted data) because these are considered more secure and, on occasion, cheaper than VPNs.

### 6. *Other Networks Distinguished*

The preceding definitions are admittedly limited to switched telecommunications networks that are in some way related to the public switched networks. In contrast, video distribution networks include traditional broadcasting and cable television networks, which are non-switched, essentially one way distribution media that are not usually interactive.

### C. *Convergence and Metamorphosis: From Cable and Telephony to Broadband Networks*

It is argued that cable networks and local telephone networks likely will evolve into the switched broadband interactive networks of the near future.<sup>23</sup> Should this be true, the resulting networks could span the gamut from private networks, to public (common carrier) networks, and they could incorporate a potential range of access options from non-discriminatory access,<sup>24</sup> to private access by negotiated contract or ownership. Speech options could range from owner control of a portion of available capacity with unrestricted user speech on the re-

---

vices—as well as customers.” See *Shortlist of Five for European Super-Network*, FINTECH TELECOM MARKETS, Dec. 9, 1993; *Viatel Goes Cross-Border with Europe’s First Voice Network*, FINTECH TELECOM MARKETS, Nov. 25, 1993 (discussing the impact of the European Commission’s decision to define closed user groups). User groups’ networks may be closed for numerous reasons including: specialized equipment, specialized features, transmission speeds, security, service pricing or speech related restrictions.

23. See *supra* note 1, at 42; Deutschman, *supra* note 1, at 21-22; Sugawara, *supra* note 1, at A1, A8. For an explanation of some of the strategic market and technical reasons for the merger of telephone and cable networks, see S. Ronald Foster, *CATV Systems are Evolving to Support A Wide Range of Services*, TELECOMMUNICATIONS, Jan. 1994, at 95; Dave Schrifgiesser, *Key Trends in Broadband Communications: The Next Five-Years*, TELECOMMUNICATIONS, Jan. 1994, at 101; Rick Pinkham, *Combining Apples and Oranges; Part 1; Telecommunications and CATV Companies Merge to Form Full Service Hybrid Networks*, TELEPHONY, Jan. 24, 1994, at 32; Alan Stewart, *Classless Cables; Common Networks for Televisions and Telephones*, COMM. INT’L, Oct. 1993, at 8.

24. Non-discriminatory access in the common carrier context connotes holding out one’s self to provide like services to like situated customers at equitable rates.



maining portion, to owner control of all capacity and ultimately all speech allowed on the network. This spectrum of alternative access and speech relationships is in essence the amalgam of access and speech relationships currently residing on cable (mandated leased or free access) and telecommunications (non-discriminatory and negotiated contract access) networks.

In this context, litigation challenging the must carry rules of the Cable Competition and Consumer Protection Act of 1992 and the telco-cable cross-ownership prohibition of the Cable Communication Policy Act of 1984, as well as several E-mail and electronic bulletin board service cases currently percolating through the judicial system, may establish much of the scope of access and speech rights network owner providers and users will have.<sup>25</sup>

### III. THE CURRENT SCOPE OF NETWORK AND USER GROUP ACCESS AND SPEECH RESTRICTIONS

There are at least four levels at which a network owner or closed user group may control access or speech activities on their facilities. Control may be exercised over actual speech or communication (content), over access to the network as configured by the owner (network access), over the ability to reconfigure network functionality (network software intelligence), and over the ability to set equipment standards for network provisioning and interfacing with the network (equipment standards and network protocols). Current government policies affect the exercise of access and speech at each of the first three levels.

Legal sanction of the exercise of control varies depending upon the manner in which the network is used. Where the network is merely one of many tools or assets used by a firm to conduct its business, the "network owner" enjoys wide latitude over each of the four levels. Where the network and its related functions and services are the product that the private or public firm sells to customers, the network owner's ability to control access and speech has been subject to greater government restraint, depending on architecture, market power and traditional rights accorded networks having similar technologies and functions.

---

25. See *infra* Parts IIB and III.

*A. Owner-Imposed Limitations on Access—Subscriber/User Initiated Access to Third Party Users and Networks*

*1. Network Owner/Employer Restrictions on Outgoing Calls*

Employers may be subscribers to the public switched networks, virtual private network subscribers, owners of their own networks or a collection or association of users forming a closed user group. They may be private or public firms. In any event, because of the utility of long distance and electronic mail (E-mail), as well as the growth in availability of 800 and 900 services, employers often find it necessary to block access to certain networks and phone services in order to limit corporate expenses. Call blocking, for instance, is used to limit employee access to the above-mentioned services.<sup>26</sup> In the process, employees are denied access to the networks over which such services are provided and the information providers residing at the other end of the line. Federal and municipal government call blocking restrictions on access to dial-a-porn and long distance calls are well-known examples.<sup>27</sup> Employers also engage in call monitoring as a means of policing their restrictions on network usage.<sup>28</sup>

Employers' justifications for engaging in these practices include the need to manage or reduce costs or fraud involved in unauthorized 900 number and E-mail calls. In addition, some companies use computers to monitor customer service employees' performance, such as keystrokes per minute, time between phone calls, length of breaks, and number of errors.<sup>29</sup>

There are potential dangers inherent in call blocking and monitoring that raise significant public policy issues. Call blocking has been argued to implicate First Amendment concerns because the employer's limitations on access to the network constitute limitations on potential speech activities in which the employee might otherwise engage. Call monitoring is said to raise issues of worker privacy as the employee's

---

26. See Carl Warren, *Abuse of Company Facilities for E-mail Must be Curbed*, NETWORK WORLD, Mar. 30, 1992, at 25.

27. For instance, many New York City agencies have configured their phones to prevent city workers from dialing long distance and calling specialty phone services such as dial-a-porn and sports information lines. See Jennifer Preston, *It's OK, As Long as It's A Local Call*, NEWS-DAY, Oct. 26, 1989, at 5.

28. See, e.g., Ronald E. Roel, *Advances in The Campaign For Workers' Rights: Laws, Court Rulings Offer Protection In Areas Where Bill of Rights Doesn't*, NEWS-DAY, Jan. 10, 1988, at 84. See also *Plan to Monitor Calls Made by Civil Servants Attacked*, L.A. TIMES, Mar. 10, 1985, at 11.

29. Roel, *supra* note 28, at 84.

expectation of privacy is infringed by periodic monitoring.<sup>30</sup> Call blocking and monitoring activities raise nettlesome problems for the public's "right to know" as well, these practices may also be used to detect whistle blowers instead of individuals calling dial-a-porn providers and other unauthorized users.<sup>31</sup>

Some observers argue that employer/network owner control of access or usage of the corporate telephone or network affects employee's constitutional speech and privacy rights.<sup>32</sup> Such arguments have met with only limited success to date. The speech activities upon which the articulation of "new" employee rights are based nevertheless occur within the traditional confines of the work place, conducted over technologies that are owned or paid for by the employer. Even though E-mail and intelligent network technologies provide new opportunities for speech activities, the articulation of these activities as rights squarely pits them against the established and legally recognized property rights of the employer/network owner.

## 2. *Third Party Access to Private Network or VPN Facilities*

Firms also attempt to limit third party access to their networks to protect against toll fraud.<sup>33</sup> Computerized telephone equipment such as voice mail often help companies conduct business with greater efficiency and lower cost. They also often provide access to electronic thieves, however, who steal thousands of dollars of long-distance telephone service. Unauthorized entry can be accomplished by calling a company's toll-free 800 number or a voice mailbox and using a computer with an automatic dialer to break the security code and gain ac-

---

30. *Id.* at 84. An examination of employee privacy rights is beyond the scope of this article.

31. See *Plan to Monitor Calls Made by Civil Servants Attacked*, *supra* note 28, at 1. "The limited rights granted to government workers under the under the United States Constitution have been strongly reinforced for federal workers through the Whistleblower Protection Act of 1989." Tom Devine, *A Whistleblower's Checklist*, CHEMICAL ENGINEERING, Nov. 1991, at 207, 212. The laws protecting corporate employees, are inconsistent at the state level. *Id.*

32. Carol Wolinsky & James Sylvester, *Privacy in the Telecommunications Age*, Feb. 1992, at 23, 24.

33. See Susan E. Kinsman, *Toll Fraud on Rise, SNET Says*, THE HARTFORD COURANT, July 29, 1992, at B1. "To frustrate casual hackers, net managers are adding password protection to private branch exchanges, voice mail systems, automated attendants and the remote administrative ports used to manage them. They are thwarting the pros by blocking calls to certain locations and taking corrective action when call monitoring indicates they've fallen victim to hackers." See Annabel Dodd, *When Going the Extra Mile is Not Enough*, NETWORK WORLD, Apr. 12, 1993, at 49.

cess to the company's telephone system and outgoing lines.<sup>34</sup> Electronic bulletin boards are sometimes used to exchange generic passwords that provide access to company maintenance ports, exchange programming instructions for various systems, or procure programming manuals for voice systems. As a result, unauthorized parties can gain operational control, including the ability to unblock restrictions on international dialing and turn off on-site call accounting equipment.<sup>35</sup> According to some experts, computer hacking may cost U.S. companies between \$2.2 billion and \$4 billion each year.<sup>36</sup>

In a less arcane realm, E-mail, voice-mail and telephony systems may be used by union organizers, law enforcement authorities, friends or family members to communicate with employees. Efforts of union organizers to make use of the employer-owned telecommunications systems or networks to communicate with employees under section 7 of the National Labor Relations Act (NLRA),<sup>37</sup> may prove unsuccessful. As a practical matter, recent precedent supports the employer's right to bar union access absent a showing that the union possesses no other reasonable means of communicating its organizational message to employees.<sup>38</sup>

---

34. Kinsman, *supra* note 33, at B1.

35. Dodd, *supra* note 33, at 49.

36. Kinsman, *supra* note 33, at B1.

37. 29 U.S.C. § 157 (1988).

38. For instance, absent a showing by union organizers that: (1) they possess no other reasonable alternative means of communication to reach non-union employees, or (2) that the employer is discriminating against the union by denying access to facilities the employer otherwise makes available, the courts are unlikely to afford the organizers access to an employer's private e-mail or telecommunications facilities. *See Lechmere Inc. v. NLRB*, 112 S. Ct. 841, 848 (1992), quoting and affirming *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). Given the circumstances cited by the Lechmere court as justifying a conclusion that no other reasonable access to communication existed, [logging and mining camps or remote resort hotels], Lechmere at 849, one commenter has concluded that organizers must establish "employee isolation" in order to prove the absence of reasonable alternative means of communication. Michael L. Stevens, *The Conflict Between Union Access and Private Property Rights: Lechmere, Inc. v. NLRB and the Question of Accommodation*, 41 EMORY L.J. 1317, 1335 (1992).

Newspaper advertisements were explicitly rejected as a "RAMC" by the *Lechmere* Court. The NLRB has held that media advertisements are not considered a RAMC due to their costly, impersonal nature and absent access to the phone numbers of target employees, telephones do not constitute a reasonable alternative. *See generally* Peter J. Ford, *The NLRB, Jean Country, and Access to Private Property: A Reasonable Alternative to Reasonable Alternative Means of Communication Under Fairmont Hotel*, 13 GEO. MASON U. L. REV. 683 (1991) (arguing that the *Jean Country* decision strikes a more appropriate balance between employer property rights and employee access to information under section 7 of the NLRA, and citing all NLRB access cases through the 1991 publication date of the article and their holdings).

### 3. *Restriction on Membership in Closed User Groups: Control of the Jointly Owned Network Asset*

Some firms joint venture to develop inter-organizational network systems (IONS). IONSs can increase the efficiency and competitiveness of their owners.<sup>39</sup> In the process, IONSs also can serve as a catalyst to realign the relative market position of non-owners by creating new barriers to market entry and exit that are often controlled by the IONS owners.<sup>40</sup> By establishing, maintaining, and changing its pricing structure as well as network applications, standards, protocols, and in-

---

39. Cash & Konsynski, *supra* note 22.

There are three levels at which companies can participate in an IONS: information entry and receipt (content), software development and maintenance (network intelligence), and network (network as configured) and processing management.

At the first level, the IOS participant performs no application processing and merely acts as an information entry-receipt node. The user generally has access only through restricted protocols. The IOS simply provides standard messages, as, for example, when an independent travel agency uses one of the major airline reservation systems with no additional in-house processing capability. The majority of current IOS participants are operating at this entry level. . . .

. . .

Although level 1 participation is not complex, the relationships established with other organizations over time can help restructure the industrial marketplace in which the participant operates. For example, IOS brokerage networks have permitted savings and loan (S&L) organizations to offer discount brokerage services. In the larger S&Ls, this innovation has given rise to a new customer segment, and the resulting increased transaction volume has forced improvements in the software and communications systems.

This improvement in turn has had the effect of bringing about economies of scale, driving unit costs down, and introducing other products and services (such as insurance). . . .

. . .

Companies participating at level 2 develop and maintain software used by other IOS participants. Usually, the developer of the IOS has absorbed the cost of this development and maintenance to gain exclusive control over decisions on access, price, and design of the application and the network. In the airline reservation system examples already mentioned, American and United Airlines are level 2 participants. They are primarily responsible for developing their SABRE and APOLLO systems, respectively. . . .

. . .

The level 3 participant serves as a utility and usually owns or manages all the network facilities as well as the computer processing resources. Examples include public information networks such as the Bell operating companies, The Source, and CompuServe. Costs increase dramatically at this level.

In addition to network development and maintenance costs, the level 3 participant accepts considerable internal control responsibility for the integrity of information exchanged. For example, consider the CIRRUS network that permits ATM transactions nationwide. CIRRUS must accept a great deal of responsibility for the reliability, availability, integrity, security, and privacy of its system." *Id.* at 140-41.

40. Cash & Konsynski, *supra* note 22.

ternal control procedures,<sup>41</sup> IONSs owners can raise barriers to system (and often, market) access for competitors.<sup>42</sup>

### B. Network Owners' Exercise of Content Controls

Public and private firms also use call monitoring to manage employee communications to the firm's customers. Telemarketing and travel reservations services are two common examples.<sup>43</sup> There are also numerous content/subject matter restrictions. For instance, some computer networks have asserted control over bulletin board content in response to various user protests regarding speech on controversial subjects.<sup>44</sup>

Aside from firm business-oriented restrictions on access and in-house, on-line speech, there are the traditional and evolving limits on

---

41. This is an area that is receiving increasing scrutiny as network users push for access to the network's functionalities and intelligence for purposes of reconfiguration.

42. For instance, it is alleged that owners of major airline reservation systems have acted in anti-competitive ways by using their systems to minimize the bookings of competing non-owners. See Dunstan McNichol, *Former NWA Exec Says Computer Monopoly Is Killing Airlines*, STATES NEWS SERVICE. See also Helliwell, *supra* note 22. While the actual use and impact of the networks is still debated, it is clear that in the airline, travel, hotel and vacation/leisure businesses, the use of inter-organizational networks has often lead to a significant competitive edge in the market. See Salamone, *supra* note 22.

43. See Wolinsky & Sylvester, *supra* note 32, at 25.

44. Prodigy Services Co., an information services company owned jointly by Sears, Roebuck and Co. and International Business Machines Corp., has been involved in a number of controversies regarding speech over its facilities. It elected to eliminate a bulletin board file entitled "Health Spa" when its frank discussion of gay sexual practices spawned a bitter feud between religious fundamentalists and gays. It has terminated the memberships of subscribers protesting Prodigy's increase in E-mail prices to Prodigy advertisers.

Moreover, while Prodigy maintains that its subscribers have no First Amendment rights on its bulletin board services, it nevertheless does not want to be held responsible for the content of communications it allows to run absent an express endorsement or failure to disavow. For instance, Prodigy was uncomfortable with taking responsibility for bulletin board statements that the Holocaust never occurred. See W. John Moore, *Taming Cyberspace*, 24 NAT'L J. 745, Mar. 28, 1992.

Some other bulletin board providers have no policy regarding what may or may not be said over their facilities. For them, the communicator of the information bears the ultimate responsibility for the content. Their position has met with judicial approval in one instance. See *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991). The *Cubby* court held that CompuServe was not responsible for allegedly libelous statements made in a bulletin board called Rumormonger that was carried on CompuServe's system. *Id.* at 142. Liability was not forthcoming because CompuServe did not exercise editorial control over the bulletin board's content. *Id.* See also Moore, *supra* at 28, 29. Felicity Barringer, *Electronic Bulletin Boards Need Editing. No They Don't*, N.Y. TIMES, Mar. 11, 1990, § 4, at 4.

access and speech in the realm of broadcasting,<sup>45</sup> cable television<sup>46</sup> and traditional telephone service.<sup>47</sup>

Long distance and local network providers are viewed by at least one Supreme Court Justice and the Second and Ninth Circuit Courts as private speakers possessing the right to refuse carriage or billing services to subscribers seeking carriage of programming the carrier deems undesirable.<sup>48</sup> By comparison, the D.C. Circuit has not agreed with the

---

45. The Courts have held that the First Amendment protects the exercise of speech and editorial control over programming decisions and transmissions by broadcast licensees. *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 439 U.S. 1019 (1990).

46. Cable television operators enjoy significant protection as well. The First Amendment protects the exercise of speech and editorial discretion by cable television operators. *Leathers v. Medlock*, 499 U.S. 439, 444 (1991); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 484, 494 (1986). However, the courts have not definitively decided whether cable operators possess absolute editorial and speech rights. *See Turner Broadcasting Sys., Inc. v. FCC*, U.S.L.W., at A-798 (May 5, 1993) (request for injunction against enforcement of must carry section of Cable Act of 1992 legislation denied).

47. Similarly to cable television, the First Amendment has been held to protect voice communications over telephone. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989). Recently, the First Amendment has been held to accord local exchange network operators the right to engage video communication to their service area subscribers. *Chesapeake and Potomac Tel. of Va. v. United States*, 830 F. Supp. 909 (E.D. Va. 1993). *See also* The Cable Communications Policy Act of 1984, 47 U.S.C. § 533(b) (1984) (prohibiting local telephone companies from providing video programming to potential viewers in their service area directly or indirectly through an entity owned by the telephone company or under its common control); Edmund L. Andrews, *Ruling Frees Phone Concerns to Offer Cable Programming*, N.Y. TIMES, Aug. 25, 1993, at A1 (announcing the U.S. District Court decision overturning the telephone-cable television cross-ownership ban).

48. 492 U.S. at 131 (1989) (Scalia, J., concurring); *Dial Info. Servs. Corp. of N.Y. v. Thornburgh*, 938 F.2d 1535, 1540 (2d Cir. 1991); *Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1296 (9th Cir. 1987); and *Information Providers' Coalition for the Defense of the First Amendment v. FCC*, 928 F.2d 866, 870 (9th Cir. 1991) (Information Providers).

In each of the cases the issues concerned messages for which the telephone companies collected fees on behalf of the information provider. The information providers were allowed to provide messages which the telephone companies did not provide billing services for. Nevertheless, the difficulties associated with collections absent the assistance of the phone companies rendered the information providers' businesses marginal at best. The carriers' provision of billing services was voluntary rather than required by law.

In *Information Providers*, the Court, *inter alia*, considered petitioners' assertion that FCC regulations requiring the individual wishing to receive "dial-a-porn" messages notify the carrier in writing, constituted a prior restraint. The Court concluded that no prior restraint was involved because there was no government action to enjoin speech, require advanced governmental approval for speech, censor or license speech. Instead, the court found that only the telephone companies are involved. Furthermore, as they are private actors, they are constitutionally free to ban dial-a-porn from their networks or refuse to make available billing services to dial-a-porn information providers. 928 F.2d at 877. Similar conclusions were reached in *Carlin*, 827 F.2d at 1293, 1295, 1297 n.10, and in *Dial Info.*, 938 F.2d at 1543.

Second and Ninth Circuits' private actor analysis (applied by the Second and Ninth Circuits in the context of telephony). In *Alliance for Media v. FCC*, it declined to view the cable operator as a private actor in the context of regulating indecency on access channels on cable television.<sup>49</sup> The D.C. Circuit distinguished the telephone and cable contexts noting that unlike the government-compelled offering of leased and public access channels in cable, the billing services provided by telephone companies were voluntary and therefore private.<sup>50</sup>

The state action/private action distinction relied upon by the D.C. Circuit in *Alliance*, could have a profound effect on future regulation

---

49. *Alliance for Community Media v. FCC*, 10 F.3d 812 (D.C. Cir. 1993), *vacated*, 1994 U.S. App. Lexis 6440. In *Alliance*, the Court considered among other issues, the constitutionality of FCC regulations requiring in some situations that cable operators: (1) prohibit or segregate any programming on their leased access channels which they reasonably believes to be indecent; and (2) prohibit obscene or indecent programming as well as programming soliciting unlawful conduct. In response to the government's argument that cable operators operating under the regulations are not state actors, the court concluded that the statute significantly encourages the operators to ban indecent speech. Consequently, operator action is state action. *Id.* at 818-20.

The Circuit Court reached its conclusion upon applying the state action test set forth in *Reitman v. Mulkey*, 387 U.S. 369 (1967) to Section 10 of the Cable Competition and Consumer Protection Act of 1992. *Id.* at 818-22. Per *Reitman*, the immediate objective, historical context and ultimate effect of the cable statute were examined. The Circuit Court found that: (a) the statute's immediate objective was to suppress indecent information by limiting its transmission via access channels; (b) the context of the statute evidenced an effort by the government to strip cable operators of editorial power over the content of information on leased and public access channels and then enlist the cable operator in identifying and then prohibiting only indecent material; and (c) the ultimate effect of the statute was to encourage a number of cable operators to ban indecent programming from leased and access channels altogether. *Id.* Based on these findings, the Circuit Court concluded that the statute's encouragement of total denial of indecent speech by cable operators constituted state action. *Id.* at 822.

The court went on to find the total ban unconstitutional because it was not the least restrictive means for achieving the government's goal of regulating access to indecent programming by children. *Id.* at 823-24.

50. *Id.* at 821 and accompanying notes. Absent the voluntary billing services distinction, it can be argued that there is no reasonable distinction between the telephone and cable contexts as addressed by the courts. Access to cable is mandated by statute while access to foreborne telephone carriers is ostensibly by election of the carrier and access to non foreborne carriers is based on state and federal regulation of tariff offerings. Given the longstanding state and federal regulatory policies regarding universal access, however, non-discriminatory service for like customers ordering like service, and carrier content neutrality, aside from the universal access requirement in telephony, an explanation of the Ninth and District of Columbia Circuit decisions based on the above referenced distinction between cable and telephony is questionable. Regardless of Congress' disinclination to label cable a common carrier, even with reference to access channels, given the first come first served non-discriminatory operation of access channels, it is difficult to make a reasonable distinctions between cable access channels and basic telephone service under tariff absent the "voluntary billing" distinction.



of customer access to the networks of forborne carriers.<sup>51</sup> They, like the local telephone companies' offering of billing services, offer their common carrier communications services on a voluntary basis. Thus, according to the *Alliance* analysis, they would be free to engage in discriminatory provision of services.<sup>52</sup>

#### IV. THE CONSTITUTIONAL DIMENSION

The above admittedly cursory review leads to the conclusion that network owner/providers limit access and speech activities of employees, user/members and third parties to accomplish numerous tasks, including: protection of property, assets, costs and market share, as well as to achieve competitive advantage, limit or constrain dissemination of proprietary information, manage the communication of information, or discourage the procurement of sometimes illicit information.

Under such circumstances when may we say that a user-member or a potential outside communicator is impermissibly constrained from gaining access or engaging in speech? Is it possible to distinguish between legitimate business needs and impermissible constraints on speech activities? At first blush, based on the prior discussion, one could suggest that permissible firm needs include all of those previously listed above.<sup>53</sup> By the same token, others might argue that impermissible firm needs include many of the same goals articulated as legitimate.<sup>54</sup>

---

51. See *In the Matter of Tariff Filing Requirements for Nondominant Common Carriers*, 8 F.C.C.R. 6752 (1993); *In the Matter of Policy and Rules Concerning Rates for Dominant Carriers*, 4 F.C.C.R. 2873 (1989); *MCI Telecommunications Corp. v. F.C.C.*, 765 F.2d 1186 (D.C. Cir. 1985).

52. Under a narrow reading of the applicable precedent, they arguably would be constitutionally free to ban dial-a-porn from their networks by refusing to offer billing services to dial-a-porn information providers. For the D.C. Circuit Court's analysis of *Dial Info.*, *Carlin Communications* and *Information Providers*, see *Alliance*, 10 F.3d at 820-21 (1993).

53. While the Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2701 protects users of E-Mail and bulletin boards against the intentional monitoring of their messages by third parties, employers seeking to protect company information and assets can monitor employee messages on internal E-mail systems. Julie Bennett, *Firms' Rights Protected by Electronic Mail Laws*, *CRAIN'S NEW YORK BUSINESS*, Oct. 8, 1990, at 28. The Electronic Communications Privacy Act of 1986 also allows employers to read employee E-mail messages situated on company computer systems that permit third party access, provided the employee gives permission. Rosalind Resnick, *The Outer Limits*, *NAT'L L.J.*, Sept. 16, 1991, at 1, 6.

54. Some commentators take the position that any monitoring of E-Mail or searching through personal employee files is ethically wrong regardless of the law. See Glenn Rifkin, *Do Employees Have a Right to Electronic Privacy?*, *N.Y. TIMES*, Dec. 8, 1991, at 8. Aside from questions of ethics, other commenters have argued that the use of monitoring is demoralizing to employees and therefore counter productive. Glenn Rifkin, *The Ethics Gap*, *COMPUTERWORLD*,

One possible way to answer this dilemma is to examine the manner in which the law has addressed and apportioned access and speech rights in the varying relationships between network owner/providers and closed user groups, on the one hand, and network users and third parties on the other. A critical distinction in the manner in which such rights are apportioned is the relative status of the network. Where the network is an asset established primarily for the internal use of the corporation or closed user group, the employees, closed user members, and third party communicators have very limited access and speech rights. Where the network is the product or service offered by the corporation or closed user group, subscribers and viewers have been accorded greater access and speech rights based on constitutional, economic and other public policy principles.

#### *A. Network as Business Asset or Tool*

##### *1. Employer/Employee Relationships*

As mentioned above, employers may be network owner/providers, closed user groups, or simply network subscribers. The nature of their status as public or private institutions, however, has a significant effect on the scope of expectations that an employee may have regarding constitutional protection of their arguable rights of access to company facilities and ability to speak on those facilities.

Recently, there has been a spate of law suits filed by employees alleging that their constitutional rights have been violated when employers monitored their conversations over E-mail or telephone networks.<sup>55</sup> None of the suits appear to have been judicially resolved to date,<sup>56</sup> but there are some indications of the extent of protection afforded employee speech. For instance, most experts agree that while the Federal Electronic Communications Privacy Act of 1986 protects the privacy of electronic messages sent through public networks to which individuals or companies subscribe, it does not apply to internal E-mail.<sup>57</sup> Thus, to the extent that employees enjoy speech rights on

---

Oct. 14, 1991, at 83, 85.

55. See Bennett, *supra* note 53, at 28; Alice Kahn, *Careful—The Boss Might be Reading Your Electronic Mail*, STAR TRIB., Nov. 20, 1991, at 3E; *More E-Mail Legal Actions*, COMPUTER FRAUD & SECURITY BULL., Feb. 1992, at 21, 22; Resnick, *supra* note 53, at 1; Rifkin, *supra* note 54, at 8; Linda Wilson, *Addressing E-mail Rights*, INFORMATIONWEEK, Feb. 15, 1993, at 54.

56. See Victoria Slind-Flor, *What is E-Mail Exactly?*, NAT'L L.J., Nov. 25, 1991, at 3, 33.

57. The Electronic Communications Privacy Act (ECPA) protects all electronic communications systems, including purely internal E-mail systems and public systems from outside intrud-

company E-mail facilities, those rights are limited to communication over public E-mail systems. Employers retain the right to restrict access to, and monitor E-mail transmitted over private lines.

*a. Public Employer/Employee*

The courts have held that a public employee has First Amendment constitutional protection for speech about "matters" of public concern.<sup>58</sup> In cases where the employee is acting as a "whistle blower," public policy and legislation in an increasing number of jurisdictions support a public employee's right to speak.<sup>59</sup> It is clear, however, that employees do not enjoy an unfettered right of speech. For instance, current cases allow the employer to deny such speech where it may disrupt the work place.<sup>60</sup>

*b. Private Employer/Employee*

Under the National Labor Relations Act, an employee has statutory protection for speech concerning work-related activities.<sup>61</sup> There

ers. It also protects the privacy of certain messages sent over public electronic mail systems like CompuServe and MCI Mail in much the same manner as telephone calls over public telephone systems are protected. *See Electronic Media Regulation and the First Amendment: Future Perspective*, *supra* note 3, at 5. *See generally* Wilson, *supra* note 55, at 54; Rifkin, *supra* note 54, at 83.

The Electronic Communications Privacy Act (ECPA) of 1986, for example, states that electronic mail messages on company computer systems that also permit access from outside can be read by the employer—but only if the receiver or sender gives permission. *See* Resnick, *supra* note 53, at 6.

Also, to the extent that state constitutions afford an employee a right of privacy or speech, they may not be precluded by the ECPA. For instance, a recent attempt to argue federal preemption failed in California. *See* Victoria Slind-Flor, *supra* note 56, at 34.

58. Rankin v. McPherson, 483 U.S. 378, 391 (1987) (public employees may not be fired for making statements about matters of public concern unless employer's interest is great). *See generally* Estlund, *supra* note 11, at 923-24. Nevertheless, the question of whether employees can make such statements over the company's E-mail and/or telephone systems has not been addressed to date.

59. *See* Estlund, *supra* note 11, at 923 n.8. *See also* MATTHEW W. FINKIN ET AL., LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE 284-86 (1989).

60. Whether a public employee's speech concerns a matter of public interest is determined by the content, form and context of the statement, gleaned from the entire record before the court. *See* Connick v. Meyers, 461 U.S. 138, 147-148 (1983). *See also* Cynthia K.Y. Lee, Comment, *Freedom of Speech in the Public Workplace: A Comment on the Public Requirement*, 76 CAL. L. REV. 1109, 1111 (1988). Even when a public employee's speech addresses a matter of public concern, an employer can restrict the speech in question if the employer perceives that the speech will disrupt the workplace. Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 3, 4 (1987).

61. These include section 7 concerted activities for the purposes of mutual aid, such as

are also "whistle blower" statutes in many states which protect employee speech about company wrongdoing.<sup>62</sup> Otherwise, under the "work at will" doctrine, the employee ostensibly has no recognized speech rights in the face of legitimate company interests, aside from unionization-related issues.<sup>63</sup> The scope of an employee's statutory license to use company E-mail or telecommunications facilities to realize their work-related speech right, however, is not established.<sup>64</sup>

## 2. Closed User Group and Members (Actual and Potential)

Where firms or users associate via network facilities that they have acquired, they may exercise control over member and non member network access and speech.<sup>65</sup>

While the scope of a closed user groups (private network's) liability for actionable speech is unsettled, it seems intuitively appropriate that its liability track that of bulletin board system operators.<sup>66</sup> The

union organizing, and striking to improve working conditions. They arguably also include protests and advocacy which predate cognizable collective efforts to organize. See Estlund, *supra* note 11, at 923 n.8; Charles Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1677 (1989).

62. See Estlund, *supra* note 11, at 923 n.8. See also FINKIN ET AL., *supra* note 59, at 284-86.

63. One expert has argued that despite the fact that free speech is a constitutional right outside of the workplace, speech can be regulated in the workplace so long as there are legitimate business reasons for doing so. Also, there should be a clear corporate policy enunciated which sets forth the reasons for the restrictions. See *Electronic Mail Raises Issues About Privacy, Experts Say*, BNA DAILY LABOR REPORT, Nov. 17, 1992, Current Developments Section.

The arguable absence of legally sanctioned speech rights has not deterred those who view employee speech as a right. See Rifkin, *supra* note 54, at 83, 85.

To date, businesses have not authored many guidelines for internal corporate E-mail networks. There are, however, as many as 200 state statutes covering E-mail related issues. See *Electronic Mail Raises Issues About Privacy, Experts Say*, BNA DAILY LABOR REPORT, Nov. 17, 1992 Current developments Section.

64. Similarly, at least one scholar argues that employers are free to invade employee privacy on E-mail as well. Steven B. Winters, *Do Not Fold, Spindle or Mutilate: An Examination of Workplace Privacy in Electronic Mail*, 1 S. CAL. INTERDISCIPLINARY L.J. 85 (1992).

65. Other forms of control are used as well. For instance, on the internet, an amalgam of research oriented networks moving towards commercialization, group users sometimes "gang up on abuses [by a particular user] in a form of citizens' arrests [sic] in which abusers are asked to stop disrespectful behavior." J.A. Savage & Gary H. Anthes, *Internet Privatization Adrift*, COMPUTERWORLD, Nov. 26, 1990, at 1. According to the Chair of the Internet Activities board, this form of censure has been effective and no one has been forced off the network. *Id.* Efforts to police university run systems are less benign and sometimes less successful. W. John Moore, *supra* note 44, at 745.

66. While it is possible that a sysop may be held responsible for libelous information residing on its bulletin board systems, the current law is unsettled as to the scope of such liability or the circumstances under which such liability would attach. See Robert Charles, Note, *Computer*

more extensive its control over the communication of content, the more extensive the liability ought to be for that content. At the same time, the more extensive the control of content, the less extensive individual user speech rights will be on that network.

*B. Network as Product or Service: Relationships between Network Owner/Providers and Users*

*1. Network Owner/Provider and Subscriber/Users (Common Carriage)*

The largest category of relationships between network owners and consumers exists in the provision of network transmission capacity and network related services. Telecommunications network owners may provide transmission between two or more points at varying speeds with a variety of ways to manipulate the various types of transported information. Services range from the provision of transmission capability for private networks, to virtual private and hybrid networks, 800 and 900 number services, billing, to plain old telephone service. The provision of network transmission, switching, billing and intelligence-based services may be accomplished pursuant to regulated tariff, by contract, or by a combination of the two.

As competition has increased, regulators have tended to afford network owner/providers greater flexibility in providing services under contract.<sup>67</sup> Even where services are not provided pursuant to contract, network owner/providers have been granted greater flexibility in providing many services under tariff.<sup>68</sup> Where the services are offered on a

---

*Bulletin Boards and Defamation: Who Should Be Liable? Under What Standard?*, 2 J.L. & TECH. 121 at 134 (1993). See also David J. Conner, *Cubby v. Compuserve, Defamation Law on the Electronic Frontier*, 2 GEO. MASON U. L. REV. 227 (1993); and David R. Johnson & Kevin A. Marks, *Mapping Electronic Data Communications Onto Existing Legal Metaphors: Should We Let Our Conscience (and Our Contracts) Be Our Guide?*, 38 VILL. L. REV. 487 (1993). It is reasonably argued, however, that if a sysop knows the statement to be false, or should have known, or if the sysop fails to delete libelous information once notified by the injured party, sysop may be sued for publication of libel. See Charles at 147-148; Johnson & Marks at 497.

67. *In re AT&T Communications, Contract Tariff* F.C.C. Nos. 2-13, 15; 9 F.C.C.R. 299 (1994) (affirming the FCC decision to allow AT&T to offer business services under contract tariffs). The Commission has permitted AT&T to offer services under tariff via individually negotiated contracts provided the contract tariffs are made generally available to similarly situated customers under substantially similar circumstances. See *In re Competition in the Interstate Interexchange Marketplace*, 6 F.C.C.R. 5880, 5896-97 (1991), *recon. in part*, 6 F.C.C.R. 7569 (1991), *further recon.*, 7 F.C.C.R. 2677 (1992) (inter-exchange Order).

68. *In re Tariff Filing Requirements for Non-dominant Common Carriers*, 8 F.C.C.R. 6752 (1993). While the FCC has substantially deregulated the telecommunications industry, it cannot

common carrier or quasi-common carrier basis, the network provider has tended to limit network access based on the type and class of service, network integrity, security and capacity.

Aside from government-mandated responsibilities to foreclose opportunities for harassing, indecent or obscene speech to reach protected subscribers, carriers have tended to eschew control of information content, thereby foregoing liability for customer communication. This practice has been sanctioned by federal and many state regulatory bodies. Also, carriers have traditionally sought to limit their liability for loss or damage to customer communications.<sup>69</sup> Until recently, these efforts have been successful.<sup>70</sup>

---

compel carriers to eschew the filing of tariffs if they so desire. *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1195-96 (D.C. Cir. 1985). Prior to the Commission's initial foray into deregulation, carriers were required to file tariffs as much as 90 days in advance of their proposed effective date to allow Commission and public review of the proposed offerings and rates. See *MCI Telecommunications Corporation v. Federal Communications Commission and United States of America*, 765 F.2d 1186; 247 U.S. App. D.C. 32, July 9, 1985. In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, Part 1 of 3, 4 FCC Rcd 2873; 1989 FCC LEXIS 860; 66 Rad. Reg. 2d (P & F) 372, Apr. 17, 1989.

The Commission's permissive tariffing policy which allowed non-dominant carriers to elect not to file tariffs was recently overturned, by the Circuit Court of Appeals for the District of Columbia. This result was much to the disagreement of at least one former chair of the FCC. See Sikes in Parting Shot to Congress Wants Forbearance Restored, Report on AT&T, Jan. 18, 1993.

Nevertheless, shortly after the circuit court's decision, the Commission has approached the line of absolute deregulation by allowing non-dominant carriers to file tariffs on one day's notice under the rationale that they do not possess sufficient market power to set rates for competitive service offerings. See In the Matter of Tariff Filing Requirements for Nondominant Common Carriers, 8 FCC Rcd 6752; 1993 FCC LEXIS 4285; 73 Rad. Reg. 2d (P & F) 849, Aug. 18, 1993. The Circuit Court's decision was recently upheld by the Supreme Court.

69. See James Brook, *Contractual Disclaimer and Limitation of Liability Under the Law of New York*, 49 BROOK. L. REV. 1, 22 (1982); Phillip S. Cross, *Utility Liability Waivers: New Rules for New Technologies*, 129 PUB. UTIL. FORT., June 15, 1992, at 34. See generally Annotation, *Liability of Telegraph or Telephone Company for Transmitting or Permitting Transmission of Libelous or Slanderous Messages*, 91 A.L.R.3d 1015 (1979 & Supp. 1993). Telephone companies retain the right to refuse service where a subscriber uses obscene or profane speech. See Allan L. Schwartz, Annotation, *Right of Telephone or Telegraph Company to Refuse, or Discontinue, Service Because of Use of Improper Language*, 32 A.L.R.3d 1041 (1970 & Supp. 1993).

70. Carriers are often successful in limiting their liability for provision of service. *M.R.C.S., Inc. v. MCI*, No. Cir. A. 86-3831, 1987 WL 12813, at 2 (E.D. La. June 17, 1987) (claims against carrier for poor quality transmission are limited to the terms of the tariff). See also Brook, *supra* note 69, at 22. However, there are numerous instances in which the courts have refused to allow exculpatory language in carrier tariffs to limit carriers' liability. See *In re Illinois Bell Switching Station Litig.*, No. 73999, 1993 WL 323120, at 5 (Ill. Aug. 26, 1993) (carrier's exculpatory tariff language limiting liability for consequential damages is not controlling in the face of willful violation of a state statute and regulations requiring utility to provide adequate and efficient, just and reasonable facilities); *Source Assoc. Inc. v. MCI*, No. Cir. A. 88-2324-S., 1989 WL 134580, at 2-3 (D. Kan. Oct. 6, 1989) (tariff does not limit liability for willful misconduct); *D. Calaro v.*

A recent court decision has held that telecommunications network owners have electronic video speech rights as extensive as cable video distribution network providers.<sup>71</sup> If the case is upheld on appeal, and if the telecommunications network providers exercise their speech and editorial rights by limiting the access and speech of users, attempts to limit speech-related liabilities may, and increasingly should, prove less successful.<sup>72</sup>

For instance, in a related area, bulletin board/E-mail providers have the ability to control access and screen speech content on their systems.<sup>73</sup> While some do not actively seek to control access, or more importantly, content, others do. As a result, while one provider has been successful in avoiding liability for libelous statements made by one of its users, it is not clear that others will fare as well.<sup>74</sup> Moreover, the decision to control content places the service provider in a difficult position when it either fails to prohibit offensive speech quickly or prosecutes other speech in a seemingly biased manner.<sup>75</sup>

---

Southwestern Bell Tel. Co., 725 S.W.2d 304, 307 (Tex. Ct. App. 1986) (reasonableness of public utility's tariff limitation becomes an issue of fact where utility can but does not timely remedy customer's problem resulting in a loss which exceeds tariff limitation on liability); *Lahke v. Cincinnati Bell, Inc.*, 439 N.E.2d 928, 931 (Ohio Ct. App. 1981) (carrier's exculpatory tariff language is not controlling in the face of violation of a state statute requiring utility to provide necessary and adequate facilities).

71. See *Chesapeake and Potomac Tel. Co. of Va. v. United States*, 830 F. Supp. 909, 931-32 (E.D. Va. 1993) (holding that telco-cable cross-ownership regulation which prohibited telephone companies from providing video programming to subscribers in the telephone companies' service areas contravenes the First Amendment).

72. There are numerous instances in which the courts have refused to allow exculpatory language in carrier tariffs to limit carriers' liability. See *supra* note 70.

There are also a growing number of cases extending tort liability to providers of goods and services generated via the use of computer and information technologies. See generally Barry B. Sookman, *The Liability of Information Providers in Negligence*, 5 *COMPUTER LAW & PRACTICE* 141 (1989).

73. "[S]ysops have the right to run their systems any way they see fit. They have no 'common carrier' obligations, as do the telephone companies, to transmit everyone's messages." Meeks, *supra* note 66, at S14. According to some, a sysop is a publisher with the corresponding right to edit or shape the bulletin board's message traffic as he sees fit. *Id.*

74. See *supra* note 66 and accompanying text.

75. See generally Stuart Silverstein, *Prodigy Services' Fee Set Up Under Probe*, *L.A. TIMES*, Apr. 16, 1991, at D1; Moore, *supra* note 44, at 13.

## 2. Network Owner/Information Provider and Consumer/ Subscribers

### a. Telephony and Telecommunications

The need for interconnection and the economies of scale inherent in provision of local telephone service led in significant part to the creation of government-sanctioned telephone monopolies. Government then sought to assure public access to the monopoly provider by requiring that the provider not discriminate between customers on the basis of facilities or the price paid for the services provided.<sup>76</sup>

As a further means of assuring non-discrimination, the telephone companies were not allowed any control over the content of information they transmitted. More recently, however, telephone companies have been allowed to deny billing and collection services to dial-a-porn providers deemed undesirable by the carriers.<sup>77</sup> Also, government requirements that the dominant, long-distance common carrier not engage in the provision of information services and local common carriers not provide electronic video services within their local markets have been overturned. According to a recent district court opinion, local telephone companies now have video electronic speech rights.<sup>78</sup> Should the decision be upheld on appeal, there is still a question of how this newly articulated speech right will merge with the telephone company owner's property right vis-à-vis control of access and content.<sup>79</sup> Many potential

---

76. Warren G. Lavey, *The Public Policies that Changed the Telephone Industry Into Regulated Monopolies: Lesson from Around 1915*, 39 FED. COM. L.J. 171, 171-76 (1989).

77. *Information Providers*, 928 F.2d at 866; *Carlin*, 827 F.2d at 1291.

78. *Chesapeake and Potomac Tel. Co. of Va. v. United States*, 830 F. Supp. 909, 931-32 (E.D. Va. 1993).

79. See *Andrews*, *supra* note 47, at D5; *FCC Upholds GTE Cerritos Waiver, Grants Another*, BROADCASTING MAG., May 1, 1989, at 136.

This change in policy has been opposed by broadcasters, cable operators, and newspaper publishers. More recently, the House of Representatives has considered H.R. 3636 which would allow the telephone companies to provide video programming to subscribers in the telephone companies' service area. See H.R. Rep. No. 3636, 103d Cong., 1st Sess. §§ 201, 651-57 (1993). See also Kate Gerwig, *The Beef of the Bills*, COMMUNICATIONSWEEK, Dec. 20, 1993, at 5. See generally *House Lawmakers Seek End to Telephone, Cable Monopolies*, REPORT ON AT&T, Dec. 6, 1993; *Markey Introduces Telecommunications Infrastructure Bill*, COMMON CARRIER WEEK, Nov. 29, 1993, at 8-7.

The Senate has also considered of a bill introduced by Senator Hollings, which *inter alia* would allow telco entry into the video programming market in the telco's service area. Cable operators have lobbied against the time table to telco entry in this bill. See Edmund L. Andrews, *A Free-For-All in Communications*, N.Y. TIMES, Feb. 4, 1994, at D1.



competitors and customers of local carriers possessing essential facilities have voiced concern over the potential for unfair competition.<sup>80</sup>

In the area of switched, interactive telecommunications, the diverse set of relationships addressed above is expanding even further as interactive video distribution capabilities come on line and user access to network functionalities increases via manipulation of network intelligence.<sup>81</sup> It is here that the newest potential for increased access and electronic speech is to be found.<sup>82</sup>

As fiber optic, computer and switched telephony technologies merge, so do the previously separate network functions and information streams of telephony, broadcasting, cable and print.<sup>83</sup> As this occurs, there is a potential danger that the network owner as the transmission provider and a potential speaker may experience a conflict of interest between the provision of network-related services to users who, like the network owner, are also information providers. Newspaper publishers, cablecasters and broadcasters have raised this potential for conflict of

80. The National Cable Television Association has gone so far as to intervene on the government's side in its efforts to deny the entry of the Regulated Bell Operating Companies (RBOCs) into the video programming markets existing in the RBOC's service areas. *See Andrews, supra* note 79, at D15; *COMMUNICATIONS DAILY*, Feb. 11, 1993, at 8. Newspaper publishers were previously similarly opposed to RBOC entry into the provision of information services. *See John A. Farrell, Newspapers Roll Out Lobbyists in Electronic Information Fight*, *CHI. TRIB.*, Oct. 27, 1991, at C5. More recently, some publishers have favored telco entry into the video programming market based on safeguards included within H.R. 3636. Safeguards would include: telco use of separate video subsidiary with separate accounting, books, customer lists and physical location; establishment of a video platform with 75% of its capacity available to all; and entry by overbuild rather than acquisition except under limited waiver circumstances. *See H.R. Rep. No. 3636*, 103d Cong., 1st Sess. § 201, 651-57 (1993). *See also Gerwig, supra* note 79, at 5. *See generally House Lawmakers Seek End to Telephone, Cable Monopolies, supra* note 79; *Markey Introduces Telecommunications Infrastructure Bill, supra* note 79.

81. *See infra* notes 41-42 and accompanying text. *See Andrews, supra* note 79, at D15.

82. The distribution of intelligence throughout the public switched network rather than solely in the central office switch could ultimately result in the ability of network users to program the network. Users could then use the network to transport and manipulate information as the users dictate. The ability to determine how, when, where and in what formats information may be transmitted enhances the ability to engage in electronic speech. It establishes the user, rather than the network owner, as the arbiter of the manner in which their electronic communication is created, manipulated, routed and transmitted. The increased ability to program the network may be viewed as the ability to engage in "service creation." *See generally* Commissioner Sherrie P. Marshall, Huck Finn and the Intelligent Network, Remarks before the Advanced Intelligent Network Communications Forum, June 25, 1990; Steven Titch, *The Pathway to Freedom; Local Exchange Carriers, Advanced Intelligent Networks*, *TELEPHONY*, Apr. 15, 1991, at 30; and Edmund L. Andrews, *Business Technology, Opening Nation's Phone Networks*, *N.Y. TIMES*, Jan. 16, 1991, at D5.

83. *See Allen S. Hammond, IV, Regulating Broadband Communications Networks*, 9 *YALE J. ON REG.* 181, 183-91 (1992).

interest as a reason for continuing the prohibition against local telephone companies' entry into the information and video distribution markets.<sup>84</sup> While these arguments have found sympathetic ears in Congress, they have proved less persuasive before the FCC and at least one district court.<sup>85</sup>

Similar complaints have been raised in other instances where access to transmission and owner speech merge. These instances concern the exercise of access and content control by bulletin board service providers, as well as the provision of access and speech related services by cable television media.<sup>86</sup>

### *b. Computer Networks*

According to a number of legal commentators, individual subscribers to commercial or private computer bulletin board services have no access rights. Access is garnered by contract, and control of access—and ultimately speech—resides, in the first instance, with the service provider or the system operator. While there is very little information on the criteria employed for denying initial access, revocation of access is the ultimate sanction employed by system operators to discipline miscreant member users.<sup>87</sup> There are options short of denial of access that are also employed.

At base, the rationale for system operator control of access is ownership of the system facilities. With regard to system operator content control, the recent *Cubby v. Compuserve* decision provides some indication of the considerations militating against system operator exercise of content control.<sup>88</sup> The greater the discernable control that the system

---

84. *Id.* at 196-98.

85. See *Chesapeake & Potomac Tel. Co. of Va. v. United States*, 830 F. Supp. 909 (E.D. Va. 1993).

86. Regarding restrictions on access to on-line data systems, see Silverstein, *supra* note 75, at D2; Michael Schuyler, *Systems Librarian and Automation Review: Rights of Computer On Line Service Users*, SMALL COMPUTERS IN LIBRARIES, Dec. 1990, at 41; Moore, *supra* note 44, at 13.

With regard to discriminatory provision of leased access to cable television, see generally *supra* note 67; Henry Gilgoff, *Report Card on Cablevision: Mixed Signals Programs Praised, Fees Criticized*, NEWSDAY, Sept. 10, 1990, at 2, 3; Chuck Stogel, *Amid Cable TV Tangle, Is Viewer Being Served*, SPORTING NEWS, Aug. 27, 1990, at 45. The more recent leased access provisions have been upheld as constitutional.

87. It may be that due to the relative newness of these services and the necessity to have access to the appropriate telephony and computer equipment, access is controlled by economic and market demand factors.

88. *Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

operator exercises over access and content, the greater its potential liability to users and third parties for damage caused by the information's content.

In *Cubby*, CompuServe, an on-line-information service provider, was sued, unsuccessfully, for the alleged libel of a third party competitor of a bulletin board provided on the service provider's system. In determining that CompuServe was not liable for the alleged libel, the court established by implication that heightened control of the communicated content would have resulted in liability.<sup>89</sup>

In another libel action ultimately settled out of court, Prodigy, another system operator, was sued for an alleged libel of a third party by a Prodigy subscriber.<sup>90</sup> Unlike CompuServe and many other system operators, however, Prodigy distinguishes itself based on the extent of control it exercises over transmitted content.<sup>91</sup> As a consequence, there was speculation that Prodigy might not have easily extricated itself from liability.<sup>92</sup>

*c. Constitutionally Based Access and Speech Rights in Traditional Media: Broadcasting and Cable TV*

Historically, market entry and technological considerations have affected the apportionment of access and speech rights between media owner/providers and the public. While, as a practical matter, electronic speech has been protected under the constitution regardless of whether it is in a print,<sup>93</sup> voice,<sup>94</sup> or video<sup>95</sup> format, traditional media owners in

---

89. CompuServe was deemed a distributor rather than a publisher based on several factors. Based on its determination that CompuServe was a distributor, the court held that CompuServe would have had to have knowledge or reason to know that the remarks of the Journalism Forum were allegedly defamatory. *Id.*

90. Medphone Corp., a small New Jersey company sued Peter DeNigris, a 41-year-old Long Island, N.Y., elections forms processor and amateur stock investor, in federal court in New Jersey. Medphone alleged that DeNigris' comments on Money Talk, a bulletin board service operated by Prodigy, helped cause an almost 50% decline in the company's stock in the summer of 1992. Medphone also alleged that DeNigris engaged in libel and securities fraud. *See generally* Amy Harmon, *New Legal Frontier: Cyberspace*, L.A. TIMES, Mar. 19, 1993, at A1.

91. Prodigy is not named as a defendant in the Medphone suit. However, its insistence on screening all electronic messages on its system has led some to argue it is a publisher and therefore should have some liability for libelous statements made over its facilities. *Id.* at A24.

The \$40 million suit filed against Denigris was settled for \$1.00 in late November 1993. *See* Fred Vowigelstein, *Computer Libel Suit Settled, Issue Isn't*, NEWSDAY, Dec. 28, 1993, at 19; Kurt Eichenwald, *Medphone Blames Messenger for its Stock Price Troubles*, N.Y. TIMES, Dec. 28, 1993, at D8.

92. Harmon, *supra* note 90, at A24.

93. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

each industry have been accorded different First Amendment rights vis-à-vis users based on differing assessments of the ease of economic and technological entry into each market.

The initial scarcity of broadcast frequencies relative to public demand for access resulted in the requirement that the broadcast licensee share its frequency with the public.<sup>96</sup> This “sharing” took the form of limitation on the broadcaster’s exercise of programming discretion. With FCC-engineered deregulation of broadcasting, the fairness doctrine, community ascertainment regulations, and programming guidelines were abolished or seriously compromised.<sup>97</sup> Subsequent to deregulation and the abolition of the fairness doctrine, the scope of access-sharing was ultimately limited to candidates for political office.<sup>98</sup> Even

---

94. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989).

95. *Leathers v. Medlock*, 499 U.S. 439 (1991) (cable); and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (broadcasting).

96. *See Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *see also Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). In *Red Lion*, the Supreme Court recognized broadcasters as having a qualified constitutional speech right. However, broadcasters’ editorial speech rights were held secondary to the rights of listeners and viewers to receive diverse information and ideas. The Court stated in relevant part:

[The First Amendment] has a major role to play [in public broadcasting] as the Congress itself recognized in § 326, which forbids FCC interference with “the right of free speech by means of radio communication.” . . . But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters which is paramount. . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.

*Id.* at 389-90.

97. *See CBS v. Democratic Nat’l Comm.*, 412 U.S. 94 (1973) (broadcasters could not be compelled to accept editorial advertisements covering controversial issues); *see also Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1985), *cert. denied*, 439 U.S. 1019 (1990).

98. Broadcasters may not be compelled to accept editorial advertisements for broadcast when they are already adhering to an obligation to present controversial issues of public importance fairly. They retain the right to decide what controversial “issues are to be discussed and by whom, and when.” *CBS v. Democratic Nat’l Comm.*, 412 U.S. at 130.

Most recently, the Federal Communications Commission successfully abolished the Fairness Doctrine because it “chilled” broadcasters’ exercise of their editorial discretion, caused a reduction in the coverage of controversial issues, and hence deserved the First Amendment interests of the public. *See* 2 F.C.C.R. 5043 (1987), *recon. denied*, 3 F.C.C.R. 2035 (1989), *aff’d*, *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 439 U.S. 1019 (1990).

The Commission rested a significant part of its rationale for advocating the repeal of the Fairness Doctrine on technological grounds: “We believe that the dramatic changes in the electronic media, together with the unacceptable chilling effect resulting from the implementation of such regulations as the Fairness Doctrine, form a compelling and convincing basis on which to reconsider First Amendment principles developed for another market.” *Id.* at 84.

before the fairness doctrine was "abolished," its potential power to require access had been significantly limited by judicial decisions.<sup>99</sup>

The current scope of government-exercised content control over the broadcast licensee extends to the prohibition of speech that is libelous, indecent or obscene.<sup>100</sup> Users have a right to diverse information but no right to speak as individuals or information providers absent owner permission.

According to at least one legal scholar, government regulation of access to cable channels is justified because franchises are scarce due to the physical limits inherent in the use of public rights of way.<sup>101</sup> The physical scarcity is further exacerbated by the economies of scale inherent in the provision of cable service.<sup>102</sup> For these reasons, the cable franchisee is required to share its channels of communication with the public and other information providers. Concerns about the continued availability of local news and public affairs programming, as well as economic market and anticompetitive constraints alleged to have been imposed by cable firms, have been used to justify limits on the control cable franchisees may exercise over broadcaster access to the cable networks.<sup>103</sup> The leased access, must carry and public access channels are an attempt by Congress to assure third party access to cable networks.<sup>104</sup> According to one scholar, the leased access rules have proved only moderately successful. Moreover, as a result of recent litigation, the must carry requirements are under a potential constitutional cloud.<sup>105</sup>

---

99. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) (broadcasters could not be compelled to accept editorial advertisements covering controversial issues).

100. *See, e.g., Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1282 (1992); and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

101. *See Michael Meyerson, The First Amendment and the Cable Operator: An Unprotected Shield Against Public Access Requirements*, 4 COMMENT 1 (1981).

102. *See Berkshire Cablevision of Rhode Island, Inc. v. Burke*, 571 F. Supp. 976 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985) (holding that mandatory cable channel access rules are constitutional based on theory of economic scarcity); *cf. Preferred Communications v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985), *aff'd*, 476 U.S. 488 (1986) (requiring cable operator to set aside mandatory and leased access channels diminishes the operator's freedom of expression).

103. *See Turner Broadcasting System, Inc. v. FCC*, 1994 WL 279691 (U.S. Dist. Ct.) June 27, 1994 at 5, 6, citing congressional fact finding hearings regarding the Cable Television Consumer Protection and Competition Act of 1992, summarized in S. REP. NO. 102-92, pp. 3-4 (1991) and H.R. REP. NO. 102-628, at 74 (1992); as well as the conclusions Congress reached which are recited in sections 2(a)(1) through (21) of the Act.

104. *See The Cable Communications Policy Act of 1984*, 47 U.S.C. § 531 (public, educational and governmental access channels), and § 532 (leased access channels).

105. Cable operators engage in constitutionally protected speech activities. *See Leathers v.*

## The cable franchisee's control of communicated content is con-

---

Medlock, 499 U.S. 439, 26 (1991); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 494 (1986). The courts, however, have decided whether cable operators are more akin to newspaper publishers or broadcasters. Consequently, the constitutional status of cable operator speech is still unsettled. See *Turner Broadcasting Sys. Inc. v. FCC*, [1993] U.S.L.W. at A-798 (May 5, 1993) (request for injunction against enforcement of must carry section of Cable Act of 1992 legislation denied). Moreover, the recent FCC promulgation of rate regulations for cable service coupled with the multi-tiered access requirements render cable more akin to common carriage telephony than the Congress or the courts have been willing to acknowledge.

The Supreme Court has unanimously affirmed that cable operators engage in constitutionally protected speech activities. See *Turner Broadcasting System, Inc. v. FCC*, 1994 WL 279691 (U.S. Dist. Ct.) June 27, 1994 (citing *Leathers v. Medlock*, 499 U.S. 439, 444 (1991)). More important, for the first time, the Court has established a substantive legal distinction between the First Amendment regulation of cable television on the one hand, and that of broadcast television and newspapers on the other. A majority of the Court has held that because cable television does not suffer from the technical limitations of channel (spectrum) scarcity and channel interference of broadcasting, the less stringent standard of First Amendment scrutiny applicable to broadcasting is not applicable to cable television. *Turner* at 8. For different reasons, according to the Court, cable television is distinguishable from newspapers as well. Newspaper publishers cannot obstruct or prevent reader access to other publications. Cable television operators, however, by virtue of the technology, possess bottleneck or gatekeeper control over the subscribers access to other speakers. *Turner* at 16. Because of the bottleneck control which cable operators enjoy and the potential for abuse that such control entails, First Amendment regulation of cable television requires a less stringent standard than that applied to newspapers. *Turner* at 16.

While the court did not address the potential distinctions or similarities between telephony and cable, it may have provided a glimmer of a majority of the Court's view on the issue in addressing the bottleneck power of local cable operators. Indeed, the most telling passage from the case may prove to be the Court's assessment of the government's affirmative responsibility in the face of the potential exercise of private power over bottleneck facilities. The Court majority stated: "The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." *Turner* at 16.

At least one broadcast industry commenter on the *Turner* opinion has alluded to the potential impact of this portion of the opinion. See Doug Halonen, *Cable, Broadcast Weigh Must-Carry Ruling*, ELECTRONIC MEDIA, July 4, 1994, at 3. For further press analysis of the Supreme Court's *Turner Broadcasting* decision, see Ana Puga, *Congress Upheld on Cable Rule; But Court Orders Review of 1st Amendment Issues*, THE BOSTON GLOBE, June 28, 1994, at 35; *More Evidence Needed; U.S. Supreme Court Vacates Must-Carry Decision, Remands It to Lower Court*, COMM. DAILY, June 28, 1994, at 1; John Lippman, *For Now, TV Viewers Are Spared Another Juggling of the Channels; Cable: A Final High Court Ruling on the 'Must-Carry' Statute Could be Years Away*, L.A. TIMES, June 28, 1994, Part D, at 5; David G. Savage, *High Court OKs Congress' Right to Regulate Cable TV*, L.A. TIMES, June 28, 1994, Part A, at 1; Linda Greenhouse, *The Media Business: Justices Back Cable Regulation*, N.Y. TIMES, June 28, 1994, § D, at 1; Joan Biskupic, *Supreme Court Connects Cable TV To Free Speech Protections of Press*, WASH. POST, June 28, 1994, at A1. For a synopsis of many of the key holdings of the case see *Case Digests: Federal Cases; United States Supreme Court; First Amendment—Communications*, N.J.L.J., July 4, 1994, at 76.

Although a majority of the Court found that the must carry rules are constitutional in the abstract, the Court remanded the case back to the district court. The Court found that the govern-

strained by legal sanctions that may be imposed for indecent speech.<sup>106</sup> In part due to the necessity to avoid government-imposed sanctions, cable franchisees are compelled to exert editorial control over matter provided by third party information providers that may be deemed indecent.<sup>107</sup>

## V. REGULATORY SHIFTS IN THE AGE OF CONVERGENCE AND PRIVATIZATION: SOME PRELIMINARY ANSWERS

### A. *Network as Asset*

#### 1. *Private Firms and Closed User Groups*

Where the network is the private asset of the firm, employee and third party efforts to assert First Amendment rights of access or speech over internal communications systems have been limited.<sup>108</sup> In the case of employees of private firms, the National Labor Relations Act may allow them to negotiate for speech rights provided the rights are exercised for the protest or discussion of working conditions.<sup>109</sup> All argu-

ment's interests in promoting diversity of information from competing sources, preserving 40% of the society's access to economically viable broadcast stations, and promoting fair competition in the video distribution market are compelling. *Turner* at 19-20. It also determined, however, that the government had failed to provide sufficient evidence to establish that broadcast stations are in economic jeopardy and that the must carry rules will actually advance the government's interests by materially alleviating the economic harm. *Turner* at 20-22. Because the Court remanded the case back to the district court, the ultimate impact of the *Turner* Court's pronouncements on cable regulatory First Amendment status vis a vis newspapers is unclear. Justice Harry Blackmun, who sided with the majority, has subsequently retired. It is not clear how his apparent successor, Justice Stephen Breyer, would rule on this matter, or the basic constitutionality of the must carry rules themselves. See Halonen, *infra*.

106. *Alliance*, *supra* note 49, at 815. See also First Report and Order in the Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, 8 FCC Rcd 998; 1993 Lexis 3144, Feb. 3, 1993. In response to a request for rehearing by the Federal Communications Commission and the Department of Justice, the Appeals Court for the District of Columbia Circuit recently agreed to an en banc rehearing of the *Alliance* case. See COMM. DAILY, Feb. 22, 1994, at 5.

For commentary and limited analysis of Section 10, see Timothy B. Dyk & Sarah L. Wanner, *Developments in Communications Law: The FCC's Indecency Proposals Under Fire*, LEGAL TIMES, May 17, 1993, at 25; Bruce Fein, *Cable Discretion and the First Amendment*, WASH. TIMES, Dec. 2, 1992, at G1 (arguing that the Cable Television Consumer Protection Act of 1992 properly permits cable operators to eschew carriage on access channels of programming the operators deem to be obscene or sexually explicit).

107. *Id.* at 815.

108. See *Electronic Media Regulation and the First Amendment: Future Perspective*, *supra* note 3, at 5. See generally Wilson, *supra* note 55; Rifkin, *supra* note 54.

109. Rankin v. McPherson, 483 U.S. 378 (1987) (public employees may not be fired for making statements about matters of public concern). See generally Estlund, *supra* note 11, at 923-24. The question of whether employees can make such statements over the company's E-mail

ments for fairness and ethics aside, beyond the narrow entitlement of the NLRA, employees of private firms enjoy little real access or speech rights to corporate network assets. Ultimately, the company network owner may limit or control access and speech.<sup>110</sup>

## 2. *Public Firms*

Employees of public (government) entities are similarly limited. The First Amendment has been interpreted to afford such employees the right to speak on matters of public interest.<sup>111</sup> They, like their private brethren, also receive some protection from a variety of state “whistle blower” statutes. Aside from these protections, however, public employees have no rights of access or speech to internal communications systems. At least one commentator has forcefully argued that private and public employees should enjoy the same scope of speech rights encompassing comment on work and product quality related matters.<sup>112</sup>

Access to the networks of closed user groups is also limited.<sup>113</sup> Here, absent a showing that the network asset is being used unlawfully to restrain competition,<sup>114</sup> the user group may exercise control over access or speech on virtually all aspects of the network. Nevertheless, the

---

or telephone systems, however, has not been addressed to date.

110. The monitoring of employee E-mail is justified as a legitimate method of protecting business assets and prerogatives. The monitoring of employee E-mail is growing, and many CIOs agree that E-mail is part of the business property and, therefore, employers have a legal right to see what it is being used for. Some business executives argue that “If the corporation owns the equipment and pays for the network, that asset belongs to the company, and [they have] a right to look and see if people are using it for purposes other than running the business.” See Rifkin, *supra* note 54, at 8.

Other commenters argue that monitoring E-mail of searching through personal files is flat out wrong . . . It’s inconceivable to think of a circumstance where you should look at anybody else’s electronic mail, . . . Asking who owns the E-mail or the phone call is the wrong question. A better question is, “What kind of environment do people work most happily and efficiently in?” Others, including labor unions, have pointed out that employee monitoring can be demoralizing and counterproductive.

See Rifkin, *supra* note 54, at 85.

111. A government employee cannot be fired for non-disruptive exercise of her First Amendment right to speak on matters of public concern. *Connick v. Myers*, 461 U.S. 138 (1983). Provided, however, that the employer does not possess an interest in “effective and efficient fulfillment of its responsibilities to the public” which outweigh the employee’s interest in speaking. *Id.* at 150-51.

112. See Estlund, *supra* note 11, at 923-24.

113. While arguments for absolute access to the networks of closed user groups seem inappropriate, it is reasonable to require access where the network is an essential facility or is used for anti-competitive purposes. Similarly, it is reasonable to require some appropriate level of access where a compelling public interest in the information to be provided.

114. See Stevens, *supra* note 7.



exercise of control over access and speech carries a certain level of responsibility for actionable speech violations. The precise level of responsibility has yet to be measured, however, and may ultimately depend on the technology and the circumstances of each case.<sup>115</sup>

## *B. Network as Product or Service*

### *1. Convergence and Change: The Evolution of Speech Regulation in Traditional Media and Telecommunications*

While the traditional regulatory apportionment of network provider and user access and speech remains virtually intact in broadcasting, it is under challenge in cable and telephony. The decision of Congress to impose must carry requirements on cable franchisees has been upheld for the moment.<sup>116</sup> It was recently affirmed in the Supreme

---

115. See generally Henry H. Perrit, Jr., *The Congress, The Courts and Computer Based Communications Networks: Answering Questions About Access and Content Control*, 38 VILL. L. REV. 319 (1993).

116. Sections 4 and 5 of the Cable Communications and Consumer Protection Act require cable systems of a certain size to carry, upon broadcaster request, the signals of certain licensed commercial and non-commercial broadcast stations in the cable operator's market. Prior to enacting the must carry rules as part of the Act, Congress determined that cable operators often enjoy monopoly status as the only multi-channel provider in their respective markets. Congress also determined that the horizontal concentration of cable outlets (outlets owned and operated by multiple system owners or MSOs) and the vertical integration of distribution and programming functions in MSOs combined with monopoly status to create a "cable bottleneck." It was believed that in many cases, this bottleneck precluded broadcasters and programmers unaffiliated with the cablecaster from acquiring needed access to cable channels and created opportunities for cable operators to discriminate against broadcasters in order to garner a larger share of advertising revenues available in their market.

Several cable operators, among others, challenged the rules alleging that the provisions violate cable operators' first amendment rights to freedom of speech. First, the provisions inhibit cable operators' editorial discretion to determine what video programming messages to provide and what programming not to provide. *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32, 36 (D.C. Cir. 1993). Second, the provisions force cable operators to devote a portion of their finite channel capacity to one class of speaker-competitors (broadcasters) regardless of what the cable operator may choose to transmit. *Id.* at 36-37.

The district court panel ruled 2-1 that the provisions are constitutional. According to the court, the provisions are "essentially economic regulation designed to create competitive balance in the video industry as a whole, and to redress the effects of cable operators' anti-competitive practices." *Id.* at 40.

The Congress, in particular the Senate, had reached the same conclusions. It viewed the signal carriage provisions as "economic regulations" intended to promote competition between broadcast and cable distribution systems and enhance viewpoint diversity available to cabled and non-cabled homes.

According to the Senate, Congress enacted the regulations to ensure that cable operators do not exercise their control over their distribution facilities in a manner which discriminated against broadcasters. S. REP. NO. 102-92, 138 Cong. Rec. 1133. The Senate also stated that the signal

Court.<sup>117</sup> Congress' prohibition against local telephone company ownership of cable facilities in its service area and provision of video programming has been challenged and overturned in one district court. It too, is on appeal. Meanwhile, the cross-ownership ban is being challenged in other district courts as well.<sup>118</sup> The challenges to the must carry provisions and the telephone-cable cross ownership ban are significant because they provide two of the judicial pillars upon which regulation of the future electronic broadband networks will be built. This follows because the cases address the regulation of speech in cable and telephone, the two industries from which much of the broadband infrastructure is likely to emerge.<sup>119</sup>

It is clear that the cable television and regional telephone industries are considering opportunities to merge, following hard upon technology's lead.<sup>120</sup> Most regulators and industry analysts expect this merger of industries and technologies to result in the provision of interactive, broadband, multimedia services. Thus, judicial pronouncements on the relative rights of network owners to provide information over their networks and to determine who other than themselves may speak over their facilities are critical to the evolution of speech rights on the new and evolving infrastructure.

A decision overturning the must carry rules is possible. Majorities in both the district court and Supreme Court concluded the rules are content neutral and the government's interests compelling.<sup>121</sup> Neverthe-

---

carriage provisions are "not at all based on the content of those signals, but instead . . . counterbalance cable systems' commercial or economic incentive to exclude . . . [broadcast signals]. S. REP. No. 102-92, 138 Cong. Rec. 1133, 1189 (1992).

117. See Turner, *supra* note 105.

118. Challenges have recently been filed in Michigan and Illinois.

119. See sources cited *supra* note 1.

120. Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. at 38-39.

121. The district court in *Turner* concluded that to the extent the First Amendment is implicated at all by the must carry rules, it is a mere by-product of the fact that cable operators transmit video signals having no other function than the communication of information. As such, the must carry provisions are, in the court's mind, "unrelated to the content of any of the messages the cable operators, broadcasters and programmers have in contemplation to deliver." *Id.*

Moreover, to the extent that Congress may nevertheless be said to have authored content related provisions, the relationship between the provisions and content is negligible, and is based at most on an assumption that broadcasters have as much to say of interest or value as cable operators and diversity is better served by having both available to the public on cable facilities. *Id.* at 31.

Not surprisingly, the Congress, in particular the Senate stated that the signal carriage provisions are "not at all based on the content of the broadcast signals, but instead . . . counterbalance cable systems' commercial or economic incentive to exclude . . . [broadcast signals]. S. REP. NO.

less, a new majority of the Supreme Court still could conclude otherwise.<sup>122</sup> Justice O'Connor, like Judge Williams below, concluded that Congress rested a significant portion of the justification for its must carry rules on its desire to assure the continued provision of local news and public affairs as well as educational programming by broadcasters.<sup>123</sup> If so, Congress' reasons for adopting the must carry rules may

102-92, 138 Cong. Rec. 1133, 1189 (1992). The Senate made only an oblique acknowledgement of the possible relevance of the First Amendment to cable operator speech rights, stating that: "[t]he First Amendment supports government regulations intended to promote diversity of voices, even if some incidental loss of editorial discretion results. *Id.*

122. The conclusion that the must carry rules pass constitutional muster may be in jeopardy. As noted in note 105, *supra*, the composition of the Court has changed with Justice Blackmun's retirement and Justice Breyer's succession. Consequently, there is no majority for much of the *Turner* opinion as currently written, if the case returns to the Court subsequent to a full hearing in the district court. It is not possible to know with any assurance how Justice Breyer would vote if the case returns to the Court. Moreover, while it is unclear what further evidence the parties will submit in the district court, it is likely that a subsequent Supreme Court will have new information before it. Thus there are opportunities for a new majority to emerge.

123. Both the Supreme Court and district court dissents came to this conclusion. Justice O'Connor, in her dissent joined by Justices Ginsburg, Scalia and Thomas, concluded that Congress' reasons for adopting the rules certainly made significant reference to the content of information to be provided by broadcasters. As such, strict scrutiny is required even where the government's goals may be laudable. She stated:

Preferences for diversity of viewpoints, for localism, for educational programming, and news and public affairs all make reference to content . . . The controversial judgement at the heart of the statute is . . . that broadcasters should be preferred over cable programmers . . . The findings . . . represent Congress' reasons for adopting this preference . . . and these reasons rest in part on the content of broadcasters' speech . . .

It may well be that Congress also had other, content-neutral, purposes in mind when enacting the statute. But we have never held that the presence of a permissible justification lessens the impropriety of relying in part on an impermissible justification.

1994 WL 279691, at 29.

Judge Stephen Williams' dissent in the district court also took considerable exception to the impact of the must carry rules on cable operators and programmers. For Judge Williams, dissent, the must carry rules impose a burden ". . . on one set of speakers for the direct and explicit advantage of a limited class of their competitors—a class whose programming must, as a matter of law, include news and public affairs programming, content of a type specified by the government." District Court Opinion at 91.

The Supreme Court majority's conclusion that the must carry rules are unrelated to the content of the messages that the respective broadcasters and cable casters carry is questionable. It ignores a major thrust of congressional and FCC broadcast policy stretching back more than 30 years.

The existence, quality and quantity of bonafide licensee provided local news and public affairs programming has been a major broadcast regulatory issue almost from the inception of the service. Licensee provision of news and public affairs programming has affected its chances of receiving an initial grant of a license or a renewal of an existing license. *See Memorandum Opinion and Order in the Matter of Formulation of Rules and Policies Relating to the Renewal of Broadcast Licenses*, 44 F.C.C.2d 405; 29 Rad. Reg. 2d (P & F) 1 (Dec. 12, 1973). Such programming has figured prominently in FCC determinations of what constituted balanced programming under pre-

be argued to rest in part on the content of broadcasters' speech and may be deemed impermissible.<sup>124</sup> Also, upon remand, evidence of economic harm may, upon closer analysis and examination of prior history, prove unable to establish a sufficient threat to the government's

---

vious enforcement of the Fairness Doctrine. *See* Memorandum Opinion and Order on Reconsideration of the Fairness Report In the Matter of The Handling of Public Issues under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 58 F.C.C.2d 691; 36 Rad. Reg. 2d (P & F) 1021 (Mar. 19, 1976).

Definitions of what constitutes acceptable news and public affairs programming, including public oversight and agency enforcement, have evolved through-out the history of broadcast regulation from the 1940's through successful deregulatory efforts in the 1980s. *See generally* REPORT AND ORDER In the Matter of PRIMER ON ASCERTAINMENT OF COMMUNITY PROBLEMS BY BROADCAST APPLICANTS, 27 F.C.C.2d 650; 21 Rad. Reg. 2d (P & F) 1507 (Feb. 18, 1971); Memorandum Opinion and Order In the Matter of Petition for Rulemaking to Require Broadcast Licensees to Maintain Certain Program Records, 43 F.C.C.2d 680 (Oct. 3, 1973); Report and Order In the Matter of Amendment of the Primers on Ascertainment of Community Problems by Commercial Broadcast Renewal Applicants and Noncommercial Educational Broadcast Applicants, Permittees and Licensees, 76 F.C.C.2d 401; 47 Rad. Reg. 2d (P & F) 189 (Mar. 12, 1980); Memorandum Opinion and Order In the Matter of Amendment of the Commission's Rules Concerning Program Definitions for Commercial Broadcast Stations by Adding a New Program Type, "Community Service" Program and Expanding the "Public Affairs" Program Category and Other Related Matters, 88 F.C.C.2d 1188; 1982 FCC LEXIS 721; 50 Rad. Reg. 2d (P & F) 1245 (Jan. 13, 1982); REPORT AND ORDER In the Matter of The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076; 56 Rad. Reg. 2d (P & F) 1005 (June 27, 1984); Deregulation of Radio, 84 F.C.C.2d at 988; Commercial Television Stations, 98 F.C.C.2d at 1096.

Finally, the potential impact of competitive market entry on the provision of news and public affairs programming has served as the linchpin for congressional, judicial and administrative regulation of market competition. *See* REPORT AND ORDER In the Matter of Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations, 3 FCC Rcd 638; 64 Rad. Reg. 2d (P & F) 583 (Nov. 24, 1987).

124. For both dissents, strict scrutiny is triggered by the rules' impact. First, the must carry rules mandate speech which the cable operators would not otherwise make and prohibit cable operators from programming a portion of their channels as they might otherwise have done. 1994 WL 279691, at 27; and District Court Opinion at 85-86. Second, the rules do so in a manner which directly burdens the cable operators' exercise of editorial control and speech. 1994 WL 279691, at 27; and District Court Opinion at 85-87. As a consequence of the cable operators' loss of control over their channels of transmission, they suffer a direct, palpable, diminution of speech.

The dissenting opinions diverged once they concluded that the rules' impact triggered strict scrutiny. Justice O'Connor concluded that the government's interests were not sufficiently compelling to justify content based speech restrictions. 1994 WL 279691, at 29-30. Unfortunately, she does not state what would constitute such a compelling interest. Judge Williams concluded that while the government's interest in diversity was sufficiently compelling, its means of achieving its goal was not sufficiently narrowly tailored to accomplish the government's purpose. First, there is insufficient proof that requiring carriage of broadcasters will increase diversity. District Court Opinion at 94. Second, there are less burdensome alternatives such as the leased access channel provision, which would accomplish Congress' purpose. *Id.* at 95-96. While not conceding that the government possessed a compelling interest, Justice O'Connor too concluded that the rules are insufficiently tailored to achieve the government's stated goals. 1994 WL 279691, at 30.

interest in the retention of viable broadcast stations.<sup>125</sup> Thus it is possi-

125. The district court's dissent acknowledged as compelling the government's goal of assuring access to television for Americans financially disinclined or incapable of subscribing to cable as well as Americans who remain geographically remote from areas where broadcasting is offered. However, the available evidence does not support the congressional finding that broadcasting is being economically threatened by cable. Upon review of the proffered evidence, the dissent concluded that:

. . . the legislative findings do not support the inferences needed to sustain must-carry . . .

(1) there is no finding of any present or imminent harm; (2) the evidence of some dropping of some local broadcast channels in itself fails to show any widespread problem; (3) the proliferation of local broadcast stations since the end of the FCC's must carry rules undermines any inference of a problem; (4) the findings as to structure and incentives, taken together with the evidence of cable's dependence on broadcasting, fail to raise the concern beyond the level of speculation; and (5) even if the hazard were perceptible, the record does not address the less intrusive alternatives.

*Id.* at 108.

Moreover, Congress's efforts to establish evidence of broadcasting's economic demise prove no less effective than prior efforts by the FCC and broadcasters. The must carry question is not the first instance in which economic harm to existing broadcast stations has been raised against new competitors.

In the broadcast economic injury cases, the courts and the Federal Communications Commission concluded that an existing broadcaster could prevent the entry of a new broadcast competitor based on pleading economic harm unless its allegations of economic injury were supported by proof of a significant loss in news and public affairs programming occasioned by a loss of advertising revenues. And, it also had to establish that this loss in news and public affairs programming would not be alleviated by the new entrant. After years of litigation before it, the FCC concluded that no broadcaster had been able to successfully meet the public interest burden. See REPORT AND ORDER In the Matter of Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations, 3 FCC Rcd 638; 64 Rad. Reg. 2d (P & F) 583 (Nov. 24, 1987). The consistent inability of broadcasters to meet the burden of proof necessary to establish an actionable economic detriment lead to the abolition of the economic injury objection in comparative proceedings. The FCC, in abolishing the objection, stated that:

By this action, the Commission abolishes certain policies that address the issue of economic injury to existing broadcast stations. Our decision is based on our experience in implementing these policies and the intervening growth of the electronic media which lead us to conclude that the public interest is no longer served by their retention . . .

Our review of more than 80 cases indicates that, although parties may have routinely pleaded [economic injury issues], they have been unable to demonstrate sufficient evidence to warrant a finding of harm that would result in a net loss of service to the [public] . . .

We also conclude that the underlying premise of the Carroll doctrine, the theory of ruinous competition, i.e., that increased competition in broadcasting can be destructive to the public interest, is not valid in the broadcast field. The court, in *Carroll*, conceded that "private economic injury is by no means always, or even usually, reflected in public detriment. Competitors may severely injure each other to the great benefit of the public."

. . . consideration of allegations of economic injury to determine whether they will lead to an overall derogation of service to the public is like looking for the proverbial "needle in a haystack." On this basis, we will no longer entertain claims of Carroll injury . . .

In coming to its conclusion, the FCC also cited congressional determinations that pleadings of economic injury would be insufficient to preclude competitive market entry. See 2 FCC Rcd 3134; Mar. 26, 1987 NOTICE OF INQUIRY.

ble that the rules may be overturned under the reading of the law as espoused by the dissent or the majority of the Supreme Court in *Turner*.<sup>126</sup> Meanwhile, at least one court has held that the congressional prohibition against telephone company provision of video services is unconstitutional.<sup>127</sup> According to the district court in *C & P v. United*

---

The FCC's conclusions regarding existing broadcasters' inability to prove economic injury over many years in numerous licensing proceedings, bear a significant similarity to the conclusions reached by the Circuit Court for the District of Columbia in *Quincy Cable TV, Inc.* and those reached by the dissent in *Turner*. In each instance, the evidence proffered is too speculative. In *Quincy*, the court concluded that irrespective of the ultimate constitutionality of the rules:

. . . the Commission had not adequately substantiated its assertion that a substantial governmental interest existed . . . the problem the must carry rules purported to prevent—the destruction of free, local television—was merely a “fanciful threat” unsubstantiated by the record or by two decades of experience with cable tv.

*Century Cable* at 295, citing the court's earlier *Quincy* opinion.

Indeed, in its subsequent effort to justify the must carry rules, the FCC did not even advance an economic harm argument. A fact which the court noted, deeming that argument “foreclosed by *Quincy Cable TV*.” *Century Communications*, note 4, at 299.

126. As stated in note 105, *supra*, the Court's majority remanded the case to the district court requiring the court to hear further evidence because the government had failed to provide sufficient evidence to establish that broadcast stations are in economic jeopardy and that the must carry rules will actually advance the government's interests by materially alleviating the economic harm. *Turner* at 20-22. Only Justice Stevens would have voted for affirmance of the district court opinion upon which the appeal was based. 1994 WL 279691 at 24.

127. See *Telco Claims* at 11. See *Plaintiff's Complaint* at 5. *Chesapeake and Potomac Tel. Co. of Va., and Bell Atlantic Video Services Co. v. United States* (Bell Complaint). See also *Bell Atlantic Challenges Cable Act in U.S. District Court*, *supra* note 80.

Regulated local exchange carriers (“LECs”) have been prohibited from providing video distribution in their local markets since 1970. At that time, the FCC issued a rule prohibiting a telephone company from owning a cable concern in the same market. See 47 CFR §§ 63.54(a) and (b), and note 1(a). The rule was promulgated to prevent anti-competitive activities of some LECs who sought to control the entry of cable into their markets by restricting or controlling cable operator access to telephone facilities and pole attachments. See *generally* Applications of Telephone Common Carriers for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems (Final Report and Order), 21 F.C.C.2d 307 (Jan. 28, 1970), *recon. in part*, 22 F.C.C.2d 746 (1970), *aff'd*, *General Telephone Co. of S.W. v. United States*, 449 F.2d 846 (5th Cir. 1971).

In 1984, Congress codified the FCC's telco-cable cross ownership rules in the Cable Communications Act of 1984. See the Cable Communications Policy Act of 1984 (“1984 Cable Act”) 47 U.S.C. § 613(b). The legislative history of Section 613(b) indicates that it was intended to codify the then current FCC telco-cable cross-ownership rules prohibiting telephone companies from directly providing video programming to subscribers in their telephone markets. See H.R. REP. NO. 934, 98th Cong., 2d Sess. at 56; and 130 Cong. Rec. H 10,444 (daily Oct. 1, 1984).

The FCC subsequently reversed its earlier decision, and concluded that the public interest would be better served by partially lifting the cross ownership ban. See *Further Notice of Inquiry and Notice Proposed Rulemaking*, 3 F.C.C.R. 5849 (July 20, 1988), CC Docket 87-266, Telephone Company-Cable Television Cross Ownership Rules, §§ 63.54-63.58, FCC 88-249 (released Sept. 22, 1988). The Commission concluded that subject to safeguards, the public would receive significant benefits if telephone companies were allowed to provide cable television service. It ten-

*States*, the availability of workable regulatory alternatives that do not deny local video speech to the entire class of telephone company speakers render the prohibition unconstitutionally over-broad. The *C & P* suit is not the first effort undertaken by the Regulated Bell Operating Companies to defeat the cross ownership ban on constitutional grounds.<sup>128</sup>

---

tatively concluded that "construction and operation of technologically advanced, integrated broadband networks by carriers for the purpose of providing video programming and other services [would] constitute good cause for a waiver of the prohibition." See 3 F.C.C.R. 5849, 5870 (1988). Congress, however, did not repeal its law.

In light of Congress' refusal to remove the prohibition, Bell Atlantic filed suit alleging that the 1984 Cable Act prohibition violates the First and Fifth Amendment rights of LECs as well as the First Amendment rights of subscribers. Bell Atlantic argued that video programming is a form of constitutionally protected speech which it is not allowed to present on its own network. See Bell Complaint, *supra* note 124. According to the carrier, the statutory definition of video programming, the 1984 Cable Act prohibition is a direct abridgement of Bell Atlantic's First Amendment rights because the company and its subsidiaries are prohibited from engaging in video speech. In its Complaint, Bell Atlantic alleges that under sections 522 (16) and 533(b) of the act:

Congress has required government officials to decide whether telephone companies are providing prohibited speech that is "generally considered comparable to" television programming or whether they are providing non-prohibited speech which may also involve video images. This . . . process . . . involves an evaluation of the video images and the context in which they are presented; a consideration of the impact such video images will have upon the viewer; and a determination whether such video images will be perceived by the general public as a substitute for the forms of video speech that have been provided by others over traditional cable and broadcasting facilities.

*Id.* at 6.

Consequently, Bell Atlantic is not allowed to reach its customers through its own video or video on demand programming. *Id.* See also Judge Examines Telco Claims to First Amendment Cable Rights, Common Carrier Week, vol. 10, No. 25 (June 21, 1993) [hereinafter *Telco Claims*]. Further, the company argues that the statute does not serve a "compelling," "substantial" or "important" government interest. Bell Complaint at 6. The speech in question would not be illegal. In any event, the underlying goal of the legislation has not been achieved because a local monopoly in video transmission developed despite the statute. *Id.* at 7. Finally, the economic rationale for the statutory prohibition is argued to be vague and prophylactic because it looks to protect against future imagined abuses which the telephone companies might perpetrate.

See *Telco Claims*.

128. Prior to the *C&P* [Bell Atlantic] law suit, the government has addressed the constitutionality of restricting telephone company access to information markets in three separate proceedings, occurring in three respective venues. The issue was first raised in the modification of final judgement proceeding in 1982 and subsequently addressed again in that proceeding in 1987. In that proceeding, District Court Judge Harold Green issued an order which, *inter alia*, approved an agreement between AT&T and the Justice Department precluding the soon to be divested Regional Bell Operating Companies from entering the information services market as "electronic publishers." *United States v. AT&T*, 552 F. Supp. 131, 227 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

There were two stated rationales for the prohibition. First, was the perception that the RBOCs would use the monopoly control of their facilities in anticompetitive ways which would

## Under such circumstances, the user's control over access and

---

impede the development of the nascent electronic publishing industry. Second, the perception that allowing RBOC entry into the information services industry would have a detrimental effect on First Amendment values.

In 1987, during the first triennial review of the decree, the Justice Department and the RBOCs recommended that the ban on entry into the information services market be lifted because market conditions had changed significantly and entry would have positive effects on the industry. Further, some RBOCs argued the ban should be removed because it infringed the RBOCs' First Amendment rights. In response, the court ruled that the RBOCs could enter the information services market as transmission providers, but not as information providers. The information services had to be owned by other non-affiliated firms. The court also briefly addressed the RBOCs' First Amendment arguments and dismissed them on several grounds. First, the RBOCs, like other companies are subject to antitrust regulations of which the consent decree restrictions are a part. Second, because the RBOCs were common carriers, they enjoyed a different status from other network providers which retained speech rights. Third, there was in fact no infringement of RBOC speech rights because, upon the proper showing, the previously agreed upon ban could be lifted.

Upon RBOC appeal of the court's decision, the circuit court ruled that the district court could not require the RBOCs to establish that market conditions had changed given the fact that no party to the court administered consent decree was challenging the assertion. Further, the district court was required to apply a different standard to assess the advisability of removing the restrictions as the parties recommended. The circuit court did not, however, reach the First Amendment issue. In the subsequent remand by the circuit court of appeals, the district court reluctantly removed the restriction.

From 1988 to 1992, the RBOCs also sought relief from the cross-ownership ban through a variety of bills proposing to allow telephone company entry into the video transmission and provision market. See H.R. Rep. No. 1504, 103d Cong., 1st Sess. (1993); S. Rep. No. 1200, 102d Cong. 1st Sess. (1991); H.R. Rep. No. 2546, 102d Cong., 1st Sess. (1991); 2800, 101st Cong., 1st Sess. (1990); S. Rep. No. 1068, 101st Cong. 1st Sess. (S. 1989); H.R. Rep. No. 2437 101st Cong., 2d Sess. (1990) (companion legislation to S. 1068). However, telco provision of video programming, which was seen as an alternative to re-regulation of cable television rates and practices, was not adopted by Congress despite significant support from the then sitting president. Instead, the cable industry was substantially re-regulated. In 1993, S. 1504, a new bill which proposes to remove the cross ownership restriction, has been introduced. Yet, in all the legislation which has addressed the issue of telco ownership of video distribution facilities, and, despite efforts by telephone companies to raise the constitutional speech issue before the FCC and the MFJ court, to date there are only two references to First Amendment speech issues in previously unsuccessful legislation. See H.R. REP. NO. 934, 98th Cong., 2d Sess., 31 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4668 (citing *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (explaining the relationship between the telephone-cable cross-ownership prohibition and the First Amendment goal of diversity of ownership and viewpoint)). See also S. 1200, Communications Competitiveness and Infrastructure Modernization Act of 1991, S. 1200, 102d Cong., 1st Sess. (1991).

The Congress makes the following findings: . . . (14) A broadband communications infrastructure will be every American's tool of personal emancipation; will generate a quantum increase in Americans' freedom of speech.

*Id.* § 101(14).

The issue was addressed a second time when Congress determined that its codification of the FCC's telephone-cable television cross-ownership rules was constitutional.

Finally, the issue was addressed in the context of FCC deliberations concerning its telephone



speech on cable television and local telephone switched networks will be revised to accommodate increased network owner control. The scope of user access and speech rights most likely would be established by contract or tariff and reflect the relative bargaining power of the parties.<sup>129</sup> In such a scenario and in the absence of state action<sup>130</sup> small users and individuals would have access and speech rights solely at the sufferance of the network provider/owner, and the specter of private censorship unmediated by government becomes quite real.

Should the must carry rules be upheld based upon economic market and antitrust regulation and the telephone company prohibition overturned, at minimum, opportunities for access and speech would continue to incorporate the current statutory delineations of common carriage, leased access, public access and network owner access.<sup>131</sup> Opportunities for speech would be broadened to include telephone network owner/speakers and cable network speakers, as well as the merged cable-telephone network owner/speaker, and would continue to include unaffiliated information provider "speech" and user/subscriber speech. Under this set of outcomes, the focus of access and speech policy arguably shifts to a government-mediated inquiry into the extent and the manner in which the owner/provider may limit or prohibit the exercise of access and speech rights by potential and actual user/subscribers. So

---

company-cable television cross-ownership restriction. Collectively, in these proceedings, the government has set forth its rationale for why its decision to continue the imposition of the restriction on local telephone company provision of video programming is constitutional.

The government's argument is essentially as follows. The telephone-cable television cross-ownership ban is justified by the First Amendment interest "in the widest possible dissemination of information from diverse and antagonistic sources." Through their control of access to their local transmission and switching monopolies, the telephone companies could reduce or eliminate competition in electronic publishing, thereby reducing diversity. Therefore, the removal of the ban would threaten the First Amendment interest in diversity.

The ban does not violate the First Amendment rights of local telephone companies for several reasons. First, the ban is an anti-trust prohibition similar to those which other media companies are also subject. Second, common carriers are treated differently for purposes of the First Amendment. Third, the ban is a content neutral restriction which incidentally affects speech. It is narrowly tailored to meet the substantial government interests in preventing anticompetitive abuses by telephone carriers possessing monopoly power and in maintaining a competitive environment for broadband communications.

129. *See generally In re Competition in the Interstate Interexchange Marketplace Petitions for Modification of Fresh Look Policy*, 8 F.C.C.R. 5046 (1993); and *In re Competition in the Interstate Interexchange Marketplace*, 6 F.C.C.R. 7569 (1991). *See also* Victor J. Toth, *To Tariff or not to Tariff—That's No Longer the Question; Federal Communications Commission Tariffs*, BUS. COMM. REV., Jan. 1993, at 60.

130. *See infra* note 6.

131. *See generally Daniels Cablevision, Inc.*, 835 F. Supp. 1 (1993).

long as owner/providers and network users retain access and speech rights, the First Amendment is likely to be better served. For reasons stated above, an equally probable outcome will be modification—if not outright repeal—of the must carry rules and repeal of the cable-telephone cross ownership prohibition.

## VI. CONCLUSION: A SHIFT IN PARADIGMS?

The convergence and privatization of telecommunications networks will continue as a market and technological reality and as a preferred regulatory tool. While the outcome of the *Turner* and *C & P* cases will affect the scope of network owner control over access and content, questions regarding the scope of access to private networks and the extent of private network control over content will remain. For instance, in the event *Turner* is overturned and *C & P* upheld, how may telephone and cable network owners establish criteria for access and speech on their networks? In the context of private action by network owners, how might the government seek affirmatively to ensure subscriber/user access and relatively unfettered speech, while avoiding inappropriate regulation of network owner speech?

Access presents a particularly interesting set of problems. For instance, to the extent government regulation of network owner control over access is based upon technical scarcity, we may be approaching a time when technical scarcity will cease to be a credible concern.<sup>132</sup> Admittedly, however, an abundance of technical channel or switching capacity does not assure access to all potential users. Market place failures due to wealth distribution, limited network infrastructure availability, and selective market competition will still play a significant role.

These questions of speech and access are doubly critical given the current proposed mergers. To the extent that large telephone and cable corporations are allowed to merge, economic scarcity will remain a valid policy concern. Aside from reducing potential competitors while driving up the price for market entry, the types of services made availa-

---

132. At least one communications expert asserts that there is no shortage of available spectrum, only a shortage of current human ingenuity to harness it. He points to the history of spectrum development and management wherein new technology allows the use of portions of previously "unusable" spectrum as well as the more efficient use of available spectrum vis compression techniques. See George Gilder, *What Spectrum Shortage?*, FORBES, May 27, 1991, at 328-330. Similarly, digital, switched interactive telecommunications networks can provide another source of increasing capacity for the transmission of information to the home. Consequently, they too reduce scarcity. See generally Miller, *supra* note 10.

ble and the manner in which they are priced by the merged firms will affect who will have access to network functionalities. If the post-merger economics follow the same trends as prior periods of merger in related media industries such as broadcasting, debt service demands will ultimately force the merged firms to cut costs, serve more lucrative markets and raise prices.<sup>133</sup> In such an event, some market segments may receive less service while other segments pay more. Such developments would certainly affect the cost of access, may preclude significant segments of the market from having meaningful access, and will affect the speech activities of those who acquire access.

Some scholars have argued that the nation's constitutional laws be changed to reflect the growth of speech related activity engendered by the convergence of computer, network switching and fiber optic technologies. For instance, at least one eminent constitutional scholar has argued that the First Amendment should be amended to protect speech activities conducted over computers.<sup>134</sup> Other scholars have argued that the First Amendment, in its current form, may be interpreted to protect access and speech activities conducted over computer-augmented, broadband, interactive switched networks.<sup>135</sup>

Short of constitutional solutions, however, the government retains other regulatory tools for assuring "universal" access and relatively unfettered speech for network owners and users. Government may address these problems reactively (antitrust, liability for content, and tort liability) or proactively (setting minimum technical parameters for networks which favor distributed intelligence and switched interactive net-

---

133. Andrea Adelson, *Radio Station Consolidation Threatens Small Operators*, N.Y. TIMES, Apr. 19, 1993, at D1; Edmund L. Andrews, *Plan to Ease Rule on Buying Radio Stations*, N.Y. TIMES, Feb. 27, 1992, at D1; 1985: *A Year Like No Other for the Fifth Estate; Changes in the Broadcasting Industry*, BROADCASTING, Dec. 30, 1985, at 38.

134. Resnick, *supra* note 53, at 32. Speaking at a recent conference on computers, freedom and privacy in San Francisco, Laurence H. Tribe, a professor of constitutional law at Harvard Law School, called for an amendment to the U.S. Constitution that would protect privacy, speech and other constitutional rights made possible in part, but now threatened by computer technology.

The Tribe Amendment reads, in full:

This Constitution's protections for the freedoms of speech, press, petition and assembly, and its protection against unreasonable searches and seizures and the deprivation of life, liberty or property without due process of law, shall be construed as fully applicable without regard to the technological method or medium through which information content is generated, stored, altered, transmitted or controlled.

Resnick, *supra* note 53. In Professor Tribe's view, the current constitutional amendments do not protect the rights of computer users adequately. *See id.* at 1.

135. *See generally* Hammond, *supra* note 83. *See also* Perrit, *supra* note 115, at 334-35.

work technologies), and a universal service requirement to assure access and speech in the face of the above mentioned market failures.

Control of employee and subscriber speech is problematic for all the reasons mentioned before. There clearly are legitimate and compelling reasons for employer or network owner limits on employee or subscriber speech in some instances. Nevertheless, the potential for private censorship remains great and its negative impact is no less devastating to the individual than when engaged in by the government.

The impact of these risks can be positively affected by the exercise of regulatory choices that federal and state governments now have before them. These regulatory choices affect the exercise of access and editorial control at the content, network configuration and equipment levels—the same levels at which network owners exert control.

Given the extensive cost of deploying fiber optics to the home, federal and state regulators could allow private industry to continue to build network information delivery systems composed of one-way, compressed channel technology (cable and video dial tone) rather than switched, two-way, interactive technology (ISDN/broadband). While this approach may be favored by portions of the industry, there is a significant danger that such a solution would postpone the advent of switched interactive multi-media communications. More important, however, it replicates the current regulatory difficulties that accrue when the government cedes control over distinct, clearly discernable transmission paths to network owners and then imposes liability for speech.

At the network intelligence and applications level, the government has initiated regulatory proceedings aimed at equalizing user interconnection to the local monopoly public switched network architecture, and increasing network service offerings by enhancing network flexibility through distributed network intelligence. These proceedings have yet to be concluded. A resolution favoring distributed intelligence and shared user/network control over network functionalities would maximize speaker control over the process by which information is communicated.

Where the network owner exercises control over the network via access or content control to deter or forestall competition the antitrust laws also should be applicable.<sup>136</sup>

As privatization continues, the lessons learned in *Cubby, Inc. v.*

---

136. *Associated Press v. United States*, 326 U.S. 1, 19-20 (1945).

*Compuserve* and alluded to in other recent cases regarding publisher liability, should give would-be private network editors pause. Where a network owner exercises control over access and content, they may not be able to avoid liability for that content when it is harmful to the public.<sup>137</sup> Similarly, network owners may be held liable for negligent or careless manipulation and control of subscriber/user information where such action results in injury to the user or to third parties.<sup>138</sup> Certainly, the libel, obscenity and indecency laws will continue to make control of content a cause for liability. Thus, even where network owners seek to eschew all content regulation, they are likely to be no more successful than telephone common carriers and cable operators who by statute must exert some control over obscene or indecent subscriber speech. Ultimately, self-preservation and protection of the bottom line may motivate firm efforts to curb libelous speech. Yet, forgoing editorial control of content would remove a downside cost of doing business that may be preferable to the cost of maintaining the monitoring of subscriber and programmer speech and the potential liability which the exercise of editorial control brings.

There is another way in which network owner control of speech may be tempered by government sanction—the imposition of tort liability. The exercise of control over access and content necessarily invites expectations that the network owner, in the exercise of its editorial discretion, has reviewed and sanctioned all information which it transmits. Moreover, should the network owner lose or damage customer information in storage, manipulation or transmission, or, negligently preclude the transmission of customer information entrusted to its care, it is reasonable to require that the owner compensate the customer to the extent of its legally recognized tort damages. A recent case in Illinois had so held based on state law.<sup>139</sup>

---

137. For instance, *Soldier of Fortune Magazine* was recently held liable for an advertisement it published which the court interpreted as, *inter alia*, soliciting contract killing jobs. See Ronald Smothers, *Soldier of Fortune Magazine Held Liable for Killer's Ad*, N.Y. TIMES, Aug. 19, 1992, at 18. See also *supra* note 46 (discussing *Compuserve* and *Prodigy*).

138. "Providers of goods and services created using computer and information technologies face increasingly greater exposure to liability when things go awry." See Sookman, *supra* note 72, at 141-46.

139. At least one state has limited the applicability of telephone carriers exculpatory language to ordinary negligence and does not allow disclaimers for acts of gross negligence, willful neglect or misconduct. See *State OKs Liability Disclaimers for Telcos*, 130 PUB. UTIL. FORT. 42, Dec. 15, 1992.

The Supreme Court for the State of Illinois recently overturned the lower court ruling. It determined that parties suffering economic injury totaling millions of dollars as a result of a severe

At least one commentator has noted that in an era of deregulation, the reasons for continuing to limit the tort liability of non-dominant telecommunications common carriers cease to be applicable.<sup>140</sup> At least three reasons have been used by the courts to justify the continuation of exculpation clauses limiting common carrier liability. First, federal and state regulators may be held to possess the regulatory authority to establish such limits. Second, absent such limits, judgements paid by monopoly carriers would be passed on to subscribers having no alternative service providers. Third, limited liability provisions preserve national uniformity in the provision of services and avoid discrimination between like-situated but geographically dispersed subscribers.

Today, however, such reasons retain little credibility. First, the Communications Act of 1934, does not authorize federal regulators to preempt state law tort remedies then existing at common law or by statute. Rather, such remedies as the act provides are in addition to existing state remedies.<sup>141</sup> In addition, courts have not automatically granted primary jurisdiction over state tort liability claims to regulatory agencies but often have found such claims to be within the purview of the courts.<sup>142</sup> Second, in an era of convergence and expanding competition at all market levels in the telecommunications and, ultimately, multi-media marketplace, many subscribers increasingly have, and will continue to have, alternative sources of service. Finally, in an era of privatization, in which a substantial portion of the existing telecommunications infrastructure is owned by a growing disparate number of private owners serving distinct "high-end user" sub-markets rather than the larger local or national markets of various subscribers,

---

fire at an Illinois Bell switch could not recover. The court held that the parties' statutory claims for economic losses were not recoverable in a tort action and that the exculpatory language in Illinois Bell's tariff properly limited claims for disruption of service to compensation for the cost of the calls. See *In re Illinois Bell Switching Station Litig.*, No. 73999, 1994 Ill. LEXIS 97 (Ill. July 28, 1994).

For a summary of the impact of the Hinsdale switch fire on subscribers, see generally Art Barnum, *Bell Fire Fiasco Rings in Memory Five Years Later*, CHL. TRIB., Apr. 30, 1993, at 2. See also *Central Office Fiascos Expose User Vulnerability*, *Network World*, July 18, 1988, at 34; Barton Crockett, *Citing Negligence, Users File Suits Against Illinois Bell*, NETWORK WORLD, June 6, 1988, at 1 (discussing the law suits against Illinois Bell alleging millions of dollars in damages due to a fire in the Hinsdale central office switch); and Barton Crockett, *Users Seek Damages From Illinois Bell; Companies Charge BOC with Inadequate Fire Prevention in Wake of Hinsdale Co. Disaster*, NETWORK WORLD, May 23, 1988, p. 11.

140. See Christy Cornell Kunin, *Unilateral Tariff Exculpation in the Era of Competitive Telecommunications*, 41 CATH. U. L. REV. 907, 932-37 (1992).

141. 47 U.S.C. § 414 (1988).

142. Kunin, *supra* note 140, at 914-15, 928.

national uniformity appears to be less a function of government action and more a function of the relative market power of the service provider, the purchaser and market demand. For these reasons, government-sanctioned, carrier-initiated limitations on tort liability should be abolished except where a carrier elects to serve all classes of customers via public switched multi-media networks.

A decision to remove the tort liability limitation except when applied to carriers serving the majority of all classes of users via a public switched multi-media network or providing significant interconnection between public switched networks, would serve as a financial incentive for some carriers to maintain service to a broad subscriber base, or to expand their service offerings to include other consumer groups, or, at the very least, assure sufficient compatible interconnection.

Where the non-dominant network provider or providers resort to contracts or tariffs as the vehicle for the offering of services to subscribers, there may be instances in which the doctrine of contract unconscionability may be invoked. If the network owner, as provider of scarce network resources, leveraged its economic position by employing form contract language to limit its tort liability, its attempt to enforce such restrictions might be denied by the courts on the grounds of unconscionability.<sup>143</sup> Moreover, as one public service commission has observed, given the increasing complexity of tariffs it would be “. . . ‘unconscionable’ to assume that any telephone subscriber had consented either impliedly or expressly to broad liability waivers.”<sup>144</sup>

Each of the above-mentioned policies affects the incentive structure under which information carriers would exercise control of access and speech on their networks. None of the proposed policies is inconsistent with established constitutional law. They do not preclude network owner exercise of control over access and speech. They merely remove liability protections enjoyed by public common carriers, expand techni-

---

143. It has been aptly observed that:

the law, by protecting the unequal distribution of property, does nothing to prevent freedom of contract from becoming a one-sided privilege. Society, by proclaiming freedom of contract, guarantees that it will not interfere with the exercise of power by contract. Freedom of contract enable enterprises to legislate by contract and, what is even more important, to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms.

Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 640-41 (1943).

144. Cross, *supra* note 69, at 35 (quoting *In re Equicom Communications, Inc.*, 109 Purdon 4th, 540 (1990)).

cal opportunities for user access and speech, and continue pre-existing economic regulation. As such, they should be adopted as regulatory policy regardless of whether constitutional law is changed.



