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MAPPING ELECTRONIC DATA COMMUNICATIONS ONTO  
EXISTING LEGAL METAPHORS: SHOULD WE  
LET OUR CONSCIENCE (AND OUR  
CONTRACTS) BE OUR GUIDE?

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I. INTRODUCTION

SINCE the inception of networked data communications systems,<sup>1</sup> commentators have attempted to analyze the rights and duties of participants in these systems by mapping the systems against existing relationships in order to try to pick the "right" metaphor.<sup>2</sup> These attempts, however, presuppose that there is some "best fit," some metaphor that will accurately characterize all the activities involved in these systems. In fact, the most significant attribute of "Cyberspace"<sup>3</sup> is its malleability, the ability to

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1. Networked data communications systems, the most common of which are electronic bulletin board systems (BBSs), consist of computer programs with the ability to gather, store, and distribute messages. These systems vary in size, from systems as large as CompuServe to those run from an individual personal computer. Increasingly, all these systems tend to be linked, at least for the purposes of exchanging electronic mail.

2. Electronic communications systems represent a relatively new technology. This technology spans numerous different functions, including among other activities, sending electronic mail (E-mail) messages, transferring data files, and sharing software. This variety of activity makes the pigeon-holing of this concept into an established legal metaphor all the more difficult. The various authors who have attempted to pinpoint the best metaphor to encompass this technology have acknowledged the difficulty in accomplishing this objective. See, e.g., Henry H. Perritt, Jr., *Tort Liability, the First Amendment, and Equal Access to Electronic Networks*, 5 HARV. J.L. & TECH. 65, 65-66 (1992) ("The legal system is struggling to adapt traditional doctrines to new market structures and technologies . . .") (footnote omitted); Loftus E. Becker, Jr., *The Liability of Computer Bulletin Board Operators for Defamation Posted By Others*, 22 CONN. L. REV. 203, 205 (1989) ("[The] legal issues surrounding computer bulletin boards comprise a land with no maps and few native guides.").

3. The term "cyberspace" has its beginnings in science fiction. See Mark L. Van Name & Bill Catchings, *Now's the Time to Make Rules for Cyberspace*, PC WEEK, October 5, 1992, at 70, 70. It is a term "for that unreal world inside the ever-

change to fit a variety of metaphors. This same amorphous nature of cyberspace allows the participants to decide how electronic data communications systems should operate<sup>4</sup> by selecting the appropriate attributes from many different models.

Due to this same malleability, however, cyberspace remains relatively undeveloped and many of its possibilities remain unexplored. Users cannot readily predict conditions or anticipate ground rules. New and different situations occur around each bend. Any attempt to "map" territory that is unstable, unknown and changeable proves to be difficult, which is why metaphors, which are "maps," do not help in any consistent way. Instead, one needs a "guide" to maneuver through the difficult areas. Through this new jungle of questions posed by this electronic media, our consciences should be our guides. In other words, the best way to determine the rights and duties of participants in electronic networking communities is not to pick a particular metaphor to be our "map," but rather, to apply basic principles of fairness and justice and to use the existing "legal metaphors" only for what they are worth as illuminators of a principled discussion.

That said, there is substantial utility in asking ourselves how particular online environments are similar to or different from other environments where the rights and duties of participants have been analyzed more fully in the past. The malleability of cyberspace creates an opportunity for system operators (sysops) to create a wide range of different sets of ground rules; selected and imposed metaphors that are adopted by contractual agreements between sysops and users. Existing metaphors can serve as shorthand "signals" of the types of relationships and ground rules the parties intend to adopt.<sup>5</sup> The providers of communications services, the owners of the disks used by centralized databases, and the parties presiding over electronic discussion groups all act in effect as "sysops" who have de facto power to

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growing network of computers, the electronic universe in which people send E-mail messages, download shareware, and move around lots of data." *Id.*

4. Usually, the system operator (sysop) decides how his or her particular system is to operate; the sysop establishes the ground rules. A user can either comply with the ground rules, or find another system that will allow the desired activity.

5. The idea of borrowing from existing metaphors has been practiced in the computer arena for some time. For example, the early providers of shrink wrap software licenses communicated the terms of their licenses by telling consumers they were free to treat the software "just like a book."

select applicable rules.<sup>6</sup>

The users, however, are not powerless in this arrangement. While they are unable to dictate or, often, even to negotiate the specific rules, they do have the power to voice their approval or disapproval of these rules by deciding whether or not to subscribe to a particular system. This *de facto* voting power gives the users as a group substantial strength in this arrangement.<sup>7</sup>

But even clear contracts regarding ground rules are not enough because the interests of those not party to such contracts may be affected by online activities. The new electronic networks impact in novel ways upon third parties who may be harmed by defamatory, infringing or criminal electronic speech. Additionally the networks raise novel issues regarding third-party rights.<sup>8</sup> In general the duties participants owe to potential third-party victims will turn on what kinds of actions are "reasonable" under all the circumstances. The newness and malleability of the electronic medium imply that there may be continual changes in what will be considered "reasonable care" to avoid "foreseeable" harm to others. Thus, the application of well-established legal principles, and the determination of which principles will be applied in particular situations, will itself be determined by customs and capabilities that arise, and may only exist in the online environment. However, until the application of these principles to cyberspace is well understood, contracts should govern the relationships evolving in the field of electronic data communications.

This Article advocates primary reliance on contracts to gov-

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6. The sysops neither need nor have a duty to pick any particular metaphor. They may, however, have a duty to be clear and candid about any metaphor they have picked and will enforce, so that participants know their rights and obligations.

7. Facially, contracts between sysops and users may appear to be contracts of adhesion, with the users possessing no negotiation or bargaining power. However, once the sysop has clearly and candidly articulated the applicable rules and obligations of the contract, the users are on notice of the nature of the contract. At this point, the users can choose to accept the terms as stated or walk away and find another system whose terms are more favorable. Moreover, online rules do evolve in response to complaints by communities of users—there is genuine collective negotiation over time.

8. Authorities may be tempted to analogize activities within electronic data communications systems to non-electronic activities to determine whether the electronic action is tortious, or even criminal. Are certain types of electronic messages analogous to junk mail, shouting in public, drug trafficking, defective products or negligent spreading of an infection? Every time the law encounters new types of activity, it should examine rules applicable to similar cases. However, the law should not look at only one such metaphor and should not feel bound to select and use one particular analogy to reach a result.

ern the cyberspace environment. First, we discuss the necessity of rules and obligations to govern electronic data communications. We then turn to the evaluation of established legal principles commonly used as metaphors. Third, despite our caveats about the limits on such metaphors, we explore a particular comparison with an industry where contracts now flexibly govern key relationships between service providers and consumers. Finally, we argue that electronic data communications should for now be ruled by contracts, not governed by extraneously imposed regulations.

## II. FOR WHAT PURPOSES SHOULD WE CHOOSE AND APPLY LEGAL METAPHORS TO ELECTRONIC DATA COMMUNICATIONS?

Why do we want to choose metaphors and decide on rights and duties of participants in electronic data communications? Because there are key elements of electronic data communications that are similar to previously established legal metaphors. As sysops and users, we need to know:

- Whether and when the public has a right to send messages over particular communications channels.
- Whether and when a sysop has a right to edit or delete a message based on its content.
- Whether and when certain types of messages may be excluded from various systems, or criminalized by government action.
- Whether and when recipients of electronic messages, or sysops, have the right to disclose, re-use or republish messages posted or sent by others.
- Whether and when the sender of an electronic message has a right to condition or license the copying or re-use of the contents or specific terms of the message.
- Whether and when a party defamed by an electronic message can sue the sender and/or the operators of electronic systems through which the harmful message was republished and distributed.
- Whether and when the owner of a copyright, or other intellectual property right, may sue a user of an electronic data communications system to infringe those rights—or the provider of the communications service used for such infringement.
- Whether and when a participant in an electronic data communications system has a right NOT to receive messages of a particular type (e.g. simply because they may annoy or offend the recipient).
- Whether and when a sysop can and should configure a commu-

nications system to make identification of the originator of each message easy—or impossible.

- Whether and when a community or persons having online discussions can impose their collective judgments on the conduct of individual participants.
- Whether and when the provider or operator of an electronic data communications service is liable for facilitating criminal activities which have occurred on the system that she controls.
- Whether and when an action by a user in an online environment can be treated as the equivalent of a signature.
- Whether and when to apply antitrust principles to limit agreements concerning access to and use of online services, to require that access be given to online services, or to prevent requirements that particular packages of services be taken together.
- Whether and when the laws of any particular jurisdiction apply, or have been violated, by actions that have electronic effects in numerous, perhaps unpredictable, locations.

This list is by no means exclusive. The number and breadth of these questions demonstrates that no one existing metaphor can answer all questions adequately. However, some general and particularly persuasive metaphors in the area of information distribution can possibly be used to shed much light on the relationship between sysops and users. The next section outlines these primary metaphors and discusses the consequences of applying them to an electronic data communication system.

### III. CONSEQUENCES OF CHOOSING PRIMARY METAPHORS

Few standards exist that can assist in determining who has what responsibility for harms caused by the contents of particular electronic messages or publications. We can, however, look broadly to three particularly relevant models: (1) publishers, (2) distributors and (3) common carriers.

#### A. *Publishers*

The employment of the publisher metaphor to electronic data communications systems would have limiting ramifications.<sup>9</sup>

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9. The term "publisher" encompasses all those who communicate statements to third persons or issue a "publication." As defined in the Second Restatement of Torts, a "publication" consists of an intentional or negligent act which results in the communication of a statement to a third person. RESTATEMENT (SECOND) OF TORTS § 577 (1976). The term "publisher," in the context of this Article, encompasses both the original author, or publisher, of a statement

Considering someone a publisher has the major consequence of presuming the person controls the contents of what she publishes and, therefore, may be liable for any resulting harm.<sup>10</sup> Additionally, it presumes that the person is free to exclude anyone or anything.<sup>11</sup> Newspapers, magazines, speakers, pamphleteers and senders of mail all enjoy First Amendment protection,<sup>12</sup> which limits their liability, but, to the extent their speech is not protected, they can be civilly or criminally liable for its content.<sup>13</sup>

The inadequacy of this metaphor for the regulation of electronic data communications is due to its presumption that electronic publishers have direct control over the items that they

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and those who subsequently repeat or republish the statement. Both publishers and republishers are held to similar standards of care. *Id.* at § 578; *see also* Perritt, *supra* note 2, at 98-99 (general fault provisions eliminate need for separate standards) (citing MODEL DEFAMATION ACT §§ 8-101 cmt. (draft 1991)).

10. The harm usually associated with publishers comes in the form of four torts: defamation, false light, public disclosure of private facts, and intentional infliction of emotional distress. This Article employs the tort of defamation as representative of all four torts.

To recover for the tort of defamation, the plaintiff must demonstrate: (1) a false statement about another; (2) lack of privilege in publishing the statement to third party; (3) at least negligence on the part of the publisher; and (4) special harm caused by the publication. RESTATEMENT (SECOND) OF TORTS § 558 (1976).

Publishers have been held liable in tort for everything from stories written by a publisher's employee, to letters to the editor, to advertisements. Becker, *supra* note 2, at 222 & n.89; *see, e.g.*, *Burton v. Crowell Publishing Co.*, 82 F.2d 154 (2d Cir. 1936) (allowing cause of action for libel for cigarette advertisement even though advertisement asserted no fact or opinion concerning plaintiff); *see also* W. PAGE KEETON, ET AL., PROSSER & KEETON ON TORTS § 113, at 803-04, 810-12 (5th ed. 1985) ("Fault Issues in Defamation Law" and "Publishers and Disseminators"). *But see* *Safarets, Inc. v. Gannett Co.*, 361 N.Y.S.2d 276 (Sup. Ct. 1974), *aff'd*, 373 N.Y.S.2d 858 (App. Div. 1975) (dismissing complaint alleging libelous letter to editor regarding conditions at pet store).

11. *See* *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254-55 (1974) (privately owned newspaper allowed to advance own political, social and economic views (citing *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 117 (1973))).

12. The First Amendment limits publishers' liability for any of the four torts. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (applying First Amendment protection to tort of defamation and holding public official must show "actual malice" to recover for defamation relating to official conduct); *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967) (holding that First Amendment requires plaintiff to prove "knowledge of . . . falsity or . . . reckless disregard of the truth" to recover under New York privacy statute); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 493-95 (1975) (holding that First Amendment precluded liability for disseminating truthful, public-record information); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (holding that public figure must show "actual malice" to recover for intentional infliction of emotional distress).

13. *See, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (allowing private individuals to recover against publications for actual injury due to defamation).

distribute.<sup>14</sup> Most print publishers have significant contact with any libelous item before it is disseminated.<sup>15</sup> An equivalent presumption could not reasonably be applied to the operator of an electronic data communications system.<sup>16</sup> To place the responsibility on the sysop to effectively monitor the contents of each item released to the public would significantly reduce the number of sysops who would be willing and/or able to operate electronic data communications systems.<sup>17</sup> In any event, in many communications systems, access to contents before "publication" is a practical impossibility.

### B. Distributors

As with the publisher metaphor, the employment of the distributor metaphor also has its difficulties.<sup>18</sup> Typically, a distributor does not control the content of a publication and has duties and liabilities only in the event that the harm created by the act of distribution is brought to his or her attention.<sup>19</sup> Newsstands,

14. See Becker, *supra* note 2, at 223 ("[T]he unstated assumption seems always to be that the publisher or one of his agents knows what he is publishing.") (emphasis omitted).

15. Print publishers include newspapers, magazines, pamphleteers, senders of mail, and book publishers.

16. The presumption attaching to the publishers of printed material seems based on the idea that a publisher, through its agents, has constructive, if not actual, knowledge of the contents of each piece distributed. See Becker, *supra* note 2, at 223.

17. Similar difficulties attend an analogy to radio and television broadcasters. While these "publishers" are in control of what they broadcast, often third-party comments can be inserted into a broadcast. For example, a microphone might broadcast random comments from a crowd during an on-location news broadcast. Delay systems would enable a broadcaster to filter these libelous comments, but their use is often impractical. Becker, *supra* note 2, at 223-24. Moreover, many states have enacted statutory rules that require a finding of some degree of fault on the part of a broadcaster before imposing liability for third-party statements. *Id.* at 226 n.111 (forty states); see, e.g., CAL. CIV. CODE § 48.5 (West 1982) (negligence standard); GA. CODE ANN. § 51-5-10 (Michie 1982) (negligence standard); MISS. CODE ANN. § 95-1-5 (1972) (good faith and correction are affirmative defenses); N.H. REV. STAT. ANN. §§ 507-A:1-3 (1983) (negligence standard).

18. The category of distributor is separate and distinct from that of a republisher. RESTATEMENT (SECOND) OF TORTS § 578 (1976). A distributor is one who delivers or transmits information, as distinct from a republisher who repeats it. *Id.*

19. *Id.* § 581(1) ("[O]ne who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character."); see also *Hartmann v. American News Co.*, 171 F.2d 581, 585 (7th Cir. 1948), *cert. denied*, 337 U.S. 907 (1949) ("[A distributor is] not liable if he can prove . . . that he did not know of the libel, and that he was not negligent in not knowing."); *Balabanoff v. Fossani*, 81 N.Y.S.2d 732, 733 (Sup. Ct. 1948) ("In these days of speedy dissemination of



book stores, and libraries<sup>20</sup> all distance themselves from control over what they transmit, but all reserve the right, and may have the duty, to exclude substantially harmful content once it is specifically brought to their attention.

To some commentators, this metaphor fully encompasses electronic data communications systems.<sup>21</sup> However, as with the publisher metaphor, the distributor metaphor presents significant difficulties. The most significant of these difficulties is the restrictions placed on a sysop's activities within his or her own system. Most sysops actively participate in their own systems.<sup>22</sup> This activity may be interpreted to suggest that the sysop could and should have knowledge of defamatory or libelous statements contained on his or her system. Moreover, the distributor metaphor further demands that, once knowledge is established, an inquiry into whether the sysop has used reasonable care, in light of the risk of harm, must be undertaken. If the sysop had not used reasonable care, then liability would result.

The imposition of a high standard of care that would result from the use of the distributor metaphor could be disastrous for the growth of electronic data communications. It would, in effect, demand that the sysop choose between operating a system and not participating in it, or operating a system, participating in it, and taking his or her chances with liability. Either choice would decrease the number of present sysops and deter future sysops from introducing new systems and new technology.

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news it seems unreasonable to hold that a local distributor of newspapers should be required to check the contents of each issue for libelous matter in order to protect himself against liability for damages." (quoting *Bowerman v. Detroit Free Press*, 283 N.W. 642, 645 (Mich. 1939)).

Privilege also protects distributors from liability: one who provides a means of publication of defamatory matter published by another is privileged to do so if (a) the other is privileged to publish it, or (b) the person providing the means of publication reasonably believes that the other is privileged to publish it. RESTATEMENT (SECOND) OF TORTS § 612(1) (1976). Therefore, if a distributor is able to establish that a privilege is present, no cause of action exists.

20. *Id.* § 581 at cmt. d (owner of news stand not liable unless he knows or should have known of defamatory article); *id.* at cmt. e (book store not required to examine contents of books, but may be liable if publisher is known for "notoriously sensational or scandalous books"); *id.* (also applicable to libraries).

21. See, e.g., Becker, *supra* note 2, at 228 ("[C]omputer bulletin board operators should be treated . . . like news vendors, libraries, and telegraph companies.").

22. This activity, however, usually does not extend to the sysop having control over anything that is published.

### C. Common Carriers

Similarly, the employment of the common carrier metaphor would be detrimental to electronic data communications systems.<sup>23</sup> Unlike publishers and distributors, common carriers have a duty to carry all content, without discrimination.<sup>24</sup> Common carriers therefore have immunity from liability.<sup>25</sup> The post office and ordinary telephone system are not, generally, liable for what is transmitted through their channels.<sup>26</sup> They have only limited

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23. The concept of common carrier has evolved historically through both the common law and statutory schemes. Historically, one important consideration in the determination of whether a business was a common carrier was whether the business held itself out as such. Perritt, *supra* note 2, at 77. Another major consideration involved the market structure of which the enterprise was a part and specifically whether the enterprise would be a monopoly. See generally Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156 (1904); Perritt, *supra* note 2, at 79. The modern inquiries into the common carrier determination, in both the state and federal courts, focus on three factors: (1) the "holding out" consideration; (2) whether a business is a "carrier;" and (3) what is "common." See, e.g., National Ass'n of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976) [hereinafter *NARUC II*] (test for common carrier is whether business held itself to serve all clients indiscriminately); Perritt, *supra* note 2, at 81-82 (three factors to determine "carrier" status: whether transportation is primary business, whether service is provided to generate revenue and whether transportation service is conducted regularly); *id.* at 82-83 (four factors to satisfy "common" inquiry: holding out, lack of discrimination regarding customers, serving public interest and lack of control over content). For a detailed discussion of the scope of the statutory common carrier obligations, see *infra* notes 27-32 and accompanying text; Perritt, *supra* note 2, at 85-91.

24. 47 U.S.C. § 202(a) (1988) ("It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications . . ."); see also *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1192 (D.C. Cir. 1985) ("[P]ractices [must] be just, fair, reasonable and nondiscriminatory.") (quoting *AT&T v. FCC*, 572 F.2d 17, 25 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978)).

25. RESTATEMENT (SECOND) OF TORTS § 581 at cmt. f (1976) ("[A] telegraph company that transmits a communication innocent on its face is not liable to one who by reason of extrinsic facts is libeled by it."); see *O'Brien v. Western Union Tel. Co.*, 113 F.2d 539, 541 (1st Cir. 1940) (holding that telegraph company must be privileged to enable it to efficiently transmit messages); *Von Meysenbug v. Western Union Tel. Co.*, 54 F. Supp. 100, 101 (S.D. Fla. 1944) (holding that telegraph company must be given privileged status).

Additionally, a common carrier, because it has an obligation to serve all, possesses a broad privilege to shield it from liability unless it knows or should have known that the author was not privileged. RESTATEMENT (SECOND) OF TORTS § 612(2) (1976).

26. Claims for defamation against the United States Postal Service are barred by the Federal Tort Claims Act, 28 U.S.C. §§ 2680, 1346(b) (1988). See *Davis v. United States Postal Serv.*, 1992 U.S. Dist. LEXIS 16066, \*8-9 (N.D. Cal. October 13, 1992) (defamation claim against post office barred by Federal Torts Claims Act). Claimants had attempted to fit defamation claims into the category of "lost, mishandling, and negligent transmission of letters and postal matter." 26 U.S.C. § 2680(b); see *Anderson v. United States Postal Serv.*, 761

rights to inspect or disclose the contents of such messages.

In the communications field, statutory common carriers are defined by section 153(h) of the Communications Act as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy."<sup>27</sup> Various court interpretations of this definition have evolved into a three element test.<sup>28</sup> First, the carrier must possess a "quasi-public" character.<sup>29</sup> Second, a carrier must have uniform business practices and not operate where "individualized decisions . . . [determine] whether and on what terms to deal."<sup>30</sup> Finally, the determination of what is transmitted must be made by the user and not by the carrier.<sup>31</sup> It is within this three-element test that the FCC classifies and regulates communications operations.<sup>32</sup>

Placing statutory common carrier restrictions on electronic data communications systems would have wide-ranging ramifications. First, because common carriers provide vital services, they

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F.2d 527, 528 (9th Cir. 1985) (court lacks subject matter jurisdiction over defamation claim and must dismiss claims under Federal Rule of Civil Procedure 8(a)(1)).

Other postal services (e.g. United Parcel Service, Federal Express) are also not liable for defamation because they are not considered "publishers" of the messages that they deliver. The authors have been unable to find cases involving other postal services being sued for defamation. The telephone companies are also immune from liability because the transmission of a statement is not considered a "publication." See *Anderson v. New York Telephone Co.*, 345 N.Y.S.2d 740, 751-52 (Sup. Ct. App. Div. 1973) (Witmer, J., dissenting) (arguing that telephone companies are not publishers), *rev'd*, 320 N.E.2d 647 (N.Y. 1974) (adopting Witmer dissent); see also Note, *Must the Telephone Company Censor to Avoid Liability for Libel: Anderson v. New York Telephone Company*, 38 ALBANY L. REV. 317, 322-23 (1974) (comparing phone company to post office, which is not liable as publisher of letters it delivers).

27. 47 U.S.C. § 153(h) (1988).

28. *National Ass'n of Regulatory Comm'rs v. FCC*, 525 F.2d 630, 642-45 (D.C. Cir.) [hereinafter *NARUC I*] (applying three-part test to classify new entrepreneurial mobile radio systems as non-common carriers), *cert. denied*, 425 U.S. 992 (1976).

29. See *id.* at 641 (quasi-public nature of activity as justification for common carrier concept); *Semon v. Royal Indemnity Co.*, 279 F.2d 737, 739 (5th Cir. 1960) (distinguishing feature of common carrier is "undertak[ing] to carry for all people indifferently").

30. *NARUC I*, 525 F.2d at 641 (citing *Semon*, 279 F.2d at 739-40).

31. See, e.g., *NARUC II*, 533 F.2d 601, 609 (D.C. Cir. 1976) (citing *Industrial Relocation Serv.*, 5 F.C.C.2d 197, 202 (1966)).

32. Traditionally, using this definition, the FCC has subjected telephone and telegraph companies to common carrier regulation. However, some communications industries have managed to escape the FCC's regulatory reach. Cable television is an example of one such industry. See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 169 n.29 (1968) (noting FCC and litigant agreement that cable television systems are not common carriers).

would have an affirmative duty to make their facilities available to all.<sup>33</sup> Second, the rates of the system would be subject to FCC approval.<sup>34</sup> Finally, and most important, the operator may be barred from entering the market absent advance approval from the FCC.<sup>35</sup>

One advantage of electronic data communications is the relative ease with which an individual can establish a system. Placing common carrier restrictions on aspiring operators would jeopardize the rapid development of a robust cyberspace.<sup>36</sup>

#### D. *How Should We Handle These Metaphors?*

In general, as noted, we should apply the available metaphors in light of overarching goals and principles of justice, while also keeping in mind the implications of selecting any given metaphor—the transaction costs of regulation and potential preservation of the virtues of private ordering. There are some easy cases. Sysops and users clearly have a duty to avoid foreseeable, unjustified harm to others. Sysops should take action to prevent criminal or tortious conduct, once they have notice of the risk. Additionally, users are not free to disregard potential consequences of their activities online.

Most people agree that data communications systems should operate without unjustified governmental intrusions or regulations. However, there are those who advocate governmental regulation to require access to data communications systems or to restrict the right of sysops to adopt their own rules. Before these regulatory enthusiasts act, they should look outside of the realm of communications and into another industry where the government occupies a regulatory position.

A cursory examination of federal regulatory history reveals an influential metaphor that directs us not toward regulation and restriction of electronic data communication, but toward contractual control of electronic data communication as a means of establishing the rules in this new sphere of human endeavor. While

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33. 47 U.S.C. § 202(a) (1988) (prohibiting “unjust or unreasonable discrimination”).

34. See 47 U.S.C. § 201(b) (1988) (requiring that charges be “just and reasonable and making all other charges unlawful”); 46 Fed. Reg. 10,924, 10,926 (1981) (policy statement and proposed rules).

35. 47 U.S.C. § 201 (1991); see also, 46 Fed. Reg. 10,924, 10,926 (1981).

36. Not only would such restrictions deter individuals from establishing new systems, they would also place indirect constraints on the users’ avenues of expression.

many scholars choose to view electronic data communications systems as forms of "electronic publishing," and accordingly attempt to apply metaphors associated with the written or spoken word, these systems can be viewed alternatively as "transporters of information" and analogized to transportation. The next section examines this analogy between electronic data communications systems and transportation by examining the trucking industry and comparing that industry to electronic data communications.

#### IV. THE FORMULATION OF COMMON AND CONTRACT CARRIERS IN THE TRUCKING INDUSTRY

##### A. *Early History of the Trucking Industry*

Having its beginnings in the 1920s, the trucking industry is relatively young.<sup>37</sup> Due to free market competition and comparatively low capital start-up and maintenance costs, the industry grew substantially:<sup>38</sup> the number of trucks increased from 85,600 in 1914 to 3,480,939 in 1930.<sup>39</sup> A noticeable lack of regulation also proved to be an influential factor in the growth of the industry.<sup>40</sup>

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37. The conditions of the roads and the absence of the appropriate equipment stunted the early stages of the trucking industry. William E. Thoms, *Rollin' On . . . To a Free Market Motor Carrier Regulation 1935-1980*, 13 *TRANSP. L.J.* 43, 44 (1983). In fact, commercial trucking was not even mentioned in the Transportation Act of 1920, ch.91, 41 Stat. 456 (codified in scattered sections of 49 U.S.C.). Leslie W. Jacobs, *Regulated Motor Carriers and the Antitrust Laws*, 58 *CORNELL L. REV.* 90, 90-91 (1972).

38. The industry was inundated with a large number of small owner-operated firms due to the ease with which an individual could set up business. Michael J. Ogborn, *The Impact of Deregulation of the Trucking Industry*, 10 *MEM. ST. U. L. REV.* 1, 2 (1979). The barriers to entry existing in the railroad industry, such as the costs of constructing rights-of-way, etc., did not apply to the trucking industry, which could operate on public highways without having to build its own facilities. Thoms, *supra* note 37, at 45.

39. Warren G. Magnuson, *The Motor Carrier Act of 1935: A Legislator Looks at the Law*, 31 *GEO. WASH. L. REV.* 37, 40 (1962).

40. Until 1925, the trucking industry was under state control, with carriers operating in different states having to acquire authority from each state through which they traveled. Thoms, *supra* note 37, at 47. However, the United States Supreme Court changed this regulatory nightmare in *Buck v. Kuykendall*, 267 U.S. 307 (1925). In *Buck*, the State of Washington denied a motor carrier permission to operate between Seattle, Washington and Portland, Oregon. *Id.* at 313. The Court protected competition in interstate commerce in *Buck* by striking down the Washington licensing statute as a violation of the dormant commerce clause. *Id.* at 316. *Buck* effectively removed entry barriers erected by the states and confined state regulation to safety and highway conservation. Thoms, *supra* note 37, at 47 (citing Charles A. Webb, *Legislative and Regulatory History of Entry Controls on Motor Carriers of Passengers*, 8 *TRANSP. L.J.* 91, 92 (1976)).

By 1935, many people were calling for Congress to step in and regulate motor carriers. The industry was overcrowded with small, ill-equipped and underfinanced carriers.<sup>41</sup> These carriers and other industries, specifically the railroads, were beginning to lose money.<sup>42</sup> Additionally, the states were applying pressure on Congress because they were in danger of being rendered helpless to restrict carriers due to the prohibition against state interference with interstate commerce.<sup>43</sup> Finally, in response to this increasing pressure, Congress enacted the Motor Carrier Act of 1935 (Motor Carrier Act).<sup>44</sup>

B. *Regulation between 1935 and 1980—Emergence of Common and Contract Carriers*

With the passage of the Motor Carrier Act, Congress authorized the Interstate Commerce Commission (ICC) to regulate the trucking industry.<sup>45</sup> The ICC's focus expanded from purely railroad regulation to the regulation of all areas of surface transportation. Congress entrusted the ICC with not only the protection of the public, but also with the economic viability and stability of rail, motor and water carriers.<sup>46</sup>

The Motor Carrier Act also set forth the distinction between common carriers and contract carriers. While both categories of

41. Ogborn, *supra* note 38, at 2 (small carriers could not meet even the minimal financial or safety requirements (citing American Trucking Ass'n v. United States, 344 U.S. 298, 312 (1953))).

42. *Id.*; see JOSEPH B. EASTMAN, SECOND REPORT OF THE FEDERAL COORDINATORS OF TRANSPORTATION, S. DOC. NO. 152, 73rd Cong., 2d Sess. 14 (1934) (railroads losing millions of dollars per year due to motor carriers).

43. Thoms, *supra* note 37, at 49. At this time, states possessed comprehensive schemes of regulations that effectively controlled the activities of intrastate carriers. See Webb, *supra* note 40, at 94.

44. 49 U.S.C. § 301 (1978). Under this Act, Congress entrusted control of the trucking industry to the Interstate Commerce Commission (ICC). 49 U.S.C. § 10321 (1988). The ICC, in order to fulfill Congress' desire for a dynamic regulatory scheme, followed a three-part test first articulated in Pan American Bus Lines Operation, 1 M.C.C. 190, 203 (1936). In considering a new application, the ICC looked to:

[W]hether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.

*Id.*; see Ogborn, *supra* note 38, at 3 n.12.

45. 49 U.S.C. § 10321.

46. Thoms, *supra* note 37, at 50. Certain carriers were exempt from ICC control: private carriers, agricultural transportation, local transportation and occasional transportation. *Id.*

carriers needed ICC authorization before they could begin operation, each category had its own requirements and regulations. This next section discusses the important distinctions between common carriers and contract carriers.

### 1. *Common Carriers*

The motor common carriers<sup>47</sup> of the trucking industry had the same common law obligation that attached to other common carriers at the time: a duty to undertake transportation for compensation for any member of the general public who desired it.<sup>48</sup> To become a common carrier, a trucking company had to apply to the ICC and demonstrate that "public convenience and necessity require its services."<sup>49</sup> Once common carrier status has been granted, the carrier had the affirmative obligation to file tariffs with the ICC regarding their fees and charges for transportation.<sup>50</sup>

Typically, the ICC had been hesitant to allow a large number of carriers to service a particular market. The ICC based its philosophy on the assumption that too many carriers would dilute the business to such a degree that no carrier could survive.<sup>51</sup> The ICC usually allowed the admission of a new carrier into a well-served market only when a carrier offered a unique type of

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47. A "motor common carrier" is a "person holding itself out to the general public to provide motor vehicle transportation for compensation over regular or irregular routes, or both." 49 U.S.C. § 10102(14).

48. Thoms, *supra* note 37, at 51; *see* 49 U.S.C. § 10741(a)-(b). The code states that a common carrier "may not charge or receive from a person a different compensation . . . for a service rendered, or to be rendered, . . . than it charges or receives from another person for performing a like and contemporaneous service in the transportation of a kind of traffic under substantially similar circumstances," while also not subjecting any person "to unreasonable discrimination." *Id.*

49. Thoms, *supra* note 37, at 51. While there is no statutory definition for "public convenience and necessity," the ICC established three factors to determine whether a carrier could satisfy this criteria: (1) whether there is a need or demand for the service; (2) whether existing carriers are already servicing this need; and (3) whether a new carrier would be a detriment to other existing carriers. *Id.* (citing Pan American Bus Lines Operations, 1 M.C.C. 190, 203 (1936)).

50. 49 C.F.R. § 1312.1-.40 (ICC regulations governing submission of tariffs).

51. Thoms, *supra* note 37, at 52.

transportation<sup>52</sup> or when there was an increase in traffic.<sup>53</sup> During this period, the ICC emphasized protecting developed business, not promoting competition.

## 2. *Contract Carriers*

As an alternative to the rigorous restrictions on common carriers,<sup>54</sup> the Motor Carrier Act provided for contract carrier permits.<sup>55</sup> The differences between contract carriage and common carriage began with the charge for their services. Contract carriers established the cost of their services by contract, while common carriers established their costs by filing tariffs with the ICC.<sup>56</sup> Additionally, contract carriers, unlike common carriers, were not obligated to serve the general public.<sup>57</sup> This lack of obligation, however, did not allow contract carriers the freedom to serve anyone with whom they could contract. Conversely, contract carriers were restricted to serving a "limited number of persons,"<sup>58</sup> under

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52. *Id.* at 51. The ICC often decided that when a carrier proposed a unique type of transportation, the public benefit derived from this new service outweighed the detriment of traffic diversion. *Id.* at 51-52; see Paul S. Dempsey, *Entry Control Under the Interstate Commerce Act*, 13 WAKE FOREST L. REV. 729, 740 (1977) (citing *Ken L. Pollack Common Carrier Application—Passengers*, 119 M.C.C. 763, 771 (1974) (new service included transportation of passengers and their automobiles from Boston, MA, Chicago, IL or Washington, DC to St. Augustine, FL)); see, e.g., *Kroblin Refrig. Xpress, Inc.*, 125 M.C.C. 354, 359 (1976) (ability to provide multi-stop service unlike existing carriers, as ground for permanent authority).

53. Thoms, *supra* note 37, at 52.

54. The term "contract carrier" encompasses both "motor contract carrier" of passengers, and "motor contract carrier" of property. 49 U.S.C. §§ 10102(15)(A) and 10102(14)(B), respectively. A motor contract carrier is defined as a "person providing motor vehicle transportation of property [or persons] for compensation under continuing agreements with one or more persons (i) by assigning motor vehicles for a continuing period of time for the exclusive use of each such person; or (ii) designed to meet the distinct needs of each such person." 49 U.S.C. § 10102(15)(B).

55. Thoms, *supra* note 37, at 52; see 49 U.S.C. § 10923.

56. Thoms, *supra* note 37, at 52 (contract carrier alternative represented departure from tariff principle).

57. *Id.*

58. There was a significant amount of uncertainty as to the definition of "limited number of persons." In 1956, the United States Supreme Court read this phrase expansively and held that a holder of 69 separate contracts could still retain its classification as a contract carrier. *United States v. Contract Steel Carriers, Inc.*, 350 U.S. 409, 412 (1956). In 1957, Congress responded to *Contract Steel Carriers* and amended the Motor Carrier Act to further regulate the contract carriers and limit their services. Pub. L. No. 85-163, § 1, 71 Stat. 411 (1957) (current version at 49 U.S.C. § 10102(15)(B)).

The ICC responded to this congressional lead and thereafter used the "rule of eight" as the number of shippers a contract carrier could service without further ICC investigation into the carrier's operations. Thoms, *supra* note 37, at 53;



the terms and conditions set forth in their contracts.

As a whole, contract carriers were usually smaller and more specialized than common carriers. Often, contract carriers were formed to serve the specific needs of a particular shipper.<sup>59</sup> Such carriers were limited by their contracts to servicing these shippers, and as a result, the capital investment required to operate these carriers was minimal.<sup>60</sup> Thus, firms could more easily gain entry into the contract carrier arena than into that of the common carrier.<sup>61</sup>

### C. Deregulation After 1980

The ICC upheld the strict distinction between common and contract carriers until the late 1970s. At that time, the ICC began moving toward deregulation.<sup>62</sup> By 1979, the ICC was accomplishing its deregulatory goal not only by granting a large percentage of common and contract carrier applications,<sup>63</sup> but also by loosening restrictions and deregulating through its adjudication and rulemaking procedures,<sup>64</sup> a fact acknowledged by the

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*see* Umthun Trucking Co., 91 M.C.C. 691, 696-97 (1962) (establishing rule of eight).

59. This phenomena came about as a result of the 1957 amendments to the Motor Carrier Act. *See* Pub. L. 85-163 § 1(1), 71 Stat. 411 (codified as amended at various sections of 49 U.S.C.). In these amendments, the concept of motor contract carriage was defined as:

[T]ransportation for compensation under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

*Global Van Lines, Inc. v. ICC*, 804 F.2d 1293, 1296 (D.C. Cir. 1986) (citation omitted). As a result, a carrier had to tailor its service to the particular needs of a shipper. *Id.*

60. Costs involved in maintaining a base of operations, other terminals or hubs, and other internal expenses were often non-existent.

61. Thoms, *supra* note 37, at 53.

62. For a concise discussion of motor carrier regulation from 1956-1980, *see Global Van Lines, Inc.*, 804 F.2d at 1293-97. Beginning with President Carter and continuing through President Reagan, appointees to the ICC were committed to radical change. Some thought this ICC philosophy represented the White House's dedication to deregulation. Paul S. Dempsey, *The Interstate Commerce Commission—Disintegration of an American Legal Institution*, 34 AM. U. L. REV. 1, 3-4 (1984) (noting continued practice of Presidents Carter and Reagan of appointing "fervently dedicated . . . deregulation zealots").

63. Dempsey, *supra* note 62, at 3-4. At this time, the ICC was granting permits to ninety-eight percent of its applicants. *Id.*

64. *Id.*; *see, e.g., Arrow Transp. Co.*, 131 M.C.C. 941, 942 (1980) (raising burden of parties opposing new entries into field to show adverse effect on their

courts.<sup>65</sup>

Finally, in 1980, Congress decided that, if deregulation was to occur, Congress would be responsible for it. The Motor Carrier Act of 1980<sup>66</sup> lifted many of the controls placed upon both common and contract carriers, while facially keeping the distinction between the two intact.<sup>67</sup> A major change came in the area of contract carriage because a carrier could now have continuing agreements not with "one person or a limited number of persons," but with "one or more persons" without any numerical limits.<sup>68</sup>

As a result of the Motor Carrier Act of 1980, there are very few distinctions left between common and contract carriers. Contract carriers now have the ability to expand operations beyond a specific geographic area.<sup>69</sup> Further, contract carriers are allowed to offer contractual service beyond that needed by one particular shipper. Carriers can now serve a class of shippers, an entire industry, or even multiple industries.<sup>70</sup> In addition, the ICC has decreased carriers' burden in proving that they will dedicate equipment to shippers to satisfy the shippers' unique needs.<sup>71</sup> As a result, contract carriers now perform virtually the same tasks as common carriers. Yet, their relationships with their shippers are governed not through federal regulation and tariffs, but through a series of continuing contracts. As a few commentators have noted, the end of common carriage may soon be realized.<sup>72</sup>

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whole operations); Policy Statement on Motor Carrier Regulation, 44 Fed. Reg. 60,296, 60,298 (1979) (stressing new policy of competition among carriers).

65. See *Argo-Collier Truck Lines v. United States*, 611 F.2d 149 (6th Cir. 1979). In *Argo-Collier*, the Sixth Circuit held that the ICC had acted outside of its congressional authority by making its decisions purely for the purpose of increasing competition. *Id.* at 155.

66. Pub. L. No. 96-296, 94 Stat. 793 (codified as amended at various sections of 49 U.S.C.).

67. Compare 49 U.S.C. § 10102(14) (defining "motor common carrier"), with § 10102(15) (defining "motor contract carrier").

68. 49 U.S.C. § 10102(14)(B) (1988); see Pub. L. 96-296, 94 Stat. 793 (including "one or more persons" in definition of contract carrier).

69. See 49 U.S.C. § 10923(d)(1) (1982) (ICC may not require motor contract carrier of property to confine operations within particular geographic area).

70. Dempsey, *supra* note 62, at 37 (citing Motor Contract Carriers of Property—Proposal to Allow Issuance of Permits Authorizing Indus. Wide Serv., 133 M.C.C. 298 (1983) (Contract Carrier Proposal)).

71. *Id.* at 37 (citing Contract Carrier Proposal, 133 M.C.C. at 301 (explaining that dedication of equipment would result in inefficient use of equipment)).

72. Commentators have noted that the ease in which contract carriers can enter the industry and the lack of control over their activities is leading to the virtual demise of common carriage. See *id.*; see also Collins, *Contract v. Motor Com-*

D. *Similarities Between the Trucking Industry and Electronic Communication*

A close look at the trucking industry reveals several similarities with electronic data communications. First, like electronic communications, the trucking industry by nature provides a service designed to meet consumer needs. Second, this service is provided, in part, through the use of a federally created and funded interstate highway system. Third, in the area of contract carriage, contracts control the relationship between the carrier and the consumer. Finally, the industry ardently favors a deregulatory stance.

The trucking industry was created to allow consumers to ship products from one location to another without purchasing of their own vehicles. The consumer simply had to contact a carrier and negotiate the details of receiving and distribution of the product. The ease with which the carriers could enter the industry and the ease with which the consumers could access the carriers' services led to a dramatic increase in the number of carriers.

This same phenomenon is occurring in the field of electronic data communications. Sysops, like carriers, use their systems to transport information for consumers. The consumers simply need to sign-on to a system and the system assists in delivering the information to an assigned destination. The ease with which sysops can develop a system, and the relative ease with which consumers can access the service, are leading to a drastic increase in both the number of systems available to the consumers and in the usage of such systems.

In the trucking industry, once the carrier picks up a product, the product is transported along a federally created and funded interstate highway system. A similar process occurs within the electronic data communications industry. Once a "product" is picked up by a BBS, it may also be transported along a federally created and funded interstate electronic highway system.<sup>73</sup> The

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*mon Carriage*, TRAFFIC WORLD, July 18, 1983, at 78 (ICC's decision serving to remove congressional restraints on contract carriers); *Demise of Common Carriage Anticipated*, TRAFFIC WORLD, Dec. 12, 1983, at 5 ("[T]he era of common carriage is dead.").

73. In this case, the "product" would be any electronic mail message, electronic file, or any of the numerous types of data.

present NSFNET<sup>74</sup> and the proposed NREN<sup>75</sup> provide users with the opportunity to transport large amounts of electronic information quickly and easily.

Additionally, in the area of contract carriers, contracts control the relationship between the carrier and the consumer. Contracts dictate the terms of the interaction: the cost, the destination, the products to be transported, and various other conditions.<sup>76</sup> In the area of electronic data communication, contracts between sysops and users<sup>77</sup> dictate the terms of the interaction: the cost of transportation,<sup>78</sup> the possible destination points,<sup>79</sup> the types of data that may be transported<sup>80</sup> and various other conditions.<sup>81</sup>

In the formative years of the trucking industry, there was a call for regulation of these emerging enterprises. Then, after forty-five years of regulation, the government decided to loosen the reins and let the marketplace dictate the actions of the industry. Now, a similar call is being made for the regulation of the

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74. From 1986 to 1988 the National Science Foundation established and sponsored a high-speed computer network, NSFNET, that was designed to serve computer scientists and other scientists who employed advanced data networks. NSFNET is used mainly by universities and United States government research labs.

75. In 1991, Congress adopted the High Performance Computing Act of 1991. 15 U.S.C.A. §§ 5501-5520 (1991). This act provided for the establishment of the National Research and Education Network, or NREN. *Id.* § 5502(1)(A). Congress' goal was "to provide researchers and educators with access to computer and information resources and act as a test bed for further research and development of high-capacity and high-speed computer networks." *Id.* § 5501(4).

76. An agreement typically also addresses insurance, tort liability, limitation on damages and other relevant concerns.

77. Once the user signs-on to a system, an introductory screen will usually set forth the terms and conditions for usage. Once the user accesses the system, he or she acknowledges that a contract now exists between the user and the sysop.

78. Use of a BBS typically costs the user either charges for online time or price per message.

79. The contract discusses the possible destination points for the data, including another user's mailbox, an INTERNET address, and a system "court-yard" where messages are displayed for all to see.

80. The types of data vary from mail messages to word processing documents to binary files to more complicated computer files. Contracts also specify subject matters to be discussed in particular forums and impose requirements that discussion be civil, nondefamatory and lawful. A prime forum where contracts could serve to control a discussion group would be the proposed INTERNET radio talk show.

81. As with contracts for motor transportation, these other conditions may address insurance, tort liability, limitations on damages and indemnification and contribution clauses.

electronic data communications field. Officials, however, should examine the history of the trucking industry and its current trend toward deregulation<sup>82</sup> closely before making this drastic choice. There is no need to make the same mistake twice.

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82. Since 1979, the FCC has been initiating possible methods of deregulation of communication common carriers. See Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facilities Authorizations Therefor, 77 F.C.C.2d 308, 359 (1979) (Notice of Inquiry and Proposed Rulemaking). In its Notice of Inquiry and Proposed Rulemaking, the FCC recognized that the communications industry had changed drastically since the inception of the Communication Act of 1934. Specifically, the technological improvements had promoted the idea of competitive services. *Id.* at 309. The FCC believed that the status quo threatened the possibility that a competitive marketplace would develop. *Id.* In response to this fear, the FCC proposed two methods of deregulation: (1) a policy which allowed the FCC discretion to refrain from enforcing all but the most minimal regulations and (2) an attempt to redefine the term "common carrier." *Id.* at 359-68.

Initially, the FCC adopted the first policy. In its First Report and Order, the FCC ordered that "non-dominant carriers," those that lack the market power to artificially control prices or to discriminate, were only required to satisfy minimal Title II requirements. Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facilities Authorizations Therefor, 85 F.C.C.2d 1, 50 (1980) (First Order and Report). This policy continued through 1984 with the issuance of five additional orders relating to "permissive forbearance." See Policy and Rules Concerning Rates for Competitive Carrier Serv. and Facilities Authorizations Therefor, 91 F.C.C.2d 59 (1982) (Second Report and Order) (establishing policy of permitting resellers of services to conduct business on contractual basis); Policy and Rules Concerning Rates for Competitive Carrier Serv. and Facilities Authorizations Therefor, 48 Fed. Reg. 46,791, 46,792 (1983) (Third Report and Order) (extended policy to carriers with service outside of continental United States); Policy and Rules Concerning Rates for Competitive Carrier Serv. and Facilities Authorizations Therefor, 95 F.C.C.2d 554, 557 (1983) (Fourth Report and Order) (extending to all resellers and specialized carriers and allowing permissive non-filing of fees), *vacated*, AT&T v. FCC, 978 F.2d 727, 735-36 (D.C. Cir. 1992) (allowing permissive detariffing exceeds FCC authority); Policy and Rules Concerning Rates for Competitive Carrier Serv. and Facilities Authorizations Therefor, 98 F.C.C.2d 1191, 1209 (1984) (Fifth Report and Order) (extended policy to apply to, inter alia, various common carriers and digital transmission networks); Policy and Rules Concerning Rates for Competitive Carrier Serv. and Facilities Authorizations Therefor, 99 F.C.C.2d 1020 (Sixth Report and Order) (providing for mandatory detariffing), *vacated*, MCI Telecommunications Corp. v. FCC, 765 F.2d 1186, 1195 (D.C. Cir. 1985) (holding that mandatory detariffing exceeded FCC authority).

The second policy toward deregulation, redefinition of common carrier, while taking a backseat to the first policy, was not forgotten. While the FCC did not feel the need to promulgate orders regarding the loosening of the common carrier definition, its policy was evident in several of its decisions. See, e.g., Cox Cable Communications, Inc., 102 F.C.C.2d 110, 121-22 (1985) (adopting use of market power analysis to determine status of applicant carrier); International Competitive Carrier Policies, 102 F.C.C.2d 812, 829-30 (1985) (using market power analysis in determination of whether communication service falls under Title II control).

## V. ACTIONS TO ENSURE ELECTRONIC DATA COMMUNICATIONS SYSTEMS REMAIN RELATIVELY UNREGULATED

Presently, electronic data communication is in danger of regulatory attacks on several different fronts. Federal regulations are not the only sources of burdensome restrictions that threaten electronic data communications systems. While the FCC may choose not to regulate the value-added service providers, the pro-regulatory lobbyists can take their show on the road and attempt to persuade state regulatory commissions to regulate BBSs as common carriers. This action would be disastrous, largely because each state could choose to restrict its carriers differently. The sysops would then have to choose to operate selectively in certain states,<sup>83</sup> provide generic services that could satisfy all regulations<sup>84</sup> or simply pack-up and walk away.

There are two possible sources of federal action, however, that can prevent any state imposition on the electronic data communications field. Both preemptive FCC action and federal legislation would enable the federal government to promote a hands-off policy and prevent the states from regulating.

### A. *Preemptive FCC Action*

The FCC could pursue regulation of electronic data communications systems in three ways: (1) by classifying them as "enhanced services"; (2) by classifying sysops as non-dominant carriers; or (3) by showing that state regulation would negate FCC regulatory goals. In order to preempt the states from regulating electronic data communications, deregulation advocates must obtain a judicial or FCC ruling that classifies the services offered in electronic data communication as "enhanced services," as defined by the *Second Computer Inquiry* decision.<sup>85</sup> In order to

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83. Realistically, it would be extremely difficult, if not impossible, for a sysop to limit the users of his/her system to a certain geographic area. Further, it is unclear what level of contact with a state is required to permit regulation.

84. Satisfying all regulations would eliminate any unique features of individual BBSs and sysop originality and homogenize most systems.

85. Amendment of Sec. 64.702 of the Commission's Rules and Regulations (*Second Computer Inquiry*), 72 F.C.C.2d 358, 394 (1979) (Tentative Decision), *recons.*, 77 F.C.C.2d 384 (Final Decision), *recons.*, 84 F.C.C.2d 50 (1980) (First Memorandum and Order), *recons.*, 88 F.C.C.2d 512 (1981) (Memorandum and Order on Further Reconsideration). In its First Memorandum and Order in *Second Computer Inquiry*, the FCC classified basic service as a "transmission pipeline" where information is passed along, untouched and unaltered. 84 F.C.C.2d 50, 53-54.

In *Second Computer Inquiry*, AT&T argued that if the FCC classified voice storage services as enhanced services, such a classification would stunt the develop-

characterize electronic data communications systems as "enhanced services," the advocates must show that the users of the service have the ability to alter the method, content and form of the information in their control.<sup>86</sup> Once the FCC classifies the services provided as enhanced,<sup>87</sup> these services are then subject neither to FCC regulation when offered interstate nor to state regulation when offered intrastate.<sup>88</sup>

Additionally, the FCC could preempt state regulations by classifying sysops as non-dominant carriers. As the FCC established in *Competitive Carrier Rulemaking*,<sup>89</sup> the imposition of any

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ment of certain technological advancements. *Id.* In its Final Order, the FCC had defined enhanced service as the combination of "basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information." 77 F.C.C.2d at 387. In its First Memorandum and Order, the FCC ruled that computer-based voice storage and retrieval applications and customer-interactive services exceed the mere pipeline classification and are, therefore, enhanced services. 84 F.C.C.2d at 54; *see also* GTE's Telenet Communications Corp., 91 F.C.C.2d 232, 237 (1982) (Memorandum and Opinion Order) (reiterating that enhanced services are outside Title II common carrier regulation).

There is some debate as to whether the basic and enhanced distinctions of *Second Computer Inquiry* are still valid. In June 1986, the FCC built upon the reasoning of *Second Computer Inquiry* and issued orders that, inter alia, preempted practically all state regulations of the sale of enhanced services by communication carriers. Report and Order, Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 104 F.C.C.2d 958, 1126-28 (1986) (Phase I Order), *recons.*, 2 F.C.C.R. 3035 (1987). These preemptive orders were subsequently overturned in *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990). As a result, the FCC preemptive stance returned to that articulated in *Second Computer Inquiry*. For a further discussion of *California v. FCC*, see *infra* note 91.

86. *Second Computer Inquiry*, 77 F.C.C.2d at 387.

87. The FCC has taken this step, although not formally, with several of the computer networks. Although two of these networks, TELENET and TYMNET, had common carrier status in the past, the FCC currently treats them as enhanced services. *See* Application of Tymnet, 65 F.C.C.2d 247 (1976) (granting TYMNET common carrier status); Application of Telenet Communications Corp., 46 F.C.C.2d 680 (1974) (granting TELENET common carrier status); *see also* Petitions for Waiver of Rules Filed by Pacific Bell, 50 Fed. Reg. 13,573 n.2 (1985) ("Initially, the Commission certificated as common carriers several VANS [value added networks], including TELENET and TYMNET . . . . Since these entities's services involved protocol conversion, after [*Second Computer Inquiry*] was adopted they were treated no differently than other enhanced service vendors.")

88. *Second Computer Inquiry*, 77 F.C.C.2d at 387 ("[W]e find that regulation of enhanced services is not required . . . . [T]he absence of traditional public utility regulation of enhanced services offers the greatest potential for effective utilization and full exploitation of the interstate telecommunications network."); *see also* *Second Computer Inquiry*, 84 F.C.C.2d at 104 (declaring that FCC regulatory policy preempted inconsistent state regulation).

89. Policy and Rules Concerning Rates for Competitive Common Carrier

type of common carrier/public utility regulation of carriers without significant "market power" is against the public's interest.<sup>90</sup> The FCC determined that common carrier regulations should not apply in instances where competition can justly act as a price check.<sup>91</sup> In the area of electronic data communications services, the advocates for preemption must demonstrate that the competition among systems is strong and can constrain prices. This argument should support preemption.

Finally, the FCC can preempt state regulation by finding that state regulation cannot feasibly coexist with FCC regulatory goals. In *Louisiana Public Service Commission v. FCC*,<sup>92</sup> the United States Supreme Court construed section 2(b)(1) of the Communications Act of 1934<sup>93</sup> to provide for FCC preemption when the FCC demonstrates that the state's regulation would negate federal policies.<sup>94</sup> To achieve preemption, the FCC must articulate how electronic data communications systems as enhanced services are structurally unified and indivisible into their interstate and intrastate components.<sup>95</sup>

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Servs., 85 F.C.C.2d 1 (1980) (First Report and Order) (Competitive Carrier Rulemaking).

90. The FCC defined the term "market power" as "the ability of a firm to raise and maintain its prices above costs, including an allowance of a fair profit." *Second Computer Inquiry*, 84 F.C.C.2d at 450.

91. The FCC feels strongly about maintaining a deregulatory stance regarding competitive carriers. The FCC stated in *Second Computer Inquiry*: "We have found that regulation inhibits the market forces which we believe will best serve federal communications policies and goals . . . We intend to preclude the states from regulating non-dominant entities providing communications services in competitive markets on an interstate basis." *Second Computer Inquiry*, 84 F.C.C.2d at 519.

92. 476 U.S. 355 (1986).

93. Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. § 151-613 (1988)).

94. *Louisiana PSC*, 476 U.S. at 368. The Court in *Louisiana PSC* established a two-part test to determine whether FCC preemption is appropriate. First, a court must decide whether Congress intended to grant exclusive power to the FCC. *Id.* at 369. If the answer is in the affirmative, then preemption is established. However, if Congress intended both the FCC and the states to regulate, the issue of separability arises. If, as in *Louisiana PSC*, the matters can be separated and regulated by both the states and FCC, then no preemption exists. But, if the technical nature of the industry does not allow it to be separated, then preemption is necessary because "where compliance with both federal and state law is in effect physically impossible" federal supremacy controls. *Id.* at 368. For a complete discussion of the Court's analysis in *Louisiana PSC*, see Matthew S. Bewig, *Federalism and Telecommunications: On the Right Wavelength?*, 59 GEO. WASH. L. REV. 1190 (1991).

95. The FCC has not been successful in this articulation regarding the telephone. In *California v. FCC*, the Ninth Circuit nullified an FCC decision to preempt state regulation of communications common carriers' provision of enhanced services. 905 F.2d 1217, 1245 (9th Cir. 1990). The court believed



### B. Legislative Action

Another plan of attack for the advocates of electronic data communication is preemptive federal legislation to establish federal jurisdiction over the electronic data communications field. Various interested groups are now contemplating legislation that could accomplish the goal of preemption and otherwise protect the carriers of electronic data communications from burdensome litigation that would deter the free flow of communications. Under a proposed Electronic Communications Forwarding Act (ECFA),<sup>96</sup> any person who transmits a message electronically without alteration will not be subject to criminal or civil liability for the contents, just as a trucking contract carrier is not responsible for what is inside the boxes it carries.<sup>97</sup>

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that enhanced telephone services could be separated into their intrastate and interstate components. *Id.* at 1244. The court felt that states could require separate "corporate organizations" that could provide the intrastate telephone services, while "allowing the same facilities to be used for both [interstate and intrastate] types of services." *Id.* The court concluded that "[t]he Commission has failed to explain why requiring communications carriers to offer intrastate enhanced services through a separate corporation would frustrate the Commission's goal[s]." *Id.* In overturning the FCC order, the Ninth Circuit stated that "the FCC must do more than pay lip service to Congress's intent 'to enact a dual regulatory system.'" *Id.* (quoting *Louisiana PSC*, 476 U.S. at 370). Further, "the Commission may take appropriate measures in pursuit of [its] goal[s], but only to the degree necessary to achieve [them]." *Id.* at 1244-45 (quoting *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422, 430 (D.C. Cir. 1989)). The Ninth Circuit concluded that "[t]he 'impossibility' exception to § 2(b)(1) [of the Communications Act of 1934] is a narrow one that may be invoked only when state and federal regulation cannot feasibly coexist." *Id.* at 1244.

96. The Electronic Communications Forwarding Act, September 9, 1991 (on file with *Villanova Law Review*). The ECFA is intended to add section 2522 to chapter 119 of Title 18 of the United States Code.

97. ECFA § 2522 (a)(i). The relevant sections of the act read:  
Section 2522. Forwarding of Electronic Data Communications Without Alteration or Screening—No Liability for Contents

(a) General Rule. Any person who, using an instrumentality of interstate commerce, and without altering the identifiability of the sender of an electronic data communication, forwards or transfers such electronic data communication between the originating party and authorized recipients, without reserving or exercising the right to alter the contents of such communication or the right to decline to forward or transfer communications of the same class on the basis of the contents of particular messages, and without sponsoring, promoting or adopting such communication as its own, shall not be

(i) subject to any criminal or civil penalty, or

(ii) liable to any other person for damages or equitable relief of any kind, under any federal, state or local law as a result of any publication, performance, copying, storage, dissemination, disclosure, display, or distribution of the contents of such electronic data communication incident to such forwarding or transmission.

*Id.* § 2522(a).

The ECFA would offer a solution to the preemption issue, for the act would preempt all contrary state and local laws.<sup>98</sup> The ECFA would also offer providers of data communications services the freedom to determine the classes of messages that they intend their systems to handle, as well as terms on which the messages will be handled.<sup>99</sup> Thus, carriers would be free to control usage on their systems through contracts with their users.

## VI. THE RELATIONSHIP BETWEEN TECHNOLOGICAL FEASIBILITY AND POLICY

Many of the issues regarding rights and duties of participants in electronic data communications systems relate to rights to access or to exclude. There are also subsidiary questions regarding the right to condition access on agreements regarding conduct, ownership or use of resulting materials. Using a legal metaphor that suggests that a particular party "owns" an area of cyberspace has implications for conclusions regarding who can set the rules, and who is responsible for any misconduct occurring in that "place."<sup>100</sup>

Just because a communication system can be operated like some analogous non-electronic activity does not mean that it must be so run, of course. As presently configured and configurable, electronic data communications systems can be run with a wide range of different policies and rules governing the rights and duties of participants. The most fundamental technical capability of the electronic medium is that a sysop can, in general, first decide how he or she wants the electronic "space" to be con-

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98. *Id.* ("under any federal, state or local law"); *see id.* § 2522(c) (defining federal, state or local law "to include rules, judicial and administrative decisions and principles of decision"); *see also* ECFA Attached Report § I ("The Act expressly preempts all contrary provisions of state or local law, including judicially developed common law principles.").

99. ECFA offers the providers a choice of options. Providers may offer to transmit or forward messages without a reservation of rights to review or alter messages and be covered by the Act's protective umbrella. Alternatively, they have the freedom to regulate their own systems, reserve certain editorial rights and restrict usage through contracts with the users. Exercise of this option removes the protective umbrella and requires the providers to fend for themselves in the realm of liability. *See* ECFA Attached Report § II (providing detailed explanation of Act's intended consequences and examples).

100. We are relatively accustomed to determinations regarding who controls, and is liable for, conduct that takes place in a shopping center, restaurant, conference hall, office, classroom, street, airport, national park, and retail store. Analogizing particular sets of electronic data communications to these types of environments can become a way of communicating how decisions regarding them ought to be made.

figured and then implement that choice. The sysop then communicates his or her choice to the user through their contract.

However, if left in the hands of an ill-fitting legal metaphor, the technical capability of these systems would have some limiting consequences. For example, the existence of the ability to trace electronic messages means that a policy of allowing anonymity may be an action for which the sysop is accountable. This situation is analogous to when the capability to use delay tapes on radio shows became available. At that time, the talk show host became somewhat more responsible for the contents injected into the show by third-party callers, and cases held that failure to use delay tape could be found to be negligence of a type that would render the talk show host responsible for unfiltered, harmful and non-privileged speech.<sup>101</sup> Likewise, a sysop's failure to exercise the ability to trace electronic messages could be found to be negligence and he or she could be held accountable.

Because the consequences of this technical capability are that sysops may be liable for the actions of other participants, the rights and duties of the participants in these systems can and should be contractual. It follows that sysops, at all levels, have a duty to set forth clearly the rules they will enforce. For example, the ease with which electronic files may be copied and manipulated will certainly tend to undermine efforts to protect intellectual property rights. This case of copying and manipulation means that sysops need to be especially clear about any rules they intend to apply to the files and messages on their systems. The ability to send messages across systems raises the threat of unwanted intrusion and, correspondingly, requires sysops to think hard about what connections they allow and what notice they give to their users regarding the status of such connections. The tendency of electronic records to remain available, unlike oral speech which disappears into the air, raises privacy concerns to greater prominence. Addressing these concerns, however, is and should remain substantially a matter of creating and honoring reasonable expectations. The ease of distribution of multiple voices has con-

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101. See, e.g., *Snowden v. Pearl River Broadcasting Corp.*, 251 So.2d 405, 410 (La. Ct. App.) ("The direct broadcast of . . . defamatory material, without the use of any monitoring or delay device, is . . . reprehensible in our judgment."), *application denied*, 253 So.2d 217 (La. 1971). But see *Adams v. Frontier Broadcast Co.*, 555 P.2d 556 (Wyo. 1976) (decision not to use tape delay did not constitute "reckless disregard" under *New York Times* rule) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)); *Denman v. Star Broadcast Co.*, 497 P.2d 1378 (Utah 1972) (similar result); *Pacella v. Milford Radio Corp.*, 462 N.E.2d 355 (Mass. Ct. App. 1984) (similar result).

sequences for rules regarding attribution and, indeed, libel. Also, the sheer volume of information involved suggests a need for rules regarding advance warning of the size and content of materials made available over any given system.

There are, however, some hard questions—some unresolvable tensions between the conflicting claims of various participants that cannot be settled by negotiation and require the establishment of rules by authoritative means. Claims to a right of access over the objections of a sysop have this characteristic.<sup>102</sup> The interconnectivity of networks also creates some serious problems, because one user's claim to a right to send a message may seriously interfere with the claim by another sysop and user to be free from an intrusion that does not comply with local desires or policies.<sup>103</sup>

The hardest questions, however, arise from disagreements about how much risk to take with regard to potential harm to third parties.<sup>104</sup> The electronic networks give everyone, even wrongdoers, more power. Overly cautious judgments by particular sysops may deter or limit some valuable communication, while overly liberal choices by others may facilitate crime. There is a range of views regarding these issues as applied to physical space. What makes electronic networks different is their relative seamlessness: the fact that, absent special barriers and warnings, the policies of all different actors must somehow come together in one virtual "place." Anyone favoring greater freedom and flexibility will want to reduce sysop liability for the contents that flow over the system, in order to take the pressure off decisions to screen, track and filter. In contrast, anyone seriously concerned about the potential of the networks to cause harm, whether by spreading computer viruses or facilitating copyright infringement, will want to maximize the ability to tell at all points who did what to whom.<sup>105</sup>

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102. However, these claims are still hard to support in the absence of a showing of monopoly power or scarcity of a vital resource.

103. The availability of technical filters may help to keep recipients in control of policies regarding content—but filters work only when the system requires attribution and advanced notice of content.

104. The contracts cannot solve the problems associated with harm to third parties because a third party who may be harmed by libel, fraud, theft, etc. is not party to the contract. No bargain between a user and a system provider can, in itself, alter the responsibility of either one to a third party harmed by action of one or the other.

105. In a world with multiple information sources, these two different instincts do not have to be treated as inherently at odds. We can allow sysops to establish widely differing policies, if they provide technical means to choose or

A common solution exists that would satisfy both those concerned with freedom and flexibility and those concerned with the potential for harm. The solution lies in the introduction of legislation that makes it clear that the wrongdoer, but not the person who merely allows the wrongdoer to use a communications system, is liable for wrongful acts. The communications system provider therefore would be liable only for his or her own actions. This legislative solution lies within the language of the Electronic Communications Forwarding Act.<sup>106</sup>

The ECFA would place an affirmative duty on the sysops to be clear and candid regarding the rules and policies of their systems. If the sysop seeks to shield himself or herself from liability to third parties, he or she must be clear that the communications service contract does not empower him or her to screen, edit or alter messages. Further, the sysop should inform the user that he or she would not interfere with appropriate attempts to determine the identity of the wrongdoer. Any lack of clarity regarding the sets of rules and rights will lead only to confusion, surprise and disappointment.

Once the affirmative duty on sysops to publish their rules clearly and acquire real and express agreement from users is established, government intrusion should cease. We do not need and should not encourage government regulation regarding the means chosen for achieving clear agreements. The marketplace provides adequate incentives for all concerned to agree on the rules, once the general need for choice in the face of a flexible electronic environment is understood. As a result, the marketplace will evolve signaling systems, shorthand and an ability to incorporate terms and conditions by reference. But the metaphors that are used for this purpose will evolve and develop a life of their own. We will not, ultimately, be forced to say that a particular electronic service is like postal mail, a radio talk show, a shopping center or even a trucking line. We will say a particular

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avoid their offerings. We can offer immunity from liability for sysops who choose not to control the specific contents of messages on their services by requiring, in return, a pledge that the system will be configured so as to allow actual wrongdoers to be tracked down. It may take an act of Congress to accomplish this with respect to those who have the technical capability to control contents and are on notice of an impending harm. The ECFA can be changed to include a section on the tracking of users. For a discussion of the ECFA, see *supra* notes 96-99 and accompanying text.

106. For a complete discussion of the ECFA, see *supra* notes 96-99 and accompanying text. The relevant section of the ECFA for this area of analysis is § 2522(a). For the text of this section, see *supra* note 97.

service is "like Prodigy," or "like FidoNet" or "like the Library of Congress Internet host." In this sense, a new, separate and distinct law of electronic spaces will evolve, based on understandings that have evolved primarily in cases concerning actions and events occurring in that electronic context.

Inescapably, existing legal metaphors will fail because the circumstances in cyberspace are different from those in the physical world. Already, questions have arisen regarding the alleged defamation of a fictional character corresponding to the alias an electronic messaging system permitted a user to adopt. New questions regarding liability for failing to safeguard a system against active, destructive software code have also arisen. Soon, questions will be posed regarding a user's right to send a message to 10,000 non-consenting recipients with a keystroke and regarding how a discussion among large numbers of ungovernable speakers can be edited, after the fact, without distorting the meaning of the speech of those whose comments are not edited. These and many other legal and policy questions only arise in cyberspace. As a result, our existing legal metaphors are helpful, but they cannot be dispositive.

The application of core legal principles to these new areas will require the education of, and ultimately personal experience by, decision makers, including both judges and juries. The standard of "reasonable care" will be set in part by actual industry practice. Because most of the ground rules will and should be set by contract, the rights and duties of participants in communications will ultimately turn on their acceptance and assistance in the enforcement of particular practices.

## VII. CONCLUSION

Cyberspace is, and should be, ruled mostly by contract. The highest duty of any sysop is to be thoughtful and truthful regarding applicable ground rules. The best protection for (and against) third parties is to limit, if not preclude, anonymous action. The best policy, from a social perspective, is to let the new medium develop free of the shackles imposed by any particular, soon-to-be outmoded, legal metaphor.

