

# FIRST AMENDMENT ISSUES PRESENTED BY THE "INFORMATION SUPERHIGHWAY"†

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## I. WHAT IS THE "INFORMATION SUPERHIGHWAY"?

The days of our current communications technologies may be numbered; according to many observers, contemporary electronic and written media are soon to be replaced by "broadband" digital networks carrying an array of electronic information services.<sup>1</sup> The new technology promises to provide users with a broad range of new means of receiving news and other information, of communicating, of conducting business transactions and of being entertained.

The development of the Internet may be the harbinger of the new communications regime. This international agglomeration of computer networks permits virtually instant dissemination of information among users, and provides individuals with the ability to post messages to and receive communications from thousands of others.<sup>2</sup> The current Internet, however, which can be utilized only by persons with the requisite access to and knowledge of computer technology, provides only a hint of what the future might bring. The stakes (and possibilities for changes in the nature of commerce, entertainment and communications) will increase dramatically if — as many envision — a broadband communications

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<sup>1</sup> See, e.g., Mitchell Kapor, *Where is the Digital Highway Really Heading? The Case for a Jeffersonian Information Policy*, WIRED, July-Aug. 1993, at 53 ("The information and communication infrastructure of the future, based on fiber optics, will provide the principal conduits for global entertainment, commerce, information, and communication in the next century."); Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1062 (1994).

<sup>2</sup> M. Ethan Katsh, *Rights, Camera, Action: Cyberspatial Settings and the First Amendment*, 104 YALE L.J. 1681, 1693 (1995). Contrary to popular belief, the Internet is not a single network. "It is a collection of networks bound together by the use of a common communications protocol." *Id.* at 1693 n.37.

network comes to replace and transform broadcast radio and television, cable television, telephone and even mail communications.

The development of a truly unified broadband network is likely to transform our daily activities at home and at work in heretofore unanticipated ways. For one thing, current barriers to access to information databases and entertainment programming may diminish dramatically. The new digital technology holds the promise of transmitting a virtually unlimited range of materials — from news and technical information to movies and novels — to each user when and where desired. The library, as well as the videotape rental store, may be replaced by an electronic network accessible from home and the office.<sup>3</sup>

Broadband network technology also promises to provide an additional, interactive dimension unavailable in current broadcast media. We are already becoming familiar with the electronic conduct of business communications and transactions. This trend is bound to accelerate as electronic communications networks become increasingly sophisticated and unified. Moreover, the facilitation of communications on the "information superhighway" may permit the users of the new networks to become the creators of their own information and entertainment "programming." In the view of one observer, with the advent of broadband networks, "[e]lectronic communication will no longer be a predominantly passive mode of interaction . . . . Instead, communication will be an interactive process conducted via two-way, multiple-format information streams *controlled by users of the media*."<sup>4</sup> Thus, the distinction between the purveyor of broadcast and communications services and the consumer of such services may become increasingly more difficult to draw.

It is nearly certain that the new communications networks will be developed by corporate, not government, institutions. The central role of private enterprise in developing and operating the new

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<sup>3</sup> See generally Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995).

<sup>4</sup> Allen S. Hammond, *Regulating Broadband Communication Networks*, 9 YALE J. REG. 181, 184 (1992) (emphasis added); see also Kapor, *supra* note 1, at 94 (discussing potential for "Jeffersonian" communications system); Bruce A. Olcott, Note, *Will They Take Away My Video-Phone If I Get Lousy Ratings? A Proposal For A "Video Common Carrier" Statute In Post-Merger Telecommunications*, 94 COLUM. L. REV. 1558, 1569 (1994) ("[I]ndividuals will be able to 'produce' their own television programs, bringing us increasingly back to the days when an individual who wanted to express a viewpoint could mount a soapbox in the town square and compete with the wealthy and influential for attention.").

networks has become clear over the last several years,<sup>5</sup> and was cemented by the recent Congressional elections. The Senate and House have both passed major telecommunications bills<sup>6</sup> which (if reconciled by the two houses of Congress and signed into law) promise to remove many regulatory barriers now preventing providers of long-distance and local telephone and cable television services from entering into each other's businesses. Thus, the new networks are likely to be developed and owned by current communications and entertainment giants (or agglomerations thereof).<sup>7</sup> The role of government (if any) in regulating such new communications enterprises has, however, yet to be defined. Neither have the constitutional constraints on such regulation been identified.

Congress and the courts will have to grapple with the balance of First Amendment interests at issue in a truly interactive communications environment in which the distinctions between audience and broadcaster and between broadcaster as speaker and broadcaster as conduit for the speech of others are no longer clearly defined. It is certain, however, that such novel communications technologies will raise new constitutional and policy considerations, and challenge existing First Amendment paradigms. Predicting the range of constitutional issues to be presented in the communications future is an uncertain science, particularly given the as yet undefined nature and scope of the "superhighway." Nonetheless, one can anticipate the outlines of future debates through an examination of precedents applied to current written and electronic media. This paper attempts to identify several areas of speech and speech regulation that are likely to be of importance in the new communications era: (i) the ability of government to ensure access to the information networks; (ii) government power to regulate the content of speech on the "superhighway"; and (iii) protections of personal reputation and privacy on the communications networks.

## II. PROVIDING ACCESS TO THE INFORMATION SUPERHIGHWAY

The consolidation of communications activities on privately-owned broadband networks is certain to raise issues of public access. We can anticipate disputes concerning the rights of network

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<sup>5</sup> See Kapor, *supra* note 1, at 54; Olcott, *supra* note 4, at 1560.

<sup>6</sup> See Telecommunications Competition and Deregulation Act of 1995, S. 652, 104th Cong., 1st Sess. (1995); Communications Act of 1995, H.R. 1555, 104th Cong. 1st Sess (1995).

<sup>7</sup> See Olcott, *supra* note 4, at 1560.

owners to exclude or otherwise regulate the participation of other large communications concerns, as well as small users and programmers. Central to the debate will be the power of government to mandate access to the privately owned broadband networks. Examination of the constitutional standards applicable to current communications technologies will not resolve the issue, because the courts have developed differing (and arguably contradictory) analytic schemes in evaluating government regulation of various forms of media.<sup>8</sup> A review of the existing regulatory precedents is instructive, however, and may provide hints of the First Amendment problems to be presented by the as yet uncharted future of communications technologies.

#### A. *The Written Press*

The written press stands at one end of the First Amendment spectrum; the Supreme Court has rejected virtually all regulation of the content of newspapers and other written publications.<sup>9</sup> The leading case of *Miami Herald Publishing Co. v. Tornillo*,<sup>10</sup> held unconstitutional a statute granting political candidates a right to reply to negative newspaper articles and editorials. The Court reasoned that such a governmental mandate concerning the content of the written media amounted to constitutionally violative compelled speech.<sup>11</sup>

#### B. *Broadcast Communications*

Broadcast media stand in the middle of the First Amendment spectrum. The Court has recognized significant governmental power to ensure third-party access to broadcast outlets, reasoning that the scarcity of broadcast bands gives rise to a governmental interest in ensuring a diversity of available programming.<sup>12</sup> Thus, in *Red Lion Broadcasting Co. v. FCC*,<sup>13</sup> the Court upheld the constitu-

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<sup>8</sup> See generally Peter Tu, *Communication Regulation and the First Amendment: A Utilitarian Model* 21 (May 5, 1994) (unpublished paper).

<sup>9</sup> See Note, *supra* note 1, at 1071.

<sup>10</sup> 418 U.S. 241 (1974).

<sup>11</sup> See *id.* at 256-58; see also *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 20-21 (1986) (finding unconstitutional mandate that utility include consumer advocacy group materials with bills sent to customers).

<sup>12</sup> See *National Broadcasting Co. v. United States*, 319 U.S. 190, 213 (1943).

<sup>13</sup> 395 U.S. 367 (1969). Even though *Red Lion* and *Tornillo* involved similar questions of government-compelled access to the media, the *Tornillo* Court did not even cite *Red Lion*, a case reaching a directly contrary result. This evidences the Court's differing treatment of the print and broadcast media.

tionality of the fairness doctrine (now unenforced by the FCC),<sup>14</sup> which required broadcasters to provide viewers and listeners with programming reflecting a balance of political viewpoints and positions.<sup>15</sup> Following the *Red Lion* rationale, Congress has grounded the imposition of other affirmative duties upon broadcasters, such as the provision of children's programming, on broadcast band scarcity.<sup>16</sup>

### C. Common Carriers

At the other end of the regulatory spectrum stand telephone companies. As "common carriers" under federal statute, telephone companies are required to provide access to all users on a nondiscriminatory basis.<sup>17</sup> Telephone companies lack even the power to impose time, place and manner restrictions enjoyed by the governmental operators of facilities falling within the definition of access-protected public fora. Indeed, as the mere passive carriers of third party communications (rather than the producers or selectors of programming), telephone companies arguably do not even have the status of "speakers" under the First Amendment.

### D. Cable Television

The Courts have yet fully to define the First Amendment status of cable television, the newest of the established mass-market communications systems. And the current judicial struggle with First Amendment issues presented by this communications medium may provide some hint of the constitutional status of regulations of the "information superhighway."

Like radio and television broadcasters, and unlike phone companies, the owners of cable television systems select programming for their customers; hence, the Supreme Court has deemed cable operators speakers, cloaked with some First Amendment protec-

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<sup>14</sup> See *In re Complaint of Syracuse Peace Council Against Television Station WTVH Syracuse, New York*, 2 F.C.C.R. 5043 (1987) (deciding against enforcement of fairness doctrine), *aff'd*, 867 F.2d 654 (D.C. Cir 1989), *cert. denied*, 493 U.S. 1019 (1990).

<sup>15</sup> See *Red Lion*, 395 U.S. at 377-78. Although the Court has noted that its spectrum scarcity rationale has come under criticism, particularly in the wake of technological changes increasing the range of available electronic media, it has refused to overrule the *Red Lion* precedent. See *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2457 (1994); *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984); see also *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) (holding that the First Amendment did not require broadcasters to permit editorial advertisements).

<sup>16</sup> See Children's Television Act of 1990, 47 U.S.C. § 303a.

<sup>17</sup> See Hammond, *supra* note 4, at 210; see also 47 U.S.C. § 202(a).

tions.<sup>18</sup> The Court also recently recognized, however, that a cable operator's role as programmer is substantially limited to the selection of programming sources. After choosing a menu of programming for its customers, a cable system typically plays the passive role of conduit, providing an unedited stream of programming to its customers.<sup>19</sup>

In *Turner Broadcasting System, Inc. v. FCC*,<sup>20</sup> the Court rejected the notion that government regulation of the content of cable operators' speech should be subject to the relatively relaxed standard of review applicable in the broadcast context. The *Turner* Court reasoned that the "scarcity" rationale underlying the *Red Lion* decision is inapplicable to cable technology, which lacks the bandwidth limits presented by conventional television and radio communications.<sup>21</sup> One might question the *Turner* Court's refusal to expand application of the scarcity rationale to the cable context. The number of cable channels available on each system is limited by technology.<sup>22</sup> Moreover, given that most jurisdictions are served by a single cable operator, viewers' cable television options are inextricably linked to the programming decisions of one company, and thus in some ways more constrained than their broadcast communications options.<sup>23</sup>

In any event, while the *Turner* Court rejected an expansion of the *Red Lion* doctrine, it pragmatically recognized that the monopoly character of most cable operations may permit for speech regulations that would not be constitutionally permissible in the print media context. Thus, the Court indicated the possible constitutionality of the "must carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992,<sup>24</sup> which require cable operators to provide their customers with access to, *inter alia*,

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<sup>18</sup> See *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2456 (1994); *Leathers v. Medlock*, 499 U.S. 439, 444 (1991).

<sup>19</sup> See *Turner*, 114 S. Ct. at 2452.

<sup>20</sup> 114 S. Ct. 2445 (1994).

<sup>21</sup> See *id.* at 2457.

<sup>22</sup> See generally Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619, 1622 (1995) ("[G]iven a finite number of channels (even if the number is 500 or 1000), some entity will always have to make choices about who is allowed to use a given channel.").

<sup>23</sup> It should be noted, however, that a federal statute prohibits municipalities from granting exclusive cable franchises, 47 U.S.C. § 541(a)(1), and the Supreme Court has questioned whether the granting of such franchises could survive First Amendment scrutiny. See *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 495 (1986).

<sup>24</sup> 47 U.S.C. §§ 534-35 (Supp. V 1993).

certain local commercial broadcast channels<sup>25</sup> and certain public service stations.<sup>26</sup> The Court rested its holding on a recognition that cable operators are the "gatekeepers" for the television programming received by the approximately 60 percent of homes now wired for cable reception, observing that "the physical connection between the television set and the cable network gives the cable operator . . . control over most (if not all) of the television programming that is channeled into the subscriber's home."<sup>27</sup> The Court reasoned that Congress had a strong interest in preserving the viability of broadcast television by ensuring broadcasters' access to the homes of cable viewers. If the facts supported the proposition that broadcasters required government regulation to ensure their access to cable systems, and would be driven out of business without access to cable, the Court concluded, the access law would be valid under a middle tier scrutiny standard applicable to content neutral speech regulations.<sup>28</sup>

*E. Access to the Superhighway*

The new communications networks are bound to challenge the foregoing categories of First Amendment analysis. The constitutional equation created by the "information superhighway" will be far more complicated than that presented in the print, broadcast, telephone or cable contexts. The proprietors of the new communications networks are likely to be the providers of, as well as conduits for, programming, providing information, entertainment and other services for distribution to their customers.<sup>29</sup> And, as in the cable context, competing entertainment companies and other information providers will seek access to the new communications networks.

In addition, if the new technology provides the means for users to create and disseminate their own programming to others, the new networks are bound to present novel issues related to ensuring consumers' access to the means of disseminating programming to an audience, as well as ensuring their access to a variety of

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<sup>25</sup> *Id.* § 534.

<sup>26</sup> *Id.* § 535.

<sup>27</sup> *Turner*, 114 S. Ct. at 2466.

<sup>28</sup> *Id.* at 2469-72. Justice Stevens would have deferred to Congress' judgment and upheld the provisions absent further factual inquiry. *See id.* at 2473 (Stevens, J., concurring in part and concurring in the judgment).

<sup>29</sup> *See Hammond, supra note 4*, at 189-90; *Olcott, supra note 4*, at 1567-70.

programming sources.<sup>30</sup>

The unanswered question is how legislators and courts will balance the First Amendment interests of the owners of the new communications networks against the interests of the individuals, groups and organizations that will seek to obtain access to their technology. At least one commentator has suggested that the Constitution would permit the institution of a common carrier statute for the information superhighway, requiring the proprietors of networks to grant access to all who seek it.<sup>31</sup> The author suggests that such a mandatory access law would withstand even a strict scrutiny analysis, on the ground that no reasonable alternative means of communications would be available to speakers denied access to the new communications networks.<sup>32</sup>

Another commentator has suggested that the new networks — although not government-owned facilities — might be made subject to regulations guaranteeing to users access on much the same terms as the First Amendment provides to limited public fora.<sup>33</sup> This notion is supported in part by the Supreme Court's decision in *PruneYard Shopping Center v. Robins*,<sup>34</sup> which upheld a statute requiring a privately owned shopping mall to provide picketers with access to its facilities on a nondiscriminatory basis, subject only to time, place and manner restrictions.<sup>35</sup>

Neither the common carrier nor the state-mandated forum access proposals, however, appear fully to recognize network owners' status as speakers, as well as their status as conduits for the speech of others. The proprietors of the networks are bound to argue that denying them the power to exclude others from their systems or regulate the content of speech thereon would obviate a fundamen-

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<sup>30</sup> See Berman & Weitzner, *supra* note 22, at 1632 (discussing possibility of "user-controlled" interactive media).

<sup>31</sup> See Olcott, *supra* note 4, at 1611.

<sup>32</sup> See *id.* at 1615-16.

<sup>33</sup> See *Message in the Medium*, *supra* note 1, at 1092-93.

<sup>34</sup> 447 U.S. 74 (1980).

<sup>35</sup> See *id.* at 88. It should be noted that any such regulation might be vulnerable to a Fifth Amendment takings challenge. Unlike the mall at issue in *PruneYard*, which had been held open to the public, a computer network operator may seek to limit access to paying customers. Thus, government-compelled access might be held to compromise the owner's reasonable investment-backed expectations, requiring compensation from either the government or media users. See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (government-compelled access to private marina required compensation). For a recent discussion of potential applications of public forum doctrine to the emerging 'information superhighway,' see David J. Goldstone, *The Public Forum In The Age of The Information Superhighway (Where Are The Public Forums On The Information Superhighway?)*, 46 HASTINGS L.J. 335 (1995).



tal right they enjoy as speakers: that is, their right not to speak.<sup>36</sup> The response to this objection might be that the role of network forum operators as speakers — *i.e.*, as the creators and disseminators of programming — should be distinguished from their role as the operators of communications systems. That is, network operators should be free to create and disseminate their own programming and information on the systems they own without third party interference or participation. But, in their role as system proprietors, they should not be viewed as editors, but rather as utility operators (like current phone companies) with the obligation to provide access to their facilities on a nondiscriminatory basis.

It remains to be seen whether the courts will be amenable to an analytic scheme that draws a constitutional distinction between the role of a communications network owner as information provider and its proprietary role as a conduit for the speech of others,<sup>37</sup> deeming the same entity a speaker for one purpose and not the other.<sup>38</sup> The precedents, however, do not preclude such a multifaceted regulatory strategy. Indeed, Justice O'Connor discussed such a strategy in her *Turner* dissent, suggesting that a portion of the cable spectrum be set aside to be filled by a lottery or other random method.<sup>39</sup>

### III. GOVERNMENT'S POWER TO LIMIT SPEECH

First Amendment issues will also arise if government regulators seek to police the content of speech on the information super-

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<sup>36</sup> In this regard, even one commentator arguing in favor of the permissibility of PruneYard-type regulation has observed:

[T]he information superhighway owner will be a more credible claimant of First Amendment rights than the mall owner. To guarantee access to others for the purpose of communication would potentially interfere with the superhighway owner's ability to get its message across, whereas allowing speakers into a mall does not directly encroach on the mall owner's business of selling goods. In this respect, *PruneYard* may appear to be less apt than [*Tornillo*] . . .

*Message in the Medium*, *supra* note 1, at 1092 (footnotes omitted).

<sup>37</sup> *See id.* at 1091-92.

<sup>38</sup> An alternative argument might be drawn from the reasoning of *Turner*. While a network provider would be deemed a speaker when functioning in its proprietary role, its monopoly status might give rise to a sufficient governmental interest in providing public access to overcome the proprietor's First Amendment interest in asserting editorial control.

<sup>39</sup> *See Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2480 (O'Connor, J., dissenting in part and concurring in part); *see also* C.R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1798 (1995) (discussing Justice O'Connor's lottery idea and related "open channel" concept).

highway. In *FCC v. Pacifica Foundation*,<sup>40</sup> the Supreme Court permitted limited government regulation of the broadcast of indecent material on the radio, reasoning that the broadcast media have a uniquely pervasive presence in the lives of Americans. The Court emphasized that one cannot avoid encountering the messages broadcast on radio and television, and that the particular message at issue ("seven dirty words") was broadcast during hours when it could readily be heard by children.

The Supreme Court has, however, rejected application of this "pervasiveness" rationale to permit the banning of non-obscene but indecent speech on certain "dial-a-porn" telephone services.<sup>41</sup> The Court reasoned that the audience must choose to receive a "dial it" call, and thus cannot be taken by surprise by the indecent message.<sup>42</sup> The pervasiveness rationale similarly has been rejected in the cable context.<sup>43</sup> The courts have reasoned that the cable box is an "invited guest" in the home.

Courts are unlikely to be receptive to any government attempt to censor or otherwise limit the content of speech on the new information networks on decency grounds. Given that individuals will choose which information sources to "invite" into their homes, there will be little room for government to act as a protector of the sensibilities of network users or their children. Also, the extensive menu of programming that will be available makes the "scarcity" rationale unavailable.

It seems possible that this issue may be put to an early judicial test. A provision of the telecommunications bill recently passed by the Senate criminalizes, among other things, certain "indecent"

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<sup>40</sup> 438 U.S. 726 (1978).

<sup>41</sup> *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989) (ruling upon constitutionality of amendment to § 223(b) of the Communications Act of 1934, Pub. L. No. 100-297, § 6101, 102 Stat. 130, 424 (1988)); see also *Message in the Medium*, *supra* note 1, at 1080; *Alliance for Community Media v. FCC*, 56 F.3d 105, 123-29 (D.C. Cir. 1995) (en banc) (upholding statute requiring cable television operators to segregate and, absent a subscriber's written request to the contrary, block indecent leased access programming), *petition for cert. filed*, 64 U.S.L.W. 3070 (U.S. July 21, 1995).

<sup>42</sup> See *Sable Communications*, 492 U.S. at 131. The Court did recognize a compelling state interest in protecting minors from indecent materials, but held that the statute at issue was not drawn sufficiently narrowly solely to serve this permissible interest. An amendment to the statute requiring age verification of users of "dial-a-porn" services has been upheld by a federal court of appeals. See *Dial Info. Servs. v. Thornburgh*, 938 F.2d 1535, 1541-42 (2d Cir. 1991) (reversing grant of preliminary injunction against enforcement of statute), *cert. denied*, 502 U.S. 1072 (1992).

<sup>43</sup> See generally *Turner*, 114 S. Ct. at 2457; *Message in the Medium*, *supra* note 1, at 1079-80.

communications on the Internet.<sup>44</sup>

Another significant question posed by the new communications technology is the proper governmental scheme for regulating obscene speech in an "electronic community." In one recent case, pornographic material was placed on a computer bulletin board in California and accessed by an Internet user in Memphis, Tennessee. The operators of the bulletin board were charged with and convicted of criminal obscenity violations.<sup>45</sup> The materials at issue were deemed obscene under the local community standards of Tennessee.<sup>46</sup> One commentator has suggested that the standards of the "electronic community" of cyberspace users, rather than the physical community in which each individual user resides, should usually apply in such cases.<sup>47</sup>

Courts may also have to grapple with the regulation of communications on the electronic superhighway that advocate illegal conduct. This issue has arisen recently in connection with the use of the Internet as an organizational and communications tool by anti-government militias. Existing Supreme Court precedents — read restrictively — preclude the regulation of speech advocating illegal activity absent the demonstration of a risk of "imminent" wrongdoing accompanied by words of incitement.<sup>48</sup> However, it may be difficult to establish such a risk of imminent harm arising from the electronic advocacy of criminal acts. It may be next to impossible to establish how the potentially vast, but anonymous, audience for a communication soliciting illegal conduct is likely to respond. Thus, communications such as the posting of bomb-making instructions on the Internet during the weeks prior to the

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<sup>44</sup> S. 652, 104th Cong., 1st Sess. § 410 (1995). An amendment to the House bill, however, would prevent such regulation. 141 CONG. REC. H8460, H8468 (daily ed. Aug 4, 1995).

<sup>45</sup> *United States v. Thomas*, CR-94-20019-G (W.D. Tenn. Dec. 13, 1994) (conviction and forfeiture order), *appeals docketed*, No. 94-6648, -6649 (6th Cir. Dec. 21, 1994).

<sup>46</sup> Anne W. Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspace*, 104 *YALE L.J.* 1639, 1652 (1995).

<sup>47</sup> *See id.* Professor Branscomb argues that, unless electronic communications have an impact upon a particular "geographical jurisdiction" (for example, if local children are improperly granted access to obscene materials) "libertarian philosophy" would maintain that "virtual community" standards should apply. *See id.* at 1153-54. It is important to note, however, that obscenity law is decidedly anti-libertarian, insofar as it criminalizes the obtaining of certain communications, without regard to whether the communications cause demonstrable harm to the community.

<sup>48</sup> *See generally* *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (criminal punishment permissible only upon showing that "advocacy [of unlawful action] is directed to inciting or producing imminent lawless action and is likely to produce such action").

Oklahoma City bombing might fall outside of the government's regulatory power. On the other hand, the courts may find that current First Amendment doctrine, fashioned to some extent as a reaction to the McCarthy era, must be modified to take into account the transformation of communications technology.

#### IV. REPUTATION AND PRIVACY

The distribution of vast amounts of information on the new "superhighway" is bound to give rise to allegations of reputational injury and invasions of privacy, thus presenting new constitutional and policy challenges. The blurring of the distinction between broadcaster and audience will create practical and doctrinal problems if individuals bring suit for defamation through electronic network communications. Moreover, the increasing conduct of communications and transactions on the new communications networks is bound to raise concerns about personal privacy.

##### A. *Network Communications and Defamation Law*

In an interactive environment, virtually any user will have the means to broadcast statements — including defamatory statements — to a vast audience without the mediating filter of an editor or television programmer. Rather than sharing their views among small groups of people, individuals will be free to communicate their views to the world. Moreover, the decentralization and ease of communication on the "superhighway" may make it difficult even to identify the sources of defamatory statements, let alone successfully to prosecute actions against them.

An important issue will be whether the party that distributes the message, *i.e.*, a company that maintains a broadband network, is liable as the "publisher" of a defamatory statement.<sup>49</sup> The limited case law existing in this area — developing from communications on databases such as computer bulletin boards — is somewhat divided.<sup>50</sup> A pending \$200 million libel suit against a computer bulletin board provider, *Stratton Oakmont, Inc. v. Prodigy Services Co.*<sup>51</sup> is likely to be a test case in this developing area of libel

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<sup>49</sup> Such companies may seek the First Amendment benefits of status as "speakers," but be unwilling to accept responsibility for defamations that are communicated on their systems.

<sup>50</sup> See Daniel Waggoner, *Potholes on the Information Superhighway*, in MULTIMEDIA AND THE LAW: PATENTS, COPYRIGHTS, TRADEMARKS AND LITERARY PROPERTY (Practicing Law Institute Mar.-Apr. 1994).

<sup>51</sup> 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (unpublished opinion).

law. The trial court recently rejected defendant Prodigy's claim that it could not be liable for alleged defamatory statements transmitted on its system because it served as a mere passive conduit for the communications of its users. The court focused on the fact that Prodigy had established editorial standards for communications on its network, and appointed "board leaders" to ensure conformity with those standards.<sup>52</sup> A different court rejected a defamation claim against another computer bulletin board operator, reasoning that the defendant did not exercise editorial control over, or have notice of, the content of allegedly defamatory communications carried on its network.<sup>53</sup> The divergent results in these cases suggest a network operator will undertake substantial liability risks if it chooses to play any role in policing the content of communications on its system.

One suggestion for insulating the system operator would preclude defamation liability if the proprietor provides a right-of-reply on its system to allegedly defamed parties.<sup>54</sup> However, adoption of this notion would require a significant change in current doctrine.

Surely, existing common law rules, which would treat system operators as either speakers or neutral conduits for the speech of others, are ill-suited to dealing with the consequences of widespread dissemination of defamatory messages through new communications technologies. A legislative solution that would limit the defamation tort remedy to situations where a system operator exercises specific types of editorial control is clearly preferable.

### *B. Network Communications and the Threat to Privacy*

The new information and communications technologies are bound to create new personal privacy concerns.

For example, privacy issues are likely to arise in connection with the "overhearing" of electronic conversations on the new networks, whether by government or private entities. It is arguable that electronic mail and other new communications technologies should be protected from interception to the same degree that conventional telephone communications are protected today.<sup>55</sup>

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<sup>52</sup> 1995 WL 323710, at \* 6. The court recently agreed to consider rehearing its decision. See *Prodigy's Next Chance*, INFO. Wk., Aug. 7, 1995, at 22.

<sup>53</sup> See *Cubby Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991).

<sup>54</sup> See Branscomb, *supra* note 46, at 1671-72.

<sup>55</sup> See *Katz v. United States*, 389 U.S. 347 (1967) (discussing Fourth Amendment privacy interest in telephone conversations); 18 U.S.C. 2510 *et. seq.* (regulating, *inter alia*, government interceptions of telephone conversations).

Courts have, however, often been unreceptive to such arguments.<sup>56</sup> A statute passed by the last Congress<sup>57</sup> imposes some new limitations upon governmental and private interception of electronic communications, including protecting cellular telephone communications.<sup>58</sup> However, the statute includes a number of exceptions, most notably providing no protection for communications on systems "configured so that electronic communication is readily accessible to the general public."<sup>59</sup> It is conceivable that any communications network providing bulletin board or conferencing services might fit within this exception.

It is obvious that legislatures will continue to be challenged to draw boundaries between protected private and public communications on new information networks that blur the line between public and personal electronic space.

#### CONCLUSION

As the foregoing discussion demonstrates, the rapidly changing nature of communications technology will pose a multitude of constitutional and policy problems relating to freedom of speech and expression. The challenge for courts and legislatures will be to recognize and define the rights and responsibilities of both those who own and those who utilize the new "superhighway."

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<sup>56</sup> See, e.g., *In re Askin*, 47 F.3d 100, 103 (4th Cir. 1995). The court in *Askin* held that a warrantless interception of a cordless telephone conversation did not violate the Fourth Amendment.

<sup>57</sup> Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994).

<sup>58</sup> See *id.* § 202 (amending 18 U.S.C. § 2510). The statute also includes some protections for transactional communications, such as electronic mail. See *id.* § 207 (amending 18 U.S.C. § 2703). Several states have also enacted statutes limiting both governmental and private interceptions of electronic communications. See, e.g., Nev. Rev. Stat. § 200.620 (1995) (Nevada statute prohibiting interception of certain wire communications); 18 Pa. Cons. Stat. Ann. § 5703 (1995) (Pennsylvania statute prohibiting intentional interception of, *inter alia*, certain wire communications); Ga. Code Ann. § 16-11-62, 64 (1995) (Georgia statute prohibiting interception of certain "private conversation[s]"); Ga. Code Ann. § 16-11-66.1 (1995) (Georgia Statute prohibiting interception of certain cellular telephone communications).

<sup>59</sup> 18 U.S.C. 2511(g)(i).