

IMPENDING LEGAL ISSUES

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1. Introduction

The Integrated Broadband Network (IBN) has yet to arrive. Though its extraordinary technical capabilities are well-established, it is far from clear what uses it will serve. The answer will depend on a host of unresolved issues. Which entities will operate IBNs? Which businesses will choose to use IBNs? Which services will be offered? What will the long-term regulatory environment be like? And most importantly, what services will consumers be willing to pay for?

Whatever form IBNs take, there are legal problems that are certain to arise. The insatiable human appetite for mischief, information, pornography, and anti-competitive activity guarantees that many of the conflicts that have afflicted previous technologies, such as computers, telephones, cable television and broadcasting, will again be visited on IBNs.

This paper will focus on several of the legal problems which may affect IBNs. I will examine the history of a number of recent controversies involving the electronic media including breaches of security, protection of privacy, regulation of sexual material and refusals to deal. Based on the laws governing older technologies, and the similarities or differences between those technologies and IBNs, I will outline some possible solutions which may forestall or limit future conflict.¹

2. Hacking and Viruses

During the 1980s, the inadequacies of computer security were revealed. In 1988, a computer virus, allegedly created by a twenty-three year old graduate student, quickly paralyzed 6,000 military and university computers across the country. In another incident, a "logic bomb" sabotaged the central computer at the Los Angeles Department

of Water and Power in 1985, rearranging data and making critical information temporarily inaccessible. And in 1983, a group of teenagers used a simple home computer to break into the radiation treatment computer at the Memorial Sloan Kettering Cancer Center, gaining access to the treatment records of patients as well as the ability to alter the radiation level each patient received.

The two-way capabilities of an IBN create the same possibility for mayhem. One of the promised benefits of IBN is that individuals will possess the ability to transmit as well as receive information. Once people can connect to the network, it will be difficult to prevent the next generation of hackers from either breaking into the data stream of others or introducing destructive information into the system.

The law as it exists today is unable to cope with the current assault on computer systems. For example, the federal Computer Fraud and Abuse Act of 1986 makes it a crime "intentionally, without authorization, to access any computer of a department or agency of the United States."² Since the verb "access" is not defined, it is unclear whether a person who creates a computer virus which jumps from one program to another is in violation. It is also difficult to establish "intent" if someone argues that their action was a simple prank that got out of hand.

Federal wiretap laws may not be of much help either. The Omnibus Crime Control and Safe Streets Act of 1968 was amended in 1988 to prohibit the interception of wire, oral or electronic communications.³ The focus of the Act, however, is limited to protecting "communication," the passing of information between parties, rather than protecting "information." Thus, it may not protect information that is generated and stored, but not communicated to others.⁴ Furthermore, the Act contains no restrictions on those who might add to or alter information in a system.

Destruction or interference with an IBN data stream could have a devastating effect, not only on the users of the system, but on the future development of IBN. It would be prudent to enact criminal penalties before IBNs become operational.

The law should protect both the IBN and the information that is transmitted. The law should make it a crime:

- to knowingly insert information or instructions into an IBN which alters or is likely to alter, delay, disrupt or destroy any other information or programming transmitted either over the IBN or through a device connected to the network;
- to use an IBN to knowingly obtain information or programming without authorization;
- to use an IBN to obtain money, property or services by false or fraudulent means;
- to copy information or proprietary programs using an IBN without the permission of the owner; and

- to knowingly use or disclose codes, passwords, and similar means of access to information without the consent of the owner.

The penalties for these crimes should be severe. It should be a felony to violate the integrity of an IBN, punishable by fine and imprisonment. Additionally, all those who suffer damage due to the crime should be able to sue to recover their losses.

3. Privacy

IBNs will be able to offer a wide range of services to consumers and businesses. High-definition television, non-broadcast video entertainment, picture telephones, home shopping, home security, polling, data bases and videotex can all be provided by the same system. This cornucopia will also mean that an enormous amount of personal information will be flowing through the same conduit. The easy accessibility of this material will pose a direct threat to consumer privacy and to businesses trying to safeguard proprietary information.

History shows that when information is compiled, others will seek access to it. For example, government agents have the right to search library records to see which books an individual has been reading.⁵ In Utah, when one supplier of telephone services was charged with violating laws on telephone pornography, the United States Attorney attempted to subpoena records to identify which individuals had called the service.⁶ In a similar case, the owner of an adult movie theater in Columbus, Ohio who was charged with exhibiting obscene movies sought a court order to obtain the names of the cable subscribers who viewed similar movies on the local cable television system.⁷

There are other interested parties. The direct mail industry is continually seeking better and more precise information about the American public. The wealth of information conveyed over an IBN would represent a gold mine for those seeking to pinpoint potential customers. Finally, creditors, insurers and employers may all have a similar economic use for the information carried over an IBN.

If violations of privacy occur with the onset of IBNs, the resulting loss of trust on the part of the consumer could hinder or doom their development. Accordingly, privacy protection should already be in place before IBNs are operational. Prior legislation, especially the federal Cable Act and Fair Credit Reporting Act, provides a useful framework for such protection.

There will need to be carefully prescribed limitations on the compilation and dissemination of information. The Cable Act wisely draws a distinction between "personally identifiable information" — that which can identify particular persons or households — and aggregate data which analyzes populations but does not permit the identification of individuals.⁸ All limits on information gathering and distribution refer only to information about individuals.

As is the case with cable television, IBN should impose a prohibition on the un-

authorized collection of personal information. The Cable Act provides two exceptions, both of which make sense and could be applied to IBN.⁹ First, a cable operator may collect personal information that is necessary for providing a service to the subscribers. For example, a cable operator offering pay-per-view will need to know what program the paying customer wants to receive. Such information will be essential for the IBN operator as well. Second, the cable operator can “sweep” the system to search for unauthorized reception of cable service. Again, both the cable and IBN operator should be able to ensure that only those who have paid for a service are receiving it.

A related issue is, how should the collection and dissemination of personal information be authorized? The Cable Act requires “positive consent,” that is, an affirmative act by the subscriber, rather than permitting the cable operator to assume that consent has been a given because a subscriber failed to respond to a request for permission.¹⁰ A positive consent requirement is crucial, since it is the only means for ensuring that consent is knowingly and voluntarily given.

There should be another limitation placed on the collection of information. Personally identifiable information should be discarded after a specified period of time. The Cable Act requires cable operators to destroy information when it is no longer needed for the purposes for which it was acquired. The Fair Credit Reporting Act prescribes specific time limits after which “obsolete” information must be destroyed.¹¹ Requirements of this kind may help to limit the damage that can be done by any breach of security.

Limitations on the dissemination of information should be similar to the limitations placed on collection of that information. Unless specific assent has been given, information should only be disclosed to a third party under the following conditions. First, a private entity would only be eligible to receive information necessary for the provision of a specifically requested service. Thus, the transfer of information between either an IBN service provider or an IBN operator and a parent or related company would not be related to the service provided and would be prohibited. This rule would have the additional benefit of limiting the competitive advantage gained by a monopoly IBN operator providing non-monopoly services.

The government might seek information from an IBN operator. The 1977 Report of the Privacy Protection Study Commission recommends that personal information, “should not be accessible to government unless a compelling governmental interest outweighing the individual’s interest to be free from governmental intrusion can be shown.”¹² The Cable Act requires the government to provide clear and convincing evidence that the subject of the information sought is reasonably suspected of criminal activity and that the information sought would be “material evidence.”¹³ If a situation were to arise that was similar to the Columbus, Ohio case discussed earlier, the Cable Act would prohibit the disclosure of the names of cable subscribers because it was the adult movie owner, not the subscribers, who was suspected of criminal activity.

The Cable Act also requires that the subject of the information sought by the government be notified and given the opportunity to contest the government’s request.¹⁴

Without notice of the request, the subject will not know when information is disseminated and will be unable to ensure that the safeguards are followed.

Similarly, consumers must be fully informed of their rights if their legal protections are to be effective. IBN operators should be required to give periodic notice of these rights to those connected to the network.¹⁵

There will also need to be a mechanism which permits individuals to correct any erroneous information contained in their files. The Fair Credit Reporting Act requires credit agencies to review disputed information and either correct the information or permit the consumer to include an opposing or explanatory statement.¹⁶

Heavy penalties will be needed for those violating the privacy rules. IBN operators, service providers, and their employees should all be subject to specified civil penalties. Those whose privacy has been infringed should be able to recover compensation for damages suffered — a statutory minimum plus attorney fees. In addition to civil penalties, the government should have the power to enforce privacy protection as well.

Finally, specific legal responsibility must be assigned for creating a system that is capable of safeguarding information.¹⁷ Those who operate the IBN and those who provide services should each be required to take all reasonable steps to protect the integrity of the system. This responsibility should include all reasonable physical and electronic safeguards. These safeguards should be periodically redesigned to keep pace with advances in technology.

4. Pornography

Every form of communication has had to deal with the issue of pornography. Inevitably, IBNs will transmit programming deemed pornographic by some.

Any analysis of this issue must begin with the understanding that “pornography” is not a legal term, but merely common parlance for depictions of sexual activity that may be considered offensive. The most important legal term is “obscenity,” which describes material that is beyond the protection of the First Amendment. Obscene material can be criminalized, zoned, or time-channelled without limitation. Problems arise because the Supreme Court’s definition of “obscenity” is difficult to evaluate and meet. To be legally obscene the following three-part test must be met:

- whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;
- whether the work depicts, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.¹⁸

The prevalence and availability of sexually explicit material is an indication that much of what is termed “pornography” is not legally obscene. It should be noted that the Supreme Court has treated children differently from adults in the determination of obscenity. Material that may be acceptable for adults may still be obscene for children if the work appeals to the prurient interest *of children*, is patently offensive *for children*, and lacks serious value *for children*.¹⁹

In other words, society can protect minors from material that is inappropriate for them, even if the material is otherwise protected by the First Amendment. The Government may not, however, “reduce the adult population to reading only what is fit for children.”²⁰ This dichotomy has led to a twisted path of legal cases, resulting in regulatory standards which vary from medium to medium.

For broadcasting, the Supreme Court has permitted the FCC to ban mid-day viewing of programming that is “indecent” but does not rise to the level of obscenity.²¹ The current definition of “indecent” is “language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs.”²² Thus, “dirty words” and “dirty pictures” can be kept from the airwaves, even without demonstrating that they appeal to prurient interest and even if the program, as a whole, presents material of serious value.

The reason the Supreme Court permitted this ban is that broadcasting is “uniquely pervasive” and “uniquely accessible to children.”²³ The Court noted that, unlike book sellers and movie theater owners, broadcasters could not segregate the children in their audience from adults. Broadcast programs can be viewed or heard by unsupervised children and indecent material could be withheld from them only by stopping the source of the programming.

The situation is different for cable television. As with other media, cable is prohibited from disseminating obscene material.²⁴ Unlike broadcasting, however, the courts have consistently refused to permit localities to ban indecent programming from cable television.²⁵ Cable differs from broadcasting because the technology permits each individual homeowner to decide whether specific channels should enter the home. Both addressable converters and so-called “lock boxes” permit individuals to block programming they find offensive.²⁶ Thus, children can be protected without silencing the source.

For telephones, the legal situation can be viewed as a morality play in two acts. Our drama opens in 1983, when Federal law criminalized “dial-a-porn,” defined by the law as the use of a telephone for making, “any obscene or indecent communication for commercial purposes to any person under eighteen years of age....”²⁷ After repeated litigation and three sets of FCC regulations, the law, at least in some form, passed judicial scrutiny.²⁸ At first, the FCC only permitted dial-a-porn to be available between 9:00 P.M. and 8:00 A.M. eastern time, or to those paying by credit card. (This meant that dial-a-porn was available from 6:00 P.M. to 5:00 A.M. in California, but presumably children have different bed times on the West Coast.) The Court of Appeals for the

Second Circuit struck down this rule because it unnecessarily restricted adults from receiving these services.²⁹ Two years later, the same court struck down modified FCC rules that had replaced this time-channeling with a requirement that dial-a-porn services provide users with special identification codes.³⁰ The court ruled again that there were less restrictive means for protecting children, such as blocking devices (similar to cable lock boxes).

Finally, the Court of Appeals upheld the FCC's third try. The resulting regulations stipulated that dial-a-porn could be transmitted if the service: required credit card payment prior to transmission; required an identification code obtainable by written application; or scrambled messages so that they were audible only when a descrambling device was used. The court decided that these requirements struck the proper balance. They restricted children from receiving the service while imposing a relatively light burden on service providers and their willing adult customers.³¹

This court also struck down that part of the law governing "indecent" programming. It ruled that because technology existed to protect individual homeowners and because callers must affirmatively seek the telephone messages, the *Pacifica* decision did not permit the regulation of indecent telephone messages.³² The court concluded that only "obscene" messages were prohibited.

The confusing aspect of this trio of cases is that once it is decided that only obscene services are covered by the statute, there is no need for the FCC to search for "the least restrictive alternative." The interest in protecting the right of adults to receive information denied to children — the very interest that was critical in striking down the cable indecency legislation — was based on the adult's constitutional right to receive communication protected by the First Amendment. Since obscenity is not protected by the First Amendment, there is no constitutional need for the FCC to be particularly concerned with the right of adults to receive obscene telephone messages. Such solicitude is only warranted for protected (i.e., indecent) speech. Perhaps the court was confusing the obscenity/indecency issue with the idea that a service can be "obscene" for minors but not for adults. In the latter situation, consideration for the rights of adults to receive the "obscene" programming would indeed be appropriate, since it would be protected communication for adults.

In response to the trio of cases dealing with dial-a-porn and minors, Congress amended the law in April, 1988 to prohibit obscene and indecent telephone communication to *any* recipient, regardless of age.³³ The Supreme Court upheld the ban on commercial telephone obscenity, but struck down the prohibition on telephone indecency.³⁴ The Court held that the earlier FCC rules indicated that a "feasible and effective" method existed for protecting children from indecency.³⁵ The Court also noted that the danger of the "surprised" listener was not the same for telephone as for broadcasting because the recipients of the telephone messages are callers, who are voluntarily seeking the messages.³⁶

The Court also accepted the fact that *some* children would be able to circumvent any technological safeguard: "only a few of the most enterprising and disobedient young

people will manage to secure access to such messages.”³⁷ Because this number was relatively small, the Court concluded that the total ban on indecency was “not a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages.”³⁸

Where does all this leave IBNs? Without question, under the current state of the law, obscene programming and services can be banned from the network. The more difficult questions are: 1) whether indecent but not obscene programming and services can be banned; and 2) how to protect children from material that is obscene for them though not for adults.

IBN technology will, in all likelihood, permit each individual home owner to decide which programming and services enter the home. Scrambling and locking devices will enable customers to block unwanted services. As with telephones and cable television, IBNs should establish mechanisms which permit individuals to choose their own programming, rather than relying on censorship.

These same devices should permit parents to protect their children from programming that is obscene for minors. As is the case with telephones, any regulation of such material must find the solution that is least restrictive of the rights of adults to receive constitutionally protected material. It may be permissible to require those offering IBN services and programming that are “obscene for children” to assist parents in protecting their own homes. Alternatives would be prior notification of such programming or offering them in such a way that blocking devices could be used effectively. Once parents are empowered to protect their children, adults who so desire should be able to receive the offerings.

There is one remaining question. Should the operator of the IBN be permitted to censor? Recent court cases show a discomfiting trend. Michigan Bell, for example, decided to exclude a host of services, which were, in its unlimited discretion, “inflammatory, and likely to offend ethnic, gender, racial or religious groups; lewd, lascivious, indecent or obscene; ... or likely to have a detrimental effect on Michigan Bell’s image or reputation.”³⁹ The danger of private censorship, unchecked by either competitive pressure or due process requirements is an undesirable specter.

One court, in permitting telephone company censorship, held that because the service went to many listeners simultaneously, “the telephone company resembles less a common carrier than it does a small radio station.”⁴⁰ As such, the telephone company could censor these services. The error in this reasoning is that it is not the telephone company but the service provider who is “broadcasting”. Completing the analogy, the telephone company is merely the “ether” through which the messages are transmitted.

The role of conduit and content should not be confused. Where the technology permits protection of minors, unilateral unlimited power to censor, so as to protect the “image and reputation” of the IBN is neither necessary nor advisable.

5. Refusal to Deal

The history of electronic communications is replete with conflict over vertically integrated monopolies refusing to deal with potential competitors. As the lines between different media and technologies have developed, advantages have accrued to those whom the government decided had the right to control access to what anti-trust lawyers term “essential facilities”.

Providers of long distance telephone service had to litigate in order to gain the right to connect to local telephone exchanges.⁴¹ Cable television operators have long struggled to gain access to telephone poles for the installation of the cable network. Telephone companies, sometimes desirous of constructing the cable facilities themselves, have denied access altogether or charged exorbitant monopoly prices.⁴²

Cable operators have not been above using their exclusive franchising rights to help their own programming services. For example, cable companies who own pay movie channels have been known to remove or bar competing programmers from their systems.⁴³ Similarly, cable-owned programming services have been denied to cable’s competitors, such as multichannel, multipoint distribution system (MMDS).⁴⁴

It is predictable that those with control of critical facilities will use that control to benefit their vertically-integrated corporate siblings. Whether similar discriminatory behavior will be the case with IBNs depends on a number of variables. Will IBNs operate as common carriers? Will they be owned by local telephone companies, cable companies or third parties? And will IBN operators be permitted to offer their own programming and services?

For policy makers and regulators, the task is to design a regulatory system which prohibits anti-competitive refusals to deal regardless of the eventual industry structure. The choice of a regulatory structure should reflect these considerations. Once that structure is chosen, pro-competitive safeguards should be put in place immediately.

Initially, the physical architecture of the IBN must be required to be one that encourages multiple users. One possible model is Open Network Architecture (ONA) which the FCC required the Bell Operating Companies to adopt prior to offering enhanced services.⁴⁵ While the FCC declined to adopt specific technical requirements, the guidelines of the Justice Department are useful for understanding the components of an ONA. The Justice Department defined ONA as a regimen that “encourages dominant carriers to implement technological change that, by decreasing competitive risks, will reduce the need for regulation.”⁴⁶ The heart of this architecture is that it is:

- transparent for the transmission of information;
- open to all service providers in such a way as to make discrimination by the carrier difficult or impossible; and

- designed to make it easy to detect carrier cross-subsidization. Any authorization for IBN should include a similar architectural requirement.

Specific policies requiring open access should be in place before the system is built. Whether the IBN operator is permitted to offer programming and information services or is able to enter into exclusive lease arrangements with service providers there would be incentive to discriminate against other providers. There should be an explicit requirement that the IBN offer service to all customers on a non-discriminatory basis.⁴⁷ No IBN operator should be permitted to harm a direct or indirect competitor either by denying service or offering inferior service. It would be both socially desirable and economically efficient to create a system in which, unlike the cable industry, programs and services only survive when there is marketplace demand for them, and not simply because they are protected from competition by the monopoly conduit. It is also important that those entering the IBN business know from the start that they can derive no profit from anti-competitive practices.

6. Whose Speech Is It Anyway?

A final issue that needs to be considered is whether an IBN operator should be legally responsible for illegal, libelous and otherwise undesirable material merely because it has been carried over the IBN network.

Some telephone companies have been warned that they will be held responsible for the services they carry. Mountain Bell was threatened with legal action by a local prosecutor for carrying dial-a-porn service in violation of a state law barring the distribution of explicit sexual material to minors.⁴⁸ The service was immediately discontinued.

In contrast, cable operators, who have been barred from interfering with public access programs have also been immunized against liability for such programming.⁴⁹ An early FCC rule holding cable operators liable for obscene access programming was struck down by a court because the FCC forced the operator to serve as, "both judge and jury, and subjected the cable user's First Amendment rights to decision by an unqualified private citizen."⁵⁰

In order to avoid the recurrence of unqualified censorship (i.e., lacking legal acumen and without limitation) IBN operators need protection similar to that provided to cable operators. The IBN operator is not capable of prescreening all communication to determine the propriety of content. Moreover, the operator is not qualified to make the exceedingly difficult legal judgments about what constitutes protected speech.

Each individual programmer and service provider should be held strictly liable for the communication they produce. IBN operators should only be held legally accountable for the programming over which they have control.

7. Conclusion

The Supreme Court has stated that, "Each method of communicating ideas is a law unto itself, and that law must reflect the differing natures, values, abuses, and dangers of each method."⁵¹ This principle applies not only to constitutional adjudication but to policy makers as well. The technology and economics of IBNs will require a legal framework that is sensitive to its nature.

Regulators do not need to reinvent the wheel or wait for crises to arise. Our previous experience with other forms of electronic communication illustrate many of the pitfalls that could ensnare IBN as well as many of the possible solutions.

Preliminary pro-competitive, pro-diversity, pro-privacy and pro-security measures can all be implemented before the first digital pulse is detected in the broadband cable. This will permit better business planning by those involved in the industry, inspire trust in the system by others, and avoid the unnecessary and wasteful repetition of old legal battles. Let history be our guide in creating a legal framework that will permit IBNs to reach their full, though as yet unknown, potential.

Notes

1. There is one critical issue that will have to be resolved — the regulatory status of IBNs. Will IBNs be common carriers? Who is permitted to own IBNs? Will the government regulate the rates and business practices of IBNs? These issues have been well analyzed and will not be discussed here. See Botein, "Regulatory Status: A Preliminary Inquiry," in this volume.
2. 18 U.S.C. § 1030(3).
3. 18 U.S.C. § 2511.
4. 18 U.S.C. § 2510(1).
5. See *Brown v. Johnston*, 328 N.W.2d 510 (Iowa), cert. den. 463 U.S. 1208 (1983).
6. See *Carlin Communications, Inc. v. FCC*, 837 F.2d, 546, 557 n.4 (2nd Cir. 1988).
7. The cable company ultimately agreed to provide only aggregate viewing data that did not disclose the names of individuals. See D. Nash and J. Smith, *Interactive Home Media and Privacy* 52-57 (1981).
8. 47 U.S.C. § 551 (a)(2).
9. 47 U.S.C. § 551(b)(2).
10. H.R.Rep. No. 934, 98th Cong., 2d Sess. 77 (1984). (This legislative history to the Cable Act is generally termed "House Report.") The only exception to the requirement for "positive consent" is for the distribution of subscribers' names and addresses for mailing list purposes. The information that may be given out pursuant to this exception is quite limited; no private data, such as the choice of programming viewed or transactions made over the system, may be conveyed. 47 U.S.C. § 551(c)(2)(C).

11. 47 U.S.C. § 551(e); 15 U.S.C. § 1681c.
12. Privacy Protection Study Commission, *Personal Privacy in an Information Society*, 362 (1977).
13. 47 U.S.C. § 551(h).
14. 47 U.S.C. § 551(c)(2) and (h); House Report, at 77-79.
15. This is similar to the Cable Act's requirement that cable operators give annual notice of privacy rights to subscribers. 47 U.S.C. § 551(a).
16. 15 U.S.C. 1681i. The Cable Act requires that subscribers be given a "reasonable opportunity to correct any error in information," 47 U.S.C. 551(d), but does not detail the procedures.
17. Such a requirement is noticeably absent from the Cable Act.
18. *Miller v. California*, 413 U.S. 15, 24 (1973). Legal obscenity is frequently referred to as "Miller obscene".
19. *Ginsberg v. New York*, 390 U.S. 629 (1968).
20. *Bolger v. Young's Drug Products Corp.* 463 U.S. 60 (1983) [quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)].
21. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).
22. *In Re Infinity Broadcasting*, 3 FCC Rd 930 (1987). The original definition of indecency also included the limitation that a determination of offensiveness must also consider whether a broadcast occurred "at times of the day when there is a reasonable risk that children may be in the audience." *FCC v. Pacifica*, 438 F.2d at 732 [quoting FCC regulations, 56 FCC 2d 94, 98 (1975)]. Under current federal law, indecent broadcasts are banned 24 hours a day. 18 U.S.C. This total ban may be susceptible to challenge since it fails to consider whether the need to protect children outweighs the interests of adults from obtaining the material. See *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).
23. *FCC v. Pacifica*, 438 U.S. at 748.
24. It is a federal criminal offense to transmit obscene cable programming, punishable by a \$10,000 fine or imprisonment for up to two years. 47 U.S.C. § 544 and 18 U.S.C. § 1468.
25. *Wilkinson v. Jones*, 107 S.Ct. 1559 (1987) summarily aff'g. 800 F.2d 989 (10th Cir. 1986), aff'g. *Community Television, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D.Utah 1985); *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985); *Community Television, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 986 (D. Utah 1982). Although the Supreme Court affirmed a decision striking down a cable indecency law, because the Court did not issue an opinion, it is not certain that all cable indecency laws are invalid. See Meyerson, *The Right to Speak, The Right to Hear, and the Right Not to Hear: The Technological Resolution to the Cable / Pornography Debate*, 21 Mich. J. Leg. Ref. 137, 156-57 (1987).
26. The Cable Act requires cable operators to make such devices available to all subscribers who request them. 47 U.S.C. § 544 (d)(2).

27. 47 U.S.C. § 223 (b).
28. FCC regulations promulgated in the Third Report and Order, *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials*, 2 FCC Rcd. 2714 (1987) were finally upheld in *Carlin Communications, Inc. v. FCC*, 837 F.2d 546 (2d Cir. 1988) ("Carlin III"), after previous rules were struck down in *Carlin Communications, Inc. v. FCC*, 749 F.2d 113 (2d Cir. 1984) ("Carlin I") and *Carlin Communications, Inc. v. FCC*, 787 F.2d 846 (2d Cir. 1986) ("Carlin II").
29. *Carlin I*, 749 F.2d 113 (2d Cir. 1984).
30. *Carlin II*, 787 F.2d 846 (2d Cir. 1986).
31. The court added that the FCC would have to reconsider its ruling were a simpler protective device to become available. Specifically, the court referred to a system whereby the service provider would precede its message with a three-tone sound. An inexpensive listening device, installed at home phones, would immediately disconnect the telephone line from all subscribers wishing to block the service. The court said that if this device were technically feasible, it might be the least restrictive means for regulating dial-a-porn. *Carlin III*, 837 F.2d at 556.
32. *Carlin III*, 837 F.2d at 560.
33. 47 U.S.C. § 223(b), amended by Pub.L. 100-297, 102 Stat. 424 (1988). The law also removed the FCC's rules, on the theory that special protections were no longer needed now that a total ban was in effect. Later in 1988, this law was further amended to permit enforcement of the dial-a-porn ban through criminal prosecutions, but not by the FCC. Pub.L. 100-690, 102 Stat. 4502 (1988).
34. *Sable Communications of California, Inc. v. FCC*, 109 S.Ct. 2829 (1989).
35. *Sable*, 109 S.Ct. at 2837.
36. *Sable*, 109 S.Ct. at 2837.
37. *Sable*, 109 S.Ct. at 2838.
38. *Sable*, 109 S.Ct. at 2839.
39. Quoted in Pepper, *Through the Looking Glass: Integrated Broadband Networks, Regulatory Policies, and Institutional Change* 66 (OPP Working Paper No. 24; Office of Plans and Policy, FCC, November 1988) (emphasis added).
40. *Carlin Communications Inc., v. Mountain States Telephone and Telegraph Co.*, 827 F.2d 1291, 1294 (9th Cir. 1987).
41. *MCI Communication. Corp. v. AT& T*, 708 F.2d 1081 (7th Cir.) cert. den. 464 U.S. 891 (1983).
42. See, e.g., *TV Signal Company of Aberdeen v. AT&T*, 617 F.2d 1302 (8th Cir. 1980). The Federal Pole Attachment Act permits the regulation of the rate a utility charges a cable operator for use of the pole. 47 U.S.C. § 224.

43. See, e.g., *New York Citizens Committee on Cable TV v. Manhattan Cable TV, Inc.*, 651 F.Supp. 802 (S.D.N.Y. 1986). See also Nadel, *COMCAR: A Marketplace Cable Television Franchise Structure*, 20 Harv. J. on Legis. 541, 548, n.40 (1983), describing how one cable operator refused to carry a channel offering twenty-four-hour news so that it could offer its own channel instead.

44. See NTIA, *Video Program Distribution and Cable Television: Current Policy Issues and Recommendations* 89-107 (1988). The NTIA found no serious threat to competition as a result of refusal to deal on the part of vertically integrated companies. It is possible for one to be more skeptical and concerned about anti-competitive motivations and effect. The report describes the about-face performed by the Cable News Network which suddenly adopted a policy against selling to MMDS shortly after several cable operators acquired a financial interest in its parent company. The report also ignores the issue of how new competitors for existing cable programs will be able to enter the business when they must gain access to systems owning the very services with which they want to compete.

45. Amendment of Sections 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, Report and Order, 104 FCC 2d 958 (1986) ("Computer III"). AT&T was largely excused from these requirements in 2 FCC Rcd 3035 (1987) ("Phase I Recon. Order").

46. *Computer III*, 104 FCC 2d at 1060.

47. See Pepper, note *supra*, at 57.

48. *Carlin Communications v. Mountain State Tel. & Tel.*, 827 F.2d 1291, 1293 (9th Cir. 1987).

49. 47 U.S.C. §§ 531(e) and 558.

50. *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1057 (8th Cir. 1978), *aff'd.* on other grounds, 440 U.S. 689 (1970).

51. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) [quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J. concurring)].