

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

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1. INTRODUCTION

The current multiple network environment -- broadcast, cable television, telephone, and computer networks -- in the United States is undergoing significant change. Network functions and the information they carry are merging as converging fiber optic, telephone, and computer technologies allow the integration of video, voice, and data information.¹ This integration has created opportunities for expanded access and speech activities in the workplace, the marketplace, and the home.

Regulatory distinctions between video distribution and public switched networks are disintegrating as the government increasingly allows inter-industry competition in the nation's video distribution, long distance, and local telephone markets.² Meanwhile, network video, voice, and data services are increasingly provided by private as opposed to public networks.

The movement from public to private networks can be seen in two recent developments. For instance, in video distribution, the emergence of cable television represents a shift from "public/free" over the air broadcast television to "private/subscriber" driven cable television services. In telephony, public common carriers have begun to lose market share as large corporations and other sophisticated users demand more specialized services that private carriers are able to provide more efficiently. This is because private carriers have no obligation to serve the less profitable segments of the public. Thus network technology applications which facilitated broad public access to information and/or interactive speech are giving way to specialized private networks which may limit access based on market demand and profit maximization.

The shift in market reality has been mirrored by a shift in government policy regarding future networks. For example, the government is increasingly relying on private market driven investment to fund the building of the future broadband electronic super-highway. The Clinton Administration has made clear that they have resolved the question of who will build the electronic highways in favor of private industry.³

Administration reliance on private sector investment and privatization of network infrastructure is a pragmatic policy developed in a time of decreasing public revenues. However, sole reliance on pro competition policies will not adequately protect the individual and group speech and related activities potentially fostered by broadband intelligent networks or existing telecommunications networks. In the process of managing market entry and firm competition, current US competition policies run the risk of ceding creation and control of speech activities to private firms. This is particularly true to the extent the First Amendment

is read as a negative bar to government action rather than an affirmative protection for speech activities.

Pro-competitive privatization policies do not directly address the need for preserving and expanding network access and electronic speech activities as an appropriate pro-social goal of American democracy because the policies possess no incentive structure to assure broad public access to the network. Under such policies, the provision of access [and subsequent speech "rights"] is a function of market demand for access and services which is, in turn, a function of the economic distribution of wealth and the network provider's perception of a market's desirability. Lack of wealth or lack of perceived desirability results in decisions to eschew deployment of infrastructure or the provision of services. The net result of such decisions in a broadband interactive network context is to deny access and speech opportunities.

The universal access and service debate addresses public policy concerns about how society may blunt the negative impact of pro-competitive network development policies on the economically disadvantaged. However, even this debate fails to address the impact of the provider's perceptions and assumptions about a potential market's or a potential user's desirability.

Because pro-competitive policies do not address the above-mentioned concerns, reliance on such policies creates a significant risk of losing opportunities for electronic speech and its related activities which might accrue to significant portions of American society. Consequently the definition, preservation, and expansion of electronic speech and its related activities must be elevated to a priority policy goal and incorporated within the broader policy framework of the government's network infrastructure policies.

At least one state has recognized the importance of elevating electronic speech policies to co-equal status with pro-competition policies. New York has recently published a document developed by the Governor's Telecommunications Exchange. The document, entitled "Connecting to the Future," identifies numerous policies which it is suggested the state pursue in acquiring the economic benefits of an advanced telecommunications infrastructure. Among the key recommendations is reliance on a competitive market to ensure greater consumer choice and higher quality service. However, unlike the federal government's NII report, the New York report acknowledges that the state retains an obligation to ensure a free flow of information and ideas accessible to all.⁴

As the movement from public to private provision of network services occurs, one of the critical questions for First Amendment theorists and scholars concerned with mass media and telecommunications is what access and speech rights will network owners and users have after the convergence and privatizing of the mass media and telecommunications networks?⁵

The growing reliance on network services provided by private as opposed to public common carriers, poses potential dangers to access and broad based speech opportunities. Privatizing the delivery of network services can lead to the concentration of control over access and content in the hands of private network owners. Because of the historic tendency to equate speech rights with ownership of the means of transmission, privatizing the merging of technology, network function and information streams could transfer control over access and speech activities from the current shared public/private constitutional arrangement to a private/contractual arrangements.⁶

Inherent in the status of ownership, is an underlying bundle of property rights which include control over who may have access to the network owners' facilities and/or services.

These rights are often referred to as rights to create, publish and/or distribute information. While the degree of control over access varies with the type of owner, ultimately, as long as ownership includes the right to decide access, some segment of potential users are likely to be excluded for a variety of oft-times unrelated reasons ranging from particular pricing or service configurations, to equipment requirements, information format, capacity needs, or discrimination based on economic or normative value considerations regarding identity of speaker or content of speech. This is so because private network providers may opt to act as publishers or distributors of information instead of carriers.

Such a result could be detrimental to the potential speech and access opportunities of existing and future network users of video, voice, and data network information services.⁷ Private owners may not be motivated by public interest considerations of access and inclusion. Instead, where a private corporation is using an internal network, its major motivation to provide access and speech to their employees is utilitarian. A private network owner's major motivation to serve a particular individual or group of customers depends (in the most ideal sense) upon the desirability of that individual or market as a customer base and their ability to pay. Because these decisions about who to serve, what is said, and to whom, are private, there is arguably less opportunity to rest the justification for access and speech rights upon constitutional grounds given the alleged absence of state action.⁸

For instance, government regulation of broadcasting has not been deemed sufficient justification for finding that the editorial decisions of broadcasters constitute state action.⁹ Recently, several circuit courts have held that decisions by regulated telephone companies to deny access or billing services to information providers of indecent communication do not constitute state action.¹⁰ The weight of precedent would tend to support a conclusion that actions to deny access or speech conducted by regulated cable operators and telephone companies are constitutionally permissible, although they would be constitutionally proscribed if conducted by the government.¹¹

Under such circumstances it is reasonable to ask, will privatizing the merged multi-function, multi-media networks result in speech rights only for network owners and those they employ or decide to serve? Who will serve people who own no network or are not selected as desirable markets? In an era of privatized carriage in the provision of network services, what ability will the government have to assure access and speech rights for the non-facilities based public?

This article begins the process of answering these questions. It defines private networks and closed user groups in relation to public networks and examines the current practices by which the owners of networks limit the access and speech activities of employees as well as potential and actual customers and subscribers on their networks. It then identifies and addresses some of the potential constitutional questions raised by such practices. In the process it identifies the current boundaries of the network access and speech continuum in the United States and addresses how these boundaries may change in light of evolving technology and government policy.¹²

The article concludes that a pragmatic balance must be struck between the speech rights of network owner providers and network users. In the area of employee access and speech rights, a three-way balance must be struck between the network owners' legitimate business needs; the employees' access, speech and privacy rights; and public policy concerns including the public's right to know. Ultimately, employee speech rights should not turn on whether they are employed by public or private firms. Rather, at minimum, employee speech "rights

should encompass concerns regarding wages and working conditions, as well as safety and product quality issues about which the public may have interest.¹³

In the broader area of network access and service provision, the article concludes that current government efforts to rely on network privatization to assure the development and deployment of network infrastructure and services are problematic. This reliance, when combined with legislative and judicial decisions expanding network provider control over access and speech activities, may result in the loss of significant access and speech opportunities for network users and subscribers.

The government should acknowledge and protect the access and speech rights of network providers. There are a host of legitimate reasons why a network owner would deny access or speech to potential network users. However, the government also must act to ensure access and speech rights for potential public and private network users, whether they are subscribers or employees.

In addition, the government should use pro-active policies to discourage censorship by network owners. Network owners should have the right to speak but not the sole right to speak. Network owners should have obligations and incentives to be as inclusive and accessible as possible in what they carry and who they serve.

One way to accomplish these goals is to remove some of the liability network owners face for the speech of network users and subscribers. Network owners should be free to select the extent to which they will exercise editorial control without government requirement. Absent the assertion of editorial control by the network provider, responsibility and liability for speech should reside with the speaker.

Another way to encourage access and broad speech is to require interconnection among public and private networks. This gives all network users more potential access to a broader array of services and information, as well as to each other. As a result, the infrastructure does not serve to fragment the national polity or its discourse. Instead, it can be used as a positive tool for achieving an inclusive national and international dialogue.

Finally, incentives to insure universal access and services are needed. These incentives would include subsidies targeted to those subscribers who might not otherwise acquire access or needed services. They would also include active use of the anti-trust laws and structural safeguard policies such as open network architecture.

2. NETWORKS AND CLOSED USER GROUPS DEFINED

2.1. General Characteristics

In their most basic manifestation, networks are collections of interconnected users.¹⁴ They can be defined in terms numerous characteristics, including: a.) technology [spectrum, wire, fiber]; b.) information [video, voice, data]; c.) ownership [private or public]; d.) control of content [editor, hybrid, common carrier]; and e.) control of network access and/or functionality. This article will discuss them primarily in terms of ownership of facilities, control of network access and/or functionality, and, ultimately, control of content. In the process, it will acknowledge the various characteristics as they apply in addressing the impact of owner control on the user subscriber and third parties.

2.2. The Network Lexicon

2.2.1. Public Switched Network: "Open Network"

The commercial common carrier network owners own the network facilities and retain control of all levels of network functionality.¹⁵ There are no predetermined limits to who may or may not join the network. All who timely pay the subscription fee [tariff rate for the particular class and volume of service] may gain access and enjoy usage.¹⁶ Because the network is available to virtually all potential users,¹⁷ it may be defined as being "open."¹⁸ These networks are the long distance, regional, and local public switched networks.

2.2.2. Virtual Private Networks

In contrast to the public switched networks, virtual private networks (VANS), offer their customers access to reserved private line capacity on the public switched telephone network (PSTN).¹⁹ VPN is essentially a long-distance service in the USA. In the case of VANS, the user manages network applications while the carrier manages all other levels of network functionality.²⁰ It is anticipated that by 1997, VPN services will account for 17 percent of the domestic service revenues of the three biggest US long-distance carriers -- AT&T, MCI, and Sprint.²¹

2.2.3. Private Networks

In the case of private networks, all telecommunications facilities are owned by an entity other than a government certified commercial common carrier, or, the user leases dedicated lines from certified carriers but maintains control over both ends of the communications channel. In the case of the latter, the user typically owns facilities on its premises [local area networks or private branch exchanges i.e. "intra-building private networks"] and leases from carriers anything that crosses public rights of way. For example, the company may lease a dedicated T-1 between two privately owned private branch exchanges (PBXs). Network usage is confined to the owner and its affiliates and is not usually shared or aggregated on a commercial basis.²²

2.2.4. Closed User Groups

A private network may be open or closed. However, most closed user group networks are based on privately owned or dedicated facilities. Thus most closed user group networks are private.²³ Closed user groups are large volume users which tend to communicate with each other "intensely." They combine to form alternative network associations for much of their communications needs. Associations' networks may have specialized performance attributes related to group needs.²⁴

2.2.5. Hybrid Networks

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

2.2.6. Other Networks Distinguished

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

2.3. Convergence and Metamorphosis: From Cable and Telephony to Broadband Networks.

However, it is argued that cable networks and local telephone networks likely will evolve into the switched broadband interactive networks of the near future.²⁵ Should this be true, the resulting networks could span the gamut from private networks, virtual private networks, and hybrid networks, to public (common carrier) networks, and they could incorporate a potential range of access options from non-discriminatory access²⁶, mandated leased and/or tariffed access,²⁷ free access,²⁸ to private access by negotiated contract or ownership. Speech options could range from owner control of a portion of available capacity with unrestricted user speech on the remaining portion, to owner control of all capacity and ultimately all speech allowed on the network. This spectrum of alternative access and speech relationships is, in essence, the amalgam of access and speech relationships currently residing on cable (mandated leased or free access) and telecommunications (non discriminatory and negotiated contract access) networks.

In this context, litigation challenging the must-carry rules of the Cable Competition and Consumer Protection Act of 1992, and the telco-cable cross-ownership prohibition of the Cable Communication Policy Act of 1984, as well as several e-mail and electronic bulletin board service cases percolating through the judicial system, may establish much of the scope of access and speech rights network owners, providers, and users will have.²⁹

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

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

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

3.1. Owner Imposed Limitations on Access

3.1.1. Subscriber/User Initiated Access to Third Party Users and Networks

3.1.1.1. Network Owner/Employer Restrictions on Outgoing Calls

Employers may be subscribers to the public switched networks, virtual private network subscribers, owners of their own networks or a collection or association of users forming a closed user group. They may be private or public firms. In any event, because of the utility of long distance and electronic mail (e-mail), as well as the growth in availability of 800 and 900 number services, employers often find it necessary to block access to certain networks and phone services to limit corporate expenses. Call blocking, for instance, is used to limit employee access to the above-mentioned services.³⁰ In the process, employees are denied access to the networks over which such services are provided, and to the information providers residing at the other end of the line. Federal and municipal government call blocking restrictions on access to dial-a-porn and long distance calls are well known examples.³¹ Employers also engage in call monitoring as a means of policing their restrictions on network usage.³²

Employers' justifications for engaging in these practices include the need to manage or reduce costs or fraud involved in unauthorized 900 number and e-mail calls which have cost companies hundreds of thousands of dollars. In addition some companies use computers to monitor customer service employees' performance, such as keystrokes per minute, time between phone calls, length of breaks, and number of errors.³³

There are potential dangers inherent in call blocking and monitoring which raise significant public policy issues. Call blocking has been argued to implicate first amendment concerns because the employer's limitations on access to the network and hence on those an employee might contact, constitute limitations on potential speech activities in which the employee might otherwise engage. Call monitoring is said to raise issues of worker privacy, as the employee's expectation of privacy is infringed by periodic monitoring.³⁴ Call blocking and monitoring activities raise nettlesome problems for the public's "right-to-know" as well. For these practices may also be used to detect whistle blowers instead of individuals calling dial-a-porn providers and other unauthorized users.³⁵

Some observers argue that employer/network owner control of access or usage of the corporate telephone or network affects employee's constitutional speech and/or privacy rights.³⁶ Such arguments have met with only limited success to date. The speech activities upon which the articulation of "new" employee rights are based nevertheless occur within the traditional confines of the work place, conducted over technologies which are owned and/or paid for by the employer. Even though e-mail and intelligent network technologies provide new opportunities for speech activities, the articulation of these activities as rights squarely pits them against the heretofore established and legally recognized property rights of the employer/network owner.

3.1.1.2. Third Party Access to Private Network or VPN Facilities

Firms also attempt to limit third party access to their networks to protect against toll fraud.³⁷ Computerized telephone equipment such as voice mail, often help companies conduct business with greater efficiency and lower cost. However, they also often provide access to electronic thieves who steal thousands of dollars of long-distance telephone service.

Unauthorized entry can be accomplished by calling a company's toll-free 800 number or a voice mailbox and using a computer with an automatic dialer to break the security code and gain access to the company's telephone system and outgoing lines.³⁸ Electronic bulletin boards are sometimes used to exchange generic passwords which provide access company to maintenance ports; exchange programming instructions for various systems; or procure programming manuals for voice systems enabling unauthorized parties to gain operational control, including the ability to unblock restrictions on international dialing and turn off on-site call accounting equipment.³⁹ According to some experts, computer hacking, may cost U.S. companies between \$ 2.2 billion and \$ 4 billion nationally.⁴⁰

In a less arcane realm, e-mail, voice-mail, and telephony systems may be used by union organizers, law enforcement authorities, friends, or family members to communicate with employees. However, efforts of union organizers to make use of the employer owned telecommunications systems and/or networks to communicate with employees under section 7 of the National Labor Relations Act (NLRA),⁴¹ may prove unsuccessful. As a practical matter, recent precedent supports the employer's right to bar union access absent a showing that the union possesses no other reasonable means of communicating its organizational message to employees.⁴²

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

Some firms cooperate to develop jointly owned networks (JONs). JONs can increase the efficiency and competitiveness of their owners.⁴³ In the process, JONs can adversely affect the relative market position of non-owners by creating new barriers to market entry and exit which are often controlled by the JON owners.⁴⁴ JON owners can raise barriers to network (and often, market) access for competitors by establishing, maintaining, and changing the network's pricing structure as well as applications, standards, protocols, and internal control procedures.⁴⁵ For instance, it is alleged that owners of major airline reservation systems have acted in anti-competitive ways by using their systems to minimize the bookings of competing non-owners.⁴⁶

3.2. Network Owners' Exercise of Content Controls

Public and private firms also use call monitoring to manage employee communications to the firm's customers. Telemarketing and travel reservations services are two common examples.⁴⁷ There are also numerous content/subject matter restrictions. Computer networks such as Prodigy have asserted some control over bulletin board content in response to various user protests regarding speech on controversial subjects.⁴⁸ Some other bulletin board providers have no policy regarding what may or may not be said over their facilities. For them, the communicator of the information bears the ultimate responsibility for the content. Their position has met with judicial approval in one instance.⁴⁹

Aside from firm business oriented restrictions on access and in house, on-line speech, there are the traditional limits on audience or subscriber access and speech in the realm of broadcasting, and the evolving limits in cable television and plain old telephone service (POTS). The First Amendment protects the exercise of speech and editorial control over programming decisions and transmissions by broadcast licensees from the assertion of access and speech rights by viewers and other programmers.⁵⁰ It protects the exercise of speech and editorial discretion by cable television operators.⁵¹ but portions of the subscribing public

and other programmers are afforded access and speech opportunities as well.⁵² The First Amendment also has been held to protect subscriber and programmer access to telephone networks even where the voice communication is indecent.⁵³

However, recent decisions in the area of telephony and cable may be harbingers of a revision of access and speech rights afforded network owners and subscribers. The First Amendment has been held to accord local exchange network operators the right to engage in video communication to their service area subscribers.⁵⁴ And, telephone common carriers are viewed by at least one Supreme Court Justice and two circuit courts as private speakers possessing the right to refuse carriage or billing services to subscribers seeking carriage of indecent programming the carrier deems undesirable.⁵⁵ The potential impact of these decisions is that common carriers which have heretofore been prohibited from exercising editorial control over the content of speech may do so either as constitutionally protected speakers,⁵⁶ or, under the guise of a refusal to transact business.⁵⁷

By comparison, in a somewhat analogous case regarding the regulation of indecent programming on cable television access and leased access channels, a three judge panel of the D.C. Circuit did not adopt the Second and Ninth Circuits' private actor analysis as it was applied to telephony. It declined to view the cable operator as a private actor in the context of regulating indecency on access channels on cable television.⁵⁸ The D.C. Circuit noted that unlike the government-compelled offering of leased and public access channels in cable, the billing services provided by telephone companies were voluntary and therefore private.⁵⁹ The state action/private action distinction relied upon by the Circuit Court in *Alliance*, could have a profound effect on future regulation of customer access to the networks of forborne carriers.⁶⁰ They, like the local telephone companies' offering of billing services, offer their common carrier communications services on a voluntary basis. Thus, per the *Alliance for Media* analysis, they would free to engage in discriminatory provision of services.⁶¹

More important however, the dial-a-porn precedents have potentially serious and negative implications for network user access to common carrier telephone networks. Read broadly, these precedents allow telephone common carriers to deny carriage to speakers for private business reasons or because the carriers are able to classify the requested service as "non common carriage" despite the fact that denial of such service precludes viable access to the network.

When these precedents are combined with the recent holding that local telephone companies possesses constitutional speech rights, the constitutional construct of the content neutral common carrier is severely undermined. In the worst case scenario, telephone companies would be free to deny access and speech rights to others via the constitutional exercise of editorial control over their networks or by business fiat.

4. THE CONSTITUTIONAL DIMENSION

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

Under such circumstances when may we say that a user-member or a potential outside communicator is impermissibly constrained from gaining access or engaging in speech? Is it possible to distinguish between legitimate business needs and impermissible constraints on speech activities? At first blush, based on the prior discussion, one could suggest that permissible firm needs include all of those previously listed above.⁶² By the same token, others might argue that impermissible firm needs include many of the same goals articulated as legitimate.⁶³

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

4.1. Network as Business Asset or Tool

4.1.1. Employer/Employee Relationships

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

Recently there have been a spate of law suits filed by employees alleging that their constitutional rights have been violated when employers monitored their conversations over e-mail or telephone networks.⁶⁴ None of the suits appear to have been judicially resolved to date,⁶⁵ but there are some indications of the extent of protection afforded employee speech. For instance, most experts agree that while the Federal Electronic Communications Privacy Act of 1986 protects the privacy of electronic messages sent through public networks to which individuals or companies subscribe, it does not apply to internal E mail.⁶⁶ Thus, to the extent that employees enjoy speech rights on company e-mail facilities, those rights are limited to communication over public e-mail systems. Employers retain the right to restrict access to, and monitor internal e-mail.

4.1.1.1. Public Employer/Employee

The courts have held that a public employee has First Amendment constitutional protection for speech about "matters" of public concern.⁶⁷ In cases where the employee is acting as a "whistle-blower," public policy and legislation in an increasing number of jurisdictions supports a public employee's right to speak.⁶⁸ It is clear that employees do not enjoy an unfettered right of speech, however. For instance, current cases allow the employer to deny such speech where it may disrupt the work place.⁶⁹

4.1.1.2. Private Employer/Employee

Under the National Labor Relations Act, an employee has statutory protection for speech concerning work related activities.⁷⁰ There are also "whistle-blower" statutes in many states which protect employee speech about company wrongdoing.⁷¹ Otherwise, under the "work at will" doctrine, the employee ostensibly has no recognized speech rights in the face of legitimate company interests, aside from unionization related issues.⁷² The scope of an employee's statutory license to use company e-mail and/or telecommunications facilities to realize their work related speech right is not established, however.⁷³

4.1.2. Closed User Group and Members (Actual and Potential)

Where firms or users associate via network facilities which they have acquired, they may exercise control over member and non member network access and speech.⁷⁴

While the scope of a closed User Groups' [Private Network's] liability for actionable speech is unsettled, it seems intuitively appropriate that its liability track that of bulletin board sysops such as CompuServe and Prodigy.⁷⁵ The more extensive its control over the communication of content, the more extensive the liability for that content ought to be. At the same time, the more extensive the control of content, the less extensive individual user speech rights will be on that network.

4.2. Network as Product or Service: Relationships between Network Owner Providers and Users

4.2.1. Network Owner Provider and Subscriber Users (Common Carriage)

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

As competition has increased, regulators have tended to afford network owner providers greater flexibility in providing services under contract.⁷⁶ Even where services are not provided pursuant to contract, network owner providers have been granted greater flexibility in providing many services under tariff.⁷⁷ Where the services are offered on a common carrier or quasi-common carrier basis, the network provider has tended to limit network access based on the type and class of service, network integrity, security, and capacity.

Aside from government mandated responsibilities to foreclose opportunities for harassing, indecent, or obscene speech to reach protected subscribers, carriers have tended to eschew control of information content thereby foregoing liability for customer communication. This practice has been sanctioned by federal and many state regulatory bodies. Also, carriers have traditionally sought to limit their liability for loss or damage to customer communications.⁷⁸ Until now, these efforts have been successful.⁷⁹

However, a recent court decision has held that telecommunications network owners have electronic video speech rights as extensive as cable video distribution network providers.⁸⁰

If the case is upheld on appeal, and if the telecommunications network providers exercise their speech and editorial rights by limiting the access and speech of users, attempts to limit speech related liabilities may, and increasingly should, prove less successful.⁸¹

For instance, in a related area, bulletin board/e-mail providers have the ability to control access and screen speech content on their systems.⁸² While some do not actively seek to control access or more importantly, content, others do. As a result, while one provider has been successful in avoiding liability for libelous statements made by one of its users, it is not clear that others will fare as well.⁸³ Moreover, the decision to control content places the service provider in a difficult position when it either fails to prohibit offensive speech quickly or prosecutes other speech in a seemingly biased manner.⁸⁴

4.2.2. Network Owner/Information Provider and Consumer/Subscribers

4.2.2.1. Telephony [POTS] and Telecommunications

The need for interconnection and the economies of scale inherent in provision of local telephone service led in significant part to the creation of government sanctioned telephone monopolies. Government then sought to assure the public access to the monopoly provider by requiring that the provider not discriminate between customers on the basis of facilities or the price paid for the services provided.⁸⁵

As a further means of assuring non-discrimination, the telephone company was not allowed any control over the content of information it transmitted. More recently, however, telephone companies have been allowed to deny billing and collection services to dial-a-porn providers deemed undesirable by the carriers.⁸⁶ Also, government requirements that long distance common carriers may not engage in the provision of information services and local common carriers may not provide electronic video services within their local markets have been overturned. According to recent court opinions, local telcos now have video electronic speech rights.⁸⁷ Should the decision be upheld on appeal, there is still a question of how this newly articulated speech right will merge with the telco owner's property right vis a vis control of access and content.⁸⁸ Many potential competitors and customers of local carriers possessing essential facilities have voiced concern over the potential for unfair competition.⁸⁹

In the area of switched, interactive telecommunications, the diverse set of relationships addressed above is expanding even farther as interactive video distribution capabilities come on line and user access to network functionalities increase via manipulation of network intelligence.⁹⁰ It is here that the greatest potential for increased access and electronic speech is to be found.⁹¹

As fiber optic, computer and switched telephony technologies merge, so do the heretofore separate network functions and information streams of telephony, broadcasting, cable and print.⁹² As this occurs, there is a potential danger that the network owner as the transmission provider and as a potential speaker, may experience a conflict of interest between the provision of network related services to users who, like the network owner, are also information providers. Newspaper publishers, cablecasters and broadcasters have raised this potential for conflict of interest as a reason for continuing the prohibition against local telephone companies' entry into the information and video distribution markets.⁹³ While these arguments have found sympathetic ears in Congress, they have proved less persuasive before the FCC and at least one district court.⁹⁴

Similar complaints have been raised in other instances where access to transmission and owner speech merge. These instances concern the exercise of access and content control by bulletin board service providers, and, the provision of access and speech related services by cable television media.⁹⁵

4.2.2.2. Computer Networks

According to a number of legal commentators, individual subscribers to commercial or private computer bulletin board services have no access rights. Access is garnered by contract, and control of access and ultimately speech resides, in the first instance, with the service provider or the system operator (sysop). While there is very little information on the criteria employed for denying initial access, revocation of access is the ultimate sanction employed by sysops to discipline miscreant member users.⁹⁶ There are options short of denial of access which are also employed.

At base, the rationale for sysop control of access is ownership of the system facilities. With regard to sysop content control, the recent *Cubby v. Compuserve* decision provides some indication of the considerations militating against sysop exercise of content control.⁹⁷ The greater the discernable control which the sysop exercises over access and content, the greater its potential liability to users and third parties for damage caused by the information's content.

In *Cubby*, Compuserve, an on-line information service provider, was sued, unsuccessfully, for the alleged libel of a third party competitor of a bulletin board provided on the service provider's system. In determining that Compuserve was not liable for the alleged libel, the court established by implication that heightened control of the communicated content would have resulted in liability.⁹⁸ In another libel action ultimately settled out of court, Prodigy, another sysop, was sued for an alleged libel of a third party by a Prodigy subscriber.⁹⁹ Unlike Compuserve and many other sysops, however, Prodigy distinguishes itself based on the extent of control it exercises over transmitted content.¹⁰⁰ As a consequence, there was speculation that Prodigy might not have easily extricated itself from liability.¹⁰¹

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

Historically, market entry and technological considerations have affected the apportionment of access and speech rights between media owner-providers and the public. While, as a practical matter, electronic speech has been protected under the constitution regardless of whether it is in a print,¹⁰² voice,¹⁰³ or video¹⁰⁴ format, traditional media owners in each industry have been accorded different First Amendment rights vis a vis users based on differing assessments of the ease of economic and technological entry into each market.

4.2.2.3.1. Broadcasting

The initial scarcity of broadcast frequencies relative to public demand for access resulted in the requirement that the broadcast licensee share its frequency with the public.¹⁰⁵ With FCC engineered deregulation of broadcasting, the fairness doctrine, community ascertainment regulations, and programming guidelines were abolished or seriously compromised.¹⁰⁶ Subsequent to deregulation and the abolition of the fairness doctrine, the

scope of access sharing was ultimately limited to candidates for political office.¹⁰⁷ Even before the fairness doctrine was "abolished," its potential power to require access had been significantly limited by judicial decisions.¹⁰⁸

The current scope of government-exercised content control over the broadcast licensee extends to the prohibition of speech which is libelous, indecent or obscene.¹⁰⁹ Users have a right to diverse information but no right to speak as individuals or information providers owner permission.

4.2.2.3.2. Cable Television

According to at least one legal scholar, government regulation of access to cable channels is justified because franchises are scarce due to the physical limits inherent in the use of public rights of way.¹¹⁰ The physical scarcity is further exacerbated by the economies of scale inherent in the provision of cable service.¹¹¹ For these reasons, the cable franchisee is required to share his/her channels of communication with the public and other information providers. Concerns about the continued availability of local news and public affairs programming as well as economic market and anticompetitive constraints alleged to have been imposed by cable firms have been used to justify limits on the control cable franchisees may exercise over broadcaster access to the cable networks.¹¹² The leased access, must carry and public access channels are an attempt by Congress to assure third party access to cable networks.¹¹³ According to some scholars, the leased access rules have proved only moderately successful. And, due to recent litigation, the must-carry requirements are under a potential constitutional cloud.¹¹⁴

The cable franchisee's control of communicated content is constrained by legal sanctions which may be imposed for libelous, indecent or obscene speech.¹¹⁵ In part due to the necessity to avoid government imposed sanctions, cable franchise owners are compelled to exert editorial control over matter provided by third party information providers which may be deemed indecent or obscene.¹¹⁶

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

5.1. Network as Asset

5.1.1. Private Firms and Closed User Groups

Where the network is the private asset of the firm, employee and third party efforts to assert first amendment rights of access or speech over internal communications systems will be limited.¹¹⁷ In the case of employees of private firms, the National Labor Relations Act may allow them to negotiate for speech rights provided the rights are exercised for the protest or discussion of working conditions.¹¹⁸ All arguments for fairness and ethics aside, beyond the narrow entitlement of the NLRA, employees of private firms enjoy little real access or speech rights to corporate network assets. Ultimately, the company network owner may limit and/or control access and speech.¹¹⁹

5.1.2. Public Firms

Employees of public [government] firms are similarly limited. The First Amendment has been interpreted to afford such employees the right to speak on matters of public interest.¹²⁰ They, like their private brethren also receive some protection from a variety of state "whistle blower" statutes. Aside from these protections, however, public employees have no rights of access or speech to internal communications systems. At least one commentator has forcefully argued that private and public employees should enjoy the same scope of speech rights encompassing comment on work and product quality related matters.¹²¹

Access to the networks of closed user groups is also limited.¹²² Here, absent a showing that the network asset is being used to unlawfully restrain competition,¹²³ the user group may exercise control over access and/or speech on virtually all aspects of the network. However, the exercise of control over access and speech carries a certain level of responsibility for actionable speech violations. The precise level of responsibility has yet to be measured, however, and may ultimately depend on the technology and the circumstances of each case.¹²⁴

5.2. Network as Product or Service

5.2.1. Convergence and Change: The Evolution of Speech Regulation in Traditional Media and Telecommunications

While the traditional regulatory apportionment of network provider and user access and speech remains virtually intact in the broadcasting, it is under challenge in cable and telephony. Congress's decision to impose must carry requirements on cable franchisees has been upheld for the moment.¹²⁵ The statute authorizing franchising authorities to require cable operators to provide public, educational and government (PEG) access channels,¹²⁶ and requiring cable operators to provide leased access channels¹²⁷ were held to be constitutionally permissible.¹²⁸

Congress's prohibition against local telco ownership of cable facilities in its service area and provision of video programming has been challenged and overturned in one district court. It too, is on appeal. Meanwhile, the cross-ownership ban is being challenged in other district courts as well.¹²⁹ The challenges to the must carry, PEG and leased access provisions as well as the telephone-cable cross ownership ban are significant because they provide several of the judicial pillars upon which regulation of the future electronic broadband networks will be built. This follows because the cases address the regulation of access and speech in cable and telephone, the two industries from which much of the broadband infrastructure is likely to emerge.¹³⁰ Thus, judicial pronouncements on the relative rights of network owners to provide information over their networks and to determine who may have access and speak over their facilities other than themselves, are critical to the evolution of speech rights on the new and evolving infrastructure.

A decision overturning the must carry rules is possible. Congress may have rested a significant portion of the justification for must carry on its desire to assure the continued broadcaster provision of local news and public affairs programming.¹³¹ And, evidence of economic harm may, upon closer analysis and examination of prior history, prove insufficient to establish a sufficient threat to the government's interest in the retention of viable broadcast stations.¹³² Moreover, Congress's efforts to establish evidence of broadcasting's economic demise prove no less effective than prior efforts by the FCC and broadcasters.¹³³

In 1984, Congress codified the FCC's telco-cable cross ownership rules in the Cable Communications Act of 1984.¹³⁴ The legislative history of section 613(b) of the 84 Act indicates that section 613(b) was intended to codify the then current FCC telco-cable cross-ownership rules prohibiting telephone companies from directly providing video programming to subscribers in their telephone markets.¹³⁵ The FCC subsequently reversed its earlier decision, and concluded that the public interest would be better served by partially lifting the cross ownership ban.¹³⁶ The Commission concluded that subject to safeguards, the public would receive significant benefits if telephone companies were allowed to provide cable television service. It tentatively concluded that "construction and operation of technologically advanced, integrated broadband networks by carriers for the purpose of providing video programming and other services [would] constitute good cause for a waiver of the prohibition."¹³⁷ However, Congress did not repeal its law.

In light of Congress's refusal to remove the prohibition, Bell Atlantic filed suit alleging that the 1984 Cable Act prohibition violates the First and Fifth Amendment rights of local exchange carriers as well as the First Amendment rights of subscribers. Bell Atlantic argued that video programming is a form of constitutionally protected speech which it is not allowed to present on its own network. According to the carrier, the statutory definition of video programming, the 84 Cable Act prohibition is a direct abridgement of Bell Atlantic's First Amendment rights because the company and its subsidiaries are prohibited from engaging in video speech.¹³⁸ Bell Atlantic has successfully plead its case before two courts.¹³⁹

Thus it is possible that the rules may be overturned under the reading of the law espoused by the dissent or the majority in *Turner*.

The ban is a content neutral restriction which incidentally affects speech. It is narrowly tailored to meet the substantial government interests in preventing anticompetitive abuses by telephone carriers possessing monopoly power and maintaining a competitive environment for broadband communications. User control over access and speech on cable television and local telephone switched networks, will be revised to accommodate increased network owner control. The scope of user access and speech rights most likely would be established by contract and reflect the relative bargaining power of the parties.¹⁴⁰ In such a scenario, in the absence of state action,¹⁴¹ small users and individuals would have access and speech rights solely at the sufferance of the network provider/owner, and the specter of private censorship unmediated by government, becomes quite real.

Should the must carry rules be upheld based upon economic market and anti-trust regulation and the telco prohibition overturned, at minimum, opportunities for access and speech would continue to incorporate the current statutory delineations of common carriage, leased access, public access and network owner access.¹⁴² Opportunities for speech would be broadened to include telephone network owner/speakers and cable network speakers, as well as the merged cable-telco network owner speaker, and would continue to include unaffiliated information provider "speech" and user subscriber speech. Under this set of outcomes, the focus of access and speech policy arguably shifts to a government mediated inquiry into the extent and the manner in which the owner provider may limit or prohibit the exercise of access and speech rights by potential and actual user/subscribers. So long as owner providers and network users retain access and speech rights, the First Amendment is likely to be better served.

6. A SHIFT IN POLICY?

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

It is highly likely that convergence will continue as a market and technological reality and that privatization of telecommunications networks will continue as a preferred regulatory tool. The outcome of the Turner, Daniels and C&P cases will affect the scope of network owner control over access and content. However, until these cases are fully litigated, questions regarding the scope of access to networks and the extent of network control over content will remain unanswered. Indeed, they may remain even after the cases are decided. For instance, in the event Turner and Daniels are overturned and C&P upheld, cable operators would have no obligation to carry local broadcasters or make channel capacity available to public, educational, or government subscribers, or to competitive programmers. Cable operators would exercise nearly total control over their facilities. Local telephone companies would be allowed to exercise editorial control over at least a portion of their facilities. Should this come to pass, how may cable network owners and telephone companies establish criteria for access and speech on their networks?

Cable operators would make private decisions about who to serve based on their assessment of who would generate a high enough profit or what programming was desirable. If the dial-a-porn decisions are reliable precedent, telephone companies will be able to deny access and consequently, speech, based upon private business decisions and determinations that the requested service is not classified as a common carrier service.

In the event Turner, Daniels, and C&P are upheld, cable operators will continue to have the range of legislatively mandated access requirements they currently have. Thus, some local broadcasters would still enjoy free channel access, as would public, educational, or government subscribers; and, competitive programmers would still enjoy access for a fee. As in the first scenario, telephone companies would be able to deny access and speech, based upon private business decisions and determinations that the requested service is not classified as a common carrier service.

In either eventuality, how might the government seek to affirmatively ensure subscriber/user access and relatively unfettered speech, while avoiding inappropriate regulation of network owner speech?

6.1. Access and Scarcity

Access presents a particularly interesting set of problems. For instance, to the extent government regulation of network owner control over access is based upon technical scarcity, we may be approaching a time when technical scarcity will cease to be a credible concern.¹⁴³ Admittedly, however, an abundance of technical channel or switching capacity does not assure access to all potential users. Market place failures due to wealth distribution, limited network infrastructure availability and selective market competition still will play a significant role.

These questions of scarcity and access are doubly critical given the current proposed mergers of telephone and cable firms. To the extent that large telephone and cable

corporations are allowed to merge, economic scarcity will remain a valid policy concern. Such mergers could reduce the number of potential local competitors while driving up the price for market entry. Also, the types of services made available and the manner in which they are priced by the merged firms would affect who would have access to network functionalities. If the post telco-cable merger economics follow the same trends as prior periods of merger in related media industries such as broadcasting, debt service demands will ultimately force the merged firms to cut costs, serve more lucrative markets and raise prices.¹⁴⁴ In such an event, some market segments may receive less service while other segments pay more. Such developments would certainly affect the cost of access. They may preclude significant segments of the market from having meaningful access. And they will affect the speech activities of those who acquire access and limit the speech opportunities of those who do not acquire access.

6.2. An Alternative Fix

Some scholars have argued that the nation's constitutional laws be changed to reflect the growth of speech related activity engendered by the convergence of computer, network switching and fiber optic technologies. For instance, at least one eminent constitutional scholar has argued for an amendment to the First Amendment to protect speech activities conducted over computers.¹⁴⁵ Other scholars have argued that the First Amendment in its current form, may be interpreted to protect access and speech activities conducted over computer augmented broadband interactive switched networks.¹⁴⁶

Short of constitutional solutions, however, the government retains other regulatory tools for assuring "universal" access and relatively unfettered speech for network owners and users. These include use of: the antitrust laws, speech and tort liability, structural network parameters favoring distributed intelligence and switched interactive network technologies, and a universal service requirement to assure access and speech in the face of the above mentioned market failures. These regulatory choices affect the exercise of access and editorial control at the content, network configuration and equipment levels. The same levels at which network owners exert control.

6.2.1. Maximizing Access

6.2.1.1. Choice of Technologies

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

6.2.1.2. Access via Market Regulation

Where the network owner exercises control over the network via access or content control to deter or forestall competition, the government can invoke the antitrust laws.¹⁴⁷

Newspaper publishers, cable programmers and broadcasters which would comprise a significant portion of the potential information providers on a telecommunications carrier provided broadband network, have alleged that the local telephone companies will in fact engage in anti-competitive activities if they are allowed to vertically integrate into the market for providing information services. For instance, broadcasters and cable operators oppose limited local telephone company entry into the video distribution services market via FCC's video dial tone proposal absent significant structural safeguards.¹⁴⁸

It is anticipated that some portion of the future broadband network infrastructure may be composed of essential facilities. If so, an antitrust violation will arise where such facilities are: 1.) extremely difficult, if not impracticable, for competitors to duplicate; 2.) owned by one or a group of firms; and 3.) not made available to competitors of the network facilities owner without an appropriate business justification or apparent efficiency, especially where the network owner is also an information provider.¹⁴⁹

The FCC's structural safeguards policy was developed to address the concern that the RBOCs would use cross subsidies and accounting standards to compete unfairly in the competitive provision of enhanced and/or information services. In telecommunications, the term "structural safeguards" refers to the separation of a vertically integrated firm into corporate segments based upon whether they provided basic network services or enhanced services.¹⁵⁰ Enhanced services include data processing services as well as videotext, audiotext, database retrieval and other computer and communications technologies applications. The goal of open networks architecture policies¹⁵¹ of which "structural separations policy" was a part, was to prevent the ability of the RBOCs to underwrite their provision of competitive enhanced and information services with monies garnered from their basic network monopoly. After a significant number of administrative hearings and judicial proceedings, there is still no agreement on how structural safeguards ought to be employed.¹⁵²

6.3. Incentives Regarding Control and Liability for Speech

As privatization continues, the lessons learned in the CompuServe case as well as other recent cases regarding publisher liability should give would be private network editors pause. Where a network owner exercises control over access and content, they may not be able to avoid liability for that content when it is harmful to the public.¹⁵³ Similarly, network owners may be held liable for negligent or careless manipulation and control of subscriber/user information where such action results in injury to the user or to third parties.¹⁵⁴

Certainly, the libel, obscenity, and indecency laws will remain, making control of content a cause for liability. Thus, even where network owners seek to eschew all content regulation, they are likely to be no more successful than telephone common carriers and cable operators who by statute must exert some control over obscene or indecent subscriber speech. Ultimately, however, self-preservation and protection of the bottom line may motivate firm efforts to curb libelous speech or avoid control of subscriber speech. But, forgoing editorial control over some content would remove a downside cost of doing business which may be preferable to the cost of maintaining the monitoring of subscriber and programmer speech and the potential liability which the exercise of editorial control brings.

6.3.1. Tort Liability

There is another way in which network owner control of speech may be tempered by government sanction, the imposition of tort liability. The exercise of control over access and content necessarily invites expectations that the network owner, in the exercise of its editorial discretion, has reviewed and sanctioned all information which it transmits. Moreover, should the network owner lose or damage customer information in storage, manipulation or transmission, or, negligently preclude the transmission of customer information entrusted to its care, it is reasonable to require that the owner compensate the customer to the extent of its legally recognized tort damages. A recent case in Illinois had so held based on state law.¹⁵⁵

The removal of government sanctioned protections from carrier tort liability would encourage some network owners to eschew private carriage for the protection which public common carriage still affords. Tort liability would attach whenever the private carrier negligently handled subscriber information. Private carrier and closed user group attempts to exempt themselves from such liability via exculpatory contract clauses or tariff language would be deemed unconscionable and unenforceable as a matter of law where it could be established that the subscriber does not possess equal bargaining power.

At least one commenter has noted that in an era of deregulation, the reasons for continuing to limit the tort liability of non-dominant telecommunications common carriers cease to be applicable.¹⁵⁶ At least three reasons have been used by the courts to justify the continuation of exculpation clauses limiting common carrier liability. First, federal and state regulators may be held to possess the regulatory authority to establish such limits. Second, such limits, judgements paid by monopoly carriers would be passed on to subscribers having no alternative service providers. Third, limited liability provisions preserve national uniformity in the provision of services and avoid discrimination between like situated by geographically dispersed subscribers.

Today, however, such reasons retain little credibility. First, the Communications Act of 1934, does not authorize federal regulators to preempt state law tort remedies then existing at common law or by statute. Rather, such remedies as the act provides are in addition to existing state remedies.¹⁵⁷ In addition, courts have not automatically granted primary jurisdiction over state tort liability claims to regulatory agencies but often have found such claims to be within the purview of the courts.¹⁵⁸

Second, in an era of convergence and expanding competition at all market levels in the telecommunications and ultimately, multi-media marketplace, many subscribers will have alternative sources of service. Finally, a growing portion of the telecommunications infrastructure is owned by a disparate number of private owners serving distinct "high-end user" sub markets rather than the larger local or national markets of various subscribers. Under such circumstances, national uniformity appears to be less a function of government action and more a function of the relative market power of the service provider, the purchaser and market demand. For these reasons, government-sanctioned carrier-initiated limitations on tort liability should be abolished except where a carrier elects to serve all classes of customers via public switched multi-media networks.

A decision to remove the tort liability limitation except when applied to carriers serving the majority of all classes of users via a public switched multi-media network or providing significant interconnection between public switched networks, would serve as a financial incentive for some carriers to maintain service to a broad subscriber base, or to expand their

service offerings to include other consumer groups or, at the very least, assure sufficient compatible interconnection.

6.3.2. Subscriber Protection via the Theory of Unconscionability

Where the non-dominant network provider or providers resort to contracts or tariffs as the vehicle for the offering of services to subscribers, there may be instances in which the doctrine of contract unconscionability may be invoked. If the network owner, as provider of scarce network resources, leveraged its economic position by employing form contract language to limit its tort liability, its attempt to enforce such restrictions might be denied by the courts on the grounds of unconscionability.¹⁵⁹ Moreover, as one public service commission has observed, given the increasing complexity of tariffs it would be "...'unconscionable' to assume that any telephone subscriber had consented either impliedly or expressly to broad liability waivers."¹⁶⁰

6.4. Interconnection and Distributed Intelligence

Other than the use of these strategies, the government may pro-actively encourage access and speech by creating regulatory policies and tax incentives which favor the building of open, switched, interconnected networks incorporating distributed intelligence. For instance, the government has initiated regulatory proceedings aimed at equalizing user interconnection to the local monopoly public switched network architecture and increasing network service offerings by enhancing network flexibility through distributed network intelligence. These proceedings have yet to be concluded.¹⁶¹ A resolution which favors distributed intelligence and shared user/network control over network functionalities would maximize speaker control over the process by which information is communicated.

Networks incorporating distributed intelligence and shared control, whether public or private, could provide the opportunity to engage in broadband multi-media interactive speech to large numbers of users.¹⁶² They arguably would also provide a preferable alternative to multi-channel, uni-directional distribution systems in which network architecture and functionality preclude two-way, broadband interactive communications.

When combined with the regulatory strategies outlined above, selection of a switched network architecture would also ensure that neither network owners or users forfeit meaningful access or speech rights. For, in a switched broadband interactive network environment, the capacity for carriage of information is substantial and the notion of scarcity upon which the constitutional regulation of antecedent technologies is based, should become a less viable justification for limiting access and speech rights.¹⁶³

Each of the above mentioned policies affects the incentive structure under which carriers would exercise control of access and speech on their networks. The proposed policies do not preclude network owner exercise of control over access and speech. They merely remove liability protections enjoyed by public common carriers, expand technical opportunities for user access and speech, and continue pre-existing economic regulation. As such, they should be adopted as regulatory policy regardless of whether constitutional law is changed.

ENDNOTES

¹The convergence phenomena arguably began with the merger of telephone network switching and computer technology. It has continued with the evolution of network transmission technologies from copper and coaxial cable to fiber optic cable along with channel/signal compression and the evolution of signaling system seven (SS-7) technology. Its most recent manifestation is the merger of fiber, telephone and computer technologies into broadband communications networks.

²The speed with which various industry firms seek to joint venture or combine to enter new markets underscores this fact. See Alan Deutschman and Joyce E. Davis, *The Next Big Info Tech Battle*, FORTUNE, Nov. 29, 1993, at 39; *Policing the Information Highway*, CHI. TRIB., Nov. 26, 1993, at 30; John Huey and Andrew Kupfer, *What That Merger Means for You*, FORTUNE, Nov. 15, 1993, at 82; Julie Solomon, *Big Brother's Holding Company*, NEWSWEEK, Oct. 25, 1993, at 38; John Greenwald, *Wired!: Bell Atlantic's Bid for Cable Giant TCI is the Biggest Media Deal in History*, TIME, Oct. 25, 1993, at 50, and Sandra Sugawara and Paul Farhi, *Merger to Create a Media Giant: \$26 Billion Bell Atlantic-TCI Deal Is a Vision of TV's Future*, WASH. POST, Oct. 14, 1993, at A1.

³See *National Information Infrastructure: Agenda for Action*, INFO. INFRASTRUCTURE TASK FORCE, Sept. 15, 1993, at 1-2, 4-16. See generally John Holliman, *Vice President Gore Press Conference on Info Highways*, Transcript No. 267-1 of live rep., CNN News, Dec. 21, 1993; Ronald Brown, *Secretary Brown on Three Goals for Our New National Information Infrastructure*, ROLL CALL, Nov. 15, 1993; and Brooks Boliek, *U.S. Data Superhighway Project Short on Concrete*, HOLLYWOOD REP., Sept. 16, 1993.

⁴See CONNECTING TO THE FUTURE: GREATER ACCESS, SERVICES, AND COMPETITION IN TELECOMMUNICATIONS, REPORT OF THE NEW YORK'S TELECOMMUNICATIONS EXCHANGE, Dec. 1993, at xii, 18-21, 28-29.

⁵As fiber optic distribution and switching technology is introduced, the distribution functions and information streams of broadcasting, cable, and telephony are merging. As they merge, the access, speech and related activities which received varying degrees of constitutional protection when conducted over the antecedent technologies will come to reside on the merged network(s). However, because the apportionment of these constitutionally recognized rights was made in the specific context of antecedent technologies and relationships, the fate of such rights in an advanced, intelligent, broadband network context is unsettled. See generally Joshua Quittner, *Online To A Revolution: The Amazing - and some Say Ominous - New World of TV, Telephone and Computer Is Heading Your Way*, NEWSDAY, July 18, 1993, at 4; and *Electronic Media Regulation and the First Amendment: Future Perspective*, DATA CHANNELS, Feb. 3, 1992, at 4 (hereinafter *Future Perspective*). This uncertainty is exacerbated by the growing number of private networks.

Some scholars have begun to address this question. See EDGE, Dec. 2, 1991, at 6.7, *Special Report: Universal Telephone Service; Ready for the 21st Century?* 1991 ANN. REV. OF THE INST. FOR INFO. STUD. (A joint program of Northern Telecom and the Aspen Inst.) (hereinafter *Special Report: Universal Telephone Service*).

⁶Several scholars have criticized the current state-private dichotomy established by the Supreme Court in light of the continuing trend toward privatization in American life. See Rodney A. Smolla, *The Bill of Rights at 200 Years: Preserving the Bill of Rights in the Modern Administrative-Industrial State*, 31 WM. AND MARY L. REV. 321 (1990) (arguing that since restraints on human thought and action are the same whether applied by public or private entities, protection of constitutional freedoms should be maintained in the private as well as the public sector.); and Clyde Summers, *The Privatization of Personal Freedoms and the Enrichment of Democracy: Some Lessons from Labor Law*, 1986 UNIV. ILL. L. REV. 689 (1989) (arguing that as more public functions are performed by private entities there is a critical need to protect constitutional rights heretofore protected from government control in the public

sphere from private control in the private sphere).

⁷ Users may be divided into two major groups composed of those who own network facilities (facilities based users) and those who do not own facilities (non-facilities based users). The vast majority of users are non-facilities based. These individuals, firms or groups purchase access to some of the networks (telephone) over which they may interact. They are most often semi-passive recipients of information transmitted one way over other networks (broadcasting and cable). The communications needs of these users vary substantially, are evolving at different speeds and in multiple directions. For instance, many businesses already have significant needs for high speed, high capacity broadband communication networks. See Michael L. Dertouzos, *Communications, Computers and Networks*, SCI. AM., Sept. 1991, at 62, 64; Al Gore, *Infrastructure for the Global Village*, SCI. AM., Sept. 1991, at 150-51; Michael L. Dertouzos, *Building the information Marketplace*, TECH. REV., Jan. 1991, 28, 31-2; George Gilder, *Telecosm: the New Rule of Wireless*, FORBES, Mar. 29, 1993, at 96. By comparison, the general public has not yet generated needs sufficient to precipitate demands for greater network speeds and capacities. Customer-users include residential as well as business customers.

⁸ Generally, absent a showing of an independent nexus of involvement by the state, neither the chartering, funding, licensing, regulating or tax exemption of a corporation by the government constitutes state action. See *Cohen v. Illinois Institute of Technology*, 524 F. 2d 818 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Sament v. Hahnemann Medical College and Hospital of Philadelphia*, 413 F. Supp. 434 (E.D. Pa. 1976), *aff'd mem.*, 547 F. 2d 1164 (3rd Cir. 1977) (charter); *Aasum v. Good Samaritan Hospital*, 542 F. 2d 792 (9th Cir. 1976); *Manning v. Greensville Memorial Hospital*, 470 F. Supp. 662, (C.D. Va. 1979); *Trageser v. Libbie Rehabilitation Center*, 590 F. 2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979) (funding); *Moose Lodge No. 107 v. Innis*, 407 U.S. 163 (1972) (licensing); *Jackson v. Metropolitan Edison*, 419 U.S. 345 (1974) (regulation); *Weis v. Syracuse University*, 552 F. Supp. 675 (N.D.N.Y. 1982); *Narango v. Alverno College*, 487 F. Supp. 635 (D.C. Wisc. 1980); and *Stewart v. New York University*, 430 F. Supp. 1305 (S.D.N.Y. 1976).

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

⁹ See *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973).

¹⁰ *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989) (Scalia, J., concurring); *Dial Info. Servs. Corp. of N.Y. v. Thornburg*, 938 F. 2d 1291 (2nd Cir. 1991); *Carlin Communication Inc. v. Mountain States Telephone & Tel. Co.*, 827 F. 2d 1291 (9th Cir. 1987); and *Information Providers Coalition for the Defense of the First Amendment v. FCC et al.*, 928 F. 2d 866 (9th Cir. 1991) (hereinafter *Information Providers*).

¹¹ Recently, however, statutorily required efforts by cable operators to limit or ban indecent programming on leased and/or public access channels have been deemed to constitute state action. See *Alliance for Community Media v. FCC*, 10 F.3d 812 (1993) (vacated upon granting of request for rehearing en banc, Feb. 16, 1994. The decision has since been reversed. See *Alliance for Community Media v. FCC*, (D.C. Cir. en banc), No. 93-1169, June 6, 1995).

¹² At present, the network access/speech continuum is bounded at one end by public switched telecommunications networks (PSTN) providing a variety of services to the public on a common carriage non-discriminatory basis. At the other end of the continuum is the privately network (PN) functioning solely as a business tool providing services exclusively to the owner(s). In between public telecommunications switched and private networks are the cable television (CATV), broadcast (B/CAST) and virtual private networks (VPN). With the advent of recent court decisions regarding cable television-telephone cross ownership and dial-a-porn, the continuum will become shorter. It may be that the pure public switched common carrier may cease to be a category. Certainly the former common carriers will have greater flexibility to provide services on a non-common carrier basis. The new network owners

will have the option to provide common carriage, private carriage and/or engage in speech themselves.

¹³See generally Cynthia L. Estlund, *What Workers Want? Employee Interests, Public Interests, and Freedom of Expression*, 140 U. PA. L. REV. 921, 925, 935-936, and 960-964 (arguing that the general public has an equal interest in the product quality and safety concerns of public and private employees, and that public employees have work place concerns similar to those of their private employee counterparts and ought to enjoy the same protections for work place related expression and association).

¹⁴For the purposes of the paper, networks are defined as collections of interconnected users. NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, NTIA INFRASTRUCTURE REPORT: TELECOMMUNICATIONS IN THE AGE OF INFORMATION, Oct. 1991, at 13-20, 92. The type of transmission and the receive/send machinery employed varies. These points may or may not be capable of engaging in interactive communication. This definition acknowledges that cable and broadcast television systems may be deemed to be networks just as the public switched inter-exchange and local exchange systems constitute networks. This definition also facilitates the exploration of the broader array of access solutions presently employed and likely to be employed in the regulation of future networks.

The paper does not address directly the need for common languages, protocols and conventions, speeds, as well as procedures of machine interaction, all of which are critical technical issues involved in network interconnection. For an excellent lay explanation of network interconnection and nomenclature, see Dertouzos, *Communications, Computers and Networks*, *supra* note 7. These issues are addressed, if at all, solely from the perspective of the network facilities, pricing and service configurations which the network owner(s) may choose in providing services and the impact such choices may have on the potential user class. It is recognized that these choices in significant measure will determine the eligible class of users.

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

¹⁵A network's functionality is the combination of the various hardware and software defined functions the network performs. A network's functionality is determined by its hardware and software architecture and by the network standards or documents which specify network protocols. Network protocols allow hardware of various manufacture to communicate with one another. Peter Fetterolf, *Connectivity: The Sum of Its Parts*, BYTE, Nov. 1991, at 197.

¹⁶A tariff is a published set of rates charged and conditions under which various classes of service are offered by common and private carriers.

¹⁷The notion of network and service availability is subsumed within the definition of universal service. Universal Service was a government and industry policy which encouraged AT&T [then a monopoly] to make telephones and service available to the American public at reasonable rates. Subsidies of less profitable [or unprofitable] provision of service to rural and poorer areas were built into the business and long distance charges. David Coursey, *Battle of the Bandwidth*, INFOWORLD, Jan. 14, 1991, at 34. The traditional goal of universal service was to assure that "all but the poorest Americans could afford to make and receive telephone calls, even if they lived in remote, expensive to serve areas." *Special Report: Universal Telephone Service*, *supra* note 5. As such, universal service operated as a kind of equality in access and likeness in service offerings. In the current era of increased competition and privatization, however, universal service may no longer mean likeness (or comparability) of service or equality in technical access. *Id.*

¹⁸The term "open" as used here to describe essentially, non discriminatory access to communicate on the network as configured by the owner, should not be confused with the Federal Communications Commission's "open network architecture" policy. In theory the open network architecture policy is an attempt to provide enhanced service providers such as voice messaging, on line data, and bulletin board

service providers the same access to the local telephone companies' transmission and features as the telephone company or its subsidiaries. See Dawn Bushaus, *Enhanced Services -- ONA and AIN on a Collision Course*, COMM. WEEK, June 17, 1991, at 32L.

¹⁹ See generally, *VPN: Set to Challenge Private Networks and PSTN During Nineties*, FINTECH TELECOM MKTS., Apr. 15, 1992, at 31; Mark Luzak, *Tapping the Hidden Savings in Virtual Networks; Hybrid Networks*, TELECOMMUNICATION, Mar. 1991, at 45; and Robert Violino, *A Network of Their Very Own*, INFORMATIONWEEK, Jan. 14, 1991 at 16.

²⁰ See *supra* note 14.

²¹ *VPNS Set to Challenge Private Networks and PSTN During Nineties*, *supra* note 19.

²² The networks typically are created to meet the needs of their respective users for transmission of high speed data, information processing, voice traffic and/or security. Consequently, they serve closed sets of users with relatively cohesive sets of needs, as well as eligibility, procurement and financing criteria. There are some firms which sell their excess network transmission capacity commercially.

²³ This definition doesn't include closed networks established without the use of private or dedicated facilities.

²⁴ Closed user group networks may be local, regional, national, or international in scope. Examples of closed user group networks include those owned by: ad agencies, media firms, printers, insurance agencies, hospitals, record rooms, police, automobile manufacturers, parts suppliers, dealers, financiers, and computer networks. See generally, James I. Cash Jr. and Benn R. Konsynski, *IS Redraws Competitive Boundaries*, HARV. BUS. REV., at 134 (Mar./Apr. 1985); Venkatraman, *IT-Enabled Business Transformation: From Automation to Business Scope Redefinition*, SLOAN MGMT. REV., Jan. 1994, at 73N. See also John Helliwell, *Networks Provide a Critical Competitive Edge for Airlines*, PC WEEK, Jan. 19, 1988, at C1; Salvatore Salamone, *Airline Reservation Network Flies Into New Age of LANs*, NETWORK WORLD, Nov. 26, 1990, at 34; *More Shared Networks Approved Under §4(c)(8)*, Banking Expansion Rep., Aug. 1, 1983, at 11; Rita Marie Emmer, *Marketing Hotels Using Global Distribution Systems*, CORNELL HOTEL & REST. ADMIN. QUAR., Dec. 1993, at 80.

User groups' networks may be closed for numerous reasons including: specialized equipment, specialized features, transmission speeds, security, service pricing, or speech related restrictions. For instance, the European Commission defines closed user groups as groups of companies with "similar business interests..." Such closed user groups may include "business associates -- wholly or partly-owned subsidiaries and suppliers of products and services -- as well as customers." See *Shortlist of five for European Super-Network*, FINTECH TELECOM MKTS., Dec. 9, 1993; and *Viatel Goes Cross-Border with Europe's First Voice Network*, FINTECH TELECOM MKTS., Nov. 25, 1993.

²⁵ See Deutschman & Davis, *supra* note 2; *The Tangled Webs They Weave*, ECONOMIST, Oct. 16, 1993 at 21; and Sugawara & Farhi, *supra* note 2.

²⁶ Non-discriminatory access in the common carrier context connotes holding out oneself to provide like services to like situated customers at equitable rates.

²⁷ This access option is similar to the common carrier model except that the network provider has not held itself out voluntarily to provide access to the network but is compelled to do so by law. The cable television leased access provisions are the best current example of this form of mandated access.

²⁸ The public, educational and governmental access channels which are required under cable franchises as well as the must carry channels set aside for broadcasters which are required by federal law are an excellent example of this type of "negotiated" or mandated access.

²⁹ See section 5.2.1 *supra* and accompanying endnotes.

⁴ Carl Warren, *Abuse of Company Facilities for E-mail Must Be Curbed*, NETWORK WORLD, Mar. 30, 1992, at 25.

¹ For instance, many New York City agencies have configured their phones to prevent city workers from dialing long distance and calling specialty phone services such as dial-a-porn and sports information lines. See Jennifer Preston, *It's OK, As Long As It's A Local Call*, NEWSDAY, Oct. 26, 1989, at 5.

³² Ronald E. Roel, *Advances in The Campaign For Workers' Rights*, NEWSDAY, Jan. 10, 1988, at 84; and *Plan to Monitor Calls Made by Civil Servants Attacked*, L. A. TIMES, Mar. 10, 1985, at A11.

³³ Roel, *supra* note 32.

³⁴ *Id.* An examination of employee privacy rights is beyond the scope of this article.

³⁵ See *Plan to Monitor Calls Made by Civil Servants Attacked*, *supra* note 32. Also see Tom Devine, *A Whistleblower's Checklist*, CHEM. ENG., Nov. 1991, at 207.

³⁶ Carol Wolinsky and James Sylvester, *Privacy in the Telecommunications Age*, COMM. OF THE ACM, Feb. 1992, at 23.

³⁷ Susan E. Kinsman, *Toll Fraud On Rise, SNET Says*, HARTFORD COURANT, July 29, 1992, at B1. "To frustrate casual hackers, net managers are adding password protection to private branch exchanges, voice mail systems, automated attendants, and the remote administrative ports used to manage them. They are thwarting the pros by blocking calls to certain locations and taking corrective action when call monitoring indicates they've fallen victim to hackers." See Annabel Dodd, *When Going the Extra Mile is Not Enough*, NETWORK WORLD, Apr. 12, 1993, at 49.

³⁸ See Kinsman, *supra* note 37.

³⁹ See Dodd, *supra* note 37.

⁴⁰ See Kinsman, *supra* note 37.

⁴¹ 29 U.S.C. § 157 (1988).

⁴² For instance, absent a showing by union organizers that: (1) they possess no other reasonable alternative means of communication to reach non-union employees, or (2) that the employer is discriminating against the union's access to facilities it otherwise makes available, the courts are unlikely to afford the organizers access to an employer's private e-mail or telecommunications facilities. The Supreme Court has held that reasonable alternative means of communication (RAMC) do not exist when the location of the employer's premises and the employee's living quarters place the employees beyond the reach of the union's reasonable efforts to communicate with them. Reasonable alternative means of communications include publicity, mail, letters, and person to person communication at employees' homes, by phone, or on the streets. See *Lechmere, Inc. v. NLRB* 112 S. Ct. 841, 848 (1992); *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 205 (1978); and *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). See Michael L. Stevens, *The Conflict Between Union Access and Private Property Rights: Lechmere, Inc. v. NLRB and the Question of Accommodation*, 41 EMORY L. J. 1317 (Fall 1992) (arguing that the Supreme Court's "reasonable alternative means of communication" standard first announced in *Babcock* and later affirmed in *Lechmere* is the appropriate standard).

⁴³Cash & Konsynski, *supra* note 24. Companies may participate in JONs on three levels. They may enter and receive information (content and access to the network as configured), they may participate in the development of software and network maintenance (network intelligence), and they may manage the network and control its configuration and provisioning (network management and control). At the first level, the JONs participant only has access to the network through restricted protocols and usually acts solely as an information entry-receipt node. The JONs system simply provides standard messages. For example, an independent travel agency may use one of the major airline reservation systems without possessing additional in-house processing capability. The majority of current JONs participants are operating at this entry level. *Id.*

Companies participating at the second level control the development and maintenance of the software used by the other JONs participants. Usually, these JONs developers have absorbed the cost of software development and maintenance in order to gain exclusive control over decisions on access, price, application design, and the network. In the airline reservation systems, American and United Airlines are second level participants. They are primarily responsible for developing their SABRE and APOLLO systems, respectively.

Participants at level three serve as the utility. They usually own or manage all the network facilities as well as the computer processing resources. The Regional Bell Operating Companies (RBOCs), The Source, and CompuServe are examples of such participants. *Id.*

⁴⁴ *Id.*

⁴⁵ This is an area that is receiving increasing scrutiny as telephone network users push for access to the network's functionalities and intelligence for purposes of reconfiguration.

⁴⁶ See Dunstan McNichol, *Former NWA Exec Says Computer Monopoly Is Killing Airlines*, STATES NEWS SERV. See also Helliwell, *supra* note 24.

⁴⁷ See Wolinsky & Sylvester, *supra* note 36.

⁴⁸ Prodigy Services Co., an information services company owned jointly by Sears, Roebuck and Co. and International Business Machines Corp., has been involved in a number of controversies regarding speech over its facilities. It eliminated controversial bulletin board files such as "Health Spa" which precipitated a bitter argument between religious fundamentalists and gays because of discussions of gay sexuality. It also terminated the memberships of subscribers protesting Prodigy's increase in e-mail prices to Prodigy advertisers. See W. John Moore, *Taming Cyberspace*, NAT'L J., Mar. 28, 1992, at 745.

Prodigy maintains that its subscribers have no first amendment rights on its bulletin board services, nevertheless it does not want to be held responsible for the content of communications it allows to run absent an express endorsement or failure to disavow. For instance, Prodigy was uncomfortable with taking responsibility for bulletin board statements that the Holocaust never occurred. *Id.*

⁴⁹ See *Cubby v. CompuServe Information Service*, 776 F. Supp. 135 (S.D.N.Y. 1991). The Cubby court held that CompuServe was not responsible for allegedly libelous statements made in a bulletin board called Rumormonger, that was carried on CompuServe's system. Liability was not forthcoming because CompuServe did not exercise editorial control over the bulletin board's content. *Id.* See also Moore, *supra* note 48; and Felicity Barringer, *Electronic Bulletin Boards Need Editing, No They Don't*, N. Y. TIMES, Mar. 11, 1990, at D4.

⁵⁰ See *Syracuse Peace Council*, 2 FCC Rcd. 5043, *recon. denied*, 3 FCC Rcd. 2035, *aff'd*, *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 439 U.S. 1019 (1990).

⁵¹ *Leathers v. Medlock*, 499 U.S. 439, 444 (1991); *City of Los Angeles v. Preferred Communications, Inc.* 476 U.S. 484, 494 (1986).

⁵²For the moment, broadcaster access to cable television channels has been upheld in *Turner Broadcasting Sys., Inc. v. FCC*, 818 F. Supp. 32, (D.D.C. 1993), vacated 114 S. Ct. 2445, (1994); while public access to cable channels via public government and educational access channels and programmer access to cable leased access channels has been recently upheld in *Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1, (D.D.C. 1993).

⁵³*Sable Communications Inc. v. FCC*, 492 U.S. 115.

⁵⁴*Chesapeake and Potomac Telephone of Virginia et al. v. U. S.* 830 F. Supp. 909, (E.D.Va. 1993), *aff'd*, 42 F.3d 181 (4th Cir. 1994) (hereinafter C&P v. US). Also see Edmund Andrews, *Ruling Frees Phone Concerns to Offer Cable Programming*, N.Y. TIMES, Aug. 25, 1993, at A1 (announcing the decision of the U.S. District Court decision overturning the telephone-cable television cross-ownership ban), and 47 U.S.C. § 533 (b), The Cable Communications Policy Act of 1984 (prohibiting local telephone companies from providing video programming to potential viewers in their service area directly or indirectly through an entity owned by the telephone company or under its common control).

⁵⁵*Sable Communications of California, Inc. v. FCC*, 492 U.S. 115; *Dial Info. Servs. Corp. of N.Y. v. Thornburg*, 938 F. 2d 1291; *Carlin Communication Inc., v. Mountain States Telephone & Tel. Co.*, 827 F. 2d 1291 (9th Cir. 1987), *cert. denied*, 485 U.S. 1029 (1988); and *Information Providers Coalition for the Defense of the First Amendment v. FCC et al.*, 928 F. 2d 866 (9th Cir. 1991).

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

⁵⁶C&P v. US, 830 F. Supp 909.

⁵⁷Professor Jerome Barron has taken justifiable issue with the Circuit Court opinions. He argues that the courts, in upholding the decisions of telephone common carriers to refuse carriage or the provision of billing services to dial-a-porn providers, have allowed the telephone common carriers an unjustified measure of editorial control over the content of speech transmitted over their facilities. Jerome Barron, *The Telco, The Common Carrier Model and the First Amendment -- The "Dial-A-Porn" Precedent*, 19 RUTGERS COMPUTER & TECH. L.J. 371, 385-91 (1993).

⁵⁸*Alliance for Community Media et al. v. FCC*, 10 F. 3d 812, (D.C. Cir. 1993), *vacated upon the granting of request for reh'g en banc*, 15 F. 3d 186 (D.C. Cir. 1994); *reversed* (D.C. Cir. en banc. 1995) No. 93-1169. In *Alliance*, the Court considered among other issues, the constitutionality of FCC regulations requiring in some situations that cable operators: (1) prohibit or segregate any programming on their leased access channels which they reasonably believes to be indecent; and (2) prohibit obscene or indecent programming as well as programming soliciting unlawful conduct. In response to the government's argument that cable operators operating under the regulations are not state actors, the court concluded that the statute significantly encourages the operators to ban indecent speech. Consequently, operator action is state action. *Id.* at *31. This reasoning was expressly overturned in the subsequent en banc opinion. However, the en banc opinion has been appealed to the Supreme Court.

⁵⁹*Id.* at *24-*27 and accompanying notes.

⁶⁰Foreborne carriers have the right to serve discrete segments of the market with minimal tariff reporting requirements. See *In the Matter of Tariff Filing Requirements for Nondominant Common Carriers*, 8 FCC Rcd 6752; Aug. 18, 1993; *In the Matter of Policy and Rules Concerning Rates for Dominant Carriers*, Part 1 of 3, 4 FCC Rcd 2873, Apr. 17, 1989; and *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985). Until recently, the Commission maintained a permissive tariffing

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

Nevertheless, shortly after the circuit court's decision, the Commission has approached the line of absolute deregulation by allowing non-dominant carriers to file tariffs on one day's notice under the rationale that they do not possess sufficient market power to set rates for competitive service offerings. See *In the Matter of Tariff Filing Requirements for Nondominant Common Carriers*, supra note 60. The Circuit Court's decision was recently upheld by the Supreme Court.

⁶¹ Under a narrow reading of the applicable precedent, they would arguably be free to ban dial-a-porn from their networks by refusing to offer billing services to dial-a-porn information providers. For D.C. Circuit Court analysis of *Dial Info. Servs. Corp. of N.Y. v. Thornburg*, 938 F. 2d 1291, *Carlin Communication Inc., v. Mountain States Telephone & Tel. Co.*, 827 F. 2d 1291, and *Information Providers*, see *Alliance for Media et al. v. FCC*, 10 F. 3d 812 (1993).

⁶² While the Electronic Communications Privacy Act protects users of e-mail and bulletin boards against the intentional monitoring of their messages by third parties, employers seeking to protect company information and assets can monitor employee messages on internal e-mail systems. Julie Bennett, *Firms' Rights Protected by Electronic Mail Laws*, CRAIN'S N. Y. BUS., Oct. 8, 1990, at 28. The Electronic Communications Privacy Act of 1986, also allows employers to read employee e-mail messages situated on company computer systems that permit third party access, provided the employee gives permission. Rosalind Resnick, *The Outer Limits*, NAT'L L.J., Sept. 16, 1991, at 1.

⁶³ Some take the position that any monitoring of E-Mail or searching through personal employee files is ethically wrong regardless of the law. See Glenn Rifkin, *Do Employees Have a Right to Electronic Privacy?* N.Y. TIMES, DEC. 8, 1991, at C8. Aside from questions of ethics, others have argued that the use of monitoring is demoralizing to employees and therefore counter productive. Glenn Rifkin, *The Ethics Gap*, COMPUTERWORLD, Oct. 14, 1991, at 83.

⁶⁴ See Linda Wilson, *Addressing E-Mail Rights*, INFORMATION WEEK, Feb. 15, 1993, at 54.; *Electronic Mail Raises Issues About Privacy, Experts Say*, BNA DAILY LABOR REP., Nov. 17, 1992; *More E-Mail Legal Actions*, COMPUTER FRAUD & SECURITY BULL., Feb. 1992; Rifkin, supra note 63; Alice Kahn, *Careful - The Boss Might Be Reading Your Electronic Mail*, SAN FRAN. CHRON., Nov. 20, 1991, at 3E; Bennett, supra note 62; and Resnick, supra note 62.

⁶⁵ Victoria Slind-Flor, *What is E-Mail Exactly?* NAT'L L.J., Nov. 25, 1991, at 3.

⁶⁶ The Electronic Communications Privacy Act protects all electronic communications systems, including purely internal e-mail systems and public systems from outside intruders. It also protects the privacy of certain messages sent over public electronic mail systems like Compuserve and MCI Mail in much the same manner as telephone calls over public telephone systems are protected. See *Future Perspective*, supra note 5. See generally Wilson, supra note 64; and Rifkin, *The ethics gap*, supra note 63; *Despite growing attention, many IS managers say, 'It's not my job,'* COMPUTERWORLD, Oct. 14, 1991, at 83.

The Electronic Communications Privacy Act (ECPA) of 1986, for example, states that electronic mail messages on company computer systems that also permit access from outside can be read by the employer -- but only if the receiver or sender gives permission. See Resnick, supra note 62.

Also, to the extent that state constitutions afford an employee a right of privacy or speech, they may not be precluded by the ECPA. For instance, a recent attempt to argue federal preemption failed in California. See Slind-Flor, supra note 65 (discussing *Alana Shores v. Epson America Inc.*, SWC112749 and *Flanagan v. Epson America*, BC007036).

⁶⁷ Rankin v. McPherson, 483 U.S. 378 (1987). (Public employees may not be fired for making statements about matters of public concern.) See generally Estlund, *supra* note 13. However, the question of whether employees can make such statements over the company's e-mail and/or telephone systems has not been addressed to date.

⁶⁸ *Id.* See also Matthew W. Finkin et al., LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE 284-286 (1989).

⁶⁹ Whether a public employee's speech concerns a matter of public interest is determined by the content, form and context of the statement, gleaned from the entire record before the court. See Connick v. Meyers, 461 U.S. 138, 147-148 (1983). Also see Cynthia K. Y. Lee, *Freedom of Speech in the Public Workplace: A Comment on the Public Requirement*, 76 CALIF. L. REV. 1109, 1111 (1988). Even when a public employee's speech addresses a matter of public concern, an employer can restrict the speech in question if the employer perceives that the speech will disrupt the workplace. Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 3, 4 (1987).

⁷⁰ These include section 7 concerted activities for the purposes of mutual aid, such as union organizing, and striking to improve working conditions. They arguably also include protests and advocacy which predate cognizable collective efforts to organize. See Estlund, *supra* note 13, at 924, n13; and Charles Morris, *NLRB Protection in the NonUnion Workplace: A Glimpse at A General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1677 (1989).

⁷¹ See Estlund *supra* note 13, at 924. See also Finkin, *supra* note 68.

⁷² One expert has argued that despite the fact that free speech is a constitutional right outside of the workplace, speech can be regulated in the workplace so long as there are legitimate business reasons for doing so. Also, there should be a clear corporate policy enunciated which sets forth the reasons for the restrictions. See *Electronic Mail Raises Issues About Privacy*, *supra* note 64. The arguable absence of legally sanctioned speech rights has not deterred those who view employee speech as a right. See Rifkin, *supra* note 63, at 83, 85. To date businesses have not authored many guidelines for internal corporate e-mail networks. There are, however, as many as 200 state statutes covering e-mail related issues. See *Electronic Mail Raises Issues About Privacy*, *supra* note 64.

⁷³ Similarly, at least one scholar argues that employers are free to invade employee privacy on e-mail as well. Steven B. Winters, *Do Not Fold, Spindle or Mutilate: An Examination of Workplace Privacy in Electronic Mail*, 1 S. CAL. INTERDISCIPLINARY L.J. 85 (1992).

⁷⁴ Other forms of control are used as well. For instance, on the internet, an amalgam of research oriented networks moving towards commercialization, group users sometimes "...gang up on abuses [by a particular user] in a form of citizens' arrests [sic] in which abusers are asked to stop disrespectful behavior." J.A. Savage and Gary H. Anthes, *Internet Privatization Adrift*, COMPUTERWORLD, Nov. 26, 1990, at 1. According to the Chair of the Internet Activities board, this form of censure has been effective and no one has been forced off the network. *Id.*

⁷⁵ It is possible that a sysop may be held responsible for libelous information residing on its bulletin board systems. However, the current law remains unsettled. See Robert Charles, *Bulletin Boards and Defamation: Who Should Be Liable? Under What Standard?* 2 J.L. & TECH. 121, 134 (1993). See also David J. Conner, *Cubby v. Compuserve, Defamation Law on the Electronic Frontier*, 2 GEO. MASON U. L. REV. 227 (1993); and David R. Johnson & Kevin A. Marks, *Mapping Electronic Data Communicanons Onto Existing Legal Metaphors: Should We Let Our Conscience (and Our Contracts) be Our Guide?* 38 VILL. L. REV. 487 (1993). It is argued that if the sysop knows the statement to be false, or should have known, or they fail to delete libelous information once notified by the injured party, they may be sued for publication of libel. See Charles, *supra* at 147-148; Johnson & Marks, *supra* at 497.

⁷⁶ *In re AT&T Communications*, Contract Tariff F.C.C. No.[s] 2[-13]; and 15, 9 F.C.C.R. 6752 (1993) (affirming the FCC decision to allow AT&T to offer business services under contract tariffs). The Commission has permitted AT&T to offer services under tariff via individually negotiated contracts provided the contract tariffs are made generally available to similarly situated customers under substantially similar circumstances. See *In re Competition in the Interstate Inter-exchange Marketplace*, 6 F.C.C.R. 5880, 5869-97 (1991), *recon. in part*, 6 F.C.C.R. 7569 (1991), *further recon.*, 7 F.C.C.R. 2677 (1992) (Inter-exchange Order).

⁷⁷ *In the Matter of Tariff Filing Requirements for Non-dominant Common Carriers*, 8 FCC Rcd 6752, August 16, 1993. While the FCC has substantially deregulated the telecommunications industry, it cannot compel carriers to eschew the filing of tariffs if they so desire. *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985). The Commission has approached the line of absolute deregulation by allowing non-dominant carriers to file tariffs on one day's notice under the rationale that they do not possess sufficient market power to set rates for competitive service offerings. *Id.* Prior to the Commission's initial foray into deregulation, carriers were required to file tariffs as much as 90 days in advance of their proposed effective date to allow Commission and public review of the proposed offerings.

⁷⁸ See Phillip S. Cross, *Utility Liability Waivers: New Rules for New Technologies*, 129 PUB. UTIL. FORT. 34 (1992); and James Brook, *Contractual Disclaimer and Limitation of Liability Under the Law of New York*, 49 BROOKLYN L. REV. 1, 22 (1982). See generally *Liability of Telegraph or Telephone Company for Transmitting or Permitting Transmission of Libelous or Slanderous Messages*, 91 ALR3rd 1015 (1993). Telephone companies retain the right to refuse service where a subscriber uses obscene or profane speech. See Allan L. Schwartz, *Right of Telephone Company to Refuse, or Discontinue, Service Because of Use of Improper Language*, 32 ALR3rd 1041 (1993).

⁷⁹ Carriers are often successful in limiting their liability for provision of service. *M.R.C.S., Inc. v. MCI*, 1987 WL 12813 (E.D.La.) (claims against carrier for poor quality transmission is limited to the terms of the tariff.). See also, Brook, *supra* note 78. However, there are numerous instances in which the courts have refused to allow exculpatory language in carrier tariffs to limit carriers' liability. See *In Re Illinois Bell Switching Station Litigation*, 1993 WL 323120 (Sup. Ct. Ill.) (1993). (carrier's exculpatory tariff language limiting liability for consequential damages is not controlling in the face of wilful violation of a state statute and regulations requiring utility to provide adequate and efficient, just and reasonable facilities); *Source Assoc. Inc. v. MCI*, 1989 WL 134580 (1989) (tariff does not limit liability for wilful misconduct); *D. Clarico, et al. v. Southwestern Bell Telephone Co.* 725 S.W. 2d 304 (1986) (reasonableness of public utility's tariff limitation becomes an issue of fact where utility can but does not timely remedy customer's problem resulting in a loss which exceeds tariff limitation on liability); *Lahke et al., v. Cincinnati Bell, Inc.* 439 N.E. 2d 928 (1981) (carrier's exculpatory tariff language is not controlling in the face of violation of a state statute requiring utility to provide necessary and adequate facilities).

⁸⁰ See *C&P v. US*, 830 F. Supp. 909.

⁸¹ See *supra* note 79. There are also a growing number of cases extending tort liability to providers of goods and services generated via the use of computer and information technologies. See generally Barry B. Sookman, *The Liability of Information Providers in Negligence*, 5 COMPUTER L. & PRAC. 141 (1989).

⁸² "...sysops have the right to run their systems any way they see fit. They have no 'common carrier' obligations, as do the telephone companies, to transmit everyone's messages." Brock N. Meeks, *As BBSes Mature, Liability Becomes an Issue*, INFOWORLD, Jan. 22, 1990, at S14. According to some, a sysop is a publisher with the corresponding right to edit or shape the bulletin board's message traffic as they see fit. *Id.*

⁸⁴ *Id.* Because CompuServe exercised no editorial control over information on one of its bulletin board services, it avoided potential liability for libel. See *Cubby, Inc. et al. v. CompuServe, et al.*, 776 F. Supp. 135 (1991). Also see William Jackson, *CompuServe Picked its Fight in Libel Case*, BUS. FIRST-COLUMBUS, Nov. 18, 1991, at 4.

⁸⁴ See Stuart Silverstein, *Prodigy Services' Fee Set Up Under Probe*, L.A. TIMES, Apr. 16, 1991, at D1; Geoffrey Stone, *The First Amendment Is Safe at Prodigy*, N.Y. TIMES, Dec. 16, 1990, at 3-13.

⁸⁵ Warren G. Lavey, *The Public Policies that Changed the Telephone Industry Into Regulated Monopolies: Lesson from Around 1915*, 39 FED. COM. L. J. 171 (1989).

⁸⁶ See *surpa* note 55.

⁸⁷ See *C&P v. US*, 830 F. Supp. 909.

⁸⁸ See Andrews, *supra* note 54. (announcing the decision of the U.S. District Court decision overturning the telephone-cable television cross-ownership ban at 47 U.S.C. @ 533 (b). The Cable Communications Policy Act of 1984). Also see 47 U.S.C. @ 533 (b), The Cable Communications Policy Act of 1984, prohibiting local telephone companies from providing video programming to potential viewers in its service area directly or indirectly through an entity owned by the telephone company or under its common control. Waivers have been granted under statute and FCC rule. See *FCC Upholds GTE Cerritos Waiver, Grants Another*, BROADCASTING MAG., May 1, 1989, at 136.

⁸⁹ The National Cable Television Association has gone so far as to intervene on the government's side in its efforts to deny the entry of the Regional Bell Operating Companies (RBOCs) into the video programming markets existing in the RBOC's service areas. See Edmund L. Andrews, *A Communications Free-For-All*, N.Y. TIMES, Feb. 4, 1994, at D1; and *Comm.Daily*, Feb. 11, 1993, at 8.

⁹⁰ In a similar vein, the Regional Bell Operating Companies (RBOCs) are currently seeking modification of proposed legislation that would require them to unbundle their switching and transmission services to allow potential competitors to interconnect at lower cost. *Id.*

⁹¹ See *infra* discussion of 1st amendment impact of switched intelligent networks.

⁹² See Allen S. Hammond, IV, *Regulating Broadband Communications Networks*, 9 YALE J. ON REG. 181, 183-191, (1992).

⁹³ *Id.* at 196-198 and accompanying notes.

⁹⁴ See *C&P v. US*, 830 F. Supp. 909.

⁹⁵ Regarding restrictions on access to on line data systems, see Silverstein, *supra* note 84; Michael Schuyler, *Systems Librarian and Automation Review: Rights of Computer On Line Service Users*, SMALL COMPUTERS IN LIBRARIES, Dec. 1990, at 41; and Geoffrey Moore, *The First Amendment is Safe at Prodigy*, N.Y. TIMES, Dec. 16, 1990, at 3-13.

With regard to discriminatory provision of leased access to cable television, see Donna N. Lampert, *Cable Television: Does Leased Access Mean Least Access?* A REP. OF THE ANNENBERG WASH. PROG. IN COMM. POL'Y STUD., 10-12, 15-16 (Northwest U. ed., 1991); Henry Gilgof, *Report Card on Cablevision: Mixed Signals: Programs Praised, Fees Criticized*, NEWSDAY, Sept. 10, 1990, at 2; Chuck Stogel, *Amid Cable TV Tangle, Is Viewer Being Served*, SPORTING NEWS, Aug., 27, 1990, at 45. The more recent leased access provisions have been upheld as constitutional. See *Most Provisions of 1992 Cable Act Survive First Amendment Challenge*, BNA ANTITRUST & TRADE REG. REP., Sept. 23, 1993, at 387.

⁹⁶It may be that due to the relative newness of these services and the necessity to have access to the appropriate telephony and computer equipment, access is controlled by economic and market demand factors.

⁹⁷*Cubby, Inc. et al. v. Compuserve, et al.*, 776 F. Supp. 135.

⁹⁸Compuserve was deemed a distributor rather than a publisher based on several factors. Based on its determination that Compuserve was a distributor, the court held that Compuserve would have had to have knowledge or reason to know that the remarks of the Journalism Forum were allegedly defamatory. *Id.*

⁹⁹Medphone Corp., a small New Jersey company sued Peter DeNigris, a 41-year-old elections forms processor and amateur stock investor, from Long Island, NY, in federal court in New Jersey. Medphone alleged that DeNigris' comments on Money Talk, a bulletin board service operated by Prodigy, helped cause an almost 50% decline in the company's stock in the summer of 1992. Medphone also alleged that DeNigris engaged in libel and securities fraud. Amy Harmon, *Cyberspace: Millions of Americans Swap Information on Computer Bulletin Boards*, L.A. TIMES, Mar. 19, 1993, at 1.

¹⁰⁰Prodigy is not named as a defendant in the Medphone suit. However, its insistence on screening all electronic messages on its system has led some to argue it is a publisher and therefore should have some liability for libelous statements made over its facilities. *Id.* The \$40 million suit filed against Denigris was settled for \$1.00 in late November 1993. See Fred Volgelstein, *Computer Libel Suit Settled, But the Issue Isn't*, NEWSDAY, Dec. 28, 1993, at 7; and Kurt Eichenwald, *Medphone Blames Messenger for its Stock Price Troubles*, N.Y. TIMES, Dec. 28, 1993, at D8.

¹⁰¹See Harmon, *supra* note 99.

¹⁰²*Miami Herald Publishing Co., v. Tornillo*, 418 U.S. 241 (1974).

¹⁰³*Sable Communications of California v. FC*, 492 U.S. 115 (1989).

¹⁰⁴*Leathers v. Medlock*, 499 U.S. 439 (1991) (cable) and *Red Lion Broadcasting, v. FCC* 395 U.S. 367 (1969) (broadcasting).

¹⁰⁵See *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990); and *Red Lion Broadcasting v. FCC* 395 U.S. 367 (1969). In *Red Lion*, the Supreme Court recognized broadcasters as having a qualified constitutional speech right. However, broadcasters' editorial speech rights were held secondary to the rights of listeners and viewers to receive diverse information and ideas. *Id.* at 389-390.

¹⁰⁶See *CBS v. Democratic National Committee*, 412 U.S. 94 (1973) (broadcasters could not be compelled to accept editorial advertisements covering controversial issues); and *Syracuse Peace Council v. FCC* 867 F. 2d 654 (1985).

¹⁰⁷Over time, the broadcast licensee's speech right has been expanded. Broadcasters may not be compelled to accept editorial advertisements for broadcast when they are already adhering to an obligation to present controversial issues of public importance fairly. They retain the right to decide what controversial "issues are to be discussed and by whom, and when." See *Columbia Broadcasting System, Inc. v. Democratic National Committee*. 412 U.S. 94 (1973).

Most recently, the Federal Communications Commission was upheld when it abolished the Fairness Doctrine because it "chilled" broadcasters' exercise of their editorial discretion, caused a reduction in the coverage of controversial issues, and hence deserved the First Amendment interests of the public. See *Syracuse Peace Council*, 2 FCC Rcd. 5043, *recon.denied*, 3 FCC Rcd. 2035, *aff'd*, *Syracuse Peace Council v. FCC*, 867 F.2d 654.

The Commission rested a significant part of its rationale for advocating the repeal of the Fairness Doctrine on technological grounds: "We believe that the dramatic changes in the electronic media,

together with the unacceptable chilling effect resulting from the implementation of such regulations as the Fairness Doctrine, form a compelling and convincing basis on which to reconsider First Amendment principles developed for another market." *Id.*

¹⁰⁸ *CBS v. Democratic National Committee*, 412 U.S. 94 (broadcasters could not be compelled to accept editorial advertisements covering controversial issues).

¹⁰⁹ *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1282 (1992); and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

¹¹⁰ See Michael Meyerson, *The First Amendment and the Cable Operator: An Unprotected Shield Against Public Access Requirements*, 4 Comment 1 (1981).

¹¹¹ See *Berkshire Cablevision of Rhode Island, Inc. v. Burke*, 571 F. Supp. 976 (1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985) (holding that mandatory cable channel access rules are constitutional based on theory of economic scarcity). Cf. *Preferred Communications v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985), *aff'd*, 476 U.S. 488 (1986) (requiring cable operator to set aside mandatory and leased access channels diminishes the operator's freedom of expression).

¹¹² See Cable Television Consumer Protection and Competition Act of 1992; and *Turner Broadcasting System, Inc. v. FCC*, 1994 WL 279691 (U.S. Dist. Col.) June 27, 1994.

¹¹³ See Cable Communications Policy Act of 1984, 47 U.S.C. §§ 531 (public, educational and governmental access channels), and 532 (leased access channels).

¹¹⁴ Although a majority of the Court in *Turner* found that the must carry rules are constitutional in the abstract, the Court remanded the case back to the district court. The Court found that the government's interests in promoting diversity of information from competing sources, preserving 40% of the society's access to economically viable broadcast stations, and promoting fair competition in the video distribution market are compelling. It also determined, however, that the government had failed to provide sufficient evidence to establish that broadcast stations are in economic jeopardy and that the must carry rules will actually advance the government's interests by materially alleviating the economic harm.

¹¹⁵ *Alliance for Media et al. v. FCC*, 10 F.3d 812 (1993).

¹¹⁶ *Id.*

¹¹⁷ See *Electronic Media Regulation and the First Amendment: Future Perspective*, *supra* note --; See generally Wilson, *supra* note 64; and Rifkin, *supra* note 63.

¹¹⁸ *Rankin v. McPherson*, 483 U.S. 378 (1987). (Public employees may not be fired for making statements about matters of public concern. See generally Estlund, *supra* note 13. However, the question of whether employees can make such statements over the company's e-mail and/or telephone systems has not been addressed to date.

¹¹⁹ Rifkin, *supra* note 63.

¹²⁰ A government employee cannot be fired for non-disruptive exercise of her First Amendment right to speak on matters of public concern, *Connick v. Meyers*, 461 U.S. 138, 150-51 (1983), provided, however, that the employer does not possess an interest in "effective and efficient fulfillment of its responsibilities to the public [which] outweigh the employee's interest in speaking."

¹²¹ Estlund, *supra* note 13.

¹²² While arguments for absolute access to the networks of closed user groups seem inappropriate, it is reasonable to require access where the network is an essential facility or is used for anti-competitive purposes. Similarly, it is reasonable to require some appropriate level of access where a compelling public interest in the information to be provided.

¹²³ Information providers who find their access to network or their communication over the network constrained by the network owner, may be able to establish that an antitrust violation has occurred. *United States v. Grinnell Corp.*, 384 U. S. 563, 570-571 (1966).

¹²⁴ See generally, Henry H. Perrit, Jr. *The Congress, The Courts and Computer Based Communications Networks: Answering Questions About Access and Content Control, Introduction*, 38 VILL. L. REV. 319 (1993).

¹²⁵ Sections 4 and 5 of the Act require cable systems of a certain size to carry, upon broadcaster request, the signals of certain licensed commercial and non-commercial broadcast stations in the cable operator's market. The legislation had been upheld as constitutional for the moment. *Turner Broadcasting Systems, Inc. v. Federal Communications Commission*, 114 S. Ct. 2445 (1994).

¹²⁶ Section 7(b)(4)(B) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), allows franchising authorities to require cable systems to provide public, educational and governmental access channels.

¹²⁷ Section 9 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), requires cable operators to make a portion of their channel capacity available for leased access by unaffiliated programmers.

¹²⁸ *Daniels Cablevision, Inc. v. U.S.*, 835 F. Supp. 909 (E.D. Va. 1993), *aff'd*, 42 F. 3rd 181 (4th Cir. 1994).

¹²⁹ Challenges have recently been filed in Michigan and Illinois. See note 139 *infra*.

¹³⁰ Cable television and regional telephone companies have recently proposed numerous mergers. Although many turned out to be short lived in the initial stages, many regulators and industry analysts expect this merger of industries and technologies to result in the provision of interactive, broadband, multimedia services. See Deutschman & Davis, *supra* note 2; *Policing the Information Highway*, *supra* note 2; Kupfer, *supra* note 2; Solomon, *supra* note 2; Greenwald, *supra* note 2; and Sugawara & Farhi, *supra* note 2.

¹³¹ The court in *Turner* concluded that to the extent the First Amendment is implicated at all by the must carry rules, it is a mere by-product of the fact that cable operators transmit video signals having no other function than the communication of information. As such, the must carry provisions are, in the court's mind, "unrelated to the content of any of the messages the cable operators, broadcasters and programmers have in contemplation to deliver." *Id.*

¹³² See Report and Order, In the Matter of Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations, 3 FCC Rcd 638; 64 Rad. Reg. 2d 583. (Nov. 24, 1987).

¹³³ The must carry question is not the first instance in which economic harm to existing broadcast stations has been raised against new competitors. In the broadcast economic injury cases, the courts and the Federal Communications Commission concluded that an existing broadcaster could prevent the entry of a new broadcast competitor based on pleading economic harm unless its allegations of economic injury were supported by proof of a significant loss in news and public affairs programming occasioned by a loss of advertising revenues. And, it also had to establish that this loss in news and public affairs programming would not be alleviated by the new entrant. After years of litigation before it, the FCC

concluded that no broadcaster had been able to successfully meet the public interest burden and abolished the economic injury objection. *Id.*

¹³⁴ See the Cable Communications Policy Act of 1984 (84 Cable Act) 47 U.S.C. @ 613(b). Also see Common Carriers for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems (Final Report and Order), 21 FCC 2d 307, recon. in part, 22 FCC 2d 746 (1970), *aff'd* General Telephone Co. of S.W. v. United States, 449 F.2d 846 (5th Cir. 1971).

¹³⁵ See H.R. Rep. No. 934, 98th Cong., 2d sess. at 56; and 130 Cong. Rec. H 10,444 (Oct. 1, 1984).

¹³⁶ See Further Notice of Inquiry and Notice Proposed Rulemaking, 3 FCC Rcd 5849, Telephone Company-Cable Television Cross Ownership Rules, §§ 63.54-63.58, FCC 88-249 (released Sept. 22, 1988).

¹³⁷ See 3 FCC 5849 (1988), *citing*, 69 FCC 2d 1110.

¹³⁸ See *C&P v. US*, Complaint for Declaratory Judgement and Injunctive Relief (Bell Complaint), para. 13 at 5. Also see *Bell Atlantic Challenges Cable Act in U.S. District Court*, TELEPHONE NEWS, Jan. 11, 1993.

¹³⁹ *C&P v. US*, 830 F. Supp. 909, *aff'd on partly different grounds*, 42 F.3d 181 (Nov. 21, 1994). One other Circuit Court and five other district courts have also found the cable-telephone cross-ownership ban unconstitutional on First Amendment grounds. See *US West, Inc. v. United States*, 1994 U.S. App. Lexis 36775; 95 Cal. Daily Op. Serv. 15, Dec. 30, 1994; *GTE California, Inc. v. FCC*, 39 F.3d 940 (Oct. 31, 1994); *Ameritech Corp. v. United States*, 867 F. Supp. 721 (Oct. 28, 1994); *Bellsouth Corp. v. United States*, 868 F. Supp. 1335 (Sept. 23, 1994); and *USTA, OPATSCO, NTCA Win Lawsuit to Lift Cable Phone Ownership Ban*, BNA MGMT. BRIEFING, Jan. 30, 1995.

¹⁴⁰ See generally *In the Matter of Competition in the Interstate Interexchange Marketplace Petitions for Modification of Fresh Look Policy*, CC Docket No. 90-132, 8 FCC Rcd 5046 (July 26, 1993); and *In the Matter of Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 7569, November 25, 1991. Also see Victor J. Toth, *To Tariff or not to Tariff - That's No Longer the Question*, BUS. COMM. REV., Jan. 1993, at 60.

¹⁴¹ See Smolla, *supra* note 6; and Summers, *supra* note 6. See also *supra* note 8 and accompanying text.

¹⁴² The statutory requirement that cable operators provide leased, educational and governmental access channels was upheld recently. See generally *Daniels Cablevision, Inc.* 835 F. Supp. 1 (1993).

¹⁴³ At least one communications expert asserts that there is no shortage of available spectrum, only a shortage of current human ingenuity to harness it. He points to the history of spectrum development and management wherein new technology allows the use of portions of previously "unusable" spectrum as well as the more efficient use of available spectrum via compression techniques. See George Gilder, *What spectrum shortage?* FORBES, May 27, 1991, at 324. Similarly, digital, switched interactive telecommunications networks can provide another source of increasing capacity for the transmission of information to the home. Consequently, they too reduce scarcity. Rockley L. Miller, *Digital World Future Systems*, MULTIMEDIA & VIDEODISC MONITOR, July 1993 (quoting Mitch Kapoor, former chairman of the Electronic Frontier Foundation).

¹⁴⁴ Andrea Adelson, *Radio Station Consolidation Threatens Small Operators*, N.Y. TIMES Apr. 19, 1993, at D1; Edmund L. Andrews, *Plan to Ease Rule on Buying Radio Stations*, N.Y. TIMES, Feb. 27, 1992, at D1; and *1985: A year like no other for the fifth estate: Changes in the broadcasting industry*, BROADCASTING, Dec. 30, 1985, at 38.

¹⁴⁵ Speaking at a recent conference on computers, freedom, and privacy in San Francisco, Laurence H. Tribe, a professor of constitutional law at Harvard Law School, called for an amendment to the U.S. Constitution that would protect privacy, speech, and other constitutional rights made possible in part, but now threatened by, computer technology. The Tribe Amendment reads, in full:

"This Constitution's protections for the freedoms of speech, press, petition and assembly, and its protection against unreasonable searches and seizures and the deprivation of life, liberty, or property without due process of law, shall be construed as fully applicable without regard to the technological method or medium through which information content is generated, stored, altered, transmitted, or controlled." In Professor Tribe's view, the current constitutional amendments do not protect the rights of computer users adequately. *See Resnick, supra* note 62.

¹⁴⁶ *See generally* Hammond, *supra* note 92; and Perrit, *supra* note 124, at 334-335.

¹⁴⁷ *Associated Press v. United States*, 326 U.S. 1, 19-20 (1945).

¹⁴⁸ *See* Harry, A. Jessell, *Video Dial Tone Advances at FCC*, BROADCASTING, Oct. 28, 1991, at 26; *Cable Attacks VDT*, TELEVISION DIGEST, Oct. 19, 1992, at 1; and Charles Mason, *Who Are the Real Monopolists?*, TELEPHONY, December 26, 1988, at 10.

¹⁴⁹ *See* 38 Vill. L. Rev. 571, 575, 584-585 (citing *City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373, 1380 (9th Cir. 1992); and *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1123-33, (7th Cir. 1983)).

¹⁵⁰ The FCC defined enhanced services as services "which employ computer processing applications that act on the format, content, code, protocol or similar aspect of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a) (1990).

¹⁵¹ At least one court was highly skeptical of the ONA plan's efficacy whether in its Computer II form or its subsequent Computer III form. *See U.S. v. Western Electric et al.*, 673 F. Supp. 525 (1987). Ironically, the same mechanisms of the ONA plans which Judge Harold Greene found so ineffective in 1987, are the very mechanisms the FCC proposes to implement under its post *California v. FCC*, modified Computer III regulations.

¹⁵² In the Computer III decision, the FCC determined that it would be sufficient for the RBOCs to provide enhanced services as integrated entities and offer their "unbundled" basic network functions to other enhanced service providers on a tariffed, nondiscriminatory basis. *See Computer III*, 104 F.C.C.2d at 964-65, 1063-66. *See* Filing and Review of Open Network Architecture Plans, 4 FCC Rcd. 1 (1988), *recon.*, 5 FCC Rcd. 3084, *amended plans conditionally approved*, 5 FCC Rcd. 3103 (1990). The FCC concluded that requirement to unbundle the network functions, combined with accounting and other non-structural safeguards would obviate the need to rely on the separate subsidiary requirement to prevent the RBOCs from engaging in access discrimination and anticompetitive cross subsidization which would favor their enhanced service operations. *Computer III*, 104 F.C.C.2d at 1007-12, 2 FCC Rcd. at 3039.

The U.S. Court of Appeals for the Ninth Circuit vacated and remanded the FCC's decision, ruling that the FCC had not provided sufficient support in the record for its conclusion. *California v. FCC*, 905 F.2d at 1238-39. In the FCC's Computer III proceedings subsequent to the court decision, the FCC quickly reinstated its ONA requirements including its waiver of the structural safeguards. It required that the RBOCs implement their plans to offer unbundled services regardless of its ultimate decision on structural separation. *See Computer III Remand Proceedings*, 5 FCC Rcd. 7719 (1990) and 6 FCC Rcd. 174.

¹⁵³ For instance, *Soldier of Fortune Magazine* was recently held liable for an advertisement it published which the court interpreted as soliciting contract killing jobs. See Ronald Smothers, *Soldier of Fortune Magazine Held Liable for Killer's Ad*, N.Y. TIMES, Aug. 19, 1992, at A18.

¹⁵⁴ "...Providers of goods and services created using computer and information technologies face increasingly greater exposure to liability when things go awry." See Barry Sookman, *The Liability of Information Providers in Negligence*, COMPUTER L. & PRAC., at 141-146 (1989).

¹⁵⁵ At least one state has limited the applicability of telephone carriers exculpatory language to ordinary negligence and does not allow disclaimers for acts of gross negligence, willful neglect or misconduct. See *State OKs Liability Disclaimers for Telcos*, 130 PUB. UTIL.FORT. 42 (Dec. 15, 1992) (discussing Re Inclusion of Liability Limitations, Case Nos. 90-774-T-GI et al., Oct. 30, 1992 (W.Va.P.S.C)).

The Supreme Court for the State of Illinois recently reached the opposite conclusion. It determined that parties' suffering economic injury totalling millions of dollars as a result of a severe fire at an Illinois Bell switch could not recover their losses. The court held that the parties' statutory claims for economic losses were not recoverable in a tort action and that the exculpatory language in Illinois Bell's tariff properly limited claims for disruption of service to compensation for the cost of the calls. See *Illinois Bell Switching Station Litig. No. 73999*, 1994 Ill. LEXIS 97 (Ill. July 28, 1994).

¹⁵⁶ Christy Cornell Kunin, *Unilateral Tariff Exculpation in the Era of Competitive Telecommunications*, 41 CATH. L. REV. 907 (1992).

¹⁵⁷ 47 USC § 414 (1988).

¹⁵⁸ Kunin, *supra* note 156, at 914-15, 926.

¹⁵⁹ It has been aptly observed that "...the law, by protecting freedom to contract does nothing to prevent freedom of contract from becoming a one-sided privilege." See Kessler, *Contracts of Adhesion-Some Thoughts About Freedom of Contract*, 43 Colum. L. Rev. 629, 640-641 (1943) (cited in Summers and Hillman, *Contract and Related Obligation: Theory, Doctrine and Practice*, chpt. 5., p. 585 (1987)).

¹⁶⁰ Re *Equicom Communications, Inc.*, 109 Pur 4th 540 (1990), cited in Cross, *supra* note 78.

¹⁶¹ One of the current policy goals in telecommunications regulation is to shift local exchange telecommunications network architecture away from a reliance on centralized network switching systems with limited flexibility to accommodate the creation of new services. The intent is to build networks in which the software "intelligence" is distributed throughout the network and often created and controlled by users rather than switch vendors and telecommunications providers. This shift in network paradigms is the essence of the movement from current telecommunications networks to advanced intelligent networks (AIN).

Ultimately, the anticipated benefit of AIN is to permit telecommunications and enhanced service providers as well as their respective customers, to enhance existing services or create new ones to meet the customers' individual needs. Steven Titch, *The Pathway to Freedom; Local Exchange Carriers, Advanced Intelligent Networks*, TELEPHONY, Apr. 15, 1991, at 30.

There is significant disagreement over the speed and manner of AIN deployment, as well as the manner in which carriers and users may gain access to future AINs. See Richard M. Firestone, *Telecommunications Pricing Strategies for the 90s*, TELECOMM. REP., 1991 FCC Lexis 2332 (Apr. 19, 1991) (Firestone is the Chief of the Common Carrier Bureau of the Federal Communications Commission).

¹⁶² There is significant uncertainty regarding how the public may ultimately react to and use the broadband multi-media capabilities which may be provided by the electronic superhighway. Nevertheless there is also substantial concern that, left to the vagaries of discernable short market demand, industry will not provide an infrastructure capable of extending broadband, multi-media interactive capabilities

and services to most, if not all, network users.

¹⁶³ There are several arguments which have arisen with regard to the viability of scarcity as a justification for future regulation of communication and telecommunication media. Some argue that choice of the appropriate technology can enhance opportunities for innovation and obviate the need for regulatory responses to access concerns raised by the existence of scarce transmission capacity. Miller, *supra* note 143. For different reasons, one noted commenter argues that spectrum scarcity as well as the current inability to build fiber to the home is a political rather than a technical or economic problem due to poor regulatory policy choices. See Gilder, *supra* note 7.

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