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Some Potential Pitfalls

by Jeffrey S. Hops

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CYBERMEDIA AND FREE SPEECH: SOME POTENTIAL PITFALLS

By

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Professor Pavlik has noted some of the technological possibilities of broadband networks. The convergence of television and the Internet is now. It is already physically and technologically possible to send switched video signals of substantial length anywhere in the globe, via T1, T3, fiber optic, or coaxial lines. The only thing that remains is to make these systems commercially available.

This raises two important questions. The first, from my organization's point of view, is vitally important: Will American culture, society, and democracy be enriched, unchanged, or even impoverished by these developments? This is not a merely idle query. The rise of so called "extreme fighting" on pay-per-view cable, for instance, is an example of how improvements in communications technology may actually have a deleterious effect on our life as Americans. I raise in passing the constant debate about the general societal impact of television. The answer may be different for cybernetworks, but the question is the same -- do they hurt or help?

How our culture is ultimately affected by these changes is ineluctably linked to the second question, which is "who gets paid and how much?" Communication is the raw material of culture, the fabric that forms the quilt of humans' social existence. And because communication is a commodity -- the economic input for which culture is the output -- the quantity and quality of culture is affected by the quantity, quality and price of communication.

Before I attempt to answer these questions, let me give you a little information about my employer, the Alliance for Community Media. The Alliance is a public interest group committed to assuring everyone's access to electronic media. The Alliance accomplishes this by creating public education, advancing a positive legislative and regulatory environment, building coalitions, and supporting local organizing. As a practical matter, the Alliance represents the interests of public, educational and governmental access centers on cable television, and their 1.2 million volunteer producers and millions more viewers. But we also represent the public interest, insofar as we believe that, as the Supreme Court stated in *Red Lion Broadcasting*, "[i]t is the right of the viewers and listeners... which is paramount.. It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here."¹ Needless to say, this puts us on the opposite side of the fence from those parties that feel that speech is a commodity as prosaic as vacuum cleaners or electric can openers. Speech is not the same as other commodities -- the health of democracy depends upon a free and diverse supply. Consequently, the Alliance believes that speech is something that all Americans should be able not only receive, but produce.

The Alliance strongly favors the principle of video switched systems. We are especially supportive of the idea that any endpoint can send video programming to any other endpoint, just

¹ *Red Lion Broadcasting Inc. v. FCC*, 395 U.S. 367, 390 (1969), accord, *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973).

as a telephone is linked to all other telephones. In an ideal world, anyone with a minicam and a computer could produce a television show for the net, as well as a home page. This means that all voices are accessible by everyone who is connected to the Internet. There is undoubtedly a gain for public discourse and the cultural life of our communities when the thoughts and creations of people are available to each other. More is better. If my brother in Thousand Oaks wants to send me the home video of my niece's second birthday party -- something he is currently doing via regular mail -- he will be able to do it. Likewise, if he wants to mail me a homemade documentary depicting numerous OSHA violations at his workplace, he can also do that. And the technology will allow him to -- if he can afford it.

Overall, the development of cybernetworks looks extremely promising from a First Amendment and access point of view. There are four potential flies in this ointment however, which separately or together might result in a net loss of expression. They are: system configuration; vertical integration and/or tying and exclusivity arrangements; fee structures; and the configuration of search engines. Each of these pose the danger of excluding would-be speakers and would-be listeners from the information network.

System Configuration

First, one type of system architecture already under construction (primarily by the cable industry) permits massive file transfers downstream via coaxial or hybrid fiber coax (HFC), but uses as simple twisted-pair telephone line for upstream communication. This means that the consumer can receive massive amounts of information, but can only send relatively tiny trickles -- the minimum necessary to send e-mail and navigate through the system. So it's back to the mailroom for my brother, and passive consumption for subscribers to these services. While so-called "telephone return" is a low-cost way for cable to get into internet and telephony, it would be a significant missed opportunity for communications if this "downstream torrent, upstream trickle" standard became the norm for residential customers.

Vertical Integration/Tying/Exclusivity

Secondly, cable companies, telephone companies, electric utilities, software and hardware manufacturers are scrambling for position to create complete end to end services, where they are both conduit and content providers. As a corollary, it would be rational to expect that once these vertically integrated offerings are in place, the integrated entity would seek to exclude either competing conduits from its content, or competing content from its conduit. Instead of the internet developing into a full-fledged common carrier system for video, regardless of the source, it will transform into something that's just like cable -- where the company that provides the line also gets to have editorial control over consumers' access. The best example of this is found in an interview with Milo Medin, VP-Networks at @Home, TCI's new venture into become an ISP. In a recent interview in Cable World magazine, Mr. Medin states, "No one would have thought to serve CNN programming to each [e.g.,] Seattle subscriber, one at a time, from Atlanta. Yet that's exactly the way the narrowband Web works today. It just doesn't scale for broadband...Why send 100 copies of the same data to everyone in a city when you can send one

copy to everyone simultaneously? That's the way cable works, after all..."² Implicit in this statement is the presumption of some sort of editorial control, since @Home will not be able to multicast all video channels now existing simultaneously.

This conflicts dramatically with the common-carrier model by which the Internet now operates. What @Home seems to be saying that when you use our conduit, you also will be using our on-line service -- and our on-line service will decide what's easy for you to access and what's difficult. Common carriage models, of course, do not exclude speakers based on content -- or business affiliation -- and neither does the Internet. But on-line services like AOL and Prodigy offer select information services that are much more accessible and easy to use than similar services provided on the Internet. And that is most definitely editorial control -- even if access to the Internet is also included.

Back-handed censorship will most likely come through ISP's, cable companies' and telephone companies' marketing departments. On-line services may include real-time editions of Soap Opera Digest, and exclude "Thomas," the Library of Congress' database. It doesn't ban use of the database, but it makes it much more difficult to find.

Tying and exclusivity arrangements may also be a danger. Right now, most of these arrangements are illegal on cable -- a programmer cannot enter into an exclusive contract with one cable company only. But nothing prohibits a programmer from cutting an exclusivity deal with an on-line provider or ISP. This troubles me not only from a First Amendment point of view, but may raise antitrust concerns.

Cost(s)

In addition to real time transmission of data and video via the internet, we now have the ability to track, account, and distribute royalties and other charges in real time. And I'm fairly certain that this will happen. Let us say that I want to watch the Lucy "Vitameatavegamin" episode. I type in vitameatavegamin, and at the same time that the beginning credits are running, a chain of financial transactions pulls 50 cents out of my bank account -- automatically. Ten cents goes to the copyright owner of I Love Lucy, five cents goes to the cable company, fifteen cents goes to Microsoft just because 30 percent of anything these days goes to Microsoft; ten cents goes to Bell Atlantic, ten cents goes to PacBell, where the program is being stored, and five cents goes to the ISP. The money changes hands at the exact second I hit "Enter."

Copyright owners are rubbing their hands with glee over the advent of addressable internet accounts that can transmit transparent billing information and complete the transaction while the system is being used. No more worrying about people making unauthorized copies of anything -- anything copyrightable will be programmed in "read only," so that the consumer will have to pay for anything and everything he or she sees. If someone wants to look at the same thing again, they'll have to call it up again, and pay another fee.

Copyright will likely be the major factor in how World Wide Web cybermedia networks are ultimately configured. As professor Pavlik noted, we will have what he called "usage-based funding" or "nano-transactions." But these "nano-transactions" will be charged at every

² Peter Lambert, "Milo Medin: @Home's Broadband Wizard," 8 Cable World No. 34 (August 10, 1996) at 64.

tollbooth along the way -- charges will be placed, not only on access to content, but on the conduit, the translation, perhaps even on "hardware usage" as well. Secondly, I suspect some of these "nanotransactions" will not be so "nano" -- \$39.95 to watch a 109 seconds of programming -- in this case, a boxing match -- is not "nano" by anyone's measure. Lexis and Westlaw are extremely expensive services; high "nano-" prices will be likely with any service that has intense demand.

Usage fees interact with vertical integration to create a scenario which looks very bad for the preferred common carriage model. Let's say NYNEX offers its on-line service, with a select package of information services and cable channels for a relatively low cost. If you want to get other services -- web-surfing, for instance, or access to programming not in NYNEX's package, costs go up - perhaps astronomically. Not absolute editorial control, to be sure, but a de-facto control created by the manipulation of pricing. There has been a great deal of debate in some sectors of the industry about whether the conduit will be free to get people to purchase the content, or the content will be free to get people to purchase the conduit. I don't think either will be the case -- people will have to pay for both the conduit and the content, and neither will be cheap. The whole movement toward "dumb terminals" will in fact expedite this by ensuring that hookups will not have the memory to retain files. You will have to go back to the mainframe every time you want access -- access at a price.

Navigation Devices

This little-discussed issue -- getting around in this converged world -- could have enormous First Amendment implications. I as a speaker do not exist until someone listens. And if I can't be found, I can't be heard.

The temptation to manipulate navigation devices so that they only find programming in which the conduit has a financial interest is great -- so great, in fact, that Congress specifically prohibited manipulation of navigation devices in its Open Video Systems provisions. However, OVS does not currently apply to the internet. @Home, TCI's new on-line service, can, if it chooses, create a menu of video and text selections comprised completely of its own content products. The door to the outside world, of course, will still be marked "To the Internet." But if TCI imposes an additional charge for going through that door... TCI may be hoping that you'll simply stick to its menu. I would not be surprised if access to menus becomes the next great litigation issue for telecommunications lawyers.

Assuming you do go through the door to the Internet, there is still a danger of implicit or explicit censorship from Internet search engines. Up to now, the engines have done an admirable job of avoiding the temptation which certainly some of them might feel -- to charge sites a fee to be "found" by them. The competition in the marketplace currently prevents that from happening -- no-one will buy a search engine that only finds a portion of the existing universe. But if one or two search engines become dominant, that dynamic could change. Combined with tying-exclusivity arrangements, this could create a situation in which one search engine becomes dominant -- and effectively excludes those entities that refuse to pay the listing fee.

The search engines may provide preferential treatment for wealthy speakers in other ways. Coca-Cola, for instance, might want to pay Yahoo or Webcrawler a little extra something to be the first listing that comes up if someone types in the search term "soft drink." And, of course, the search engines may ask you for your bank account number before they start working

for you.

How does all this affect culture then? There may actually be less of it, and it will be more expensive, and conduit providers will exercise more editorial control. ISPs may eventually become the new broadcasters -- they will determine what you can see and what you can't. And, if you are trying to send an uncopyrighted video -- or retrieve one -- the system will give you an error message. So it is possible that the benefits of the information age will accrue to owners, but not very much to users. And, as the electronic universe expands, the amount of information available at lower cost from the non-electronic universe will concomitantly contract. This is why we are keeping a close watch on developments in copyright law. The Alliance is not opposed to the institution of copyright and intellectual property, but we believe that there is still some room for fair use, even in the electronic world. And it looks to us like fair use may not be applied in cyberspace.

What I have suggested here, of course, is a multitude of worst-case scenarios from the public interest point of view. It assumes a "Wild West" atmosphere where all attempts to impose open access and rate regulation are rebuffed, something I don't think is likely. But I am certain that some of the players in the industry will attempt at least some of the actions I've described. And, I'm always hopeful that one day the telecommunications industry will eventually come to understand that their product is not just an electric can opener -- it is the health of democracy itself.