

1985

Electronic Publishing: First Amendment Issues in the Twenty-First Century

Lynn Becker

New York City Department of General Services

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>



Part of the [Communications Law Commons](#)

Recommended Citation

Lynn Becker, *Electronic Publishing: First Amendment Issues in the Twenty-First Century*, 13 Fordham Urb. L.J. 801 (1985).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol13/iss4/1>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

ELECTRONIC PUBLISHING: FIRST AMENDMENT ISSUES IN THE TWENTY-FIRST CENTURY

Lynn Becker*

I. Introduction

On November 12, 1984, the New York Times reported the arrest of Thomas Tcimpidis,¹ a Los Angeles electronic bulletin board² operator whose system allegedly was being used by "phone phreaks"³

* Assistant General Counsel, New York City Department of General Services; Suffolk University Law School, J.D., 1981; Colgate University, B.A., 1978.

1. Pollack, *Free-Speech Issues Surround Computer Bulletin Board Use*, N.Y. Times, Nov. 12, 1984, at A1, col. 1; see also Wall St. J., Nov. 9, 1984, at 33; INFOWORLD, July 2, 1984, at 15.

2. An electronic bulletin board is a computer file which is accessible to subscribers' home computers through a telephone connection. Presently there are several thousand in operation, providing a medium for the exchange of information to computer enthusiasts. N.Y. Times, Nov. 12, 1984, at D4, col. 3. Some of the bulletin boards are integrated with national information services such as CompuServe and The Source, discussed *infra* note 67 and accompanying text. An increasing number of others, however, are run by computer hobbyists and are open to all callers. *Id.* See Hansen, *Electronic Messaging*. PC TECH J., Feb. 1985, at 141 for a detailed discussion of the operation of one public access bulletin board system. These systems provide a nationwide communications network which is invisible to the majority of the American public. Thomas Tcimpidis took advantage of this network after his arrest by alerting computer users all over the country of his plight within three days of his arrest. Pollack, *Free-Speech Issues Surround Computer Bulletin Board Use*, N.Y. Times, Nov. 12, 1984, at D4, col. 4. He also secured the counsel of a computer lawyer to assist in his defense. POPULAR COMPUTING, June 1985, at 76, 144.

The underground networks, however, also have less benign ramifications. In June, 1984, the *New York Times* reported the electronic bulletin board posting of a stolen credit agency computer password. N.Y. Times, June 22, 1984, at D1. Although no thefts were reported as a result of this incident, ninety million credit histories may have been jeopardized. *Id.* More ominous, are recent reports of the use of electronic bulletin boards by an Idaho-based neo-Nazi organization to distribute its literature in Canada and apprise interstate members of subversive activities. King, *20 Held in 7 States in Sweep of Nazis Arming for 'War' on U.S.*, N.Y. Times, Mar. 3, 1985, at A20, col. 1.

3. "Phone Phreaks" specialize in making telephone calls without paying, and frequently use electronic bulletin boards, described *supra* note 2, to distribute stolen credit card numbers. Perry & Wallich, *Can Computer Crime be Stopped?*, IEEE SPECTRUM 34, 37 (May 1984) (brief case study of phone phreak) [hereinafter cited as Perry & Wallich]. In the Tcimpidis case, Pacific Bell Telephone Company initiated the investigation into the stolen credit card numbers which ultimately led to the system operator's arrest. Pollack, *Free-Speech Issues Surround Computer Bulletin Board Use*, N.Y. Times, Nov. 12, 1984, at D4, col. 2; see also Perry & Wallich, *supra*, at 39.

to post stolen telephone credit card numbers.⁴ The Los Angeles Police Department confiscated Tcimpidis' computer equipment, and the county district attorney charged him with the misdemeanor of "knowingly and willfully publishing" the stolen numbers.⁵

While the legal liability of the "phone phreaks" or "hackers,"⁶ who infiltrate boards like that operated by Tcimpidis, has become increasingly clear as numerous states pass computer crime legislation,⁷

4. By posting the stolen numbers, the phone phreaks, *supra* note 3, enable any board user to anonymously charge any telephone call to the cardholder's number. This usage is consistent with what is viewed as one of the classic motivations of the computer criminal, that is, the desire "to play Robin Hood [and rob] the government, telephone company or other large impersonal [organization.]" Sokolik, *Computer Crime—The Need for Deterrent Legislation*, 2 *COMPUTER L.J.* 353, 367 (1980) [hereinafter cited as *Deterrent Legislation*]; D. PARKER, *CRIME BY COMPUTER*, (1976) [hereinafter cited as *PARKER*].

5. Pollack, *Free-Speech Issues Surround Computer Bulletin Board Use*, N.Y. Times, Nov. 12, 1984, at A1, col. 2.

6. A hacker is "a person with computer expertise intrinsically interested in the exploration of computer systems and their capabilities." Perry & Wallich, *supra* note 3, at 37. See generally S. LEVY, *HACKERS: HEROES OF THE COMPUTER REVOLUTION* (1984) [hereinafter cited as *LEVY*]. More recently, the term has come to mean computer abusers, that is, those who seek to gain unauthorized access to a computer system. Perry & Wallich, *supra* note 3, at 37. The recently reported case of the 414's in Milwaukee, in which a group of high school students broke into numerous computer systems purely for the thrill of it, presents a classic hacker scenario. N.Y. Times, Aug. 14, 1983, at A30, col. 1. The students used information obtained from a local electronic bulletin board, *supra* note 2, and combined it with a minimal degree of computer proficiency to access various systems in this country and in Canada. *Id.* Those students who were apprehended stated that they had no idea they were doing anything wrong. *Id.* See *PARKER, supra* note 4, at 41 for a more complete description of the role of the hacker in computer crime.

7. Sullivan & Shaw, *Criminal Penalties for Misappropriation of Computer Technology*, 2 *COMPUTER LAWYER* 19 (1985) [hereinafter cited as *Criminal Penalties*]. Since 1979, when Florida became the first state to enact computer legislation, FLA. STAT. §§ 815.01-.07 (Supp. 1985), thirty-three other states have acknowledged the weaknesses of their penal laws and passed specific computer crime bills. See Raysman, *Computer Law*, N.Y.L.J., Jan. 8, 1985, at 1, col. 1 [hereinafter cited as *Raysman*]. The federal government followed suit in 1984, enacting The Counterfeit Access Device and Computer Fraud and Abuse Act of 1984, Pub. L. No. 98-473, Title II, § 2102(a), 98 Stat. 1837, 2190 (1984). Raysman, *supra*, at 1. See *Criminal Penalties, supra*, for a comprehensive overview of existing state and federal computer crime statutes. See generally U.S. DEP'T OF JUSTICE, *COMPUTER CRIME: CRIMINAL JUSTICE RESOURCE MANUAL* (1979) [hereinafter cited as *CRIMINAL JUSTICE RESOURCE MANUAL*].

Computer abuse may be defined as "any intentional act associated in any way with computers where a victim suffered, or could have suffered, a loss, and a perpetrator made, or could have made, a gain." Parker, *Computer Abuse Research Update*, 2 *COMPUTER L.J.* 329, 333 (1980) [hereinafter cited as *Computer Abuse Research Update*]. There are four generally accepted classifications of computer crime: (1) introduction of fraudulent records or data into a computer system; (2)

the *Tcimpidis* case appears to be the first in which the legal liability of the system operator⁸ is at issue.

unauthorized use of a computer or computer-related facilities; (3) alteration of computerized information or files; and (4) theft by electronic means of money, financial instruments, property, services or valuable data. See Note, *Computer Abuse: The Emerging Crime and the Need for Legislation*, 12 FORDHAM URB. L.J. 73, 74-75 (1984). Recent surveys estimate that the annual loss to American businesses from computer related crimes is \$3 billion, with 25% of responding companies acknowledging that they were victimized by computer criminals. *Crime Pays*, DATAMATION, Sept. 15, 1984, at 72.

Although one commentator has argued that computer crime is nothing more than a standard crime which happens to involve a computer, Taber, *On Computer Crime*, 1 COMPUTER L.J. 517, 537 (1979), most experts agree that computer abuse presents a difficult and unique set of penal issues to the state or federal prosecutor. See Gemignani, *Computer Crime: The Law in '80*, 13 IND. L. REV. 681 (1980) [hereinafter cited as *The Law in '80*]; *Deterrent Legislation*, *supra* note 4; Note, *A Suggested Legislative Approach to the Problem of Computer Crime*, 38 WASH. & LEE L. REV. 1173 (1981) [hereinafter cited as *Suggested Legislative Approach*].

The major problem in prosecuting computer crime is the difficulty of applying traditional penal laws to new technology. See Comment, *Computer Crime—Senate Bill S.240*, 10 MEM. ST. U.L. REV. 660, 661-62 (1980) [hereinafter cited as *Computer Crime*]. As a result, most early cases had to be "shoe horned" into criminal categories which were inappropriate, and which were not designed to accommodate the special evidentiary and sentencing problems presented by computer crimes. See, e.g., *United States v. Seidlitz*, 589 F.2d 152 (4th Cir.), *cert. denied*, 441 U.S. 922 (1978) (unauthorized access to and misappropriation of computer program prosecuted under federal wire fraud statute, 18 U.S.C. § 1343, when interstate telephone lines were used to transmit computer program signals); *Lund v. Commonwealth*, 217 Va. 688, 232 S.E.2d 745 (1977) (unauthorized use of computer time held not to constitute Virginia crimes of false pretenses or larceny); *Ward v. Superior Ct.*, 3 Comp. L. Serv. Rep. 206 (1972) (electronic impulses representing stolen computer program held not to constitute tangible article under California theft statute). See also the case of Jerry Schneider reported in PARKER, *supra* note 4, at 59-70. Schneider allegedly stole millions of dollars of telephone equipment from Pacific Telephone and Telegraph Company through a sophisticated computer scam. He served forty days in jail, paid a \$500 fine, and made restitution in the amount of \$8,500. He reportedly now earns over \$100,000 per year as a computer security consultant. *Id.* at 68. See generally McLaughlin, *Computer Crime: The Ribicoff Amendment to the United States Code, Title 18*, 2 CRIM. JUST. J. 217, 224 (1979).

8. The system operator, or sysop in the current jargon, manages the central computer which users access and through which they post messages. See Pollack, *Free-Speech Issues Surround Computer Bulletin Board Use*, N.Y. Times, Nov. 12, 1984, at D4, col. 1. The operator may generate information himself or may contract for it with "information providers" such as advertisers, wire services, government agencies or other publishers. Neustadt, Skall & Hammer, *The Regulation of Electronic Publishing*, 33 FED. COM. L.J. 331, 334 (1981) [hereinafter cited as *Regulation of Electronic Publishing*]. In some operations, such as Knight-Ridder's Viewtron bulletin board, discussed *infra* notes 68 & 73, the corporate system operator considers itself responsible for all messages on the system, screening material and deleting obscene messages as well as those judged to be in poor taste. N.Y. Times, Nov. 12, 1984, at D4, col. 1. Other services, such as CompuServe and The Source, *infra* note 67, do not screen messages or monitor them with any regularity. N.Y. Times, June

The *Tcimpidis* case raises significant questions about the regulation of electronic publishing,⁹ a field which encompasses bulletin boards like *Tcimpidis*, as well as on-line information services, electronic mail and teletext and videotext technologies. Foremost among these questions is the relationship between the new electronic media and the first

22, 1984, at D4. Following *Tcimpidis*' arrest, *see supra* text accompanying notes 1-8, his bulletin board advised all users that "illegal, obscene or abusive messages . . . will not be tolerated." *Id.* Whether or not such a message would protect a system operator from any or all legal liability under the existing law is not yet clear.

Depending on whether the medium is viewed as a common carrier, *see infra* notes 279-308 and accompanying text, broadcasting, *see infra* notes 185-272 and accompanying text, or electronic newspaper, *see infra* notes 135-81 and accompanying text, the *sysop* may be prohibited, required, or permitted to exercise control over the content of the messages conveyed.

9. Electronic publishing has also been defined as "the provision of any information which a provider or publisher has, or has caused to be originated, authored, compiled, collected, or edited, or in which he has a direct or indirect financial or proprietary interest, and which is disseminated to an unaffiliated person through some electronic means." *United States v. AT&T, Co.*, 552 F. Supp. 131, 181 (D.C. Cir. 1982), *aff'd*, 103 S. Ct. 1240 (1983). Included within this definition are two-way interactive transaction services transmitted via pay television, radio and television broadcasting. *Id.* at 181 nn.207-08; *see infra* note 13. Electronic publishing is also used generically to describe teletext and videotext information distribution services. *Regulation of Electronic Publishing, supra* note 8, at 332. *See infra* notes 29-74 and accompanying text for a description of teletext and videotext. Electronic publishing has been defined as "[s]ystems for the widespread dissemination of text and graphic information by wholly electronic means for display on low-cost terminals under the selective control of the recipient, using control procedures easily understood by untrained users." *Regulation of Electronic Publishing, supra* note 8, at 332 n.1, *citing* M. TYLER, *ELECTRONIC PUBLISHING: A SKETCH OF THE EUROPEAN EXPERIENCE* (1980) (unpublished manuscript distributed by Institute for the Future).

Electronic publishing is to be distinguished from the electronic newsrooms of technologically astute journalists who have substituted computer video display terminals for paper and typewriters, but who have also maintained traditional roles with respect to news compilation and distribution. *BROADCASTING*, Jan. 21, 1985, at 92.

Also excluded from the limits of electronic publishing, for purposes of this Article, are continuous news presentations on cable television channels and the use of over-the-air broadcasting, satellite relays and telephone wires by national newspapers to transmit their editions to printing presses throughout the country, as well as audiotex systems which use the telephone wires to aurally transmit data and which include the Dial-it services that provide time, sports scores and weather along with more sophisticated interactive information retrievals. *See* Pollack, *Audiotex: Data By Telephone*, N.Y. Times, Jan. 5, 1984, at D2, col. 1; Blain, *Audiotex Phone Service Available Soon in D.C.*, *TELEPHONY*, Mar. 4, 1985, at 85; *see also* Nadel, *A Unified Theory of the First Amendment: Divorcing the Medium from the Message*, 11 *Fordham Urb. L.J.* 163, 166 n.9 (1982-1983) [hereinafter cited as Nadel].

amendment, which guarantees freedom of speech and of the press.¹⁰

This Article addresses some of the questions which arise out of the *Tcimpidis* case.¹¹ Part II provides an introduction to electronic publishing: teletext,¹² videotext,¹³ the subcategories of electronic mail¹⁴ and electronic bulletin boards,¹⁵ as well as the related technology

10. See generally Bazelon, *The First Amendment and the "New Media"—New Directions in Regulating Telecommunications*, 31 FED. COM. L.J. 201 (1979) [hereinafter cited as Bazelon]; Stern, Krasnow & Senkowski, *The New Video Marketplace and the Search for a Coherent Regulatory Philosophy*, 32 CATH. U.L. REV. 529 (1983) [hereinafter cited as *The New Video Marketplace*]; *Legal Issues in Electronic Publishing: Videotext Symposium*, 36 FED. COM. L.J. 217 (1984) [hereinafter cited as *Videotext Symposium*].

11. The major question raised by the *Tcimpidis* case concerns the responsibility for information provided over electronic publishing facilities, particularly if the publication is defamatory, obscene or criminal. If bulletin boards and their related technology are considered common carrier information distributors, such as telephone companies, the bulletin board operator would not be responsible for the content of the information conveyed. See *infra* notes 303-09 and accompanying text. If, however, the bulletin board is viewed as a form of electronic newspaper, then the operator would be liable for the material published in the same manner as the traditional press. See *infra* notes 135-81 and accompanying text. The question of whether print, common carrier or broadcasting is the most appropriate classification for electronic publishers will be explored throughout this Article.

12. Teletext is a one-way information distribution service whereby data is transmitted from a central computer to a subscriber's terminal using broadcast, cable or microwave technology. See *Regulation of Electronic Publishing*, *supra* note 8, at 332; *infra* notes 29-53 and accompanying text.

13. Videotext is a two-way information distribution service whereby the subscriber can respond to, as well as receive, the transmitted data, and execute service transactions via cable or telephone technology. *Regulation of Electronic Publishing*, *supra* note 8, at 333; see *infra* notes 54-74 and accompanying text. Commentators differ on the appropriate terms in this area: teletex versus teletext, and videotex versus videotext or viewdata. See *Videotext Symposium*, *supra* note 10, at 149. For consistency of application, the increasingly accepted spellings, 'teletext' and 'videotext,' as discussed *infra* notes 29-74, will be used throughout this Article.

14. Electronic mail is a method of electronically transmitting a message from an individual at one computer terminal to someone at another terminal, via a routing mechanism contained in a central or "host" computer. More accurately described as a computer based message, rather than a mail, system, the technology is generally viewed as a substitute for short telephone calls rather than for the postal system. To use electronic mail, a subscriber accesses his computer, locates the "mailing address" of the subscriber to whom the communication will be directed, then types in the message and directs the system to transmit it. Existing services include MCI Mail, ITT Dialcom, Compuserve, The Source, GTE's Telemail, Tymshare's On Tyme, and Western Union's Easylink. See 71 A.B.A. J. 96 (1985); INFOWORLD, July 2, 1984, at 28; MICRO COM., Feb. 1985, at 36; Nat'l L.J., Feb. 4, 1985, at 15.

15. See *supra* note 2.

of home banking.¹⁶ Part III examines the digital electronics¹⁷ revolution which gave birth to these new media and considers the technology from a historical perspective.¹⁸ Part IV reviews the in-

16. Home banking is a transactional form of videotext which enables subscribers to conduct electronic fund transfers through their home computers. EFT REP., May 23, 1984, at 4-6 [hereinafter cited as EFT REP.]. See generally Connors, *The Implementation of the Electronic Fund Transfer Act: An Update on Regulation E*, 17 WAKE FOREST L. REV. 329 (1981). For a listing of articles pertaining to Electronic Fund Transfers, see *Electronic Fund Transfer Bibliography—Update*, 9 RUTGERS J. OF COMPUTERS AND THE LAW 403 (1983). One of the first banks to offer home banking services was New York's Chemical Bank, which initiated the "Pronto" system in September 1983. EFT REP., *supra*, at 6. Subscribers pay \$12 per month for the system which is compatible with Apple, Atari and IBM personal computers. Pronto is currently used by approximately 5000 Chemical bank customers, although expansion is anticipated as the system develops into an all-encompassing home financial services system. *Id.* In addition to providing bill paying, funds transfer, balance inquiry, electronic statements, home budgeting, and checkbook reconciliation services, Pronto offers a securities trading service to its subscribers through "Trade*Plus," a California financial information firm. *Id.* at 5. When a customer enters a buy or sell transaction, the message goes instantly to the Trade*Plus host computer via Chemical's Pronto mainframe. The Trade*Plus computer sends the information to a discount broker who executes the order and sends a trade confirmation back to the subscriber's terminal. *Id.* at 5-6. Additionally, Chemical Bank licenses the Pronto system to other banks, thereby enabling the bank to raise revenue and participate more fully in the videotext market. *Id.* at 6.

17. Digital electronics is the system upon which almost all modern computing applications are based. Digital computers are basically counting devices that operate on discrete data or numbers. COUGAR & MCFADDEN, A FIRST COURSE IN DATA PROCESSING 52 (1977) [hereinafter cited as COUGAR & MCFADDEN]. The data are represented by binary signals (zeros and ones) called bits, which may be processed within a single computer or transmitted to various remote computer sites over the telephone. This transmission is carried out by the use of a modem which translates the computer digital pulse into an analog wave form capable of being carried by telephone copper wires. *Id.* Digital computers can accurately process sequential operations on these data in a wide variety of business applications. Taetzsch, *Computer Basics*, INFORMATION PLUS No. 120 (1982).

Digital computers are contrasted to analog computers which use continuous, rather than unconnected, signals. Analog computers operate by establishing a physical analogy between the computer system and the system being studied. *In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 47 RAD. REG. 2d (P&F) 669, 694 n.33 (1980) [hereinafter cited as *Computer II*]. Analog computers are most frequently used for manufacturing applications, where continuously operating variables such as temperature, pressure or speed are analyzed. COUGAR & MCFADDEN, *supra*, at 52.

The legal problems which arise in the area of electronic publishing are the result of the confluence of traditional and regulated analog communications, such as telephones, with digital computers which are used for information processing and enhanced transmission functions and do not neatly fit into any previously defined regulatory category. *Computer Services Inquiry*, 18 RAD. REG. 2d (P & F) 1713, 1719 (1970).

18. See *infra* notes 75-126 and accompanying text.

terplay between the first amendment and the existing regulatory models of the press, broadcasting, common carriers and cablecasting.¹⁹ Of particular concern will be the areas of content regulation,²⁰ defamation,²¹ and obscenity.²² In parts V and VI, this Article concludes by proposing a regulatory approach to the new electronic communications based on extrapolations from the existing media models, and suggests guidelines for implementing a coherent national telecommunications policy.²³

19. See *infra* notes 127-309 and accompanying text.

20. Content regulation of various media has been justified as an acceptable abridgement of first amendment rights when issues such as obscenity, privacy, defamation and criminal incitement are raised. See, e.g., *Time v. Hill*, 385 U.S. 374 (1967) (privacy); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (libel); *Feiner v. New York*, 340 U.S. 315 (1951) (criminal incitement); *Johnson v. Harcourt, Brace, Jovanovich, Inc.*, 43 Cal. App. 3d 880, 118 Cal. Rptr. 370 (1974) (privacy). Content regulation in the broadcasting context represents the most pervasive involvement of the government in the control of any medium of expression protected by the first amendment. See, e.g., Communications Act of 1934 § 315 (Fairness Doctrine).

In broadcasting, Government power is used to shape and direct the content of programming toward various social ends by requiring, or indirectly coercing, the presentation of various types of information and programming in the name of the public interest It is only in the broadcast media that the First Amendment has been interpreted to permit governmental efforts to foster the expression of certain ideas or information by intruding upon the creation, selection, and editing functions of the private media owners.

REPORT TO THE PRESIDENT OF THE CABINET COMM. ON CABLE COMMUNICATIONS 23 (U.S. Gov't Printing Office 1974) (cited in Goldberg & Couzens, "Peculiar Characteristics": An Analysis of the First Amendment Implications of Broadcast Regulation, 31 FED. COMM. L.J. 1, 2-3 (1978) [hereinafter cited as Goldberg & Couzens]). The most infamous form of broadcasting regulation is the Fairness Doctrine, codified at 47 U.S.C. § 315 (1982), discussed *infra* note 196.

21. Defamation is: (a) the making of a false and defamatory statement about another; (b) an unprivileged publication to a third party; (c) fault amounting to at least negligence by the publisher; and (d) either actionability of the statement regardless of special harm or the existence of special harm caused by the publication. RESTATEMENT (SECOND) TORTS § 558 (1977) [hereinafter cited as RESTATEMENT-TORTS]. See *infra* notes 147-73 and accompanying text for a discussion of defamation.

22. "Obscene" means

that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to the prurient interest, *i.e.*, a shameful or morbid interest in nudity, sex or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters.

Miller v. California, 413 U.S. 15, 17 n.1 (1973). Obscene material is not protected by the first amendment. *Roth v. United States*, 354 U.S. 476 (1957). See *infra* notes 174-81 and accompanying text for a discussion of obscenity law.

23. See *infra* notes 310-81 and accompanying text.

II. Introduction to Electronic Publishing

Electronic publishing is a generic term used to describe the providing of information of any sort to consumers by electronic means.²⁴ Text or graphic data is created or compiled in a central computer by a system operator and transmitted over airwaves or through cable or telephone wires to subscribers who receive and display it on a television or computer screen.²⁵ By combining the technology of data processing²⁶ and telecommunications,²⁷ electronic publishers can provide customers with a wide variety of information services.²⁸

A. Teletext Technology

One-way data transmission, known as teletext,²⁹ operates by conveying information from the host computer to the subscriber as a continuous cycle of data.³⁰ The subscriber requests a particular page

24. R. NEUSTADT, *THE BIRTH OF ELECTRONIC PUBLISHING* 5-24 (1982) [hereinafter cited as NEUSTADT]; see also Beck, *Control of, and Access to, On-Line Computer Data Base: Some First Amendment Issues in Videotex and Teletex*, 5 COMM/ENT 1 (Fall 1982); Branscomb, *Electronic Publishing: A Global View of Videotex*, 36 FED. COM. L.J. 119 (1984) [hereinafter cited as *Global View*].

25. NEUSTADT, *supra* note 24, at 5, 10.

26. Data processing is the use of a computer for operations such as storing, retrieving, sorting, merging and calculating data according to programmed instructions. Computer Services Inquiry, 18 RAD. REG. 2d (P & F) 1713, 1719 (1970) [hereinafter cited as *Computer I*].

27. Telecommunications, which originally included only telegraph and telephone facilities, now encompass all forms of electronically transmitted communications. See generally J. MARTIN, *FUTURE DEVELOPMENTS IN TELECOMMUNICATIONS* 28 (1977) [hereinafter cited as MARTIN]; see also PIERCE, *SIGNALS: THE TELEPHONE AND BEYOND* (1981) [hereinafter cited as PIERCE].

28. See *supra* notes 2, 14 & 16 and *infra* notes 29-74 and accompanying text.

29. See *Regulation of Electronic Publishing*, *supra* note 8, at 332. Teletext was originally defined by the Federal Communications Commission (FCC) as "a data system associated with a television broadcast signal that is used for the transmission of textual and graphic information intended for display on the screens of suitably equipped receivers." Notice of Proposed Rulemaking (BC Docket No. 81-741), 46 Fed. Reg. 60,851, 60,856 (1981) (codified at 47 C.F.R. Part 73) (proposed Dec. 14, 1981). In 1983, the FCC defined it as "a data system for the transmission of textual and graphic information intended for display on viewing screens." *In re Amendment of Parts 2, 73 and 76 of the Commission's Rules to Authorize the Transmission of Teletext by TV Stations*, 53 RAD. REG. 2d (P & F) 1309, 1320 (1983) [hereinafter cited as *1983 Teletext Order*]. The Order, however, examines teletext only with respect to its narrowband broadcast component, ignoring the technical capabilities of full channel microwave teletext and cable transmissions of on-line teletext services. See *infra* notes 37-44 and accompanying text. A more appropriate definition would view teletext as "one-way electronic publishing transmissions," utilizing the Tyler definition of electronic publishing. See *supra* note 9.

30. See *Regulation of Electronic Publishing*, *supra* note 8, at 332-33.

of data through a remote terminal, which "grabs" the page as it goes by in the data cycle,³¹ and presents the information on the terminal screen.

Teletext can be transmitted over four different media: television or radio frequency, microwave or cable.³² Presently, teletext is most frequently transmitted over the "narrowband"³³ vertical blanking interval (VBI)³⁴ of the television screen.³⁵ The VBI is that portion of the television signal generally viewed as a black line when the picture is rolled and which represents the period required for the signal to return from the top of the screen to the bottom. Without a decoder, the VBI teletext would be indecipherable.³⁶

31. *Id.*; NEUSTADT, *supra* note 24, at 5.

32. See *Regulation of Electronic Publishing*, *supra* note 8, at 336; NEUSTADT, *supra* note 24, at 11-13.

33. Narrowband, as opposed to full channel broadband service, utilizes only a portion of the broadcast signal, and transmits only a few thousand bits of data per second. By contrast, full capacity broadband service carries millions of bits per second, and is therefore better suited to higher volume applications. COUGAR & MCFADDEN, *supra* note 17, at 547; *Regulation of Electronic Publishing*, *supra* note 8, at 336. A "bit" is a single data character, the smallest unit of information that can be recognized by a computer. COUGAR & MCFADDEN, *supra* note 17, at 77. It is a contraction of "binary digit," the system of zeroes and ones upon which all computer languages are based. *Id.*

Narrowband teletext may be transmitted over the Vertical Blanking Interval (VBI) of broadcast television, *infra* note 34, cable television VBI, or Multipoint Distribution Services (MDS), *infra* note 40. Low Power Television (LPTV), *infra* note 37, Direct Broadcast Satellite (DBS), *infra* note 38, and the FM radio subcarrier frequency, *infra* note 43, are alternate narrowband options. *Regulation of Electronic Broadcasting*, *supra* note 8, at 337; NEUSTADT, *supra* note 24, at 14.

34. The Vertical Blanking Interval (VBI) is the black bar that appears on the television screen when the vertical hold is not functioning properly. *The New Video Marketplace*, *supra* note 10, at 535 n.23. There are twenty-one lines in the VBI, one of which is used to signal the end of a videoframe, and another, line 21, is reserved by the FCC for closed-captioning services to the hearing impaired. *Id.* The 1983 Teletext Order ensures the continued use of line 21 for closed captioning service for a period of five years and authorizes teletext transmission on lines 14-18 and line 20. Lines 10-13 will be gradually phased in for teletext use in the future. 1983 Teletext Order, *supra* note 29, at 1328.

35. *Regulation of Electronic Publishing*, *supra* note 8, at 337; NEUSTADT, *supra* note 24, at 12.

36. *Regulation of Electronic Publishing*, *supra* note 8, at 342 n.33. The relatively high cost of a teletext decoder, which is approximately \$300, has been cited as one reason for the slow development of the medium. Unless the price for this equipment is substantially lowered or decoders become integrated into standard television receivers, the market success of the medium is questionable. BROADCASTING, Dec. 10, 1984, at 66; *id.*, Mar. 11, 1985, at 105. Teletext decoders are regulated under Part 15, subparts H & J, of the FCC Rules. 1983 Teletext Order, *supra* note 29, at 1330.

Low power television³⁷ and direct broadcast satellites (DBS)³⁸ eventually also may be used to transmit teletext.³⁹ Microwave multipoint distribution service (MDS)⁴⁰ and cable can carry teletext over the

37. Low Power Television (LPTV), formally authorized by the FCC in April, 1982, 51 RAD. REG. 2d (P & F) 476 (1982), utilizes vacant UHF and VHF channels to transmit local broadcasting, or rebroadcast network signals, over limited areas at power levels significantly lower than full service television channels. 47 C.F.R. § 74.731 (1984). A typical LPTV system would operate at power levels of only 10 to 1,000 watts. 47 C.F.R. § 74.735(a) (1984). See *In re Inquiry into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System*, 53 RAD. REG. 2d (P & F) 1267 (1983).

Although the technology for LPTV has existed since the 1950's and low power transmitters, or translators, were authorized in 1956, 13 RAD. REG. (P & F) 1561, the FCC only began to formally examine the potential of the medium in 1980. 45 Fed. Reg. 69,178 (1980). During the pendency of this rulemaking, the Commission was forced to issue a freeze on license applications, as thousands of broadcasters sought to cash in on the anticipated goldmine. In September, 1983, the FCC instituted a lottery system to select from amongst the competing applicants and began granting LPTV licenses. BROADCASTING, Dec. 10, 1984, at 58; 46 Fed. Reg. 26,062 (1981). *In re Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, 53 RAD. REG. 2d (P & F) 1401 (1983). Currently, there are 266 licensed LPTV broadcasters and the FCC has issued construction permits for 263 more. BROADCASTING, Oct. 1, 1984, at 81. LPTV stations have few regulatory obligations. They must observe statutory prohibitions against broadcasting obscenities and lotteries, and they must fulfill limited "fairness doctrine" and "equal time" responsibilities. See *infra* note 196. There are no crosspartnership or multiple ownership restrictions. BROADCASTING, Oct. 1, 1984, at 81; see *The New Video Marketplace*, *supra* note 10, at 565 (subscriberhip predictions).

38. Direct Broadcasting Satellites (DBS) are radio communication services in which signals from the earth are transmitted by highpower, geostationary satellites for direct reception by small, relatively inexpensive earth terminals. Houdek, *Video Technology and the Law: A Bibliography of Legal and Law-Related Materials on Cable Television, Subscription/Pay Television, Direct Broadcasting Satellites, Videorecording and Videotext*, 5 COMM/ENT 341, 389 (1982) [hereinafter cited as Houdek]. Authorized by the FCC in 1982, 90 F.C.C.2d 676, DBS subscribership is projected at 5.4 million households by 1990, *The New Video Marketplace*, *supra* note 10, at 565 n.202, although only eight companies are presently authorized to build DBS satellites. MULTICHANNEL NEWS, Feb. 18, 1985, at 35. Two of these are in serious financial difficulty. BROADCASTING, April 1, 1985, at 35; see BROADCASTING, Dec. 10, 1984, at 54-64. The FCC has recently proposed technical standards for DBS facilities in order to ensure a reasonable degree of system interoperability and to limit DBS system interference. MULTICHANNEL NEWS, Feb. 18, 1985, at 35.

39. *Regulation of Electronic Publishing*, *supra* note 8, at 336-37.

40. Multipoint Distribution Services (MDS) are over-the-air common carriers in which omnidirectional microwave signals are used to transmit pay television and data services to subscribers within the direct line of sight of the MDS transmitter. Houdek, *supra* note 38, at 390; *Regulation of Electronic Publishing*, *supra* note 8, at 336 n.17.

Programming is generally supplied by content producers, such as Home Box

VBI or as "broadband"⁴¹ full channel services.⁴² Alternatively, teletext may be transmitted on the subcarrier portion⁴³ of the radio frequency with virtually no discernable effect on the regular signal.⁴⁴

Regardless of the medium of transmission, however, teletext is a limited capacity service because it can provide only a finite number of information pages on its scroll-like data cycle,⁴⁵ and because it

Office and Showtime, who lease transmission time from the MDS, solicit customers and provide distribution services. The scrambled MDS signal is generally transmitted on a full channel or VBI frequency to subscribers who must utilize a special decoder attached to their television sets to unscramble the signal. As a common carrier, the MDS operator must supply services consistent with FCC regulations, and its rates are set pursuant to tariff. 47 C.F.R. § 21.903(b) (1984).

Although originally contemplated as a public service medium, MDS is emerging as an entertainment facility which, if able to compete successfully with cable television, may provide a valuable broadcasting alternative in dense urban areas. BROADCASTING, Dec. 10, 1984, at 46; *The New Video Marketplace*, *supra* note 10, at 546.

41. Broadband service is full capacity data transmission in which data is transmitted at very high rates. *The New Video Marketplace*, *supra* note 10, at 535. See *supra* note 33 for a comparison of broadband transmission with narrowband transmission.

42. NEUSTADT, *supra* note 24, at 14. Broadband teletext may be transmitted as a full television channel via cable or MDS technology, as well as low power television or DBS. See *supra* notes 37-44 for discussions of these technologies. Each medium of transmission offers different capabilities and is presently subject to different technical and regulatory considerations. See *supra* notes 32-40 and accompanying text.

43. The FM subcarrier frequency is that portion of the radio frequency adjacent to the frequency of the main channel. By use of complex multiplexing techniques, which permit two or more independent signals to be transmitted simultaneously on the same channel, the radio broadcaster can transmit several audio or data services over its assigned frequency. See *The New Video Marketplace*, *supra* note 10, at 561. Subscribers receive and separate the individual signals with special receivers. *Id.*; see also MARTIN, *supra* note 27, at 34; PIERCE, *supra* note 27, at 71-88.

In May, 1983, the FCC eliminated all prior restrictions on the use of the subcarrier frequencies. *In re* Amendment of Parts 2 and 73 of the Commission's Rules Concerning Use of Subsidiary Communications Authorizations, 53 RAD. REG. 2d (P & F) 1519, 1534 (1983) [hereinafter cited as *Subsidiary Comm. Auth.*]. Previously permitted to use the subcarrier frequency only for broadcast purposes, the new rules permit radio broadcasters to provide two or more audio or data services on their channel frequencies. *Id.* at 1533. Data transmissions, local paging and electronic mail are expected to be major consequences of the FCC's deregulation. In April, 1984, the FCC reaffirmed its FM subsidiary communications position and expanded it to preempt state regulation of the field. See *In re* Petition for Reconsideration of Amendment of Parts 2 and 73 of the Commission's Rules Concerning Use of Subsidiary Communications Authorization, 55 RAD. REG. 2d (P & F) 1607 (1984). The FCC specifically noted that its decision was based on a policy of fostering teletext-type communications over the subcarrier frequencies which were being impeded by some state regulations. *Id.* at 1610 n.6.

44. NEUSTADT, *supra* note 24, at 12.

45. *Regulation of Electronic Publishing*, *supra* note 8, at 336-37; NEUSTADT,

can convey only one-way "downstream" information, from the central computer to the subscriber.⁴⁶ Due to the limitations of the applicable technology, teletext cannot provide individualized information services.⁴⁷ Rather, it is constrained to offer only general purpose information designed for public use.⁴⁸ In the United States, a common example of teletext is closed captioning, in which one line of the television VBI⁴⁹ is used to display program captions to the hearing impaired.⁵⁰ The subscriber accesses the caption by means of a decoder⁵¹ attached to a television set. In Great Britain, where teletext was pioneered in the mid-1970's,⁵² continuously updated weather reports and financial and sports information are provided to subscribers, along with an "alarm clock" page over which emergency information can be displayed.⁵³

B. Videotext Technology

Two-way videotext offers the subscriber a much broader range of information services than those provided through teletext. Videotext information is stored in computer data bases⁵⁴ which users access through a menu or a key word search.⁵⁵ By using the sophisticated

supra note 24, at 10-14. For a comparison of teletext and videotext technology, see *infra* note 54.

46. *Regulation of Electronic Publishing*, *supra* note 8, at 332-33. Downstream transmission is the provision of data from the central computer to the user's terminal. NEUSTADT, *supra* note 24, at 14. It is to be contrasted to the upstream capacity in which the user has the ability to send messages back to the computer from the remote terminal. *Id.* See *infra* note 57 for a discussion of the upstream capabilities of videotext technology.

47. *Global View*, *supra* note 24, at 119-20.

48. *Id.*

49. See *supra* note 34.

50. *Global View*, *supra* note 24, at 120.

51. See *supra* note 36.

52. NEUSTADT, *supra* note 24, at 22.

53. *Global View*, *supra* note 24, at 120. Britain currently has two teletext services: "CEEFAX" (for "See the Facts"), developed by the BBC and supported by an annual fee collected from all British television set owners, and "ORACLE" (Optical Reception of Announcements by Coded Line Electronics), an advertiser-supported system which is distributed by the Independent Broadcasting Authority. *Id.* at 119-20; NEUSTADT, *supra* note 24, at 19.

54. A data base is any data or information which is computed, classified, transmitted, received, processed, switched, stored, recorded or used by a computer or computer system. See COUGAR & MCFADDEN, *supra* note 17, at 539. Because there is no technical limitation to the amount of information which can be contained in these data bases, videotext can provide subscribers with more extensive services than can the more limited medium of the teletext "scroll." NEUSTADT, *supra* note 24, at 13; see also *Global View*, *supra* note 24, at 121.

55. LEXIS is a familiar legal example of on-line videotext.

“switching”⁵⁶ technology of two-way telephone wires or cable, videotext can transmit information “upstream” from the user back to the central computer as well as “downstream,” and can route different data to numerous subscribers simultaneously.⁵⁷ It can also function as a “gateway,”⁵⁸ connecting subscribers to various independent data bases.⁵⁹ When these data bases are operated by other subscribers or information providers,⁶⁰ the user has access to electronic mail,⁶¹ electronic bulletin boards⁶² and videogames.⁶³ Data

56. “Switching” is the ability of a system to route different messages to various subscribers simultaneously. NEUSTADT, *supra* note 24, at 13; *see also* PIERCE, *supra* note 27, at 129-49 (explaining switching technology).

57. NEUSTADT, *supra* note 24, at 14. Currently, American videotext systems rely on telephone wires to send information “downstream” from the host computer to the user and then “upstream” from the user back to the central computer. *The New Video Marketplace*, *supra* note 10, at 556. Cable technology, however, has a much greater capacity to handle information than does the telephone’s copper wires, and experiments are under way to develop cable videotext in which cables will be utilized to provide both upstream and downstream information flow. NEUSTADT, *supra* note 24, at 14. Because current cable technology, however, has not fully developed the switching capacity of telephone networks, *see supra* note 56, it is expected that the most likely cable videotext service will be a “hybrid” in which the downstream signal would be transmitted by cable and the user’s upstream reply would be sent via the telephone network. *Id.* Such a system would take advantage of the technical capacities of cable while minimizing the subscriber’s costs in an age of increasingly inflated telephone rates. *Id.* at 13-14.

58. *See Global View*, *supra* note 24, at 126; *Regulation of Electronic Publishing*, *supra* note 8, at 334. This “gateway” capacity of the videotext medium provides subscribers with tremendous informational opportunities. British users of Independent Information Providers’ “Gateway” service, instituted in 1982, interface with outside systems to book airline reservations, access bank accounts and make on-line purchases from computerized retailers. *Global View*, *supra* note 24, at 122. The French TELETEL system contains a limited amount of information pages within its own data bases but, through its “distributed gateway architecture,” enables its subscribers to access third party data bases within France, as well as more than twenty other host computers, through switched network or leased line technology. *Id.* at 126. Users may also access foreign data bases on the continent or the United States via an international gateway which is controlled by TELETEL. *Id.* The TELETEL interconnections are all made within a two-second response time. *Id.*

59. *Regulation of Electronic Publishing*, *supra* note 8, at 334; NEUSTADT, *supra* note 24, at 17.

60. Information providers include authors or print publishers who contribute their material and who design the “electronic pages.” NEUSTADT, *supra* note 24, at 18.

61. *See supra* note 14.

62. *See supra* note 2.

63. *Regulation of Electronic Publishing*, *supra* note 8, at 334; *Videotext Symposium*, *supra* note 10, at 152. *See generally Global View*, *supra* note 24, for a discussion of the various international uses of videotext.

bases available from service providers⁶⁴ such as banks and retailers create the transactional opportunities of home banking⁶⁵ and home shopping.⁶⁶

Videotext is currently available in the United States through on-line information services such as CompuServe, The Source and Dow Jones News/Retrieval,⁶⁷ as well as various experimental and more limited efforts.⁶⁸ At this time, the medium is more widely available

64. See *Videotext Symposium*, *supra* note 10, at 152. See, e.g., Chemical Bank's Pronto electronic banking system, discussed *supra* note 16. Database ownership raises questions about copyright which are beyond the scope of this Article. For discussions and examples of these issues, see generally *Regulation of Electronic Publishing*, *supra* note 8, at 410-14; Note, *Toward a Unified Theory of Copyright Infringement for an Advanced Technological Era*, 96 HARV. L. REV. 450 (1982); Note, *Allocating Copyright Liability to Telecommunications Common Carriers Supplying Cable Systems*, 67 MINN. L. REV. 963 (1983); WGN Continental Broadcasting Co. v. United Video, Inc., 523 F. Supp. 403 (N.D. Ill. 1981), *rev'd*, 693 F.2d 622 (7th Cir. 1982) (teletext portion of television program encoded in VBI covered by copyright of carrier although it infringed copyright of television station).

65. See *supra* note 16.

66. *The New Video Marketplace*, *supra* note 10, at 536; see *infra* note 68. See, e.g., the "electronic mall" provided by CompuServe, discussed *infra* note 67, which provides subscribers with access to 35 merchants. BROADCASTING, Jan. 14, 1985, at 166.

67. Originally called "on-line data services," CompuServe, The Source and Dow Jones News/Retrieval pioneered the videotext market in the mid-to late 1970's by providing news and information services to owners of personal computers. BROADCASTING, Jan. 14, 1985, at 162. CompuServe, the Columbus, Ohio-based subsidiary of H&R Block, offers its 164,000 subscribers a primarily text-oriented service, but provides the technology for graphics as well. *Id.* at 166. Combined, CompuServe, The Source and Dow Jones News/Retrieval reach approximately 400,000 subscribers, *Id.* See also Berton, *The Business Connection*, POPULAR COMPUTING, Mar., 1985, at 74-80 for a comprehensive review of currently available on-line information sources.

68. NEUSTADT, *supra* note 24, at 19-24. The first American entrant in the videotext market was Viewdata Corporation of America, a subsidiary of Knight-Ridder Newspapers Inc., which launched the nation's first commercial videotext service in southern Florida in 1983. BROADCASTING, Dec. 10, 1984, at 66. Subscribership at the end of the first year was less than 3,000, far short of corporate projections. *Id.* The project holds 18,000 pages of information including news, weather, sports, product ratings and lists of adult educational courses, and provides transactional opportunities through participating department stores, grocery stores and banks. NEUSTADT, *supra* note 24, at 19. The data are compiled by Knight-Ridder, relying upon such information sources as the American Library Association, and the publishers of *Consumer Reports*, the *New York Times* and the *Congressional Quarterly*. Sigel, *Videotex: Into the Cruel World*, DATAMATION, Sept. 15, 1984, at 133. Communications lines are furnished by Southern Bell, and the Sceptre videotext terminals are manufactured by AT&T. *Id.* Market expansion is currently underway although system modifications have been implemented to increase the commercial viability of the videotext system. BROADCASTING, Jan. 21, 1985, at 7. Knight-Ridder lost \$16 million on VIEWTRON in 1984. MULTICHANNEL NEWS, Feb. 11, 1985, at 49.

Other current videotext projects include AP News Plus, the Associated Press'

in Europe, Britain,⁶⁹ Canada and Japan.⁷⁰

As the home computer revolution gains strength in the United States,⁷¹ however, and international ventures prove to be financially attractive, American corporations are expected to enter the videotext marketplace in greater numbers.⁷² The most likely participants will be consortia⁷³ of data processing, publishing and financial companies,

graphics-enhanced service which made its debut in Maryland in January, 1985, BROADCASTING, Jan. 28, 1985, at 11, and "Gateway," a telephone-based consumer videotext service which was developed by Times Mirror Videotext Services in association with Toronto's Infomart and AT&T Consumer Information Services. *Id.*, Oct. 8, 1984, at 100. Gateway is being sold to Los Angeles area subscribers as "an interactive information and transactional communication service" which will allow them to buy products and services, pay bills, send and receive electronic mail, play video games and gain access to national data bases. *Id.* The service costs \$99 for the start-up fee, plus \$29.95 per month. *Id.*

TRINTREX, a joint venture videotext service of IBM, CBS and Sears, is expected to premier nationwide in 1986. The primary service to be offered by TRINTREX, however, will be home shopping rather than news or home banking. DATAMATION, Sept. 15, 1984, at 140. TRINTREX required a first year investment of \$130 million, in contrast to the \$34 million invested in Knight-Ridder's VIEWTRON, and the \$15 million expended on the Times-Mirror venture. *Id.* TRINTREX is expected to solve one of the major market problems of the videotext industry by permitting its subscribers to access the system via any compatible microcomputer. *Id.* Knight-Ridder and Times-Mirror subscribers must utilize AT&T's Sceptre videotext terminal which, although cordless and lightweight, has no computing capacity, cannot run packaged software and has a small, hard to use keyboard. *Id.*

69. In Britain, the Post Office first offered interactive videotext, the PRESTEL system, via phone lines, to its subscribers in 1979. NEUSTADT, *supra* note 24, at 22. PRESTEL offers gateways to independent information providers to whom it leases transmission lines, thereby allowing users to access air, rail and ferry schedule information. *Global View*, *supra* note 24, at 122. Users can also book passage on public transportation and conduct on-line purchases from computerized stores. *Id.* In October, 1981, an electronic mail service was instituted which offered message services throughout the entire PRESTEL network as well as within closed user groups such as corporate subscribers. *Id.* at 123.

70. See *Global View*, *supra* note 24, at 122-33 (extensive review of foreign videotext market); see also MacDonald & Marisi, *Videotex Thrives in the Country*, TELEPHONY, Nov. 5, 1984, at 28-34 (technical examination of operations of one recent Canadian videotext venture).

71. See generally Robins, *Computer Communications: Industry Interdependence*, 1977 WASH. U.L.Q. 471; *Computers in Law and Society*, 1977 WASH. U.L.Q. 371.

72. See, e.g., joint venture videotext plan of AT&T, Chemical Bank, Time, Inc., and Bank of America, which was announced on February 4, 1985, N.Y. Times, Feb. 5, 1985, at D1, col. 3, and the consortium of the Public Broadcasting Service, IBM and Merrill Lynch, which was announced on February 20, 1985, following FCC authorization of PBS market entry. 57 RAD. REG. 2d (P & F) 842 (1985); N.Y. Times, Feb. 21, 1985, at A2, col. 5; BROADCASTING, Mar. 4, 1985, at 88; TELEPHONY, Mar. 18, 1985, at 20. See *infra* note 336.

73. N.Y. City Bus., Feb. 25, 1985, at 1. Currently, three giant consortia are vying for the American videotext market: (1) R.C.A., Citicorp and J.C. Penney; (2) IBM, Sears, Roebuck and CBS, Inc.; and (3) AT&T, Chemical Bank and Time,

whose distinct areas of expertise may profitably converge⁷⁴ in electronic publishing.

III. Historical Perspective on the New Media

There are various reasons why the United States, a pioneer in the data processing field, has been outdistanced by foreign venturers in the videotext and teletext markets. The most significant reason is the historic division between the American data processing and communications industries. The current digital⁷⁵ electronics revolution increasingly highlights the folly of this distinction.⁷⁶

Media which were separated by both technology of operation and use for much of this century now are converging in their reliance on digital electronics.⁷⁷ The reason is clear. Electronic transmission via digital pulses is a cleaner, faster, easier method of conveying

Inc. *Id.* The joint-venturing is desirable because it would spread the risk of entering the expensive new industry, as well as provide complementary expertise. Thus, each team includes a hardware producer, an information provider and a financial services company. *Id.* at 22. Similarly, Knight-Ridder's VIEWTRON system, discussed *supra* note 68, combines the corporate expertise of Knight-Ridder, Southern Bell, AT&T and numerous independent information providers and publishers. DATAMATION, Sept. 15, 1984, at 133. In 1983, CBS, Inc. and AT&T united to conduct a joint videotext experiment in Ridgewood, New Jersey. *Global View*, *supra* note 24, at 137. Centel, Honeywell and the Chicago Sun Times have also combined forces to provide a new Chicago area consumer videotext service. BROADCASTING, Oct. 8, 1984, at 100.

Teletext joint ventures are also seen as a valuable tool in marketing and promoting the digital information media. *Id.*, Feb. 4, 1985, at 85. Taft Broadcasting and Satellite Syndicated systems have recently joined to promote *Electra*, a teletext magazine which will be distributed to broadcasters and cable operators free of charge in order to "stimulate the market [and] to get decoders in the marketplace." *Id.* See *supra* note 36 for a discussion of economic difficulties in teletext decoder sales.

74. While American consumers have yet to evidence any significant interest in the potential of electronic publishing, industry adventurers continue to support their faith in the potential of videotext and teletext by expanding their investments in these media. BROADCASTING, Dec. 10, 1984, at 66, 70. Despite the slow growth of teletext and videotext services currently on the market, CBS and Knight-Ridder, two electronic publishing venturers, retain a strong commitment to an industry that is "going to happen." *Id.* at 70.

75. See *supra* note 17.

76. In *Computer I*, 18 RAD. REG. 2d (P & F), at 1719, the FCC noted that the great operating speed of computers had blurred the historic distinctions between digital telegraph and analog telephone technologies. Modern communication networks combine the mechanisms and attributes of both. *Accord* *United States v. Western Electric Co.*, 50 RAD. REG. 2d (P & F) 145, 149-51 (1981).

77. *United States v. Western Electric Co.*, 50 RAD. REG. 2d (P & F) 145, 149-51 (1981). See generally M. IRWIN, TELECOMMUNICATIONS AMERICA (1984) [hereinafter cited as TELECOMMUNICATIONS AMERICA]; I. DE SOLO POOL, TECHNOLOGIES OF FREEDOM (1983) [hereinafter cited as TECHNOLOGIES OF FREEDOM].

information than any previously utilized technology.⁷⁸ It is equally well suited to text or graphics, voice or data, entertainment or informational transmission.⁷⁹ Thus, industries which previously were separate and distinct now find themselves merging into a single electronic community.⁸⁰

The development of remote computer terminal capabilities,⁸¹ time sharing networks⁸² and microprocessor technology⁸³ have extended this community into our homes as well as our offices. The Federal Communications Commission (FCC or the Commission) was acutely aware of these developments in 1980 when it noted that the phenomenon of distributed processing allows computers and terminals to perform both data processing and communications control applications within the network at the customer's premises.⁸⁴ The FCC went on to acknowledge that, "dramatic advances in large-scale integrated circuitry and microprocessor technology have permitted fabrication of mini-computers, micro-computers, and other special purpose devices, which are capable of duplicating many of the datamanipulative capabilities which were previously available only at centralized locations housing large scale general-purpose computers."⁸⁵ These developments have obviated many of the technical impediments to a nationwide electronic publishing marketplace.⁸⁶ All

78. TECHNOLOGIES OF FREEDOM, *supra* note 77, at 27.

79. *Computer II*, 47 RAD. REG. 2d (P & F) 669, 693 (1980) ("[m]ore and more the thrust is for carriers to . . . accommodate a subscriber's communications needs, regardless of whether subscribers use it for voice, data, video, facsimile, or other forms of transmission").

80. "[T]he computer industry and the communications industry are becoming more and more interwoven [T]his trend will become even more pronounced in the future." *Computer II*, 47 RAD. REG. 2d (P & F), at 695.

81. Remote access capability is the ability of a computer system to transmit data between the central computer and a separate, usually off-site terminal. *Computer I*, 18 RAD. REG. 2d (P & F), at 1719-20; see *IBM v. FCC*, 570 F.2d 452 (2d Cir. 1978), discussed *infra* note 110.

82. Timesharing permits several remote users of a computer system to gain concurrent access to the central computer. It offers a subscriber significant economic advantages in that there is no need to purchase or lease a complete individual system. *Computer I*, 18 RAD. REG. 2d (P & F), at 1721; COUGAR & MCFADDEN, *supra* note 17, at 553.

83. Microprocessors are relatively small but powerful computers which are mounted on a single semiconductor chip or printed circuit board. COUGAR & MCFADDEN, *supra* note 17, at 546. Their low cost has created the widespread business computer market.

84. *Computer II*, 47 RAD. REG. 2d (P & F), at 674.

85. *Id.*

86. TECHNOLOGIES OF FREEDOM, *supra* note 77, at 6-10; see *supra* notes 73-85 and accompanying text.

that remains is the coordination of resources by market entrants who must overcome their traditionally competitive and segregated pursuits.

A. Historical Antecedents to Media Regulation

The distinct identities of the data processing and communications industries have not been altogether self-imposed. While market economics were a significant factor in segregating the developing media during the first half of this century,⁸⁷ government regulation clearly paralleled and institutionalized that breach.⁸⁸

The regulatory watchdog for most of this evolution has been the FCC, which was authorized by the Communications Act of 1934 (Communications Act or the Act)⁸⁹ to regulate interstate commerce by wire and radio.⁹⁰ The Communications Act was based on the Radio Act of 1927⁹¹ and on the legislative conviction that government regulation of the new media was necessary to "preclude bedlam on

87. While each communication medium now occupies a separate and distinct niche, the relative positioning was not always so clear. Technically, there is nothing inherent in the telephone which uniquely suits it to individualized communications. See *TECHNOLOGIES OF FREEDOM*, *supra* note 77, at 27. In fact, during the early part of the century in Budapest, Hungary, telephones were used to transmit music rather than person-to-person conversations. *Id.* Similarly, until the 1970's, the Soviet Union utilized wired public address systems, rather than radio frequencies, to disseminate mass communications. *Id.* at 32.

88. See *infra* notes 89-106 and accompanying text.

89. 47 U.S.C. § 151 (1934).

90. "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . . there is created a commission to be known as the 'Federal Communications Commission.'" 47 U.S.C. § 151 (1934).

91. *Id.* §§ 81-119 (repealed June 19, 1934, ch. 652, § 602(a), 48 Stat. 1102) (current law at 47 U.S.C. §§ 151-610 (1982)). In 1926, a bill to regulate radio communications was introduced in the House of Representatives. H.R. 9971, 69th Cong., 1st Sess., 67 CONG. REC. 4956 (1926) (introduced by Rep. White). Enormous increases in the use of the radio spectrum had made the existing federal statutes inadequate. See 67 CONG. REC. 5478-79 (1926) (statement of Rep. White). The bill was passed by Congress in 1927, 68 CONG. REC. 2580, 4155 (1927), and was enacted as the Radio Act of 1927, Pub. L. No. 632, 44 Stat. 1162 (codified at 47 U.S.C. §§ 81-119 (repealed) (current version at 47 U.S.C. §§ 151-610 (1982)). The Act abolished the Radio Division of the Department of Commerce (which had jurisdiction over foreign and interstate radio communications) and transferred its powers, duties, personnel and fiscal appropriations to the Federal Radio Commission. The power of the Commission to regulate the communications industry, by limiting the number of licenses awarded to radio stations, was eventually taken over by the Federal Communications Commission. 44 Stat. 1162-63, §§ 3-4, at 1166-67, §§ 9-11; S. 3285, 73d Cong., 2d Sess., 78 CONG. REC. 5957, 8822 (1934).

broadcast frequencies.”⁹² It provided for three distinct regulatory schemes for broadcasters,⁹³ common carriers⁹⁴ and non-broadcast users of the radio spectrum,⁹⁵ such as citizens band and mobile radios. By separating the regulated broadcast media in Title III from the common carriers⁹⁶ in Title II, and all radio and wire communications from the unregulated print media,⁹⁷ the Communications Act perpetrated a division which essentially precluded the evolution of a cooperative communications industry.

92. *Midwest Video I*, 571 F.2d 1025, 1036 (8th Cir. 1978).

93. 47 U.S.C. §§ 301-332 (1982); 47 C.F.R. §§ 73.1-73.597 (1984).

94. 47 U.S.C. §§ 201-224 (1982); 47 C.F.R. §§ 21.0-21.512 (1984).

95. 47 U.S.C. §§ 351-362 (1982); 47 C.F.R. §§ 83.1-83.74 (1984).

96. The Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151-610 (1982)) defines a common carrier as “any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio” 47 U.S.C. § 153(h) (1982). No person engaged in broadcasting shall be deemed a common carrier. 78 CONG. REC. 10,969 (1934); *see also* FCC v. *Midwest Video Corp.*, 440 U.S. 689, 704 (1979) [hereinafter cited as *Midwest Video II*] (Communications Act, 47 U.S.C. §§ 151-610, unequivocally prohibits FCC from treating broadcasters as common carriers).

Originally, any business which held itself out as providing a service to the general public was brought under the umbrella of these common carrier regulations. *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 640-42 (D.C. Cir. 1976). Common carrier regulation has been imposed on local telephone and telegraph services, *United States v. RCA*, 358 U.S. 334, 349 (1959) (citing *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474); postal services, *United States v. Van Leeuwen*, 397 U.S. 249, 251-52 (1970); railways, *Hannibal Railroad v. Swift*, 79 U.S. (12 Wall.) 262 (1870). The Supreme Court has defined a common carrier in the communications field as one that “makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing” *Midwest Video II*, 440 U.S. at 701, (citing *Report and Order, Industrial Radiolocation Service*, 5 F.C.C.2d 197, 202 (1966)). “[A] common carrier does not make individualized decisions in particular cases, whether and on what terms to deal.” *Midwest Video II*, 440 U.S. at 701, (citing *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 641, *cert. denied*, 425 U.S. 992 (1976)).

97. Incidental business regulation of the press is permissible. *Associated Press v. United States*, 326 U.S. 1, 7 (1945). However, the content regulations and access requirements of the Communications Act, while applicable to broadcasters and common carriers, are not applicable to the print media. *See infra* notes 135-46 and accompanying text.

While not absolute, the first amendment consistently has been held to limit governmental interference with the journalistic pursuits of reporters and the editorial functions of the printed press. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

The choice of material to go into a newspaper, and the decisions made as to the limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be dem-

In 1970, the FCC reinforced this segregation in its *First Computer Inquiry* (Computer I)⁹⁸ by distinguishing computer technology from common carrier communications services and assuming jurisdiction over only the latter.⁹⁹ The FCC adopted a policy of "maximum separation"¹⁰⁰ between the data processing and communications in-

onstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Id. at 258; see also *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1954). See generally F. SIEBERT, *THE RIGHTS AND PRIVILEGES OF THE PRESS* 1-11 (1970) (historical discussion of the first amendment); Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983) (evolution of first amendment press liberties).

98. *In re Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, 28 F.C.C.2d 291, 18 RAD. REG. 2d (P & F) 1713 (1970) (Tentative Decision); 28 F.C.C.2d 267, 21 RAD. REG. 2d (P & F) 1591 (1971) (Final Decision), *aff'd in part sub nom.* *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 26 RAD. REG. 2d (P & F) 901 (2d Cir. 1973), *remanded*, 40 F.C.C.2d 293, 26 RAD. REG. 2d (P & F) 1727 (1973).

The FCC initiated its inquiry in 1966 "to provide a public forum for the examination, discussion and resolution of a number of regulatory and policy questions that appeared to be emerging from the growing interdependence of computers and communications services and facilities." *Computer I*, 18 RAD. REG. 2d (P & F), at 1718.

The FCC addressed itself to the development of information regarding actual and potential computer uses of communication facilities and services. *Id.* at 1714. It sought to gather information and develop recommendations as to: (1) whether there was any need for new or improved common carrier services, regulations, practices, or rate revisions to meet the emerging communications needs for the processing of data; (2) whether, and under what circumstances, data processing and other computer services involving the use of communications facilities should be free from, or subject to, government regulation; (3) whether, and under what conditions, the entry into the data processing field by common carriers and others requires regulatory control; and (4) whether any privacy protection measures should be required of the computer industry, communications common carriers, or the government with respect to data stored in computers and transmitted over communications facilities. *Id.* See generally Frieden, *The Computer Inquiries: Mapping the Communications/Information Processing Terrain*, 33 FED. COM. L.J. 55 (1981) (analysis of FCC regulatory scheme in communications industries) [hereinafter cited as *The Computer Inquiries*].

99. *Computer I*, 18 RAD. REG. 2d (P & F), at 1722. The FCC determined that there was "no need to assert regulatory authority over data processing services, whether or not such services employ communications facilities in order to link the terminals of subscribers to centralized computers." *Id.* The FCC relied on the effectiveness of competition in the data processing industry to justify its abdication from regulatory control. *Id.* However, citing its broad grant of powers under the Communications Act to regulate common carriers, the FCC ruled that it had "ample jurisdiction" to regulate the provision of data processing services by carriers. *Id.* at 1724. The corresponding regulations are contained in 47 C.F.R. §§ 64.702(b)-64.702(c) (1984).

100. *Computer I*, 18 RAD. REG. 2d (P & F), at 1726. "We believe that these objectives [of ensuring the provision of economic and efficient common carrier services, the

dustries, whereby regulated common carriers could offer only unregulated data processing services through separate corporate entities.¹⁰¹ The most viable market entrant, however, American Telephone and Telegraph Company (AT&T), was precluded by the terms of its 1956 Consent Decree¹⁰² from entering the unregulated data processing field.¹⁰³

This media segregation was paralleled in the developing cable industry as a result of a 1966 FCC decision which brought that medium under the umbrella of section 214 of the Communications Act.¹⁰⁴ The FCC ruled that any common carrier engaged in cable construction had to demonstrate satisfactorily how public interest, convenience and necessity would be served by a proposed system.¹⁰⁵ The regulatory burdens of this decision effectively preempted any

prevention of improper subsidization, and continued uninhibited free and fair competition] will be best achieved by a maximum separation of activities which are subject to regulation from non-regulated activities involving data processing." *Id.*; see also *The Computer Inquiries*, *supra* note 98, at 67-72.

101. *Computer I*, 18 RAD. REG. 2d (P & F), at 1726. "Communications common carriers shall furnish data processing services only through separate corporate entities." See *id.* at ¶ 36 for the specific requirements regarding this separation. See also *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 730 n.7 (2d Cir. 1973) (common carriers whose operating revenues did not exceed \$1 million are exempted from these rules).

102. *United States v. Western Elec. Co.*, 1956 Trade Cas. (CCH) ¶ 68,246, 13 RAD. REG. 2d (P & F) 2143 (1956) (affirming consent decree between AT&T and Justice Department). This case, initiated in 1949 when the Justice Department sued AT&T and its manufacturing subsidiary, Western Electric, alleging various antitrust violations, ended in 1956 with severe restrictions placed on AT&T's entry into the unregulated noncommunications market. *Id.* at ¶¶ 71,137-138; see also *The Computer Inquiries*, *supra* note 98, at 105-07 (interpretation of 1956 consent decree).

103. *Computer I*, 18 RAD. REG. 2d (P & F), at 1722. Where, however, data processing services were incidental to communications activities, permitted to AT&T and the related Bell System companies under the consent decree, AT&T and its affiliated Operating Companies were allowed to furnish such services. *Id.* at 1729.

104. 47 U.S.C. § 214 (1982).

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided*, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this title

Id.

105. *In re Associated Bell Sys. Cos. Tariffs for Channel Serv. for Use by Community Antenna Television Sys.*, 5 F.C.C.2d 357 (1966), (sustaining FCC's deter-

interplay between the cable industry and common carriers for most of the critical early evolution of the cable medium.¹⁰⁶

B. The Developing Regulatory and Technological Climate

Recent administrative developments have significantly eroded many of these market impediments.¹⁰⁷ In 1976, the FCC commenced its *Second Computer Inquiry* (Computer II)¹⁰⁸ to redefine its authority over the rapidly changing communications industry.¹⁰⁹ The Commission discarded the unworkable dichotomy of Computer I¹¹⁰ and substituted an analytic framework based on the distinction between

mination to bring cable operations under umbrella of section 214 of Communications Act), *aff'd sub nom.* General Tel. of Cal., Inc. v. FCC, 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).

106. M. HAMBURG, ALL ABOUT CABLE: LEGAL AND BUSINESS ASPECTS OF CABLE AND PAY TELEVISION (1981) [hereinafter cited as ALL ABOUT CABLE].

107. See generally *The New Video Marketplace*, *supra* note 10, at 566-602 (blurring of regulatory distinctions between communications services).

108. *Computer II*, 47 RAD. REG. 2d (P & F), at 669.

109. *Computer II*, *id.*, provided a broad examination of the problems spawned by the confluence of computer and communications technologies, based on the then existing state of the art. By 1976 the FCC began to acknowledge the significant advancements in hardware and software which had been made since *Computer I*; *supra* note 26; see *In re* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry) (Notice of Proposed Rule-making), 61 F.C.C.2d 103, 105 (1976); *In re* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry) (Supplemental Notice of Inquiry and Enlargement of Proposed Rulemaking), 64 F.C.C.2d 771, 771 (1977); *In re* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry) (Tentative Decision and Further Notice of Inquiry and Rule-making), 72 F.C.C.2d 358, 363 (1979). In *Computer II*, 47 RAD. REG. 2d (P & F), at 674, the FCC acknowledged that the dramatic advances in computer technology since *Computer I* required a reexamination of the definitional structure used to distinguish regulated communications services from unregulated data processing services. *But see* Patrick, *FCC Commissioner Questions Application of Computer II Concepts*, TELEPHONY, Feb. 18, 1985, at 46 (FCC Commissioner Dennis Patrick questions the continued application of *Computer II* concepts).

110. *Computer II*, 47 RAD. REG. 2d (P & F), at 674-75. A key factor in the FCC's acknowledgement of the infeasibility of the data processing/communications distinction was its own decision in *In re* AT&T, 62 F.C.C.2d 21 (1977), *aff'd sub nom.* IBM Corp. v. FCC, 570 F.2d 452, 42 RAD. REG. 2d (P & F) 366 (2d Cir. 1978) [hereinafter cited as *Dataspeed*], in which remote computer capabilities, defined *supra* note 81, were first confronted by the FCC. The computer regulations embodied in 47 C.F.R. § 64.702 did not address the situation where data processing elements were removed from the central computer and distributed among various components within the particular service offering. Thus, the FCC rules left unregulated the provision of computer terminals by common carriers. The *Dataspeed* decision permitted AT&T to offer computer terminals as part of its communications services subject to tariff. 62 F.C.C.2d at 30-32. The FCC was dissatisfied with the *Dataspeed*

“basic” and “enhanced” transmission services.¹¹¹ The revised approach was intended to reflect the impossibility of attempting to distinguish between communications and data processing in an environment which seemed to require overlapping definitions.

Under Computer II, basic services, or the transmission of pure, “transparent” information by a common carrier, continues to be regulated under Title II.¹¹² Enhanced services, which are any transmissions beyond basic service, including all data processing activities, are unregulated.¹¹³ Reversing the major market constraint created by

decision as it reflected on the definitional constraints of *Computer I*. This prompted the FCC to revise the scope of its *Computer II* inquiry. See *Computer II*, *supra* note 17, at 675.

Following a review of the comments on the Notice and Supplemental Notice, 45 RAD. REG. 2d (P & F) 1485, at ¶¶ 8-58 (1979) (Tentative Decision), the FCC determined that any purely definitional approach that sought to set forth a concrete distinction between data processing and communications would be “a short term solution and would fail to recognize and take advantage of the potential for new and innovative competitive computer services.” *Computer II*, 47 RAD. REG. 2d (P & F), at 676. The FCC noted that while computer technology was increasingly removing technical limitations as to the types of enhanced services that could be offered by regulated carriers, the existing regulatory scheme relied on this artificial distinction between communications and data processing services. *Id.* at 675.

111. *Computer II*, 47 RAD. REG. 2d (P & F), at 695. The adoption of a differentiation between basic and enhanced services best promotes the public interest because it comports with the actual development of this dynamic industry. *Id.* at ¶ 100; see also TELECOMMUNICATIONS AMERICA, *supra* note 77, at 45-46 (distinction drawn between ‘basic’ and ‘enhanced’ communications services rather than attempt to define difference between communications and computing).

112. *Computer II*, 47 RAD. REG. 2d (P & F), at 693. Basic service is the offering of “a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information.” *In re* Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry) (Final Decision), 77 F.C.C.2d 384, 420, [hereinafter cited as *Amend. of Section 64.702*], *reconsidered*, 84 F.C.C.2d 50 (1980) [hereinafter cited as *Final Decision Reconsidered*], further reconsidered, 88 F.C.C.2d 512 (1981), *aff’d sub nom.* *Computer & Communications Indus. Ass’n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983).

113. *Computer II*, 47 RAD. REG. 2d (P & F), at 669. Enhanced service “combines basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information, or provide the subscriber additional, different or restructured information, or involve subscriber interaction with stored information.” *Amend. of Section 64.702*, 77 F.C.C.2d at 387; see also 47 C.F.R. § 64.702 (1984).

In separating basic from enhanced services, the FCC clearly set forth the policy considerations behind the new approach.

We believe that our adoption of a differentiation between basic and enhanced services best furthers the public interest because it comports with the actual development of this dynamic industry. As the market applications of computer technology increase, communications capacity

Computer I, the FCC in Computer II held that common carriers¹¹⁴ other than AT&T need not form separate corporate entities for the provision of enhanced services.¹¹⁵ The fears about monopolization upon which the Computer I requirement was grounded were viewed as unwarranted in an increasingly competitive marketplace.

has become the necessary link allowing the technology to function more efficiently and more productively [T]he computer industry and the communications industry are becoming more and more interwoven [and] . . . this trend will become even more pronounced in the future Thus, the pressure on a set of administrative rules which fail to recognize the growth in operational sophistication demanded by our nation's economy will be inexorable.

Computer II, 47 RAD. REG. 2d (P & F), at 695-96.

The FCC thus set forth guidelines which would: (1) leave undisturbed the provision of basic service; (2) allow the provider of basic services to "integrate technological advances conducive to the more efficient transmission of information through the network without the threat of a sudden, fundamental change in the regulatory treatment of that service or firm;" (3) draw a clear and "sustainable line between basic and enhanced services upon which business entities can rely in making investment and marketing decisions;" and (4) remove the "threat of regulation from markets which were unheard of in 1934 and bear none of the important characteristics justifying the imposition of economic regulation by an administrative agency." *Id.* at 696. The FCC specifically noted that the provision of "teletext and viewdata type services to residential consumers" was a prime example of new markets and services which are being opened up by the new communications and data processing technologies. *Id.* at 699.

114. *Computer II*, 47 RAD. REG. 2d (P & F), at 731. Continued application of a maximum separation policy to all carriers was held to be inappropriate in light of the evolving telecommunications market. *Id.* Accordingly, separation was found to be appropriate only "in those cases in which there is a substantial threat of injury to the communications ratepayer and where other regulatory tools would not suffice." *Id.*

115. The original decision required both GTE and AT&T to form separate subsidiaries for the provision of enhanced services. *Final Decision Reconsidered*, 84 F.C.C.2d at 72. The FCC examined the monopoly status of both AT&T and GTE, along with their integration with affiliated equipment manufacturers. The Commission found that the public interest would be best served by restricting these two communications giants as well as their corporate subsidiaries in order to prevent their exploitation of their dominant market position. *Computer II*, 47 RAD. REG. 2d (P & F), at 731.

Under the *Final Decision Reconsidered*, 84 F.C.C.2d at 72, GTE was exempted from this constraint. *See also* 47 C.F.R. § 64.702(c) (1984). "[T]he benefits of maintaining the separate subsidiary requirements for carriers other than AT&T do not outweigh other public considerations." *In re* Amendment of § 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry) (Memorandum Opinion and Order On Further Reconsideration), 50 RAD. REG. 2d (P & F) 629, 646 (1981), *citing* 84 F.C.C.2d at 75. The FCC retained the separate subsidiary requirement for AT&T and its affiliates until March 1, 1985. *N.Y. Times*, Mar. 2, 1985, at 33, col. 1. Finding that the competitive abuses to which separation had been addressed no longer existed, *see* 50 RAD. REG. 2d (P & F) at 648, ¶ 81 (1981), the FCC waived the requirement for all seven Bell Operating Companies.

The ability of AT&T to enter the new markets was clarified further by the 1982 Modified Final Judgment (MFJ)¹¹⁶ in the seven-year-long AT&T antitrust litigation.¹¹⁷ This decision freed AT&T from

N.Y. Times, Mar. 2, 1985, at 33, col. 1. The FCC action permits these telephone companies to offer low and medium speed data transmission to residential customers. MULTICHANNEL NEWS, Mar. 11, 1985, at 7. See *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946); *Geller v. FCC*, 610 F.2d 973 (D.C. Cir. 1979); *Pocket Phone Broadcast Serv. v. FCC*, 538 F.2d 447 (D.C. Cir. 1976), for examples of the FCC's obligation to reexamine policies where circumstances change or where anticipated abuses fail to materialize.

116. *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

117. See generally *In re* The Consol. Application of Am. Telephone and Telegraph Co. and Specified Bell Sys. Cos. for Authorization Under Section 214 and 310(d) of the Communications Act of 1934 for Transfers of Interstate Lines, Assignments of Radio Licenses, Transfers of Control of Corps. Holding Radio Licenses and Other Transactions as Described in the Application, 55 RAD. REG. 2d (P & F) 435 (1983) [hereinafter cited as *AT&T Divestiture*]; W.B. TUNSTALL, *DISCONNECTING PARTIES: MANAGING THE BELL SYSTEM BREAKUP* (1985); O'Reilly, *Ma Bell's Kids Fight For Position*, FORTUNE, June 27, 1983, at 62-91; Taylor, *The Bell Breakup*, U.S. NEWS & WORLD REP., Oct. 24, 1983, at 51-55; Wiley, *The Basics of the AT&T Consent Decree*, 1 COM. LAW. 3 (Winter 1983).

On November 20, 1974, the United States Department of Justice filed suit in the United States District Court for the District of Columbia against AT&T, Western Electric and Bell Labs, alleging various violations of the antitrust laws, including that AT&T monopolized the intercity telecommunications market and the telecommunications product market in violation of the Sherman Act (15 U.S.C. §§ 1-7) by using its control over the BOC's to preclude competition in both of these markets. *United States v. AT&T*, 552 F. Supp. 131, 135-36 (1983), *aff'd*, 460 U.S. 1001 (1983). The government sought the divestiture from AT&T of the BOC's and Western Electric. *Id.* at 139. BOC's are defined as only the wholly owned operating companies of AT&T. *Id.* at 139 n.19. Cincinatti Bell and Southern New England Bell are not included.

The parties reached an accord in January, 1982, in a consent decree which completely restructured the Bell System. See *AT&T*, 552 F. Supp. at 140-41. Section I of the Decree provided that "AT&T would be required to endow the [Operating] Companies with sufficient personnel, facilities, systems, and rights to technical information to enable them to provide exchange telecommunications and exchange access services." *Id.* at 142.

Section II of the Decree specifies certain requirements for the divested Operating Companies, including the requirement that each Operating Company provide to all interexchange carriers exchange access that is "equal in type, quality and price to the services provided to AT&T and its affiliates." *Id.* Conduct by the Operating Companies is also restricted to "prevent them from engaging in any non-monopoly business so as to eliminate the possibility that they might use their control over exchange services to gain an improper advantage over competitors in such businesses." *Id.* at 143. The proposed Decree modified the final judgment of a Consent Decree that had been entered into between the Justice Department and AT&T in 1956 which had terminated a prior antitrust action brought against AT&T in 1949 in the United States District Court for the District of New Jersey. *AT&T Divestiture*,

the restrictions of the 1956 Consent Decree¹¹⁸ and allowed it to enter the unregulated data processing field.¹¹⁹ Contrary to the FCC's position in Computer II, however, the MFJ restricted AT&T from engaging in electronic publishing pursuits over its transmission facilities for at least seven years.¹²⁰ The seven Bell Operating Com-

55 RAD. REG. 2d (P & F), at 441. This decree was filed with the New Jersey Court, which approved it and transferred the 1949 action to the District of Columbia where it was consolidated with the 1974 action. *AT&T*, 552 F. Supp. at 143.

On August 11, 1982 the Court approved the proposed decree "as being in the public interest" and specified that the following modifications be made:

- (1) The BOCs be allowed to provide, but not manufacture, customer premises equipment;
- (2) The BOCs be permitted to print and distribute "the yellow pages";
- (3) Restrictions on the BOC lines of business would be removed if there was no substantial possibility that the BOC could use its market power to impede competition in the market it was going to enter;
- (4) AT&T be prohibited from engaging in "electronic publishing" over its own transmission facilities for at least 7 years;
- (5) If an operating company provides billing services to AT&T, it must include in the bill a statement that there is no connection between the BOC and AT&T;
- (6) Any BOC offering less-than-equal access to an interexchange carrier must reflect the lesser cost, if any, of providing such access in its tariffs;
- (7) At the time of divestiture the BOCs should have debt ratios of approximately 45% except for Pacific Telephone and Telegraph Co. which should have a debt ratio of 50%.

AT&T Divestiture, 55 RAD. REG. 2d (P & F), at 442 n.21; see also Greene, *Judge Green on Telecommunications, Divestiture, the Government, the Courts and the Future*, TELEPHONY, Mar. 4, 1985, at 64 (personal comments of presiding Judge Harold Greene); *AFTER THE AT&T SETTLEMENT, THE NEW TELECOMMUNICATIONS ERA* (Practicing Law Institute 1982).

118. *AT&T Divestiture*, 55 RAD. REG. 2d (P & F), at 441.

The [original action against AT&T] brought in 1949 had alleged various violations of the Sherman Act and had sought the divestiture of Western Electric from AT&T and the compulsory licensing of patents held by AT&T on a nondiscriminatory basis. On January 24, 1956, the New Jersey District Court accepted a Consent Decree that barred AT&T from engaging in any business other than the provision of common carrier services subject to public regulation and services incidental thereto, barred Western Electric from manufacturing any equipment other than that used by the Bell System, and required AT&T and Western Electric to license their patents to all applicants in exchange for royalty fees.

Id. at 441 n.17, citing *United States v. Western Elec. Co.*, 1956 Trade Cas. (CCH) § 68,246 (D.N.J. 1956).

119. The 1982 accord is viewed as a modification of the Final Judgment in the 1956 case. *AT&T Divestiture*, 55 RAD. REG. 2d (P & F), at 441. The effect of the modification was to lift nearly all restrictions on AT&T's entry into unregulated lines of business. See *supra* note 117.

120. *AT&T Divestiture*, 55 RAD. REG. 2d (P & F), at 467 n.125. Electronic publishing is defined by the court as "the provision of any information which a provider or publisher has, or has caused to be originated, authored, compiled, collected, or edited, or in which he has a direct or indirect financial or proprietary

panies,¹²¹ which the judgment divested from the AT&T corporate core, are confined to a limited, regulated range of telecommunications services,¹²² although they may provide transmission facilities to non-affiliated companies for the distribution of enhanced services.¹²³ As a result of the MFJ, the extensive capital and resources of the old Bell system now are available, in splintered form, to the data processing industry for use in nationwide electronic publishing ventures.

By coupling these regulatory developments¹²⁴ with the technological advancements of the computer revolution, the potential marketplace for electronic publishing has been created.¹²⁵ However, while the major access barriers have been broken, entrants can expect to be met by a panoply of content, structural and economic regulations which predate these recent developments.¹²⁶ Although the regulations were designed for an age which could scarcely envision the present technology, they may nevertheless be applied. This application poses major legal and policy questions.

interest, and which is disseminated to an unaffiliated person through some electronic means." *AT&T*, 552 F. Supp. at 181. After seven years, AT&T may apply to the court for the removal of this restriction. *Id.* at 186. *But cf. In re* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry) (Tentative Decision), 72 F.C.C.2d 358, 428-29 (1979) (enabling AT&T to enter all areas of enhanced services market).

121. *See AT&T*, 552 F. Supp. at 139 n.19.

AT&T is the corporate parent of an integrated telecommunications network known as the Bell System. This system, which provides the vast majority of telecommunications services in the United States, is composed of AT&T, which provides overall direction and control of the operating divisions and companies; the Long Lines Department, which provides interstate toll service; AT&T Information Systems, which provides customer premises equipment (CPE) and enhanced services.

AT&T Divestiture, 55 RAD. REG. 2d (P & F), at 439.

AT&T Information Systems is the new name given to the former American Bell, Inc. American Bell, Inc. was formed pursuant to the Commission's [FCC] order in the Second Computer Inquiry, which required AT&T to offer customer premises equipment and enhanced services through a separate subsidiary on a detariffed basis. *Id.* at n.3. The Bell system also includes:

Western Electric, which manufactures telecommunications equipment; Bell Telephone Laboratories (Bell Labs), which provides research and engineering support for other parts of the company; AT&T International, which markets products and services overseas; and the 24 BOC's [Operating Companies], which provide local, intrastate toll, and some interstate toll, service within their serving areas.

Id.

122. *Id.*

123. *See supra* note 113 for a definition of enhanced services.

124. *See supra* notes 107-23 and accompanying text.

125. *Regulation of Electronic Publishing, supra* note 8, at 332.

126. *See infra* notes 186-309 and accompanying text.

IV. The Existing Models of Media Regulation

Although the first amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press,"¹²⁷ these liberties are not absolute.¹²⁸ Rather, the Supreme Court has consistently upheld various constraints in order to protect significant countervailing interests.¹²⁹

127. U.S. CONST. amend. I.

128. *Konigsberg v. State Bar of California*, 366 U.S. 36, 49-51 (1961); *Dennis v. United States*, 341 U.S. 494, 508 (1951); *Kovacs v. Cooper*, 336 U.S. 77, 89-97 (1949) (Frankfurter, J., concurring). See generally N.Y. Times Book Rev., Feb. 24, 1985, at 10, col. 1 (reviewing L. LEVY, *EMERGENCE OF A FREE PRESS* (1985)); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Schauer, *Fear, Risk and the First Amendment: Unravelling the "Chilling Effect,"* 58 B.U.L. REV. 685, 725-31 (1978). For a concise discussion of the commitment to first amendment freedoms, as underscored by acceptance of their limitations, see Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955).

The Supreme Court has articulated a test for assessing the reasonableness of such government limitations:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. O'Brien, 391 U.S. 367, 377 (1968).

Accordingly, the Court has permitted reasonable time, place and manner regulations if they serve a significant governmental interest and leave ample alternative channels for communication. *Consolidated Edison v. Public Serv. Comm'n*, 447 U.S. 530, 535 (1980); *Grayned v. Rockford*, 408 U.S. 104, 116 (1972). Such regulation may not be based on the content or the subject matter of the speech. *Consolidated Edison*, 447 U.S. at 536.

Significant governmental interests which have been held to support the imposition of government regulation include: (1) national security and public order, see, e.g., *New York Times v. United States*, 403 U.S. 713 (1971) (per curiam); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); *Schenck v. United States*, 249 U.S. 47, 52 (1919); (2) judicial and political proceedings, see, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Cox v. Louisiana*, 379 U.S. 559 (1965); and (3) public decency and morality, see e.g., *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12-2 to 12-36 (1978) (examining permissible abridgements of first amendment).

129. *Roth v. United States*, 354 U.S. 476 (1957). "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties [of the First Amendment], unless excludable because they encroach upon the limited area of more important interests." *Id.* at 484 (footnote omitted).

Constraints on the exercise of the freedoms of speech and press also have been justified for a limited range of interests, bound by the overriding prohibition against

Over the years, a model has emerged in which three distinct tiers of communications freedom exist.¹³⁰ The press and the traditional eighteenth century fora¹³¹ of speech and assembly occupy the premier,

prior restraint. See, e.g., *New York Times v. United States*, 403 U.S. 713, 714 (1971) (injunction against publication of Pentagon Papers seen as improper prior restraint); *Near v. Minnesota*, 283 U.S. 697, 722-23 (1931) (statute which prohibited engaging in the business of regularly or customarily producing, publishing or circulating malicious, scandalous and defamatory newspaper found to be an unconstitutional prior restraint of press); see also W. FRANCOIS, *MASS MEDIA LAW AND REGULATION* 53, 61-80 (1982) [hereinafter cited as FRANCOIS], for other examples of prior restraint cases. See generally Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11 (1981).

Although the generally protective stance, discussed *supra* with respect to the press represents the longstanding majority interpretation of the first amendment, there has also been a persistent minority view. Most recently, this minority view was expressed in the opinions of Justices Hugo Black and William O. Douglas who viewed the first amendment in absolute terms. "I read 'no law . . . abridging' to mean *no law abridging*," wrote Justice Black in *Smith v. California*, 361 U.S. 147, 157 (1959) (concurring opinion) (emphasis in original). "The First Amendment, which is the supreme law of the land, has thus fixed its own value on freedom of speech and press by putting these freedoms wholly 'beyond the reach' of federal power to abridge." *Id.* at 157 (footnote omitted) (emphasis in original); see also *Roth v. United States*, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting); Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960); Countryman, *Justice Douglas and Freedom of Expression*, 1978 U. ILL. L.F. 301; Kalven, *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428 (1967); Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 263. While the writings of Thomas Jefferson and James Madison have been cited in support of this absolutist position, the strength of this support is tempered by an acknowledgement that their views predated the application of the first amendment, via the fourteenth, to the states. *Smith v. California*, 361 U.S. 147, 157 n.2 (1959) (Black, J., concurring). See N.Y. Times Book Rev., Feb. 24, 1985, at 10, col. 1, citing L. LEVY, *EMERGENCE OF A FREE PRESS* (1985), for the view that passionate absolutists such as Justice Black are innocent or ignorant of the history of Revolutionary America and have "in Mrs. Malaprop's phrase anticipated the past." *Id.*

130. See generally *The New Video Marketplace*, *supra* note 10.

131. *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515-16 (1939). Although, the "use [of] the streets and parks . . . may be regulated in the interest of all; [the power to regulate] . . . is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience . . ." *Id.*; see also *Greer v. Spock*, 424 U.S. 828, 836 (1976); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-04 (1974); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969); *Adderley v. Florida*, 385 U.S. 39, 41 (1966); *Edwards v. South Carolina*, 372 U.S. 229, 235-38 (1963); *Kunz v. New York*, 340 U.S. 290, 293 (1951); *Jamison v. Texas*, 318 U.S. 413, 414-17 (1943); *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941); *Schneider v. State*, 308 U.S. 147, 163 (1939); Horning, *The First Amendment Right to a Public Forum*, 1969 DUKE L.J. 931.

In *Preferred Communications Inc. v. Los Angeles*, 754 F.2d 1396 (9th Cir. 1985), the public forum doctrine was discussed as a check on government regulation. The court recapitulated the principal, originally enunciated in *Grayned v. Rockford*, 408 U.S. 104, 116 (1972), that "[t]he crucial question is whether the manner of expres-

sion is basically incompatible with the normal activity of a particular place at a particular time." *Preferred Communications*, 754 F.2d at 1407. The court also noted that simply opening property other than streets or parks to the public does not make the facility an appropriate public forum. Rather, the place or its stated use must make it appropriate for expression. *Id.* at 1407. See generally Goodale, *9th Circuit May Have Impact on Constitutionality of Cable Act*, Nat'l L.J., Mar. 25, 1985, at 23, col. 1 (discussing impact of *Preferred Communications* on the 1984 Cable Act).

In *Preferred Communications*, the court discussed the three categories of public property that have been identified by the Supreme Court. *Preferred Communications*, 754 F.2d at 1407-08. First, there are certain places, such as parks and public streets, which traditionally have been devoted to speech and assembly. In such places, the first amendment constrains the government's power to limit free expression. However, the government may impose content neutral regulations which serve a legitimate government purpose and do not unnecessarily limit the ability to communicate freely. To be constitutional, a content-based regulation must be justified by a compelling state interest and be drawn narrowly to achieve that end. 754 F.2d at 1407.

The second category consists of property that the government has opened specifically to allow public expression. *Id.* at 1407. While the state is in no way obligated to open a facility for such purposes indefinitely, if it chooses to do so, it must observe the standards applicable to the first, traditional forum category. *Id.* at 1407-08.

The third category comprises property which is not a forum for public expression. *Id.* at 1408. With respect to this final category, the state may impose regulations which are reasonable as long as the regulation is not a guise for the suppression of unfavorable views. *Id.*

The court held in *Preferred Communications* that public utility conduits and poles are not traditional public fora. *Id.* at 1408. However, public property, which falls within the third category, can still function as a public forum if the form of expression is appropriate and compatible with the normal functioning of the location at that time. *Id.* This principle is supported by the following cases and materials which are cited in Nadel, *A Unified Theory of the First Amendment: Divorcing the Medium From the Message*, 11 FORDHAM URB. L.J. 163, 194-95 n.117 (1982):

Chicago Area Military Project v. City of Chicago, 508 F.2d 921 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975) (airport); *Wolin v. Port of New York Auth.*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968) (bus terminal); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) (schools); *Bonner-Lyons v. School Comm.*, 480 F.2d 442 (1st Cir. 1973) (school information distribution systems); Comment, *The University and the Public: The Right of Access by Nonstudents to University Property*, 54 CALIF. L. REV. 132 (1966); *City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976) (public meeting of City Board of Education); *South-eastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (municipal theatres); *Flower v. United States*, 407 U.S. 197 (1972) (*per curiam*) (military reservation); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (State House grounds); *Albany Welfare Rights Org. v. Wyman*, 493 F.2d 1319 (2d Cir.), *cert. denied*, 419 U.S. 838 (1974) (welfare office); *United States Servicemen's Fund v. Shands*, 440 F.2d 44 (4th Cir. 1971) (public auditoriums). *But see* *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (transit system held not to be an open space or public place for which first amendment guarantees access for all).

See also *Kunz v. New York*, 340 U.S. 290 (1951) (invalidating permit requirement for public worship on city streets); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (overturning disorderly conduct conviction for holding religious meeting without permis-

unregulated tier.¹³² The broadcast medium occupies a second, regulated tier, and common carriers, such as the telephone companies, occupy the third possible regulatory level.

Each medium presents a possible model for the regulation of the new electronic publishers. The electronic press, which clearly had its historical antecedents in the presses and pamphleteers of the 18th century,¹³³ frequently functions as an electronic newspaper through bulletin boards and on-line information services. By using telephone wires and over-the-air satellite technology to transmit data, electronic publishers rely on, and may function as common carriers, offering their services to anyone with a telephone and a personal computer. Some of the communications services which they provide, however, have been held to fall within the wide range of activities regulated by the FCC as ancillary to broadcasting.¹³⁴ Absent any clearly defined or legislated classification, electronic publishers will likely be governed by *ad hoc* policy incentives until a coherent national telecommunications agenda is designed to deal with the digital world of electronic publishing.

A. The Press Model

In the sacrosanct position accorded the press, first amendment freedoms are most scrupulously guarded.¹³⁵ The press is protected by a long-standing and powerful tradition that keeping government's hands off is the best way to achieve the national commitment to

sion of park commission); *Saia v. New York*, 334 U.S. 558 (1948) (striking down ordinance against use of sound amplification equipment not approved by police chief); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (voiding licensing requirement for religious solicitation); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (striking down municipal ordinance forbidding distribution of "literature of any kind" without prior permission of city manager).

132. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("governmental regulation of [the editorial] process . . . [is not] . . . consistent with First Amendment guarantees of a free press as they have evolved to this time").

133. See generally TECHNOLOGIES OF FREEDOM, *supra* note 77 (overview of evolution of American communications media).

134. See 1983 *Teletext Order*, 53 RAD. REG. 2d (P & F) 1309 (1983).

135. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575-76 (1980); *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("transcendent value"); *Thomas v. Collins*, 323 U.S. 516, 530 (1945) ("preferred place"); see also *Address by William J. Brennan, Jr.*, 32 RUTGERS L. REV. 173, 176 (1979) ("necessary for the existence of our democracy").

vigorous, uninhibited debate on public issues.¹³⁶ Courts repeatedly have held that no governmental interference with the editorial functions of the press may be countenanced under the first amendment.¹³⁷ In *Miami Herald Publishing Co. v. Tornillo*,¹³⁸ the Supreme Court stated that the "choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment."¹³⁹ Government interference in these processes was held to be clearly inconsistent with the guarantees of the first amendment.¹⁴⁰

However, some content regulation of the press is permissible,

136. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (Court voicing "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials").

137. *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 120-21 (1973); see also *United States v. New York Times Co.*, 328 F. Supp. 324 (S.D.N.Y. 1971), *rev'd and remanded*, 444 F.2d 544 (2d Cir. 1971) (per curiam), *rev'd and remanded*, 403 U.S. 713 (1972) (per curiam) (reinstating judgment of district court). "A cantankerous press, an obstinate press, an ubiquitous press must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know." 328 F. Supp. at 331; *accord Near v. Minnesota*, 283 U.S. 697 (1931).

138. 418 U.S. 241 (1974).

139. *Id.* at 258. The Supreme Court held that Florida's "right of reply" statute, which required a newspaper to provide a political candidate with equal space to answer press attacks and criticism of his record, was an unconstitutional violation of the first amendment. *Id.* The statute, noted Justice White in his concurrence, "runs afoul of the elementary First Amendment proposition that government may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor." *Id.* at 261 (White, J., concurring).

140. *Id.* at 258 ("[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment"); *CBS, Inc. v. Democratic Nat'l. Comm.*, 412 U.S. 94, 124 (1973) ("For better or for worse, editing is what editors are for; and editing is selection and choice of material."); *Schuck v. Carroll*, 247 N.W. 813, 815 (Iowa 1933) ("The newspaper business is . . . essentially private in its nature—as private as that of the baker, grocer, or milkman, all of whom perform a service on which to a greater or less extent, the communities depend, but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with the public use").

As a private enterprise, the press is limited by only two factors in its ability to advance its own political, social and economic views. These factors are the acceptance of its views by a sufficient number of readers, and thus advertisers, to ensure financial success and the journalistic integrity of its editors and publishers. See *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 120-23 (1973). The loss of its source of funds however, may as effectively silence a newspaper as enjoining its publication. *United States v. Hunter*, 459 F.2d 205, 212 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972). See generally F. SIEBERT, *THE RIGHTS AND PRIVILEGES OF THE*

although, traditionally, such regulations were based on state rather than federal proscriptions.¹⁴¹ The most significant examples are those regarding defamation and obscenity.¹⁴² Incidental regulation of the business, as opposed to the communications, aspect of the press¹⁴³ also has been upheld with regard to the application of tax,¹⁴⁴ labor¹⁴⁵ and antitrust laws.¹⁴⁶

1. Defamation

One of the most significant constraints on the freedom of the

PRESS (1970) (reviewing historical rights of press).

141. See *infra* notes 142-81 and accompanying text.

142. See *infra* notes 147-81 and accompanying text.

143. United States v. Associated Press, 52 F. Supp. 362, 374 (S.D.N.Y. 1943) (holding that membership restrictions of Associated Press' by-laws violated anti-trust prohibitions of Sherman Act; "the mere fact that a person is engaged in publishing, does not exempt him from ordinary municipal law, so long as he remains unfettered in his own selection of what to publish"); accord *Branzburg v. Hayes*, 408 U.S. 665, 681-82 (1972) (incidental regulation of press is constitutionally permissible); United States v. Hunter, 459 F.2d 205, 212 (4th Cir. 1972) (economic regulation of press is permissible).

144. *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936); *Giragi v. Moore*, 58 P.2d 1249 (Sup. Ct. Ariz. 1936), *appeal dismissed*, 301 U.S. 670 (1937); *North American Publications, Inc. v. Director, Dep't of Revenue*, 436 So. 2d 954 (Fla. Dist. Ct. 1983); *Del Val Pennysaver, Inc. v. Division of Taxation*, 188 N.J. Super. 108, 456 A.2d 115 (1983). *But see Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (Minnesota's ink and paper tax violates first amendment by singling out press without adequate justification).

145. *Associated Press v. NLRB*, 301 U.S. 103 (1937); see also *Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946) (upholding constitutionality of applying Fair Labor Standards Act, 29 U.S.C. §§ 9, 11(a) (1982), to newspaper publishing industry).

146. *Associated Press v. United States*, 326 U.S. 1 (1945).

It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.

Id. at 20 (footnote omitted); see also *Levitch v. CBS*, 495 F. Supp. 649, 661-62 (S.D.N.Y. 1980). *But see Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 605 (1953); *Fitzgerald v. National Rifle Assoc.*, 383 F. Supp. 162 (D.N.J. 1974); *America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc.*, 347 F. Supp. 328 (N.D. Ind. 1972); *PMP Assoc., Inc. v. Globe Newspaper Co.*, 321 N.E.2d 915 (Mass. 1975). Compare *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969) with *Newspaper Preservations Act*, 15 U.S.C. §§ 1801-1804 (1982).

press is the law of defamation.¹⁴⁷ Defamation law erodes the first amendment freedoms of speech and press in order to protect the interests of truth and personal reputation.¹⁴⁸ A defamatory statement has been defined as an unprivileged false statement that has a tendency to injure the defamed individual's good name and reputation and is published to one or more persons.¹⁴⁹ Once distinguished as slander or libel, depending on the oral or printed nature of the publication,¹⁵⁰ defamation law has been affected by the development of mass communications media such as radio, television, film, cable, and satellite which have overwhelmed these longstanding distinctions.¹⁵¹

Where the printed press is concerned, however, the threshold question is whether and when the publisher may be held accountable for defamatory publications.¹⁵²

Prior to the Supreme Court decision in *New York Times Co. v. Sullivan* in 1964,¹⁵³ defamatory statements were outside the scope of first amendment protection.¹⁵⁴ Instead, such statements were governed by state tort laws¹⁵⁵ and criminal libel laws.¹⁵⁶ At common law, a

147. *Meyer v. Joint Council 53 Int'l Bhd. of Teamsters*, 316 Pa. 401, 412-13, 206 A.2d 382, 388 (1965).

148. *Rainier's Dairies v. Raritan Valley Farms, Inc.*, 19 N.J. 552, 557-58, 117 A.2d 889, 891 (1955) (defamation law can conflict with counter-policy favoring free speech and press).

149. *New York Times Co. v. Sullivan*, 376 U.S. 254, 267 (1964). This decision adds to the traditional libel defenses, which include truth, qualified privileges, and fair comment criticism, a first amendment qualified privilege for news media which criticize public officials. FRANCOIS, *supra* note 129, at 117.

150. RESTATEMENT-TORTS, *supra* note 21, § 559; W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS § 111, at 771 (1984) [hereinafter cited as PROSSER & KEETON].

151. See *infra* notes 258-65 for a discussion of the merging of slander and libel.

152. See *infra* notes 153-73 and accompanying text. Since the first amendment guarantee is "not for the benefit of the press so much as for the benefit of all of us," it may sometimes be held accountable for its false and defamatory statements. *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967); see also *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (calculated falsehoods do not enjoy constitutional protection); *Pennekamp v. Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring) ("the liberty of the press is no greater and no less than the liberty of every . . . citizen of the Republic"); FRANCOIS, *supra* note 129, at 40-41 (listing areas in which press may be held accountable and unprotected by first amendment); *id.* at 89, 245 (privacy law also constrains freedom of the press).

153. 376 U.S. 254 (1964).

154. FRANCOIS, *supra* note 129, at 117.

155. *Id.* at 91.

156. *Id.* at 121-25. For cases involving criminal libel statutes, see *Beauharnais v. Illinois*, 343 U.S. 250, 261, *reh'g denied*, 343 U.S. 988 (1952) (statute to "curb false or malicious defamation of racial and religious groups"); *Garrison v. Loui-*

defamation defendant could be held strictly liable where the plaintiff was able to establish three elements: the statement must have been published to a third person; the defamed individual or group must have been identifiable; and the statement must have been both false and injurious to reputation.¹⁵⁷ The defenses to a defamation suit available at common law include the truth of the statement,¹⁵⁸ privilege¹⁵⁹ and fair comment.¹⁶⁰

Privileges are no longer solely within the province of state common law.¹⁶¹ With its decision in *New York Times v. Sullivan*, the Supreme Court created a federal constitutional privilege for certain defamatory

siana, 379 U.S. 64, 74 (1964) (*New York Times* rule limits state's power to criminal-ly sanction criticism of public officials).

157. RESTATEMENT-TORTS, *supra* note 21, § 569 comment a; Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1353 (1975) [hereinafter cited as Eaton]. Initially, at common law, defamation was a strict liability tort because of society's "pervasive and strong interest in preventing and redressing attacks upon reputation." Rosenblatt v. Baer, 383 U.S. 75, 86 (1966). Strict liability was the traditional common law rule for several important reasons. First, injury to one's reputation was exceedingly difficult to prove. Locating witnesses, pinpointing changes in their business or personal relations with the plaintiff, and establishing a causal connection between the defamation and these changes could be nearly impossible. A requirement that plaintiffs establish these elements in order to recoup compensatory damages would render the action for defamation futile. Eaton, *supra*, at 1537. Under this theory, a plaintiff who could not show pecuniary losses was entitled to nominal damages as long as he could establish the publication of a defamatory falsehood. *Id.* at 1538 (citing RESTATEMENT-TORTS, *supra* note 21, § 569 comment c). Another reason supporting the strict liability theory derived from the fact that mass distribution of a defamation via newspaper created an enormous risk of accidental injury. This risk was comparable to the risk posed by "highly desirable but necessarily dangerous" instrumentalities for which strict liability was the law. Eaton, *supra*, at 1359. Most important, strict liability for defamation was justified as an inducement to the truthful dissemination of information. "Since the effect of a defamatory falsehood . . . is the same whether the statement is an intentional lie or an innocent mistake, the common law seeks to deter both by placing the burden of proving the truth on the defamer . . ." *Id.* at 1358.

158. PROSSER & KEETON, *supra* note 150, at 839-40.

159. *Id.* at 815-16.

160. *Id.* at 831-32.

161. 376 U.S. at 279-80. In his opinion for the Court, Justice Brennan noted that a state must safeguard the freedom of expression as guaranteed by the first amendment and applied to the states by the fourteenth amendment. *Id.* at 277. "The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. Actual malice does not mean ill will as in the old common law, but rather scienter. See *Garrison v. Louisiana*, 379 U.S. 64, 73-74 (1964) (state statute permitting liability for statement about public official made with common law malice or ill will struck down). Public officials have been held to include those elected to office, and "at the very least to [include] those among the

publications, holding that defamatory publications about public officials are only actionable if made with actual malice.¹⁶² Malice is defined as knowledge, or reckless disregard for the truth.¹⁶³ Absent such a showing, the publication is privileged.¹⁶⁴ This conditional privilege and its accompanying actual malice standard subsequently were extended to apply to publications about public figures.¹⁶⁵

The common law standards controlling the law of defamation were not uniformly applied to each link in the defamatory chain. A primary publisher, such as a newspaper, employs individuals who participate in the defamation by gathering, writing and disseminating information.¹⁶⁶ Each of these participants in the publication process, for example, reporters, copy editors, news directors and the corporate entity itself, could be held liable for "publication" of a defamatory falsehood.¹⁶⁷

On the other hand, secondary publishers, which include libraries, news vendors, distributors, and carriers, are not liable for the defamation unless it is established that they changed the communication and knew or had reason to know of the defamatory nature of the statement.¹⁶⁸ The rationale behind this distinction is that these publishers usually are unaware of the defamatory nature of the message and are not in a position to halt or alter the harm.¹⁶⁹

A republisher¹⁷⁰ of defamatory material also may be held liable since he made a conscious decision to publish the material just as

hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (footnote omitted).

162. 376 U.S. at 279-80.

163. See *supra* note 161.

164. *Id.*

165. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967) (football coach accused in publication of cheating must show "actual malice" to recover damages).

166. The primary publishers, [t]hose who manufacture books by way of printing and selling them, and those who print and sell newspapers, magazines, journals, and the like, are subject to liability . . . because they have the opportunity to know the content of the material being published and should therefore be subject to the same liability rules as are the author and originator of the written material." PROSSER & KEETON, *supra* note 150, at 810.

167. Thornton, Gerlach & Gibson, *Libel in Videotex Symposium*, 36 FED. COM. L.J. 178, 179 (1984) [hereinafter cited as Thornton, Gerlach & Gibson]. "[E]veryone who takes part in the publication, as in the case of the owner, editor, printer, vendor, or even carrier of a newspaper is charged with publication . . ." PROSSER & KEETON, *supra* note 150, at 799 (footnotes omitted).

168. PROSSER & KEETON, *supra* note 150, at 810-11.

169. Thornton, Gerlach & Gibson, *supra* note 167, at 179.

170. A republisher is one who publishes material that he did not write and that was previously published by another. *Id.*

the primary publisher did.¹⁷¹ The degree of responsibility of primary publishers, secondary publishers and republishers thus appears to be based upon and proportional to their discretion regarding publication decisions.¹⁷² The standards against which their liabilities are measured reflect these various degrees of responsibility.¹⁷³

2. *Obscenity*

A constitutional concept of obscenity was first enunciated in *Roth v. United States*,¹⁷⁴ in which Justice Brennan, writing for the Court, stated that “[t]he dispositive question is whether obscenity is utterance within the area of protected speech and press.”¹⁷⁵ He answered this question in the negative because obscene speech is “utterly without redeeming social importance.”¹⁷⁶ In *Roth*, the Court proffered a test to be used in distinguishing obscene materials from those which are to be accorded first amendment protection:¹⁷⁷ obscene material was that in which the dominant theme appealed to the prurient interest of an average person applying contemporary community standards.¹⁷⁸

171. *Id.*

172. *Id.* at 180.

173. *Id.*

174. 354 U.S. 476 (1957). Samuel Roth, a dealer in erotica, published, advertised and sold through the mails, monthly magazines such as *Good Times*, *A Review of the World of Pleasure*, a quarterly called *American Aphrodite*, and photograph collections such as *French Nudes at Play* and *Wallet Nudes*. Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 19 & n.80 (1960) [hereinafter cited as *Censorship of Obscenity*]. Roth was convicted of violating a federal statute, 18 U.S.C. § 1461 (1952), which prohibited the mailing of obscene matter. 354 U.S. at 480. After his conviction was affirmed by the Court of Appeals for the Second Circuit, 237 F.2d 796 (2d Cir. 1956), the Supreme Court granted *certiorari*. 352 U.S. 964.

175. 354 U.S. at 481 (footnote omitted). Dicta in earlier cases indicated that the “lewd and obscene” were among “certain well-defined and narrowly limited classes of speech” unprotected by the Constitution. *Beauharnais v. Illinois*, 343 U.S. 250, 255-56 (1952); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). This exclusion from first amendment protection was justified on the ground that such utterances were of such little social value that any benefit derived was outweighed by society’s interest in order and morality. *Chaplinsky*, 315 U.S. at 572 (citing Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 149 (1941)).

176. *Roth*, 354 U.S. at 484; *Censorship of Obscenity*, *supra* note 174, at 27. In a later decision, *Miller v. California*, 413 U.S. 15 (1973), Justice Burger stated: “[T]o equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom.” *Id.* at 34.

177. *Roth*, 354 U.S. at 488-89.

178. *Id.* at 489. The Court expressly rejected the rule of *Regina v. Hicklin*, [1868]

In *Miller v. California*,¹⁷⁹ the Court attempted to refine the definition of obscenity and to determine the permissible scope of state and federal regulation.¹⁸⁰ Three basic guidelines were set forth for the trier of fact to consider in determining whether published material is obscene and therefore not protected by the first amendment: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."¹⁸¹ A publication deemed obscene under this test may be restricted by the government and the actions of its publisher restrained.

B. Broadcast Regulation

The first amendment's guarantee of a free press¹⁸² embodies two correlative goals: (1) that publishers be free from government censorship;¹⁸³ and (2) that the public be exposed to diverse and robust communication.¹⁸⁴ The general restraint exercised by the government with respect to the print media represents the optimal balance of these two goals. For a variety of reasons with respect to the broadcast

L.R. 3. Q.B. 360, which determined obscenity merely by the effect of the material on any person, regardless of particular sensibilities. *Id.*

179. 413 U.S. 15 (1973).

180. *Id.* at 24-25.

181. *Id.* at 24 (citations omitted).

182. *See supra* notes 135-46 and accompanying text.

183. *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 76 (1976) ("The primary concern of [the first amendment] is that there be full opportunity for expression in all of its varied forms to convey a desired message. Vital to this concern is the corollary that there be full opportunity for everyone to receive the message."); *Pell v. Procunier*, 417 U.S. 817, 822 (1974) ("free speech includes a right to communicate a person's views to any willing listener"); *Branzburg v. Hayes*, 408 U.S. 665, 727 (1972) (acknowledging the clear first amendment rights of newspapers and electronic media to disseminate ideas and information) (Stewart, J., dissenting); *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) ("In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people."); *American Communications Ass'n v. Douds*, 339 U.S. 382, 442 (1950) (Jackson, J., concurring and dissenting).

184. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) ("First Amendment protection . . . [is] enjoyed by . . . recipients of the information, and not solely . . . [by those] who seek to disseminate

media, the right of the public to receive published materials has been held to be paramount to the broadcaster's right to publish.¹⁸⁵

1. *The Communications Act of 1934*

Broadcasting, which is regulated under the Communications Act of 1934 (Communications Act),¹⁸⁶ is defined therein as the "dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations."¹⁸⁷ The Communications Act was designed to regulate and limit the multitude of voices

that information"); *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973) (right of viewers and listeners is "paramount" to the rights of broadcasters); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) ("it is the purpose of the First Amendment to preserve an uninhibited market place of ideas in which truth will ultimately prevail"); *Ginsberg v. New York*, 390 U.S. 629, 649 (1968) (Stewart, J., concurring) ("[t]he Constitution protects more than just a man's freedom to say or write or publish what he wants. It secures as well the liberty of each man to decide for himself what he will read and to what he will listen."); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (first amendment includes "right to receive [and] the right to read"); *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.) ("[T]he First Amendment . . . presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many, this is, and always will be, folly; but we have staked upon it our all."). See generally Bazelton, *supra* note 10, at 203-04.

185. See *infra* notes 186-224 and accompanying text. The essence of the distinction between the treatment accorded to the press and the broadcasting media is expressed in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee 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.

Id. at 390 (citations omitted); see also *Writers Guild of Am. v. ABC*, 609 F.2d 355, 362 (1979) (in conflict of interest among television "licensees, networks, broadcasters, writers, actors, producers, and the public, it must be remembered that the Communications Act makes the interests of the public paramount"), *cert. denied*, 449 U.S. 824 (1980).

186. 47 U.S.C. §§ 151-610 (1982).

187. *Id.* § 153(o). Radio communication means transmission by radio of writing, signs, signals, pictures and sounds of all kinds, including all instrumentalities, facilities, apparatus and services incidental to such transmission, as well as television transmissions. 47 U.S.C. § 153(b) (1982); see *Standard Radio & Television Co. v. Chronicle*

exploding onto the airwaves by 1934.¹⁸⁸ Engineering chaos threatened the radio spectrum.¹⁸⁹ A licensing system was instituted to limit the number of broadcasters and thereby prevent etheric bedlam.¹⁹⁰

In order to compensate the public for the excluded voices, however, the Act imposed a concept of "public trusteeship" upon the licensees.¹⁹¹

[T]he First Amendment confers no right . . . to an unconditional monopoly of a scarce resource which the Government has denied to others the right to use It does not violate the First Amendment to [give] licensees [who are] given the privilege of using scarce radio frequencies as proxies for the entire community, [an obligation] to give suitable time and attention to matters of great public concern.¹⁹²

Publishing Co., 182 Cal. App. 2d 293, 6 Cal. Rptr. 246 (1960); *see also* United States v. Southwestern Cable Co., 392 U.S. 157, 172 (1968) (FCC given " 'regulatory power over all forms of electrical communication' ") (citation omitted); Allen B. Dumont Laboratories v. Carroll, 184 F.2d 153, 155 (3rd Cir. 1950), *cert. denied*, 340 U.S. 929 (1951).

188. *NBC v. United States*, 319 U.S. 190, 210-14 (1943). This case, affirming the FCC's power to regulate chain broadcasting, is generally regarded as the "touchstone" for measuring the constitutionality of FCC regulation. Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 86 (1967) [hereinafter cited as Robinson]. The Communications Act was based on the Radio Act of 1927, 47 U.S.C. §§ 81-119 (1928) (repealed June 19, 1934, ch. 652, § 602(a), 48 Stat. 1102); *see supra* notes 89-92.

Before 1927, the allocation of [radio] frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource [needing] government control [or] the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard.

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375-76 (1969) (footnotes omitted). *See generally* Davis, *The Radio Act of 1927*, 13 VA. L. REV. 611 (1927).

189. *NBC*, 319 U.S. at 210-214.

190. 67 CONG. REC. 5479 (1926). "The plight into which radio fell prior to 1927 was attributable to certain basic facts about radio as a means of communication—its facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody In its essentials the Communications Act of 1934 . . . derives from the Federal Radio Act of 1927." *NBC*, 319 U.S. at 213-14 (citing *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940); *see also* *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 104 (1973)).

191. *CBS*, 412 U.S. at 117, 118 (opinion of Burger, C.J.); *see also In re Wharton Comm. Inc.*, 29 RAD. REG. 2d (P & F) 81, 87 (1973); *In re Prattville Broadcasting Co.*, 8 RAD. REG. 2d (P & F) 120, 130 (1966); *In re KWK Radio Inc.*, 25 RAD. REG. 2d (P & F) 577, 583 (1963), *aff'd sub nom. KWK Radio, Inc. v. FCC*, 337 F.2d 540 (D.C. Cir. 1964), *cert. denied*, 380 U.S. 910 (1965). *But see* Brennan, *Economic Efficiency and Broadcast Content Regulation*, 35 FED. COM. L.J. 117 (1983); Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEXAS L. REV. 207, 213 [hereinafter cited as Fowler & Brenner].

192. *Red Lion Broadcasting*, 395 U.S. at 391, 394. The Court stated that

2. Affirmative Obligations

Various affirmative obligations, which have been imposed on broadcasters under this "scarcity" rationale,¹⁹³ have withstood the first amendment challenge.¹⁹⁴ Implicit in each obligation is the notion that government regulation of broadcasting will best promote the dissemination of diverse ideas which is encouraged by the first amendment.¹⁹⁵ Under this rationale, broadcasters have been subjected to regulations such as the Fairness Doctrine¹⁹⁶ and to the equal access

[t]o condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press. Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions. The statute, long administrative practice, and cases are to this effect.

Id. at 394.

The public convenience, interests and necessity standard of 47 U.S.C. § 307(a) resulted in a licensing standard under which the FCC chooses licensees, based in part on their programming proposals. This standard and the concomitant regulations have been upheld in accordance with the unequivocal recognition "that the Commission was more than a traffic policeman concerned with the technical aspects of broadcasting and that it neither exceeded its powers under the statute nor transgressed the First Amendment in interesting itself in general program format and the kinds of programs broadcast by licensees." *Id.* at 394-95 (citations omitted).

193. *See id.* at 376-77; *see also* NBC v. United States, 319 U.S. 190 (1943) (FCC has power to impose regulations upon broadcast stations in the public interest); Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246, 274 (D.C. Cir. 1974) (en banc) (Bazelon, C.J., concurring) (limits associated with scarcity of broadcast frequencies are necessary "to prevent total anarchy in the broadcast media") (footnote omitted). In order to meet the public interest, the desires and the needs of the community in which the station is located, a station should attend to the following major elements, which were developed by the industry and approved by the FCC: (1) opportunity for local self-expression; (2) development and use of local talent; (3) programs for children; (4) religious programs; (5) educational programs; (6) public affairs programs; (7) editorialization by licensees; (8) political broadcasting; (9) agricultural programs; (10) news programs; (11) weather and market reports; (12) sports programs; (13) service to minority groups; and (14) entertainment programs. Goldberg & Couzens, *supra* note 20, at 13 n.48.

194. National Ass'n of Indep. Television Producers & Distributors v. FCC, 516 F.2d 526 (2d Cir. 1975); Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246 (D.C. Cir. 1974) (en banc); Citizens Comm. v. FCC, 436 F.2d 263 (D.C. Cir. 1970).

195. Farmers Educ. & Coop. Union of Am. v. WDAY, 360 U.S. 525 (1959); *see* American Sec. Council Educ. Found. v. FCC, 607 F.2d 438 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980); Straus Communications, Inc. v. FCC, 530 F.2d 1001 (D.C. Cir. 1976); NBC v. FCC, 516 F.2d 1101 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 910 (1976).

196. 47 U.S.C. § 315(a) provides:

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal

requirements for political candidates.¹⁹⁷ Community needs were to be ascertained,¹⁹⁸ and controversial public interest programming presented.¹⁹⁹

opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

- (1) bona fide newscast,
- (2) bona fide news interview,
- (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
- (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

47 U.S.C. § 315(a) (1982). The following cases support the notion that the goal of the Fairness Doctrine is to promote the right of the public to be informed and to be apprised of different attitudes and viewpoints on controversial issues of public importance. *American Sec. Council Educ. Found. v. FCC*, 607 F.2d 438 (D.C. Cir. 1979); *Public Media Center v. FCC*, 587 F.2d 1322 (D.C. Cir. 1978); *NBC v. FCC*, 516 F.2d 1101 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 910 (1976); *see also* 47 C.F.R. § 73.1910 (1984).

The Fairness Doctrine imposes an affirmative obligation on the broadcaster to provide coverage of issues of public importance which is adequate and fairly reflects differing viewpoints. The broadcaster must provide free time for the presentation of opposing views if no paying sponsor is available, *Cullman Broadcasting Co.*, 25 RAD. REG. (P & F) 895 (1963), and must initiate public issue programming if no other source does so. *John J. Dempsey*, 6 RAD. REG. (P & F) 615 (1950). The evolution of the Fairness Doctrine and its component obligations is discussed at length in *Red Lion Broadcasting*, 395 U.S. at 375-79.

The subsidiary personal attack rule provides that "[w]hen, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person," the licensee must notify the person attacked and provide an opportunity to respond. 47 C.F.R. § 73.1920 (1984); *see also* 47 U.S.C. § 312(a)(7) (1982) (political access requirement); 47 C.F.R. § 73.1930 (1984) (political editorials requirement). *See generally* Chamberlin, *The FCC and The First Principle of the Fairness Doctrine: A History of Neglect and Distortion*, 31 FED. COM. L.J. 361 (1979) (discussing development of the Fairness Doctrine and its subsequent interpretations by the judiciary); Downs & Karpen, *The Equal Time and Fairness Doctrines: Outdated or Crucial to American Politics in the 1980s*, 4 COMM/ENT 67 (1981) (stressing continued utility of the Fairness Doctrine in contemporary broadcasting).

197. *See infra* note 201; 47 C.F.R. § 73.1940 (1984).

198. Report and Statement of Policy Re: Commission *en banc* Programing Inquiry, 22 RAD. REG. (P & F) 1901, 1912 (1960).

199. 47 C.F.R. § 73.1910 (1984). The original programming requirements were

Public affairs and childrens' programming is mandated by the FCC's regulations,²⁰⁰ as is reasonable access for candidates for elective office.²⁰¹ Television programming guidelines have been upheld²⁰² as have prohibitions against overcommercialization,²⁰³ lotteries,²⁰⁴ rigged contests,²⁰⁵ and failure to disclose consideration paid for broadcast material.²⁰⁶ The FCC monitors broadcasters' adherence to these public trustee obligations through its comparative renewal process.²⁰⁷ All licensees are required to periodically demonstrate to the FCC that they are complying with its regulations.²⁰⁸ Broadcast market entry by prospective licensees similarly is regulated in the public interest,²⁰⁹

contained in the infamous *Blue Book*, FCC PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES 55 (1946). See Robinson, *supra* note 188, at 111.

200. 47 C.F.R. § 73.4050 (1984). See generally Roberson, *Mandatory Programming Rules for Children's Television*, 3 COMM/ENT 701 (1981) (discussing desirability of mandatory programming for children).

201. 47 U.S.C. § 312(a)(7) (1982); 47 C.F.R. § 73.1940 (1984). See generally Geller & Yurov, *The Reasonable Access Provision (312(a)(7)) of the Communications Act: Once More Down the Slippery Slope*, 34 FED. COM. L.J. 389 (1982) (discussing development and judicial interpretations of reasonable access provision).

202. *Action for Children's Television v. FCC*, 564 F.2d 458, 480 (D.C. Cir. 1977) (upholding FCC's 1974 Policy Statement which required increased childrens' programming as condition to license renewal); see also Report and Statement of Policy Res: Commission *en banc* Programming Inquiry, 44 F.C.C. 2303, 2307-08 (1960) (FCC does not view itself as barred by Constitution or statute from exercising any responsibility with respect to programming). See *supra* note 193 for a list of items to be included among a broadcasting station's programming. See also *Action for Children's Television*, 58 RAD. REG. 2d (P & F) 61 (1985) (Commission declines to act on complaints regarding program length commercialization in animated childrens' programs starring syndicated characters).

203. 47 C.F.R. § 73.4010 (1983) (removed in entirety in 49 Fed. Reg. 33,604 (1984)).

204. 47 C.F.R. § 73.1211 (1984); 18 U.S.C. § 1304 (1982).

205. 47 C.F.R. § 73.1216 (1984).

206. 47 C.F.R. §§ 73.4242, 73.4180, 73.1212 (1984); 47 U.S.C. § 317 (1982).

207. 1 F.C.C.2d 393 (1965). See generally Lindemann, *Simon Geller and the Comparative Renewal Process*, 6 COMM/ENT 185 (1983); Kuklin, *Continuing Confusion: The Renewal of Broadcast Licenses*, 27 ST. LOUIS U.L.J. 95 (1983).

208. See 47 U.S.C. § 307(c) (1982); see, e.g., *Cosmopolitan Broadcasting Corp. v. FCC*, 581 F.2d 917 (D.C. Cir. 1978); *Brandywine Main Line Radio, Inc. v. FCC*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973); *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969); *Sharp & Lively, Can the Broadcaster in the Black Hat Ride Again? "Good Character" Requirements for Broadcast Licensees*, 32 FED. COM. L.J. 173 (1980).

209. 47 U.S.C. § 309(a) (1982); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (Congress has power to grant and deny broadcasting licenses and to close existing stations); see also *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 595-96 (1981) (FCC's decision not to regulate but to allow marketplace to determine entertainment programming is compatible with its mandate to serve public interest); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 780 (1978) (FCC may regulate and allocate licenses for broadcast frequencies to promote "public interest").

and various multiple ownership and cross-ownership restrictions have been imposed.²¹⁰

In addition to the scarcity rationale, broadcast regulation also has been upheld based on the pervasive nature of the medium,²¹¹ and its special impact on the American public.²¹² In *FCC v. Pacifica Foundation*,²¹³ the Supreme Court upheld the Commission's power to regulate the publication of indecent speech²¹⁴ over broadcasting frequencies.²¹⁵ The Court stated that while the "seven dirty words"²¹⁶ which were spoken on the offending radio show were protected under the first amendment,²¹⁷ the Commission's interpretation of 18 U.S.C. section 1464, which prohibited the broadcast of indecent, as

210. 47 U.S.C. § 310 (1982). FCC restrictions on broadcast ownership have been upheld by the Supreme Court as a legitimate means of ensuring a continued diversity of voices over the broadcast spectrum. *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 794-95 (1978); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956); *NBC v. United States*, 319 U.S. 190, 226-27 (1943). See generally Comment, *Media Cross-Ownership, Effective Enforcement of the Antitrust Laws and the FTC*, 32 FED. COM. L.J. 105 (1980).

In February, 1985, the FCC affirmed its abrogation of the previously controlling "seven station rule" and expanded permissible multiple broadcast ownership under the 12-12-12 formula which provides that a person or company could own a maximum of 12 AM stations, 12 FM stations and 12 television stations. *In re Amendment of § 73.3555* [formerly §§ 73.35, 73.240 and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 57 RAD. REC. 2d (P & F) 966, 968-69 (1985). The FCC modified its original position by adding an audience reach cap and a minority preference provision to its original rule. *Id.* at 969 (limiting access of TV station owners to no more than 25 percent of national audience; minority ownership of broadcast facilities to be promoted).

211. *FCC v. Pacifica Foundation*, 438 U.S. 726, 748-49 (1978).

212. *Id.*

213. 438 U.S. 726 (1978). In *Pacifica Foundation*, the Supreme Court noted that broadcasting required special treatment because of the four following considerations: (1) children have access to radios and in many cases their use of radio is unsupervised by parents; (2) radio receivers are in homes, where privacy interests are entitled to special protection (citing *Rowan v. Post Office Dep't*, 397 U.S. 728 (1970)); (3) unconsenting adults may tune in to a station without warning that offensive language is being, or will be, broadcast; and (4) there is a scarcity of spectrum space; public interest necessitates the licensing of broadcasters. *Id.* at 731 n.2.

214. See *infra* notes 267-277 and accompanying text.

215. 18 U.S.C. § 1464 provides: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years, or both." 18 U.S.C. § 1464 (1982); see also 47 U.S.C. § 312(a)(6) (1982) (FCC may revoke station licenses for violations of 18 U.S.C. § 1464). Accordingly, the Court upheld sanctions against Pacifica Station WBAI for broadcasting the George Carlin "seven dirty words" monologue. 438 U.S. at 751.

216. The Court's opinion does not delineate the offending words. They are contained in the Appendix to the decision. 438 U.S. at 751 app.

217. 438 U.S. at 744.

well as obscene speech,²¹⁸ was constitutional.²¹⁹

Under *Pacifica*,²²⁰ broadcast regulation, which is justified by the medium's unique impact on the American public,²²¹ is necessary to protect this "captive audience"²²² from unwanted invasions of privacy.²²³ A significant factor in the Court's decision was the unique accessibility of the broadcast medium to children.²²⁴

3. Deregulation

Although the authority of the FCC to regulate the content,²²⁵ structure²²⁶ and technical aspects²²⁷ of broadcasting is clear,²²⁸ the Commission also is authorized to refrain from imposing permissible regulations and to "unregulate" areas previously constrained.²²⁹ In

218. See *supra* note 215.

219. 438 U.S. at 750-51.

220. *Id.* at 726.

221. *Id.* at 748-49.

222. See, e.g., *Cohen v. California*, 403 U.S. 15, 21 (1971) ("[w]e are often 'captives' outside the sanctuary of the home and subject to objectionable speech.' The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.") (quoting *Rowan v. Post Office Dep't*, 397 U.S. 728, 738 (1970)); *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 515 (1969) (Stewart, J., concurring) ("a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees") (quoting *Ginsburg v. New York*, 390 U.S. 629, 649-50 (1968)). See generally Report on the Broadcast of Violent, Indecent and Obscene Material, 32 RAD. REG. 2d (P & F) 1367, 1373 (1975); Comment, *Morality and Broadcasting: FCC Control of "Indecent" Material Following Pacifica*, 31 FED. COM. L.J. 145 (1978).

223. 438 U.S. at 748-49.

224. *Id.* at 749; see *supra* note 222.

225. See *NBC v. United States*, 319 U.S. 190, 215 (1943).

226. See *supra* note 210.

227. See, e.g., 47 C.F.R. §§ 73.1213-73.1750 (1984).

228. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 387 (regulation of use of broadcast equipment); *id.* at 388 (regulation of radio spectrum to reserve portions for important uses); *id.* at 390 (authority of FCC to regulate radio frequency licenses); Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413, 1427, 1429 (D.C. Cir. 1983) (FCC's requirement that broadcast licensees "provide programming responsive to community issues" based on its mandate to promote public interest; licensees have "some affirmative obligation to present informational programming") (emphasis in original).

229. 47 C.F.R. § 73.3597 (1984); 47 Fed. Reg. 55,930 (1982) (statement by FCC Chairman Fowler that abrogation of license "trafficking" rules was "a true blockbuster in the unregulation process"); see also *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 595-96 (1981) (public interest best served by FCC refraining from regulating entertainment programming); Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413, 1436 (D.C. Cir. 1983) (upholding the FCC's deregulation of radio). See generally Fowler & Brenner, *supra* note 191.

recent years, an open market approach has been evinced by the FCC²³⁰ as the scarcity rationale²³¹ has come under increasing attack.²³²

The development of FM radio, broadcast and subscription television, cable, satellite, microwave and low-power broadcasting technologies belie the 1934 scarcity assumptions and compound the multiplicity of voices competing for a market share in 1985.²³³ A communications environment has been created which was unimagined in 1943, when Justice Frankfurter, writing for the Supreme Court, stated that the "radio spectrum simply is not large enough to accommodate everyone."²³⁴ Accordingly, in June, 1984, the FCC deregulated commercial television by eliminating non-entertainment programming and commercial logging guidelines;²³⁵ removing the formal ascertainment requirements for commercial licensees;²³⁶ de-

230. Fowler, *Foreword to The New Video Marketplace*, *supra* note 10, at 523-24 (discussing movement by FCC and Congress away from "public trusteeship" approach to broadcast regulation, toward an approach more responsive to market forces).

231. *See supra* notes 190-92 and accompanying text.

232. *See Bazelton*, *supra* note 10, at 207. The inherent limitations of the radio spectrum which provided the touchstone for the Radio Act and the 1934 Communications Act, if valid at all in 1927 or 1934, are clearly not valid in 1985. *See The New Video Marketplace*, *supra* note 10, at 562-66.

The dramatic media changes which have taken place since the scarcity rationale was first articulated underscore its current weaknesses. An eightfold increase in radio stations since 1934 has taken place, along with the development of FM and television stations which followed the enactment of the Communications Act. *Id.* at 563. In 1983, an estimated 28% of American households received ten or more broadcast television signals; 80% received at least five. *Id.* at 564. VHF frequencies are supplemented by UHF frequencies, lowpower television, direct broadcast satellites, subscription television, cable, multipoint distribution service, videocassettes and videodiscs. *Id.* These alternatives to conventional radio and television broadcasting undermine the scarcity rationale and highlight the market opportunities beyond the traditional broadcast spectrum. Additionally, technological developments may permit a more efficient use of the available spectrum through multiplexing, compression and subcarrier operations. *Id.* at 565-66. *See FCC v. WNCN Listeners Guild*, 450 U.S. at 590, for an acknowledgment of the 'bewildering array of diversity' in entertainment formats which inhabits the radio broadcast spectrum. *But see NBC v. United States*, 319 U.S. at 213 ("the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another") (footnote omitted).

233. 47 U.S.C. § 151 (1982).

234. *NBC v. United States*, 319 U.S. at 213.

235. *In re The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 56 RAD. REG. 2d (P & F) 1005, 1006-07 (1984); *In re Revision of Program Policies and Reporting Requirements Related to Public Broadcasting Licensees*, 56 RAD. REG. 2d (P & F) 1157, 1160-61 (1984) [hereinafter cited as *Public Broadcasting Deregulation*].

236. 56 RAD. REG. 2d (P & F) 1005 (1984).

leting commercialization levels from its future inquiries into license applications; replacing the detailed program log requirement²³⁷ with a generalized quarterly response; and eliminating the long form renewal audit which had been used to assess licensee performance.²³⁸ Public broadcasters similarly were relieved of many of their regulatory obligations under the terms of a companion ruling.²³⁹ Complete deregulation of television is a viable possibility in the coming months.

This television deregulation followed the 1981 radio deregulation proceedings under which the FCC dropped non-entertainment programming guidelines and restricted ascertainment,²⁴⁰ logging, and commercialization regulations.²⁴¹ Numerous broadcasting "underbrush" rules²⁴² were also recently dropped in the spirit of deregulation and administrative simplification.²⁴³

One of the more significant aspects of the recent deregulation is the current FCC examination of the continued viability of the Fairness Doctrine.²⁴⁴ Elimination of this doctrine would be a monumental acknowledgement of the end of scarcity and would accord with the increasingly apparent FCC attitude toward regulation. This approach was enunciated in the Public Broadcast Deregulation²⁴⁵ in which the FCC emphasized its conversion to the market approach of broadcast regulation, stating that the FCC "should regulate only where social

237. *Id.* at 1006.

238. *Public Broadcasting Deregulation*, *supra* note 235, at 1158.

239. *Id.*

240. *In re Deregulation of Radio*, 84 F.C.C.2d 968, 49 RAD. REG. 2d (P & F) 1, 5, 11, *reconsideration denied*, 87 F.C.C.2d 797, 50 RAD. REG. 2d (P & F) 93 (1981); *see Office of Communication of the United Church of Christ*, 707 F.2d 1413, 1436-42 (D.C. Cir. 1983).

241. 49 RAD. REG. 2d (P & F) at 5.

242. *In re Elimination of Unnecessary Broadcast Regulation*, 54 RAD. REG. 2d (P & F) 1043, 1046 (1983). Underbrush rules relate to "the accumulation of policies, doctrines, declaratory rulings, interpretive statements . . . that [have] 'grown up' around major regulations over the years." 54 RAD. REG. 2d (P & F) at 1046.

243. 54 RAD. REG. 2d (P & F) at 1047.

244. 47 U.S.C. § 315 (1982). *See California Public Broadcasting Forum v. FCC*, 57 RAD. REG. 2d (P & F) 899 (1985), for an extensive review of the FCC proceedings held on February 7 and 8, 1985 to examine the continued viability of the Fairness Doctrine. The explosive growth in alternative communications fora has been cited as a basis for eliminating the Doctrine, which was intended to ensure the adequate airing of diverse viewpoints. *See supra* note 196; *see also The Great Debate on Fairness is a Little Less Than That*, BROADCASTING, Feb. 11, 1985, at 30, 32; *The Fairness Doctrine Debated*, N.Y. Times, Feb. 8, 1985, at C32. The power of the FCC to abrogate a codified policy such as the Fairness Doctrine, absent Congressional authorization, is not clear. *See infra* notes 245-46 and accompanying text.

245. 56 RAD. REG. 2d (P & F) 1157, 1161-65 (1984).

and market forces are unlikely to ensure service in the public interest."²⁴⁶ The most pressing question now is whether the FCC has the authority to abrogate the statutory Fairness Doctrine, absent Congressional authorization, not whether it is wise to do so.

4. *The Impact of Defamation Law on the Broadcast Media*

In addition to these administratively imposed content regulations, the broadcast media, in their role as publishers, are governed by the judicial constraints of defamation²⁴⁷ and obscenity law.²⁴⁸ In *Farmers Union v. WDAY*,²⁴⁹ these two controls overlapped when the Supreme Court held that section 315 of the Communications Act²⁵⁰ barred broadcasters from censoring defamatory statements made during radio transmissions by political candidates.²⁵¹ As a consequence, the Court held that a broadcast licensee is immune from liability for any defamation which is published over its facilities as required by section 315.²⁵² Inasmuch as the intent of section 315 was to encourage the broadcasting of political debate,²⁵³ it would be unrea-

246. *Id.* at 1162, ¶ 17; see 1983 *Teletext Order*, 53 RAD. REG. 2d (P & F) 1309, 1324 ¶ 59 (Fairness Doctrine inapplicable to teletext because scarcity rationale not viable with respect to this medium).

247. See *Farmers Union v. WDAY*, 360 U.S. 525, 530-42 (1959) (broadcaster is immune from liability for defamatory statements made by candidates for political office when the broadcaster is required to provide the candidate with airtime. However, broadcaster may be held liable for defamations where statements not made during broadcasts which station is required to air); Note, *Developments in the Law—Defamation*, 69 HARV. L. REV. 875, 907-10 (1956).

248. See, e.g., *Illinois Citizens Comm. for Broadcasting v. FCC*, 515 F.2d 397 (D.C. Cir. 1974).

249. 360 U.S. 525 (1959).

250. 47 U.S.C. § 315 (1934). See *supra* notes 186-224 and accompanying text for a discussion of this Act.

251. *Farmers Union*, 360 U.S. at 527-31.

252. *Id.* at 531-35; *Lamb v. Sutton*, 274 F.2d 705 (6th Cir. 1960) (Federal Communications Act of 1934 bars radio and television broadcasting stations from removing defamatory statements from speeches broadcast by legally qualified candidates for public office, and grants federal immunity for libelous statements so broadcast).

253. *Farmers Union*, 360 U.S. at 528-29. The legislative history of section 315 also indicates a deep hostility to censorship either by the FCC or by the broadcast licensee.

The flat prohibition against the licensee of any station exercising any censorship authority over any political or public question discussion is retained and emphasized. This means that the Commission cannot itself or by rule or regulation require the licensee to censor, alter, or in any manner affect or control the subject matter of any such broadcast and the licensee may not in his own discretion exercise any such censorship

sonable to frustrate that intent by imposing liability on a broadcaster who complied with that section.²⁵⁴

Specifically, the Supreme Court held that the radio broadcaster who provides an opportunity for a qualified senatorial candidate to reply to speeches by other candidates, as required by section 315, may not be held liable for the candidate's defamatory statements.²⁵⁵ The Court held that section 315, which required the broadcaster to make air time available to competing political candidates, precluded the broadcaster's censorship of their material and granted the broadcaster immunity from liability for defamatory statements made by them.²⁵⁶

In situations in which the Communications Act is not directly applicable, defamatory materials conveyed over a broadcaster's facilities generally have followed the analysis applied to the written press.²⁵⁷

One difference between broadcast defamation and print defamation has been the categorization of the allegedly injurious publication as libel or slander.²⁵⁸ The distinction originally was based on assumptions

authority . . . [S]ection 326 of the present act, which deals with the question of censorship of radio communications by the Commission . . . makes clear that the Commission has absolutely no power of censorship over radio communications and that it cannot impose any regulation or condition which would interfere with the right of free speech by radio.

S. REP. No. 1567, 80th Cong., 2d Sess. 13-14 (1948).

254. *Farmers Union*, 360 U.S. at 529-31.

255. *Id.* at 526-27, 535.

256. *Id.* at 529-35. At first glance this immunity seems similar to that of a common carrier for defamatory communications transmitted via its facilities, as the broadcaster appears to be a mere provider of technology. However, by the terms of section 315, a broadcaster is not required to make its facilities available to everyone. By not granting access to one candidate, the broadcaster can escape the duty to grant access to all. A common carrier, however, must provide non-selective, non-discriminatory access to all and thus cannot make a conscious choice to remove itself from regulatory requirements.

257. See *supra* Part IV. A.1. for a discussion of defamation law and the written press. For examples of cases applying traditional defamation law to the broadcast media, see, e.g., *St. Amant v. Thompson*, 390 U.S. 727 (1968) (deputy sheriff claiming defamation by televised speech deemed a public official and thus must demonstrate "actual malice" to recover damages); *Walker v. Pulitzer Pub. Co.*, 394 F.2d 800 (8th Cir. 1968) (Major Walker, claiming defamation by television report of his role in civil rights incident, deemed public figure and thus must demonstrate actual malice); *Correia v. Santos*, 191 Cal. App. 2d 844, 13 Cal. Rptr. 132 (1961) (manager of radio station liable for defamatory broadcast made by his agent who was also announcer); *Irwin v. Ashurst*, 158 Ore. 61, 74 P.2d 1127 (1938) (judge who allowed radio transmission of judicial proceedings immune from liability for defamation); *Miles v. Louis Wasmer*, 172 Wash. 466, 20 P.2d 847 (1933) (writer and announcer/editor held liable for defamatory advertisement read over radio).

258. For a discussion of the significance of this distinction in cases of broadcast

regarding the intent, impact, permanence and geographical area of dissemination of the defamatory communication.²⁵⁹ The greater potential for harm posed by libel traditionally was believed to justify its broader scope of liability.²⁶⁰

defamation, see *infra* notes 259, 260. See also Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 569-71 (1903); RESTATEMENT—TORTS, *supra* note 21, § 568(1), (2) (“Libel consists of the publication of defamatory matter by written or printed words [S]lander consists of the publication of defamatory matter by spoken words”).

259. It was assumed that a writing was more deliberately made than an oral statement; a writing had a greater impact on the eye than words had on the ear; a writing was more permanent and reached a larger audience than did speech. Note, *Torts: Defamation: Libel-Slander Distinction: Extemporaneous Remarks Made on Television Broadcast*: *Shor v. Billingsley*, 43 CORNELL L.Q. 320, 322 (1957) [hereinafter cited as *Libel-Slander Distinction*].

260. *Shor v. Billingsley*, 4 Misc. 2d 857, 861, 158 N.Y.S.2d 476, 481 (Sup. Ct. N.Y. County) (defamatory broadcast treated as libel rather than slander even though no prepared script was used) (quoting *Hartmann v. Winchell*, 296 N.Y. 296, 304, 73 N.E.2d 30, 34 (1947) (Fuld, J., concurring)), *aff'd*, 4 A.D.2d 1017, 169 N.Y.S.2d 416 (1st Dep’t 1957) “Many things that are defamatory may be said with impunity through the medium of speech. Not so, however, when speech is caught upon the wing and transmuted into print. What gives sting to the writing is its permanence of form.” *Ostrowe v. Lee*, 256 N.Y. 36, 39, 175 N.E. 505, 506 (1931) (Cardozo, C.J.). Thus, it was easier for a plaintiff to maintain a libel cause of action. See *Libel-Slander Distinction*, *supra* note 259, at 326.

The cause of action for slander generally requires demonstration of special damages, usually of a pecuniary nature. “The requirement of proof of pecuniary damages apparently developed from an ancient jurisdictional dispute between the ecclesiastical courts and the common law courts (the latter requiring proof of some ‘temporal’ harm distinct from the mere ‘spiritual’ offense cognizable in the former.)” *Eaton*, *supra* note 157, at 1356 n.22. If the injurious statement falls into one of the four traditional, narrow categories of slander *per se*, a claim of general damages will suffice. The categories of slander *per se* are:

- (a) an imputation that the plaintiff has committed a serious crime. *Mullins v. Brando*, 13 Cal. App. 3d 409, 91 Cal. Rptr. 796, *cert. denied*, 403 U.S. 923 (1970) (allegation that defendant stated on television that police department was “out to get the Black Panthers” and that member of group was killed in a shoot-out with police stated a cause of action for slander of officers who allegedly fired shot); *Snowdon v. Pearl River Broadcasting Co.*, 251 So. 2d 405, 411 (La. Ct. App. 1st Cir. 1971) (radio station inviting public to call and speak freely without employing monitoring equipment liable *per se* to plaintiff accused on broadcast of illicit sale and distribution of narcotics);
- (b) an imputation that the plaintiff has a loathsome disease, *Williams v. Holdredge*, 22 Barb. [N.Y.] 396 (1854);
- (c) an imputation damaging to the plaintiff’s business, trade or profession, *White v. Valenta*, 234 Cal. App. 2d 243, 44 Cal. Rptr. 241 (1965) (defendant who uttered slanderous remarks within camera and microphone range while plaintiff was delivering live advertisement for his business held liable without proof of special damages);
- (d) an imputation of unchastity in a woman, *Sauerhoff v. Hearst Corp.*, 538 F.2d 588, 591 (4th Cir. 1976) (implication of an extra-marital affair is intrinsically defamatory and no proof of injury is required).

See RESTATEMENT—TORTS, *supra* note 21, §§ 571-74.

The characteristics of modern media, however, tend to belie the traditional assumptions regarding defamation.²⁶¹ The FCC requirement that licensees maintain manuscript, video tape or other permanent records of everything which is broadcast²⁶² puts the spoken material into visible form, thereby destroying the libel/slander distinction.²⁶³

Although individual state laws remain inconsistent in this area,²⁶⁴ the Second Restatement of Torts characterizes all broadcast defamation as libel.²⁶⁵ Consequently, the requisites of evidence and the recoverable damages generally are the same for defamation in the broadcast and print media.²⁶⁶

5. *Regulation of Obscenity on Radio, Television and Cable*

Obscenities which are published over the broadcast media are more stringently restricted than those published by the printed press.²⁶⁷

On the other hand, a showing of general damages is generally sufficient to maintain an action for libel. *See, e.g., Sauerhoff v. Hearst Corp.*, 538 F.2d 588 (4th Cir. 1976) (defendant's newspaper reported a legal dispute between plaintiff and his girlfriend; plaintiff's wife left him following publication of the article); *Morrison v. Ritchie & Co.*, [1901-02] Sess. Cas. 645 (Scot.2d Div.) 39 Scot. L. RPTR. 432 (1902) (defendant's newspaper twice reported that plaintiff had given birth to twins; plaintiff had been married only one month and three months on the respective dates of publication). However, libel *per quod* requires a showing of special damages. Eaton, *supra* note 157, at 1360. Libel *per quod* is a statement that is defamatory only if the third party recipient has extrinsic knowledge that makes it so. *Id.* at 1354-55.

261. PROSSER & KEETON, *supra* note 150, at 787-88.

262. *See* 47 C.F.R. §§ 73.1800-73.1840 (1984).

263. The current market dominance of the broadcast media more closely resembles the role of the 18th century press than does the often struggling press of today. Thus, radio and television broadcasts would seem more analogous to the print media for which libel laws were created than to the more intimate publications addressed by slander laws. Accordingly, in cases of media defamation, courts have held that an oral defamatory broadcast which is read from a prepared script is libel rather than slander. Similar treatment is given to extemporaneous defamatory statements. *See Gearhart v. WSAZ, Inc.*, 150 F. Supp. 98 (E.D. Ky. 1957), *aff'd*, 254 F.2d 242 (6th Cir. 1958); *Charles Parker Co. v. Silver City Crystal Co.*, 142 Conn. 605, 116 A.2d 440 (1955); *Shor v. Billingsley*, 4 Misc. 2d 857, 158 N.Y.S.2d 476 (Sup. Ct. N.Y. County), *aff'd*, 4 A.D.2d 1017, 169 N.Y.S.2d 416 (1957).

264. *Compare Sorensen v. Wood*, 123 Neb. 348, 243 N.W. 82 (1932), *appeal dismissed*, *KFAB Broadcasting Co. v. Sorensen*, 290 U.S. 599 (1933); *Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889 (W.D. Mo. 1934); *Shor v. Billingsley*, 4 Misc. 2d 857, 158 N.Y.S.2d 476 (Sup. Ct. N.Y. County), *aff'd*, 4 A.D.2d 1017, 169 N.Y.S.2d 416 (1957), *appeal denied*, 5 A.D.2d 768, 170 N.Y.S.2d 976 (1958); *with Kelly v. Hoffman*, 137 N.J.L. 695, 61 A.2d 143 (1948); *Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 182, 8 A.2d 302 (1939).

265. RESTATEMENT—TORTS, *supra* note 21, § 568A.

266. *See supra* note 260.

267. *See supra* notes 174-81 regarding standards for determining obscenity in the print media.

While printed obscenities are analyzed in accordance with the *Miller* standards,²⁶⁸ broadcast obscenities are governed by federal statutes which allow, and indeed require, an even more restrictive test. This test was enunciated by the Supreme Court in *Pacifica*.²⁶⁹

In *Pacifica*, the Court upheld the FCC's prohibition of the broadcast,²⁷⁰ finding the material indecent under section 1464 of the Federal Criminal Code.²⁷¹ The pervasive impact of the broadcast medium was cited as the key to permitting the FCC such broad regulatory authority.²⁷²

Obscene materials which are transmitted over the cable medium fall into yet another regulatory category.²⁷³ Under the new Cable Communications Policy Act,²⁷⁴ federal standards and criminal pen-

268. *Miller v. California*, 413 U.S. 15 (1973).

269. 18 U.S.C. § 1464 (1982), originally enacted as part of the Radio Act of 1927, *supra* note 91, became part of the Communications Act of 1934, *supra* notes 89-95 and accompanying text. In 1948 it was incorporated into the criminal code. *FCC v. Pacifica*, 438 U.S. 726, 738 (1978). The statute punishes the utterance of obscene, indecent or profane language which is published by means of radio communication. 18 U.S.C. § 1464 (1982). 47 U.S.C. § 303(m)(1)(D) (1982) allows the FCC to suspend the license of an operator upon proof of transmission of superfluous radio communications which contain profane or obscene words, language or meaning. 47 C.F.R. § 73.4165 (1984) prohibits the broadcast of indecent language over radio or television; 47 C.F.R. § 73.4170 (1984) prohibits the broadcast of indecent lyrics over radio or television. The Supreme Court expanded the parameters of permissible regulation of broadcasts which contain offensive material in *Pacifica*. 438 U.S. 726 (1978). The FCC, recognizing that the material was indecent rather than obscene under the guidelines set forth in *Miller*, 413 U.S. 15 (1973), and therefore not without first amendment protection, drew upon the law of nuisance in deciding that the licensee could be subject to sanctions for the broadcast. *Pacifica Foundation*, 56 F.C.C.2d 94, 99 (1975), *rev'd*, 556 F.2d 9 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978).

270. 438 U.S. 726, 741 (reversing circuit court's holding, 556 F.2d 9 (D.C. Cir. 1977)).

271. 18 U.S.C. § 1464 (1982). Indecency was defined as the failure to conform to generally accepted standards of morality. *FCC v. Pacifica*, 438 U.S. at 740 n.14. This definition of indecency points out the contrast to obscenity, which must appeal to the prurient interest. The Court justified its limitation of first amendment guarantees because of the broadcast media's uniquely pervasive nature and unique accessibility to children. *Id.* at 748-50. Due to these characteristics, regulation of indecency in broadcasting is permissible to the extent necessary to abate its nuisance aspects. 438 U.S. at 750. The Court stated that context is critical in determining the existence of a nuisance. "'[N]uisance may be merely a right thing in a wrong place,—like a pig in the parlor instead of the barnyard.'" *Id.* (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 368 (1926)).

272. See *supra* note 271.

273. See *infra* notes 317 & 322 for a discussion of the application of obscenity regulations to the cable medium.

274. Pub. L. No. 98-549, 98 Stat. 2779 (1984).

alties are established for the transmission of obscene materials via cable.²⁷⁵ The Act also gives the local franchising authority the right to regulate any cable service it deems obscene.²⁷⁶ This regulation is a specific exemption from the Act's bar on local censorship or control of editorial content.²⁷⁷

C. Regulation of Common Carriers

Before focusing on the new electronic media, a brief examination of the third media role model, the common carriers, is in order. Common carriers are defined in the Communications Act²⁷⁸ as those engaged as common carriers for hire.²⁷⁹ The Supreme Court, however, has developed a significantly more instructive definition. In *National Association of Regulatory Utility Commissioners v. FCC* (NARUC I),²⁸⁰ a common carrier was defined as an individual or organization that holds itself out as available to the public for hire, that provides

275. *Id.* § 2, 98 Stat. 2801. The FCC has proposed deletion of current rule 47 C.F.R. § 76.215 (1984), which prohibits origination cable operators from transmitting obscene or indecent materials, because the rule has been superseded by the 1984 Cable Communication Act's criminal sanction (Section 639 of the Act). *See* 49 Fed. Reg. 48,772 (1984).

276. Pub. L. No. 98-549, § 2, 98 Stat. 2785 (1984) (section 612(h) of the Cable Act).

277. Section 612 of the Cable Act, Pub. L. No. 98-549, § 2, 98 Stat. 2782; 49 Fed. Reg. 48,772 n.51 (1984). Ordinances and state laws which restrict or regulate the transmission of obscene, indecent and offensive materials over cable technology are under increasing attack by advocates of first amendment guarantees. For example, a Miami city ordinance banned obscene or indecent material on cable. In *Cruz v. Ferre*, 571 F. Supp. 125, 132 (S.D. Fla. 1983), *aff'd*, 755 F.2d 1415 (11th Cir. 1985), a suit brought by a cable television viewer, such an ordinance was struck down because it impinged not only on obscene but also indecent speech, a category which is entitled to some constitutional protection. *Id.* at 130-31. Similar suits in other jurisdictions are pending: *McGhee v. Vernon Hills*, 83-C-2486 (N.D. Ill. 1984) (Vernon Hills, Illinois); *Gates v. Ney*, C-1-83-0999 (S.D. Ohio 1984) (Cincinnati, Ohio). The *Ferre* court held that indecent speech was protected despite the *Pacifica* holding which permitted regulation of indecent speech in the conventional broadcast context. *Cruz v. Ferre*, 571 F. Supp. at 131-32. Cable television allows viewing control by the subscriber. Such control nullifies the problems of pervasiveness and accessibility inherent in broadcast television and radio which provided the rationale for the *Pacifica* prohibition against indecent speech. The rationale in *Pacifica* is also inapplicable to cable broadcasting in that the survival of a cable system depends on subscription sales. Financial necessity forces cable operators to provide the viewing public with acceptable programming to stimulate sales and minimize requests for cancellation. *See id.* at 631-32.

278. Communications Act of 1934, 47 U.S.C. §§ 151-609 (1934), *as amended* by Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984).

279. 47 U.S.C. § 153(h) (1982).

280. 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976) (*NARUC I*).

facilities thereby to all members of the public who choose to use its services to transmit information of their own design,²⁸¹ and that serves all members of the public indifferently, basing all decisions on non-discriminatory factors.²⁸² The common carrier's responsibility is to provide a communications "pipeline."²⁸³

1. Rate and Structural Regulation

Communications common carriers are regulated under Title II of the Communications Act.²⁸⁴ After obtaining an FCC sanctioned franchise, a carrier is "permitted to accrue revenues sufficient to cover all reasonable operating expenses, the cost of acquiring capital, and

281. 525 F.2d at 640, 642; *see also* FCC v. Midwest Video Corp., 440 U.S. 689, 701 (1979); Frontier Broadcasting Co. v. Collier, 24 F.C.C. 251, 254 (1958). The original rationale for regulation of common carriers was that they took on a quasi-public character when they held themselves out as offering their services to the public in general. *NARUC I*, 525 F.2d at 640. This role, coupled with the general lack of care exercised by most carriers over the safety of their carriage, justified the imposition of an "insurer" standard of care upon the common carriers. *Id.* Under this rule, they were absolutely liable for any damage to their carriage, other than that caused by an act of God, warfare, or similar *forces majeures*. *Id.* at 640-41. The late nineteenth century saw the imposition of price and service regulations on the carriers as a result, in part, of their monopoly status. *Id.* Despite constitutional challenges, these regulations have been upheld. *See, e.g.*, Ambassador, Inc. v. United States, 325 U.S. 317, *reh'g denied* 325 U.S. 896 (1945) (FCC granted jurisdiction over carriers to determine rates, services, charges, practices, classifications and regulations in connection with carriers' communication services); *Munn v. Illinois*, 94 U.S. 113 (1876) (establishing constitutionality of federal regulation of industries which affect public interest).

282. *See generally* TECHNOLOGIES OF FREEDOM, *supra* note 77, at 75-107; Geller & Lampert, *Cable, Content Regulation and the First Amendment*, 32 CATH. U.L. REV. 603, 621 (1983) [hereinafter cited as Geller & Lampert]; Harrison, *Public Utilities in the Marketplace of Ideas: A "Fairness" Solution for a Competitive Imbalance*, 1982 WIS. L. REV. 43 (1982); Cosson, *Development of Regulation of Common Carrier Communications*, 28 FED. COM. L.J. 132 (1975).

283. *In re* Amendment of Parts 1, 2, 21 and 43 of the Commission's Rules and Regulations to Provide for Licensing and Regulation of Common Carrier Radio Stations in the Multipoint Distribution Service (Report and Order), 45 F.C.C.2d 616, 618 (1974). This pipeline or "conduit" role of the common carrier, along with its monopoly status, are the bases for all carrier regulation. The pipeline aspect affords the carrier immunity from prosecution for defamation over its lines. *See infra* note 303 and accompanying text; *see also* Farmers Union v. WDAY, 360 U.S. 525 (1959) (immunity of broadcaster from defamation when acting merely as conduit for required political messages); *Edwards v. National Audubon Soc'y, Inc.*, 556 F.2d 113 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977) (immunity of newspaper from defamation liability when merely acting as conduit for communication of reported accusation by a responsible speaker).

284. 47 U.S.C. §§ 201-224 (1982).

a fair rate of return on its communications investments."²⁸⁵ Such carriers are required to file schedules of all charges, classifications, practices and regulations affecting their charges with the FCC which may examine and change them when it believes them to be unreasonable or unjust.²⁸⁶ Common carriers are subject to rate of return and rate base regulations, which define their allowable charges and permissible profits,²⁸⁷ and must offer their services subject to government tariff.²⁸⁸ Common carriers must obtain certificates of public convenience²⁸⁹ prior to constructing, expanding or terminating any line of communication and must not discriminate unreasonably against users of their services.²⁹⁰ The rate and service requirements imposed on these carriers under the Communications Act reflect the view that their natural monopoly status justifies government control of their business activities.²⁹¹

This position, and the resultant statutory requirements, accord with common carrier laws which long predate the Communications Act.²⁹² While conventional telephone and telegraph services, as well

285. *The Computer Inquiries*, *supra* note 98, at 59; see 47 U.S.C. §§ 201, 203, 204, 205, 220 (1982).

286. 47 U.S.C. §§ 203(a), 205, 214(d) (1982).

287. 47 U.S.C. §§ 201-205 (1982).

288. 47 U.S.C. §§ 203, 205 (1982); see *Phonetele, Inc. v. AT&T*, 664 F.2d 716, 721-23 (9th Cir. 1981) (discussing tariffs imposed by 47 U.S.C. § 203(a)).

289. 47 U.S.C. § 214(a) (1982); see *General Tel. Co. v. FCC*, 413 F.2d 390 (D.C. Cir.) (holding that section 214 applies to construction of community antenna television or cable facilities), *cert. denied*, 396 U.S. 888 (1969).

290. *General Tel. Co.*, 413 F.2d at 395, see also 47 U.S.C. § 202(a) (1982), which provides:

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

Id.

291. *NARUC I*, 525 F.2d at 640-42. See generally *United States v. RCA*, 358 U.S. 334, 346-50 (1959); *National Ass'n of Letter Carriers v. Independent Postal Sys. of Am.*, 470 F.2d 265 (10th Cir. 1972). But see *Community Communications Co. v. City of Boulder*, 630 F.2d 704, 712 (10th Cir. 1980) (dissenting opinion) (CATV is not a natural monopoly), *rev'd*, 455 U.S. 40 (1982).

292. A. KAHN, *THE ECONOMICS OF REGULATION* 3-19 (1970); see *Phonetele, Inc. v. AT&T*, 664 F.2d 716 (9th Cir. 1981), *cert. denied*, 959 U.S. 1145 (1983); *Mid-Texas Communication Sys. v. AT&T*, 615 F.2d 1372 (5th Cir.), *reh'g denied*, 618 F.2d 1389, *cert. denied*, 449 U.S. 912 (1980) (upholding ability of the FCC to regulate rates, the financial integrity of the carrier, network safety and efficiency, the proper

as the more recent microwave and satellite technologies,²⁹³ are included under the common carrier umbrella,²⁹⁴ the regulatory role model is the railways of the nineteenth century.²⁹⁵

2. *Inadequacy of the Railroad Model*

Lower costs and widespread accessibility to electronic communication have substantially eroded the validity of the railroad role model for both common carriers and the new media.²⁹⁶ As the FCC noted in *Computer II*,²⁹⁷ in which common carrier regulations were specifically held inapplicable to "enhanced"²⁹⁸ "communications"²⁹⁹ services,³⁰⁰

communications and data processing technologies have become intertwined so thoroughly as to produce a form different from any expressly recognized in the Communications Act^{[301 T]o} subject enhanced services to a common carrier scheme of regulation because of the presence of an indiscriminate offering to the public would regulate the dynamics of computer technology in this area.³⁰²

Similarly, the industry monopolization upon which many of the common carrier regulations were grounded does not appear to pertain to the dynamic telecommunications market. Consumer demand and foreign competition are now regulating rates and organizations as effectively as nineteenth century tariffs.

allocation of the rate burden and the future needs of both the carrier and the public in order to determine the "public interest" and public convenience and necessity, all of which are traditional common carriage objectives). See 47 U.S.C. § 201 (1982).

293. 47 C.F.R. § 25.103(c)(2) (1984).

294. 47 U.S.C. §§ 201-224 (1982).

295. TECHNOLOGIES OF FREEDOM, *supra* note 77, at 95-96.

296. See Martin, *supra* note 27, at 357, 358 (economic railway type regulation should not be applied to non-monopolistic telecommunications). See generally TELECOMMUNICATIONS AMERICA *supra* note 77, at 93; Comment, *Of Common Carriage and Cable Access: Deregulation of Cable Television by the Supreme Court*, 34 FED. COM. L.J. 167 (1982).

297. 47 RAD. REG. 2d (P & F) 669 (1980); see *supra* notes 108-115.

298. See *supra* note 113 and accompanying text.

299. *The Computer Inquiries*, *supra* note 98, at 63-64. "Communications," a term coined by Anthony Oettinger, Director of the Program in Information Resources Policy at Harvard University, has been used to describe the new information services which integrate data processing and telecommunications. *Id.*

300. *Computer II*, 47 RAD. REG. 2d (P & F), at 703-04.

301. *Id.* at 701. See generally Bigelow, *Introduction to Symposium: Computers in Law and Society*, 1977 WASH. U.L.Q. 371, 374-75 (1977) (discussing difficulty of distinguishing, for regulatory purposes, data communications and computer production and use).

302. 47 RAD. REG. 2d (P & F) at 701. The early history of broadcasting indicates

3. Content Regulation

Because their fundamental characteristic is nondiscriminatory service, common carriers may not base decisions regarding message transmission on the identity of the customer or the content of the message. Accordingly, carriers are immune from liability for message content, and libel and slander actions are inapplicable against them.³⁰³ This degree of responsibility is quite different from that of the press³⁰⁴ or broadcaster³⁰⁵ who is expected to oversee transmission content and may be held responsible for the material therein.

Unlike the print and broadcast media, common carriers have been subject to only the most limited kind of first amendment analysis. This detachment results not so much from a preferred status under the first amendment but rather from an unarticulated but historical acknowledgement that the telegraph did not possess the same claim to first amendment protection as did the press.³⁰⁶ One noted scholar has offered an appealing economic rationale for this curiosity. In *Technologies of Freedom*, Dr. Ithiel de Soto Pool suggests that the high cost of transmittal over early telegraph systems precluded utilization of the medium for anything other than terse news and

that the common carrier model was considered for radio regulation. 67 CONG. REC. 12501-05 (1926). The intended Radio Act provision, requiring a broadcaster to accept any service requested without discrimination, was viewed as excessively burdensome on the medium and was deleted in the final bill. Compare H.R. 9971, 69th Cong., 2d Sess., 67 CONG. REC. 4956 (1926) with Pub. L. No. 632 § 18, 44 Stat. 1170 (1927). See *infra* note 308.

303. See, e.g., *Von Meysenburg v. Western Union Tel Co.*, 54 F. Supp. 100 (S.D. Fla. 1944) (telegraph company's immunity from liability for transmission of libelous message must be broad enough to enable company to render its public service efficiently and with dispatch).

304. See *supra* notes 133-81. But see *Edwards v. National Audubon Soc'y, Inc.*, 556 F.2d 113, 120 (2d Cir. 1977) (publisher may be held responsible for accusations published by him where he has "espous[ed] or concurs in the charges . . . or [where he] deliberately distorts [the] statements . . .").

305. See *supra* notes 186-277. But see *Farmers Union v. WDAY*, 360 U.S. 525, 531 (1959) (immunity for broadcaster is implicit in section 315 of the Federal Communications Act of 1934).

306. TECHNOLOGIES OF FREEDOM, *supra* note 77, at 102-04; see *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 89-90 (1953) (Secretary of Commerce and Labor authorized by Radio Act of 1912 to license radio operators; Radio Act of 1927 gave Federal Radio Commission "wide licensing and regulatory powers over interstate and foreign commerce," provided that it [was] "guided by the 'public interest, convenience or necessity'"); *Farmers' & Merchants' Coop. Telephone Co. v. Boswell Tel. Co.*, 187 Ind. 371, 119 N.E. 513, 515-16 (1918) (because public welfare requires adequate telephone service, state may regulate such service; section 97 of Public Utility Act not "repugnant to section 1 . . . of the Bill of Rights").

business communiques.³⁰⁷ Hence, the telegraph was not viewed as a vehicle for transmitting protected speech and first amendment issues were irrelevant.³⁰⁸ The Supreme Court's recent obviation of the distinction between unprotected commercial and protected expressive speech in *Virginia State Board of Pharmacy v. Virginia Citizens and Consumers Council, Inc.*,³⁰⁹ merely highlights the longevity of the distinction which may have justified the historical controls imposed on common carriers.

V. Regulation of the New Electronic Media

A. Teletext

If prior models and regulations are inapplicable, how then should this new technology be treated? It does not fit squarely into the categories of print media, broadcasting or common carrier.³¹⁰ Nevertheless, in accordance with the FCC's Communications Act mandate,³¹¹

307. TECHNOLOGIES OF FREEDOM, *supra* note 77, at 91.

308. *Id.* The Supreme Court, in fact, did not rule until 1976 that commercial speech was within the protective ambit of the first amendment. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Thus, while various forms of electronic publishing, particularly on-line information services, may fall within the parameters of commercial, as opposed to expressive, speech, this distinction is probably not viable with regard to first amendment guarantees.

The history of the Radio Act indicates that, initially, the medium was not viewed as an organ of expression either. *See supra* note 302. It was viewed as a facility somewhat comparable to the telegraph or telephone. Although the final version of H.R. 9971 did not include common carrier-type regulation for the radio broadcasters, the medium is still constrained by the original view that it is a facility for dissemination rather than expression. Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections On Fairness and Access*, 85 HARV. L. REV. 768, 785 (1972). Accordingly, under the Communications Act, the public interest standard of carrier regulation has been applied to broadcasters who are permitted to monopolize a particular frequency solely by virtue of their government-awarded license. *See Cosmopolitan Broadcasting Corp. v. FCC*, 581 F.2d 917 (D.C. Cir. 1978). The Act, however, makes it clear that broadcasters are not common carriers. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 704 (1979); *see supra* notes 281-83 and accompanying text. *See infra* note 356.

309. 425 U.S. 748, 762 (1976); *see Nadel, supra* note 9, at 184 n.82.

310. *See generally Videotex Symposium, supra* note 10; Geller & Lampert, *supra*, note 282, at 610-22.

311. 47 U.S.C. § 151 (1982). Section 151 provides that "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . . there is created a commission to be known as 'Federal Communications Commission.'" *Id.* § 151; *see*

it must be encouraged.³¹² If new services such as teletext³¹³ and videotext³¹⁴ provide a "catalyst for change from the present regulatory scheme,"³¹⁵ the direction of that change will be of critical importance. The new media provide a compelling opportunity to create a coherent theory of the first amendment, one which would embrace both print and electronic communications and which would respond to the technology and economics of the coming century.³¹⁶

As forms of electrical communication, teletext and videotext clearly fall within the FCC's jurisdictional ambit.³¹⁷ Even though an activity falls within its subject matter jurisdiction, however, the Commission's regulatory powers are not without constraints.³¹⁸ Indeed, the FCC has held that in certain instances involving new technology it has the prerogative not to regulate at all.³¹⁹

The most important recent utilization of this prerogative occurred in the 1983 FCC Teletext Order.³²⁰ The Commission authorized VBI teletext³²¹ as an "ancillary" broadcast medium³²² and excluded it

also 47 U.S.C. § 303(g) (1982); *Computer II*, 47 RAD. REG. 2d (P & F), at 1324.

312. See, e.g., *Amend. of Parts 2, 73 and 76*, 53 RAD. REG. 2d 1309, 1311-12 (1983).

313. See *supra* notes 29-53 and accompanying text.

314. See *supra* notes 54-74 and accompanying text.

315. *The New Video Marketplace*, *supra* note 10, at 574-75 n.268 (quoting statement of FCC Commissioner Anne Jones in FCC News Release, Rep. No. 07762 (Mar. 5, 1981)).

316. See, e.g., H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* 3-6 (1966).

317. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172 (1968) (citing S. REP. No. 781, 73d Cong., 2d Sess. 1 (1934)). In *Southwestern Cable*, the regulatory jurisdiction of the FCC over the new cable technology was at issue. The Court acknowledged that cable television did not fit neatly into the broadcasting model of Title III, 392 U.S. at 167-69, or the carrier model of Title II of the Communications Act. *Id.* at 169 n.29. Noting that it could not construe the Act so restrictively, the Court held that "[n]othing in the language of § 152(a), in the surrounding language, or in the Act's history or purposes limits the Commission's authority to [regulate] those activities and forms of communication that are specifically described by the Act's [other] provisions." *Id.* at 172.

318. *Computer II*, 47 RAD. REG. 2d (P & F), at 702. The principal limitation upon the FCC's exercise of its statutory powers is that regulation must be "directed at protecting or promoting a statutory purpose." *Id.*

319. See, e.g., *HBO v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977).

320. 53 RAD. REG. 2d (P & F) 1309 (1983).

321. See *supra* notes 33-36 and accompanying text.

322. *Amend. of Parts 2, 73 and 76*, 53 RAD. REG. 2d (P & F) at 1322; see also *Southwestern Cable*, 392 U.S. at 178 (cable regulated under FCC authority over those media which are "reasonably ancillary to the effective . . . regulation of . . . broadcasting"). Accordingly, the FCC has authority under 47 U.S.C. § 303(r) to issue regulations in the cause of public convenience, interest and necessity. *Id.*

from existing content and service regulations.³²³ Noting its statutory obligation to promulgate policies which are responsive to new communications technologies and to encourage rather than to frustrate their development, the Commission decided to authorize teletext under an open market approach. Thus, the FCC authorized full service and low power television teletext in which the broadcast licensee is free to choose both the kind of service offered,³²⁴ and the technical standards utilized.³²⁵ The only limitation is a proscription against system interference with regular broadcasting or the signals of nonbroadcast radio stations.³²⁶

Additionally, while focusing on the ancillary nature of this service, the FCC decided that teletext would not be required to promote the public service programming obligations of a television broadcaster nor would the political broadcast obligations of sections 312(a)(7) or 315 of the Communications Act³²⁷ be applied to teletext transmissions.³²⁸ By acknowledging that teletext was a form of "electronic newspaper"³²⁹ which was fundamentally distinguishable from traditional broadcasting, the Commission was able to justify exempting it from the burdens of the Fairness Doctrine.³³⁰ Similarly, service guidelines for news and advertising,³³¹ which had constrained radio and television broadcasters until the most recent spate of deregulation, were determined to be inapplicable.³³²

On January 24, 1985, the Commission reaffirmed its 1983 Teletext Report and Order (1985 Reconsideration).³³³ Noting the affinity between teletext and the press, the FCC declined to reconsider the

323. *Amend. of Parts 2, 73 and 76*, 53 RAD. REG. 2d (P & F), at 1322.

324. *Id.* at 1319.

325. *Id.*

326. *Id.*

327. Section 312(a)(7) of the Act allows the FCC to revoke a station's license for "willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office . . ." 47 U.S.C. § 312(a)(7) (1982). Section 315 is the codification of the Fairness Doctrine. *See supra* notes 196 & 244.

328. *Amend. of Parts 2, 73 and 76*, 53 RAD. REG. 2d (P & F), at 1323.

329. *Id.* at 1322-23.

330. *Id.* at 1323-24. "Indeed, it seems probable that teletext — a textual means of communication primarily not employing sound and pictures — more closely resembles, and will largely compete with, other print communications media such as newspapers and magazines." *Id.* at 1324.

331. *Id.*

332. *Id.* at 1312, 1321.

333. *Amend. of Parts 2, 73 and 76* (Memorandum Opinion and Order), 57 RAD. REG. 2d (P & F) 842, 843 (1985).

applicability of either common carrier or broadcast content regulation to the medium.³³⁴ The 1983 Order was modified, however, to the extent that public broadcasters henceforth would be permitted to use their teletext facilities on a remunerative basis as an alternative source of financing.³³⁵

On the same day, the Commission also authorized television stations to make expanded use of the VBI, permitting commercial and noncommercial television licensees to transmit dataprocessed information or any other digital or analog communication over their vertical blanking interval.³³⁶ Such services are considered "ancillary" programming.³³⁷

The FCC's decision also provides that cable systems generally will not be required to carry television broadcasters' VBI transmissions, although a full resolution of the relationship between cable and VBI was deferred pending conclusion of the FCC's television aural sub-carrier proceedings.³³⁸

The 1983 Teletext Order and the 1985 Reconsideration, while clarifying some issues in electronic publishing, dealt only with one-way VBI transmissions.³³⁹ Teletext is capable of being transmitted over various media other than broadcast VBI,³⁴⁰ however, and vi-

334. 57 RAD. REG. 2d (P & F), at 846.

335. *Id.* at 845.

336. *Id.* at 834-35. In March, 1985, the Public Broadcasting Service (PBS) signed an agreement with International MarketNet, a joint venture of IBM and Merrill Lynch, to develop a high speed data delivery service in which financial information would be downloaded into computers through the VBI of PBS member stations. A significant infusion of new funds into PBS is expected to result. BROADCASTING, Mar. 4, 1985, at 88.

337. *In re* Amendment of Parts 2, 73 and 76 of the Commission's Rules to Authorize the Offering of Data Transmission Services on the Vertical Blanking Interval by TV Station (Report and Order), 57 RAD. REG. 2d (P & F) 832, 835 (1985) [hereinafter cited as *Amend. of Parts 2, 73 and 76* (Report and Order)].

338. *Id.* at 840. See *infra* note 354, discussing Cable Act provisions concerning videotext.

339. *Amend. of Parts 2, 73 and 76* (Report and Order), 57 RAD. REG. 2d (P & F), at 833. This is in accord with the original *1983 Teletext Order*, 53 RAD. REG. 2d (P & F), at 1331, in which the FCC held that, given the ancillary and discretionary nature of teletext transmissions, the communications policy concerns underlying cable mandatory carriage requirements, Cable Television Report and Order, 36 F.C.C.2d 143, 173, 24 RAD. REG. 2d (P & F) 1501 (1972), were inapplicable. Accordingly, cable television systems were not required to carry teletext services.

340. *Amend. of Parts 2, 73 and 76 (Memorandum Opinion and Order)*, 57 RAD. REG. 2d (P & F) 842, 843-44 (1985); *Amend. of Parts 2, 73 and 76* (Report and Order), 53 RAD. REG. 2d (P & F) 1309, 1320 (1983). See *supra* note 34 and accompanying text for a discussion of the VBI.

deotext, while primarily a telephone communication medium at present, is expected to increasingly rely on cable technology in the coming years.³⁴¹ Although the FCC has not yet specifically addressed cable teletext or videotext, except to bar local authorities from regulating cable videotext as common carriage, it repeatedly has examined cable technology in other areas during the past twenty years.³⁴²

B. Cable

The FCC's authority over cable operations was first formally recognized in *United States v. Southwestern Cable Co.*,³⁴³ in which the Supreme Court held that the FCC's jurisdiction over all interstate and foreign radio and wire communications included jurisdiction over those facilities which were "reasonably ancillary" to its broadcasting duties.³⁴⁴ The limited holding in *Southwestern Cable* was

341. See *supra* note 57 and accompanying text.

342. See *infra* note 354. See generally D. LE DUC, *CABLE TELEVISION AND THE FCC: A CRISIS IN MEDIA CONTROL* (1973).

343. 392 U.S. 157 (1968).

344. *Id.* at 178. The Supreme Court did not express any view with respect to the FCC's authority to regulate cable television under any other circumstances or for any other purposes. The Court's opinion related to the precursor technology of cable television, Community Antenna Television (CATV). *Id.* at 160-63. This medium was defined as a system capable of receiving the signal of a television broadcast station, amplifying it, transmitting it by cable or microwave, and ultimately distributing it by wire to the receivers of its subscribers. *Id.* at 161 n.8. CATV was found to perform two functions: the supplementing of broadcasting by enhancing reception of local stations in adjacent areas; and the transmission to subscribers of distant signals beyond the range of local antennae. *Id.* at 163. The Commission adopted the term "cable television" in 1972. See *United States v. Midwest Video Corp.*, 406 U.S. 649, 651 n.3 (1972) (citing Report and Order on Cable Television Service; Cable Television Relay Service, 37 Fed. Reg. 3252 n.9 (1972)).

CATV systems were first established on a non-commercial basis in 1949 and in 1950 as commercial ventures. *Southwestern Cable*, 392 U.S. at 162 & n.12. In the late 1950's approximately fifty new systems were established each year, reaching a total of 550 systems by 1959, serving 1.5-2 million people. *Id.* at 162. In 1959 the FCC completed an exhaustive survey of several auxiliary broadcasting services, including CATV, and found that medium to be related to interstate commerce and communication. *Id.* at 164. It determined to not regulate CATV at that point, but recommended legislation which was never enacted. *Id.* at 164-65. Since 1960, the FCC has gradually asserted its authority over CATV and in 1965 issued revised rules which were applicable to cable and microwave carriage. *Id.* at 165-66. These rules regulated local signals and provided for nonduplication of local programming. *Id.*; see *Carter Mountain Transmission Corp.*, 32 F.C.C. 459 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963); Notice of Inquiry and Notice of Proposed Rulemaking, 1 F.C.C.2d 453 (1965); *CATV* (Second Report & Order), 2 F.C.C.2d 725, 733-34 (1966) (holding that "CATV systems are engaged in interstate communication by wire to which the provisions of the Communications Act are applicable . . ."). *Midwest Video I*, discussed *infra* notes 345-46, was instituted

expanded in *United States v. Midwest Video Corp.*³⁴⁵ (*Midwest Video I*), which upheld the authority of the FCC to regulate cable programming.³⁴⁶

The 1972 FCC Cable Rules and Regulations (Cable Rules)³⁴⁷ codified the Commission's previous *ad hoc* ownership, programming and technical regulations.³⁴⁸ The Cable Rules also specifically subjected origination programming³⁴⁹ cablecasters to the Fairness Doctrine as well as to the equal access and programming/record keeping regulations which applied to radio and television broadcasters at that time.³⁵⁰ Although most of the cable franchising regulations were abrogated in 1977,³⁵¹ when jurisdiction over this activity was delegated to local authorities,³⁵² many of the 1972 content and service re-

thirteen days after the FCC's adoption of the Second Report.

345. 406 U.S. 649 (1972) (*Midwest Video I*). This case should be distinguished from a subsequent case involving the same parties, *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (*Midwest Video II*).

346. At issue in *Midwest Video I* was whether the Commission's program origination rule was ancillary to broadcasting. 406 U.S. at 662-63. That rule required cable television systems with 3,500 or more subscribers, which carried the signal of any broadcast television station, to originate programming and make their facilities available for local programs other than automated services. *Id.* at 653-54. The Supreme Court held that the programming origination rule fell within the FCC's jurisdiction because it satisfied the "reasonably ancillary to broadcasting" test, 406 U.S. 649, 662, set forth in *Southwestern Cable*, 392 U.S. 157 (1968).

The Commission, however, never enforced the mandatory origination regulations, but chose to conduct new proceedings which ultimately resulted in the 1972 mandatory access rules contained in the Cable Television Report and Order, 36 F.C.C.2d 143, 240-41 (1972). The mandatory origination rule was formally rescinded in 1974, 39 Fed. Reg. 43,302, and equipment availability rules were instituted and merged with the two year old access requirements. This precipitated the second challenge by *Midwest Video*, *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979) (*Midwest Video II*).

Justice Douglas, in his dissent in *Midwest Video I*, 406 U.S. at 680, viewed CATV as a common carrier which had no more control over message content than the telephone company. He vehemently opposed the FCC's program origination rule as exceeding the Commission's ability to regulate and noted that its enforcement would force a carrier CATV system to become a broadcaster against its will. See *Community Communications Co. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), for the acknowledgement that the first amendment protects cable television; See also *Black Hills Video Corp. v. FCC*, 399 F.2d 65 (8th Cir. 1968) (microwave CATV covered under Communications Act without violating first amendment).

347. 24 RAD. REG. 2d (P & F) 1501 (1972); Cable Television Report and Order, 36 F.C.C.2d 143 (1972); 47 C.F.R. § 76.1-.617 (1984).

348. 47 C.F.R. § 76.1-76.617 (1984).

349. 47 C.F.R. § 76.205 (1984).

350. 47 C.F.R. § 76.209 (1984).

351. Report and Order, 66 F.C.C.2d 380, 41 RAD. REG. 2d (P & F) 885 (1977).

352. *Id.* The New York State Commission on Cable Television promulgates Cable Rules in New York which govern the local franchises.

quirements still remain³⁵³ as modified by the provisions of the 1984 Cable Communications Policy Act.³⁵⁴

In 1979, the Supreme Court limited FCC jurisdiction over cable television in *Midwest Video II*.³⁵⁵ The Court held that Commission regulations which required cable operators to provide access channels to government, public, educational or lease use were beyond the FCC's "reasonably ancillary" jurisdiction, since such common carrier-type restrictions could not be imposed on cablecasters consistently with the Communications Act.³⁵⁶ Thus, the cable medium could only be regulated by the FCC in relation to its traditional broadcasting jurisdiction.³⁵⁷ To the extent that the medium affects the FCC's historical obligations with respect to broadcasting,³⁵⁸ cable falls within

353. 47 C.F.R. § 76.1-.617 (1984).

354. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984). This new cable act reaffirms the ability of local governments (franchising authorities) to regulate cable through their franchising processes while establishing federal guidelines to guide the local efforts. See Pub. L. No. 98-549, §§ 601-626, 98 Stat. 2780-91. The law also sets up new rules for franchise renewals, cable rates, program packages, system access, ownership, female and minority employment, subscriber privacy, and theft of programming services. *Id.* The act also provides that local authorities may prohibit the transmission of obscene cable services which are not otherwise protected by the first amendment, *id.* § 639, and requires operators to provide subscribers with "lock-boxes" to restrict childrens' viewing of cable programming upon request. *Id.* § 624(d)(2)(A); see *supra* note 277.

In order to address the growing use of cable to provide two-way information and video communications, the act provides that local authorities may not regulate two-way video programming cablecasters, including cable videotext, as common carriers, *id.* § 602(5), (6), but that informational tariffs may be required by the states or the FCC. *Id.* § 621(d)(1); see Cable Communications Policy Act Rules, 58 RAD. REG. 2d (P & F) 1 (1985) (adopted by Commission to implement 1984 Act).

While the Act is viewed as a boon to the economic prospects of the cable industry and the local authorities whose regulatory power is now clear, the codification of the franchise process may ultimately work to the detriment of the first amendment claims of cable operators who claim the title of electronic heir to the unregulated press. See generally Wiley and Swanson, *New Cable Act Should Help Stabilize Industry*, Legal Times, Nov. 12, 1984, at 20.

355. *Midwest Video II*, 440 U.S. 689 (1979), *aff'g* 571 F.2d 1025 (1978).

356. *Id.* at 705. The Supreme Court held that the FCC had " 'strain[ed] the outer limits' of [its] authority," *id.* at 708 (quoting *Midwest Video II*, 406 U.S. at 676 (Burger, C.J., concurring in part)), and set aside the Commission's mandatory access, channel construction and equipment availability rules. Essential to this holding was the fact that the FCC had failed to show even the slightest nexus between the regulations and its authority over broadcasting. The Court thus held that the FCC could not impose on cable systems that which it was specifically prohibited from imposing on broadcasters: the burden of common carrier status. *Id.* at 701, 705, 709; see also *ACLU v. FCC*, 523 F.2d 1344 (1975) (Commission should be accorded flexibility in dealing with cable television and its jurisdiction should not be rigidly compartmentalized into licensing and public utility regulation).

357. *Midwest Video II*, 440 U.S. at 708.

358. See *supra* notes 182-277 and accompanying text.

the ancillary jurisdiction of the FCC.³⁵⁹ Whether cable videotext or VBI teletext will be viewed as ancillary to broadcasting is not yet clear. What is becoming increasingly evident, however, is the strength of the argument against such a construction and the need to formulate a coherent regulatory policy which does not depend on technical distinctions between the cable, broadcasting, common carriage and print media.

VI. Conclusion

Current control of electronic publishing is unfocused. The FCC's 1983 Teletext Order³⁶⁰ specifically addressed VBI teletext, deemed it ancillary to broadcasting and refrained from imposing content, structural or technical controls.³⁶¹ This order covers over-the-air and, presumably, cable teletext, both of which use the narrowband VB.

No pronouncements have been made yet concerning broadband, full-channel teletext,³⁶² which certainly could be viewed as more of a broadcast medium than the isolated VBI. Alternatively, MDS³⁶³ or DBS³⁶⁴ teletext may be regulated as common carriers.³⁶⁵ Telephone videotext may also fall within this regulatory ambit. The uses of all these systems, however, most closely resemble those of the print media, a fact specifically acknowledged by the FCC in its 1983 Teletext Order.³⁶⁶

The current regulatory fragmentation of the electronic publishing media makes no sense from either a legal or technical point of view. From the legal perspective, the present *ad hoc* approach appears to value form over substance. Viewed from the technical perspective, the existing regulatory alternatives hinder industry development by creating an ambiguous future for a technology sorely in need of economic security. The present framework permits the arrest of a Thomas Tcimpidis³⁶⁷ and creates nationwide confusion about his

359. *Midwest Video II*, 440 U.S. at 708.

360. 53 RAD. REG. 2d (P & F) 1309 (1983); *see supra* notes 320-32 and accompanying text.

361. 53 RAD. REG. 2d (P & F), at 1324.

362. *See supra* notes 41-42.

363. *See supra* note 40 and accompanying text.

364. *See supra* note 38 and accompanying text.

365. *See supra* notes 278-309 and accompanying text.

366. 1983 *Teletext Order*, 53 RAD. REG. 2d (P & F), at 1322. Indeed, Richard Wiley, former chairman of the FCC, has called teletext a "wireless newspaper." Statements of R. Wiley before the ABA Forum Comm. on Communications Law, the Lawyer and the New Videomarketplace III, Feb. 22, 1985.

367. *See supra* notes 1-8 and accompanying text. Ultimately, the Los Angeles

legal liability. It also leaves open questions about technical standards and permissible corporate structure and ownership, which are critical to any potential market entrant. This is unacceptable.

A preferable alternative would be to view all electronic publishing as a single communications medium regardless of the method of transmission. It is clear that the present communications environment has far surpassed that envisioned by the drafters of the 1934 Communications Act.³⁶⁸ The basis for distinguishing between typeset and electronically transmitted communications is not viable in 1985. The regulatory underpinnings are without merit.

Scarcity, even if a legitimate concept in 1934, certainly is not a valid regulatory consideration today. The exploding number of broadcast radio and television stations, cable systems and satellite alternatives offer the American audience an array of voices unimaginable in 1934. Switching³⁶⁹ and multiplexing³⁷⁰ technologies further increase the number of possible communicators at any single instant.

While the radio spectrum may be limited in a cosmic sense, the only relevant limitation to its present utilization is economic rather than physical.³⁷¹ However, the Supreme Court has held that economic scarcity is not a valid basis for regulation.³⁷²

Similarly, the electronic media of 1985 cannot be said to so pervade our lives that we are captive audiences in our homes.³⁷³ Even if the *Pacifica* rationale was ever valid, it is not applicable to teletext and videotext. While rapidly advancing, modern technology has not yet evolved to the stage where it can intrude uninvited into our living rooms. A conscious decision to subscribe to each separate system is required, and sophisticated technologies are necessary to access and use these media. We must spend a lot of money and achieve a modicum of computer literacy before even the most user-friendly

City Attorney's Office decided that it had insufficient evidence to continue to prosecute the case against Tcimpidis. The case was dismissed "with prejudice." *POPULAR COMPUTING*, June, 1985, at 144. Although Tcimpidis' lawyer was pleased with the outcome, the central issue of sysop liability has not been resolved. *Id.*

368. See *supra* notes 186-92 and accompanying text.

369. See *supra* note 56.

370. See *supra* note 43 discussing multiplexor technology vis-a-vis the FM sub-carrier frequency.

371. See Fowler & Brenner, *supra* note 191, at 221-26 (FCC's allocation scheme perpetrates spectrum scarcity beyond any intrinsic physical limitations).

372. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 46 (D.C. Cir.) ("scarcity which is the result solely of economic conditions is apparently insufficient to justify even limited government intrusion into the [f]irst [a]mendment rights of the conventional press"), *cert. denied*, 434 U.S. 829 (1977).

373. See *supra* notes 211-24 and accompanying text.

systems are available to us. We can bar our children from undesirable material through the use of lock-boxes and confidential log-on IDs. We can keep the electronic publishing medium out of our homes if we do not choose to be exposed to it. We are not captives.

Electronic publishing is not broadcasting. Neither, however, is it common carriage,³⁷⁴ providing universal service and open access to all comers. While MDS and telephone facilities have been held to be common carriers, the use of these media in connection with electronic publishing ventures, which require individualized subscription and service, does not appear to constitute carriage under the Supreme Court's *NARUC* definitions.³⁷⁵ Indeed, the nation's premier carrier, AT&T, is precluded by the terms of the MFJ from presently entering the electronic publishing business.³⁷⁶

Electronic publishing is provided, however, by a wide range of other corporate and individual entities, none of whom evidence the market dominance or monopoly status which historically justified the regulation of common carriers.³⁷⁷ Absent the historic or economic justification for the imposition of common carrier regulation, it would be highly unreasonable to shoehorn the electronic publishers into this constraining mold. Additionally, if the FCC's current open market approach³⁷⁸ to the new technology is successful, it should preclude further monopolization and thus negate the primary basis for carrier regulation.³⁷⁹

Because the broadcast and carrier models are not applicable, an alternative framework must be designed to accommodate the new media. This framework must acknowledge the current technology, as well as the open market approach now favored by the FCC as essential to the economic development of the new media.³⁸⁰

Recent history has provided a trial balloon for this new framework in the regulation of the cable medium. This medium, while falling within the FCC's ancillary jurisdiction, is clearly heading towards a first amendment position which is more analogous to the press than to the other regulated methods of communication. This is appropriate and should be paralleled by the newer electronic communications.

374. See *supra* notes 278-309 and accompanying text.

375. See *supra* notes 280-83 and accompanying text.

376. See *supra* note 102 and accompanying text (AT&T Consent Decree).

377. See *supra* notes 278-309 and accompanying text.

378. See, e.g., 1983 *Teletext Order*, 53 RAD. REG. 2d (P & F) 1309.

379. *Id.*

380. *Digital Termination Systems*, 86 F.C.C.2d 360, 389-90 (1981); *Cellular Communications Systems*, 86 F.C.C.2d 469, 503 (1981) ("We are committed . . . to a policy of encouraging multiple entry").

The acknowledgement of cable's increasing right to first amendment privileges is based, in large part, on the voluntary and individualized nature of its subscription.³⁸¹ This rationale is even more appropriate to the electronic publishing ventures. In this respect, cable and electronic publishing are the newspapers of the twenty-first century and must be accorded their appropriate freedoms.³⁸²

The burdens which cable technology allegedly place on public resources, however, cannot be said to apply to the broad spectrum of electronic publishing media. Accordingly, franchise requirements, which were imposed on cable operators and legislated under the new Act, are not relevant to electronic publishers. In this respect, the new media must be viewed according to their function rather than through their methods of distribution, and must be treated as a wireless press. When viewed in this manner, the regulatory mandate is clear: Congress shall make no laws abridging . . . the freedom of the press.

381. Nat'l L.J., Mar. 25, 1985, at 23, col. 1.

382. On July 19, 1985, a unanimous three judge panel of the U.S. Court of Appeals in Washington held that Cable "must-carry" rules were unconstitutional. *Quincy Cable T.V., Inc. v. FCC*, No. 83-1283, (D.C. Cir. July 19, 1985). These rules, the centerpiece of FCC cable legislation for twenty years, required cable operators to carry local broadcast signals. In holding the rules too broad to pass first amendment muster, the court forged "a vital link in the chain of decisions establishing cable's status as a First Amendment speaker and electronic publisher." *BROADCASTING*, July 22, 1985 at 31, 32 (statements of Jim Mooney, president of National Cable Television Association).