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Introduction, The Congress, the Courts and Computer Based Communications Networks: Answering Questions about Access and Content Control, Symposium

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THE CONGRESS, THE COURTS AND COMPUTER BASED COMMUNICATIONS NETWORKS: ANSWERING QUESTIONS ABOUT ACCESS AND CONTENT CONTROL

INTRODUCTION

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I. INTRODUCTION

THE symposium that spawned the Articles in this issue was held at the Villanova University School of Law in Villanova, Pennsylvania, a suburb of Philadelphia, on November 7, 1992. The format differed from that followed in many law review symposia. Rather than presenting papers one at a time, the participants discussed a hypothetical.[1] This introduction summarizes

1. The participants were: Professor Angela J. Campbell from Georgetown University, David R. Johnson from Wilmer, Cutler & Pickering, Professor Ethan Katsh from the University of Massachusetts, Ronald L. Plesser from Piper & Marbury, Kathleen Price the Law Librarian of Congress, Marc Rotenberg of Computer Professionals for Social Responsibility and Shari Steele of the Electronic Frontier Foundation. Professor Perritt moderated.

that discussion. The Articles in this volume probe certain issues raised by the hypothetical and in the discussion more deeply.

Before getting to the hypothetical, it is useful to understand how the interrelated issues of network access, tort liability and First Amendment privileges arise in the context of electronic communications networks and why they are important. The American public is increasingly interested in the idea of an "electronic super highway" as a part of a national information infrastructure. Interest has increased since the Clinton Administration took office, due in a large part to Vice President Gore's well-known support for expansion of the federally initiated Internet when he was in the Senate.

The electronic super highway metaphor means different things to different people. One of the immediate policy challenges is to refine the concept so that it can be translated into a concrete policy and entrepreneurial agenda. One fairly obvious initial step is to dissect the concept into at least four pieces. Metaphorically speaking, they are (1) six lane super highways, (2) the interchanges with their on and off ramps, (3) the neighborhood surface streets and (4) the driveways to individual offices and homes.[2] The technologies appropriate for these different pieces probably differ, and the best mix of public and private sector activities certainly differs for the different pieces. There is, of course, already an elaborate and sophisticated information infra-

2. One difficulty in selecting a useful metaphor is that advances in technology continually alter the functional characteristics of the various components of a network. Consequently, referring to a part of the network as a "driveway" may be, or become, misleading. For example, recent innovations in signal compression technology could significantly broaden the bandwidth available to individual users. ISDN is another example of "driveway" technology. Developing wider bandwidths is like widening a driveway; now the driveway can accommodate larger vehicles carrying bigger loads.

Presently, the maximum digital bandwidth available on the voice grade dial up telephone line is 9600 bytes per second (BPS), although speeds up to 14.4 kilobytes per second (KBPS) are possible with compression techniques installed on commonly used modems. ISDN makes a digital channel of 56 kilobytes per second available at the desktop. This is the speed that is commonly used by smaller Internet nodes through dedicated lines to the next larger node in the hierarchy.

At 9600 BPS (approximately 10 KBPS) a 200,000 byte file of judicial opinions and statutes takes 200 seconds or 3.4 minutes to transmit. At 56 KBPS it takes about 4 seconds. Actually, the transfer time is longer because the use of error checking protocols slows things down by a factor of 2 to 3.

The increased bandwidth changes the trade off threshold between remote access and local access and thus advantages electronic publishing through networks versus electronic publishing through physical media like CDROM and magnetic disk.

structure in the United States. It is made up of telephone systems, radio and television networks, cable television systems, newspapers, magazines, book publishing and, increasingly, private and public computer networks. The infrastructure is being transformed and new pieces added. Technology changes blur old boundaries and make new modes of information storage, transfer and rearrangement economically attractive.

This transformation of the information infrastructure was foreseen in the 1970s by an MIT political scientist named Ithiel De Sola Pool. His seminal book, *Technologies of Freedom*[3], identified three prototypical information channels in the American legal tradition: the newspaper, the telephone and broadcasting. Each of these occupied a dramatically different conceptual position under the First Amendment and each experienced dramatically different approaches to regulation. Pool predicted that the traditional legal categories would come under pressure as changes in communications and computing technologies caused the three prototypical categories to become less distinct.

Now, that is occurring, as cable television providers are allowed into a broader range of information services, including two way communication to the home, and as the FCC's "video dial tone" order[4] permits the telephone companies to handle video entertainment.

As the boundaries between the components of the national information infrastructure blur, a number of legal issues arise. The relative importance of an individual issue varies in intensity and difficulty depending on the involvement of the public sector in a particular configuration, but the issues are common to all parts of the infrastructure.

There are three major legal questions that must be addressed with respect to any information infrastructure. The answers to the questions may, of course, be different for different parts of the infrastructure and for different products and producers, just as they were different historically for Pool's three major prototypes. The three questions are:

1. Does the First Amendment to the United States Constitution protect access to the channels practically necessary to get a message to its intended audience, and conversely, does the First Amendment entitle a channel owner to control what messages his channel will carry?

3. ITHIEL DE SOLA, TECHNOLOGIES OF FREEDOM (1983)

4. Final Rule; Recommendations to Congress, 57 Fed. Reg. 41,106 (1992).

2. Who, among originators and intermediaries, is liable for harmful messages, like those injuring reputation, invading privacy or infringing intellectual property rights?

3. Who has a duty to provide access to communications channels and computing facilities, and who owns the corresponding rights to access?

As the summary of the discussion and many of the Articles in this issue demonstrate, these questions are highly interrelated. A First Amendment privilege of a channel owner like a newspaper publisher to control content prevents the imposition of a duty to provide access. Imposition of a duty to provide access, as with a common carrier, typically reduces exposure to liability for harmful content resulting from that access.[5]

Before beginning to discuss these interrelated issues, the format of this introduction and summary of the symposium discussion deserves a few words. Published transcripts of live discussions at law review symposiums are disfavored for two good reasons. The interactive nature of the discussion makes it difficult for a reader to follow an analytical thread. The informality of oral discourse conflicts with the traditional formal style of Law Review articles. I edited the transcript of this symposium with these usual difficulties in mind. With few exceptions, I eliminated the question and answer structure and attempted to emphasize thematic continuity. When it seemed appropriate to identify an individual panel member with a particular idea, I usually did that in the third person. Otherwise, the views are presented more or less neutrally without attributing them. The obvious exception is the concluding remarks of each panel member.

Nevertheless, despite the nonattribution of most of this introductory discourse, the ideas are not mine; they are the ideas of the individual panel members. In the live discussion, I prodded and challenged and tried to magnify disagreements to ensure that ideas and arguments were developed as fully as practicable, but the ideas and arguments are those of the others.

II. THE HYPOTHETICAL

We are going to talk about people who provide electronic analogues of interstate highway services. We want to explore the

5. Henry H. Perritt, Jr., *Tort Liability, the First Amendment, and Equal Access to Electronic Networks*, 5 HARV. J. L. & TECH. 65 (1992); Henry H. Perritt, Jr., *Tort Liability, the First Amendment, Equal Access, and Commercialization of Electronic Networks*, 2 ELECTRONIC NETWORKING 29 (Fall, 1992).

circumstances under which those people may be liable for defamation, negligence, infringement of intellectual property, or perhaps even for crimes relating to terrorism or pornography. We also want to talk about the duties of these network service providers to let people use their networks. Using the metaphor of the interstate highway system, we are going to talk about the obligations that the owners of these electronic interstate highways have to let people use the highways. Also, because we are talking about communications, we must necessarily talk about the First Amendment and about how the First Amendment influences the answers to questions of liability and access. Finally, we are also going to talk about process, about who makes the rules that govern the use of this electronic interstate highway and about how the rules get enforced.

Our hypothetical is about a murder.[6]

The hypothetical involves three kinds of businesses run by an electronic information services provider called "VillaLink": an electronic publishing business, an electronic conferencing business where people can set up conferences on particular subjects and post messages to be seen by other participants in the conference (a kind of a bulletin board), and finally an electronic mail service, which works just like a mail system except that the messages are in electronic form. Villalink's customers connect to these services in one of three ways. They can go through the voice telephone system using personal computers and modems and dialing an ordinary telephone number. They can get there through a public data network like Tymnet or Sprintnet. They can get there through the Internet or NREN.

The suppliers of electronic publishing content send their published materials through one of these three channels up to the electronic publishing area. Then customers gain access and get copies of the published materials in exactly the same way that you get access to WESTLAW or LEXIS. Integrated into the electronic publishing system is a billing service that tracks usage and forwards receipts to data suppliers.

Users of the electronic mail and conferencing features log on

6. Braun v. Soldier of Fortune, 968 F.2d 1110 (11th Cir. 1992), *cert. denied*, 113 S.Ct. 1028 (1993). This hypothetical is based upon the facts in *Braun*. For a complete discussion of the facts in *Braun*, see Brian Cullen, Note, *Putting a 'Chill' on Contract Murder: Braun v. Soldier of Fortune and Tort Liability for Negligent Publishing*, 38 VILL. L. REV. 625 (1993).

each time they access the system and are billed according to the time spent using a particular feature.

The electronic mail and conferencing service both play prominent roles in the murder that I want to tell you about. Suppose someone is interested in trying to make some money and sets up a list server on the VillaLink system.[7] This list server is called *Soldier of Fortune*. It handles articles and whatever else people want to send to the list addresses. A fellow by the name of Michael Savage, who is a veteran, sends a message to this list server in the expectation that it will be relayed to other users of this service. Here is what the message says:

> "Gun for hire. Thirty-seven year old professional mercenary desires job. Vietnam veteran, discreet and very private. Bodyguard, courier and other special skills. All jobs considered."

At the end of his message, Mr. Savage gives his EMail address on the VillaLink EMail system.

Also participating in our hypothetical is a fellow by the name of Bruce Gastworth, who is not getting along with his business partner Richard Brown. In fact their relations are so bad that Mr. Gastworth has reluctantly concluded that he should murder his business partner. He is trying to figure out how to do it when he subscribes to the VillaLink electronic mail service and the *Soldier of Fortune* list server. To his great surprise, a day or two after he concludes firmly to murder his business partner, he gets the message from Mr. Savage. He sends Mr. Savage an EMail message, but not through the list server, because he wants this transaction to be more private. He sends him personal EMail that goes to Mr. Savage and Mr. Savage only. He tells Mr. Savage that he would like to take him up on his offer. Negotiations ensue, mostly conducted through VillaLink's EMail. Eventually they result in Mr. Savage taking on the job. Sometime after that, Mr. Savage goes to Mr. Brown's Atlanta home and when Mr. Brown comes out with one of his children to go to work, Mr. Savage shoots him and kills him.

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7. A list server is a kind of software that can be placed on an electronic mail system so that when people send a message to the address of the list server, the message is automatically relayed to everybody else who subscribes to that list server. It's a kind of multiplier or reflector: an automatic mailing list. It is technically a use of electronic mail. It functionally is a hybrid of electronic mail, electronic conferencing and electronic publishing.

III. THE PANEL DISCUSSION

A. *Tort Liability*

Mr. Brown's survivors are interested in trying to recover damages from whoever they can. The first question is whether the Brown survivors can recover damages from VillaLink.

You must look at the context, what the ad said and what the risk was in publishing it. As a general rule the publisher and electronic bulletin board have some responsibility if a message on its face appears to present an imminent risk of serious injury or harm. It becomes a question of fact in terms of what the context of the bulletin board was, whether there was a reasonable expectation that harm could come. It would be easy to say the First Amendment protects the bulletin board and it has no responsibility, but we can not quite say that.

The legal framework is not exactly negligence. It is important, as in libel law, to have a standard that gives breathing room. It should not simply be negligence. It cannot just be a balancing of interest; it must be whether a reasonable publisher who read that ad, on its face, would conclude that there was a danger of physical injury. The test is what a reasonably prudent publisher would do.

When answering this question, one must recognize that the highway metaphor used to introduce this discussion may be misleading. For example, using the term *electronic mail*, is like using the term *horseless carriage* to refer to early automobiles. It may help us in the initial stage of understanding these systems but the metaphors can be misleading about the potential of the systems.

We not only have highways but bus lines, travel agents, tour operators and personal drivers. The relevant question is how much involvement did the provider of this particular service have in the content. Liability should depend upon whether the cost to the defendant of adopting adequate precautions is less than the probability of harm to the defendant multiplied by the gravity of the injury that might result. That is definitely a negligence standard, but one mitigated by First Amendment concerns. It considers the need for a system in which the messages flow freely.

While it is hard to imagine a graver kind of harm then a death, and while it may seem reasonable to require that the person who made this computer system available for this kind of communication look at these messages, one must probe more deeply. The technological capability of the service is relevant, but

there is also a public policy overlay. There may be a general public interest in creating list servers that send messages to interest groups because a new flow of computer conferencing capabilities may depend upon being able to establish these servers without fear of liability. For that reason we may want to override the normal tort liability rule: that the duty to prevent harm expands with the ability to prevent it.

It is also appropriate to distinguish between EMail and the list server function. EMail is really the equivalent of private communication. The law would not hold the Post Office liable if the actors communicated by hand-written letters. In contrast, the list server (if it exists as a separate entity) is potentially liable but VillaLink may not have any idea what is going on in all of these different list servers.

The conclusion that the sponsor of the *Soldier of Fortune* list server would be liable even though the list server was implemented completely through the electronic mail system is probably correct. Although it is a factual question, the sponsor of the list server is in a better position to monitor than VillaLink would be.

On the feasibility of monitoring the list server messages, however, VillaLink and the list server sponsor may be forbidden to read these EMail messages under Federal law. Given the automatic forwarding of private electronic mail messages, there is the argument that the user is protected by the Electronic Communications Privacy Act.[8] But the list server labels itself as a particular kind of forwarding service that is more than a simple forwarding of a message from one party to another. Therefore, whether a list server provider has a duty to inspect a low volume of messages when the subject matter is "Gun for hire" is not as simple as a normal EMail privacy question.

Some legal issues arise because we struggle with the meaning of words. The phrase "list server" may be alien, while "publishing," "conferencing" and "mail" are commonly understood terms. On the other hand, the use of three familiar terms makes it easy to put things into a context but presents the danger of assuming that the electronic context is the same as those familiar contexts. But how do we make the "list server" meaningful? First, VillaLink is *not* exactly like a traditional publisher, and neither is the list server owner. The list server is simply an automated routing device that routes messages. There is no human

8. 18 U.S.C. §§ 2510-2520 (1990).

intervention. There could be different kinds of list servers, but in the kind in the hypothetical, the owner of the list server cannot stick his finger in and push a button to prevent this message from flowing. Thus, it would be as unreasonable to hold the list server sponsor liable as it would be to hold IBM liable because it made the computer. The list server operator has as much control as IBM over this particular message going from Savage to the subscribers on the list.

A list server is different from electronic mail. It is not just one message going from one person to another one person. It has the quality of a conference, where one person posts something, and there are several other people who read it. Then those people have the opportunity to respond. Because of that, the one decided case in this area, *Cubby v. CompuServe*,[9] would play a big role in determining liability.

Cubby was not a wrongful death case. It was a case in which some defamatory information was posted on CompuServe, in one of the conferences that was run by a private organization, not by CompuServe itself. The court held that CompuServe was not responsible for the information that was in all of its conferences. By analogy, VillaLink would not be held responsible for all the things that are going in the list server area. An important difference between the CompuServe case and the murder case is that in the actual murder case there was just one magazine. It was not equivalent to VillaLink, it was only the equivalent of the list server. But in the *Cubby* case, there were two levels of supplier. There was CompuServe itself, which is analogous to VillaLink. Then there was an independent contractor who organized the particular conference. That is analogous to the *Soldier of Fortune* list server sponsor.

There are, however, two problems with the *Cubby* analogy. One is that *Cubby* concerned an electronic newsletter that was published without any realistic opportunity for review. In the hypothetical the messages may go through so fast that there really is nothing that the owner of the list server could do to prevent the delivery of that particular message. In that case it is hard to say there is a duty to react — just like *Cubby*. But if there is a train of messages and if there are filters that could be added, the result may be different. In the list server case, the owner of the system can make itself a censor for the list. It can identify messages go-

9. 776 F. Supp. 135 (S.D.N.Y. 1991).

ing over the list. At some point, the technological ability to review gives rise to a duty.

One can interpolate between two extreme positions. We could assume that the list serve is an operation untouched by human hands. Therefore, there is neither the opportunity nor the expectation of any prior inspection of communications. The opposite would be the case under some circumstances. Then, one would expect the list serve sponsor to look at the messages.

So does the outcome turn on technical feasibility (which may implicate some cost issues), or does it turn on an objective classification of the function? Or, does it depend on the practice in the industry generally? Perhaps it turns on a more particular set of expectations, driven perhaps by a declaration by the list server sponsor of the ground rules for a particular list.

At some point, the list server operator, or VillaLink, has some responsibility for the use of the service. Suppose VillaLink merely sets up a list server capability that someone could use simply by providing a credit card number. VillaLink is just offering this service. A third party actually sets up the list. Now VillaLink does not have control over the first message sent out. If you are advising a list server operator, what do you tell that person? Do you tell the operator that he or she ought to set it up so that he or she can look at the messages or do you tell the operator that he or she needs to declare in advance whether he or she is going to look at the messages? Or do you tell the operator to stay away from the content? But suppose the contents of a list involve some kind of criminal activity?

There may be a difference between what happens now and what may happen in the future. Today, the conference metaphor is accurate. These are electronic conferences. People come together on line to discuss something and the conference has an organizer or a moderator, somebody who initiates the conference. That person assumes some kind of responsibility. But it is possible for all this to be successful and to be almost anonymous. If some human moderator is involved and the discussion turns in a clearly illegal direction, the moderator has a duty of some kind.

Of course, this invites consideration of what the law *should* be, not what the law has been or what it is. If we really do want these networks to broaden the ability to communicate, then maybe exposure to liability needs to be changed because it is not very conducive to the anonymous messaging that people want to put on the networks. Fear of liability may chill many kinds of materials

that should flow through. If operators sit on top of these networks with very restrictive acceptable use policies and with heavy editing, it is not going to be very conducive to growth in expression. Acceptable use policy (AUP) concerns many network operators. Facing this obligation, they match a message against a set of principles and see whether the message squares with the set of principles. This opens up a real set of problems.

Moreover, imposing duties on the service provider may be an illusory solution. The fact is that the Internet and NREN is a channel that goes all the way around the world. It has thousands of VillaLinks on it, and it is getting easier and easier and cheaper and cheaper to set up a new VillaLink-like nodes on the Internet. Users are not only going to be able to receive anonymous messages saying whatever other users choose to send, but they also will be able to get files off nodes and servers that are kept anywhere in the world. The posession or duplication of much of this material may be illegal under United States' law. Some of it may involve terroristic activity. There certainly is some of it that would offend community standards in the pornography sense.[10] The question is, "What do you do?" Some of the people that ordinarily would be enthusiastic about this use of the technology in the public education system say they are afraid to do it because they think they are going to get sued and they are going to lose the lawsuits.

At the same time, there are other people who say, "Well, you don't need to be worried about that because you can limit the technologies so that the kids can't get into the file server that may have offensive material in it." Yet the technology may not be easy to limit in that fashion. How should that be dealt with? It is here where the newsstand and the shopping center metaphors begin to lose their force.

Yet, you do not have to go to a legal regime in which everything is open to everybody. You can create clear signals as to when you are in the area as to which the system provider reserves the right to control content and when you are going through

10. There is a recent example of how possesing information downloaded from international sources can allegedly violate the law in the United States. During the first week of March, 1993, the United States Customs Service, pursuant to 29 warrants in 18 states, seized numereous computer files containing child pornography. This material was imported over computer networks from Danish computer bulletin boards. *See* Jordana Hart & Monica Young, *Child Pornography via Computers is Focus of Federal Sweep*, BOSTON GLOBE, March 7, 1993, at 48.

some doorway or gateway into the great highway of the world beyond, where you are on your own.

We are in the early stages of technology, but VillaLink is not hypothetical. Although it still takes a bit of skill and knowledge to navigate the Internet, it is rapidly getting easier. As it gets easier and easier, the market increases. Ultimately, there will be technological ways to provide indications and to exercise some kind of technological control. But national governments may not be able to do very much about this. One could argue that one reason the Soviet Union no longer exists is that barriers to communication that were once strong gradually eroded. The citizens now have access to information that they didn't have access to before. Earlier this morning some members of the panel were sitting in one of the Villanova Law School classrooms that has a lot of computers in it. In a matter of 30 seconds, those computers hooked us into computers in Germany and Scandinavia enabling us to look around for information. What is the feasibility of any kind of governmental intervention in this international network?

The reality is that we are already late in the system design process if we envision a world where we are going to design the system to protect against these harms. It is not a matter of deciding what the responsibilities are before anybody hooks up. They already *are* hooked up. So, the question is what you are going to do about it. A big battle that is going on between the FBI and its opponents exemplifies this dilemma. The FBI's problem is this: Until recently, it has not been a technical problem to do electronic surveillance. Once the FBI agent gets a warrant for a wiretap, the agent goes to the telephone company and the telephone company accommodates the FBI. The switching systems make it relatively easy to do a wiretap when the court authorizes one. Now, the new network technologies may make it infeasible to some types of electronic surveillance. The FBI is concerned that when it is trying to investigate terrorism, is trying to investigate drug trafficking or when VillaLink is the victim of some kind of intruder and wants the FBI to come in and do a criminal investigation, a court ordered surveillance may be technically impossible.

So the FBI has proposed that the Congress enact legislation that obligates the VillaLinks of the world to make sure that any new technology that is introduced allows authorized surveillance to be connected. There the battle is joined. This illustrates Professor Katsh's point that if you just let the technology go along,

you will not be able to enforce the judgments that have been made by the legal system.

Mr. Rotenberg has debated the point with the FBI director on network television. The FBI says, "One public policy goal we would like you to incorporate into technological design is our ability to conduct criminal investigations. That is our job, and it is certainly an important public policy goal for any country. As technology has changed, it has become more difficult for us to do our job. Therefore, we would like you, in the design of your future technology, to restrict the use of cryptography."

We do not want, with today's perceptions of technology, to put barriers to new technologies that can be used through the design process. We should leave design to private decisionmakers in the market.

B. *Torts, Contracts, and Access*

The definition of the service may determine liability. Under the Electronic Communications Privacy Act, whether a provider declares a particular messaging service to be private EMail or an open conference readily accessible to public, determines user rights with regard to disclosure of messages. The Act also shapes expectations about a reasonably prudent service provider with regard to how frequently the service provider will look at messages. If a message to a subscriber causes harm, remedies can be affected by the contract between the provider and subscriber. But if the harm is done to a third party, VillaLink's main argument would be that there is an independent contractor relationship between VillaLink and the list server organizer. In principle that might exculpate VillaLink from responsibility for what happens on the list serve conference.

Let us shift the focus a bit. Suppose VillaLink wins on this lawsuit, because the list server might have some responsibility but not VillaLink. But now VillaLink is scared. It thinks not only about advertisements to do murders for hire, but also the possibility of copyright-infringing works and messages or files that might invade people's privacy.[11] The more that VillaLink learns about the possibilities, the more concerned it becomes.

Now, while all this was going on, suppose there is a small electronic publisher named Kevin Marks. Mr. Marks decides he

11. Perhaps someone would crack a consumer credit database and then distribute some of the more interesting excerpts through this system.

can make a lot of money by publishing materials electronically and so he builds a considerable business around the VillaLink service. He advertises heavily and publishes VillaLink's Internet address. His ads explain how you can get the VillaLink through the public data networks using VillaLink's 800 phone number. He designs his files so that they match the VillaLink software.

Now everything works just great until Mr. Marks branches out beyond his initial business of distributing legal opinions and litigation materials like complaints and briefs and begins to distribute commentary on legal material. There is no question that he has a right to do this under his relationship with VillaLink. Nevertheless, when VillaLink discovers that one of Mr. Marks offerings is called "How to be a Killer for Hire," a kind of an electronic book in a file form, VillaLink calls up Mr. Marks and says, "It has been nice doing business with you, but we don't want to be a part of it anymore." Villalink then unplugs Mr. Marks.

Does Mr. Marks have any remedy against VillaLink? He is dead as an entrepreneur because he spent all his working capital and his whole business is built up around VillaLink.

This may be primarily a contract question. It really depends on Marks' contract with VillaLink. VillaLink may protect itself in contract by saying that we are allowing you to use our facilities under the following understandings. You may use it only for X and Y. If you then start to use it for Z, the contract may be terminated. It may be only a hand-shake contract—a very informal one—and still impose those limitations. Also, the limitations may be implied from the nature of the electronic publishing service.

Second, VillaLink is not formally a statutory common carrier. VillaLink does not have a responsibility to provide service to anybody. If this particular product is something it finds offensive or unacceptable in some way, VillaLink has the power and authority to say, "We no longer want you."

In contrast, suppose it is not VillaLink that hears about the electronic book, "How to be a Killer for Hire," but Bell Atlantic, which says to VillaLink, "We are not going to connect you anymore." Bell Atlantic is a common carrier, and it is required to provide service. There is, however, an exception when it comes to billing privileges such as 900 numbers providing sexually explicit conversation.[12] If the billing for Mr. Marks' service was

12. The telephone company has the option of not billing for these services. The courts have been upholding that refusal, saying that billing is not common carriage.

done not by VillaLink but by Bell Atlantic, Bell Atlantic could not unplug Mr. Marks altogether, because it is a common carrier as to the communications traffic, but Bell Atlantic would be entitled to unplug him as to billing services.

Moving beyond the common carrier issue, there is another level of inquiry. If VillaLink is an exclusive facility, and there is no other way for Marks to get to his market,[13] denial of access would be impermissible under antitrust law. Thus, there are various levels of inquiry: contract law, common carrier law and antitrust law. Even though we might not label VillaLink a common carrier, the result may be the same under the antitrust essential facilities doctrine.

Practically, however, an essential facility finding is unlikely. We are talking about the higher levels of the system. Somebody is molding contents and pulling together particular types of substance. Although it is theoretically possible that somebody could have an essential facility at that level of the system, it is highly implausible because we are talking about large numbers of people who have the ability to enter, to provide competing services. Additionally, even if this is the only system like this, you have to analyze whether the barriers to creating a competing service are high or low. You cannot be an essential facility unless you not only are essential but are likely to remain that way.

C. *Free Speech*

Will it make a difference if Mr. Marks was unplugged for publishing an electronic book on how to elect a Republican president? There are some political forums that might be required to give access, but if VillaLink is privately owned, it is not one of those. There is no state action involved.

But if VillaLink is in fact run by the library of Delaware County, the answer may be different. Libraries generally are available to all comers. Librarians might include information based on certain standards of quality or price, but they normally do not exclude information based upon political content.

If the library does exclude based on political content, the library may have a problem under public forum analysis. But how do we decide if it is a public forum? Here we have an electronic publishing service, but it is run by the public library system. Is it

13. Or, perhaps VillaLink forms a conspiracy with several other commercial interests and they agree to knock Marks off so they can centralize the business.

enough if it describes itself as a public library, as the public library of the 21st century? Does that make it a public forum?

In both the public and private sector cases, the product or service offered is a definition matter. The service designee may specify that it only wants a particular type of message on the system. One service only wants fiction; it does not want non-fiction. Another system just wants to have gardening information; it does not want messages about movie reviews or responses to political issues. Clearly, any provider of a forum should have a right to define the bulletin board without getting into First Amendment questions.

On the other hand, discrimination *within* the defined subject matter may be a breach of contract, a violation of common carrier duty or a violation of the First Amendment. Even if we go back to purely private sponsorship, there may be a First Amendment problem. You may have an electronic shopping center. In the hypothetical, Mr. Marks contracted with the shopping center owner to open a B. Waldens Books (metaphorically) and, after this is not going so well, he changes to a sexually explicit "Art" shop. In that situation, the shopping center developer is completely within its rights to say that this exceeds the contract, and to terminate the relationship.

First Amendment issues also underlie the controversy over whether people should be able to use this technology anonymously. Should you be able to send EMail messages without revealing your name?

In *Talley v. California*[14], a local government required a person who distributes a pamphlet to put a name and address on the pamphlet. The Supreme Court found a relationship between anonymity and the First Amendment that goes deep into our country's roots. Indeed, the Federalist was published without actual signature through newspapers. Anonymity protects unpopular views. The electronic environment should protect the identity of the speaker.

That does not mean we must to do it in all circumstances. There obviously are enormous questions about accountability because that is what we give up when we protect anonymity. But there is a close tie in the speech environment between the right of anonymity and First Amendment freedoms. This has implications for an intermediary who is worried about being liable for the mur-

14. 362 U.S. 60 (1960).

der message. One of the ways we can address the problem of liability and protect intermediaries, is to encourage intermediaries to point in the direction of the offending message. When there is a murderer for hire, when there is copyright infringement and when there is credit card information published illegally to a bulletin board the intermediary says, "I should not be responsible. This other person should be responsible. I can gain this protection as long as I make sure that everyone who uses my service tells me who they are."

Now, you need not prohibit anonymity. It may be enough to condition immunity on the system provider not taking deliberate steps to make it harder than it otherwise would be to trace the wrongdoer—to trace who sent the message that caused the harm. That trade off, as long as its a voluntary one, makes a lot of sense. You still could provide anonymity in most cases. The model would be like the letters to the editor department of many newspapers. If you want the letter not to have your name on it in the newspaper, that is OK, but you must give your real name to the newspaper before it will run the letter.

D. *Availability of Alternative Channels*

Alternatives are important no matter what the legal theory is. In the state action or the common carrier settings, the Kevin Marks of the world have no alternative channel. But if Mr. Marks finds that a private shopping center owner does not want him in its shopping center, Mr. Marks can go somewhere else. He can find another shopping center or another place in town that is willing to accept his business. It is important whenever we are talking about speech and electronic environments to ask, "Are there alternative channels? Are there other ways to get this message out?" If there are alternative channels, we are not going to be as concerned about denials of access by one channel. In this respect, there is a considerable similarity among common carrier, antitrust essential facilities and First Amendment analysis. In all three cases, you inquire as to available alternative modes of expression. The key question is whether it is easier for Mr. Marks to move to another electronic host than to change shopping centers.

First Amendment analysis cuts both ways, however. If Mr. Marks owned a book store and he didn't want any books in that book store that supported Republican positions, he could refuse to buy and resell those. Clearly he has a right to do that. It would be a First Amendment violation to limit his ability to select. So if

we classified him as a common carrier or an essential facility, the imposition of that responsibility might violate the First Amendment.

E. *Common Carrier and the First Amendment*

If you have a *traditional* common carrier, the restrictions on content selection may not violate the First Amendment. But common carrier is self-defining and the only people who are really defining themselves as common carriers are the public switched networks. An ordinary publisher or Prodigy or WESTLAW will avoid doing the things necessary to create common carrier status for many reasons, the First Amendment being one.

Common carrier status is self-defining, by conduct or by self-declaration. It also is organizational. You have to decide if you want to apply to regulatory authority for a license to serve a region or network. Admittedly, there is at least a slight inconsistency between the position that common carriage is self defining and the FCC's notion that the "holding out" part of the test is not useful and that market analysis alone decides whether someone is a common carrier. Of course if you can hold yourself out maybe you can pull yourself back in. It is useful to explore that in the contractual context and then maybe link it up with the common carrier idea.

E. *Holding Out (Self-Definition)*

Suppose we had more than a hand shake when VillaLink first set up service. There was lots of advertising by VillaLink. It advertised itself as the ultimate electronic communications service for the Mid-Atlantic states. It said things like, "There is no need for any other service, this is it, one stop shopping. We will take absolutely anything that is not clearly prohibited by the criminal laws of the country. If you want to get some kind of information out to *any* market, come see us and we will make a deal with you." Mr. Marks, responding to that ad, came to VillaLink. Now scared by the murder for hire and frightened by Mr. Marks' book about killers for hire, VillaLink excludes Mr. Marks.

This may seem implausible, but there are lots of people in the world who have no legal advice or bad legal advice. Even people with very good legal advice say something close to a hypothetical. Sprintnet and other value added networks do that. They say, "We will connect anyone who has a network." Anyone can

get service through a dial in node. They provide a packet switching network to get messages from A to B.

This scenario deals with the legal relationship contractually. Mr. Marks has an argument that there was an offer. Now says he is being treated inconsistently with the offer. Of course, as a contract interpretation matter, VillaLink either reserved the right to terminate or it did not. There may be implied promises not to terminate without a fair reason, in which case he has a contractual claim.

If you are going into the business of offering some higher level communication service, you have to make a fundamental decision on whether or not you want to reserve the right to control content. Unless you are just providing something very close to a mere wire connection, what you are trying to build is a set of customer relationships. If your system is used to transmit content that the customers do not want, then your relationships will suffer. So it is the natural tendency of distributors, as well as outright publishers, to reserve the right to edit and control content that upsets their customers because what they are building is a property interest in the relationship.

It seems okay to have a system provider live and die by its contract. But there is one other element that makes it more complicated here. In an electronic environment, the provider of a higher level of systems is not just carrying preformulated publications. In this kind of environment, the user becomes the information provider. As a result, if you create a discussion forum, what you are doing is not only making a statement with regard to what you will bring to the user, you are inherently allowing the user to broadcast statements back to other users. In that kind of environment, that nature of the promise you are making evolves over time as the community grows up on line. The standards of what users expect may also change over time. You are delivering communications to people who are themselves supplying the information to the system. That is a very evolutionary situation.

F. *Choosing Metaphors*

Metaphor selection frequently is outcome determinative. Sometimes we ask which one is going to give us the result that we want, and then work backward to apply a suitable metaphor to the facts. We had two good metaphors in the *Soldier of Fortune* example. One is a magazine. The editor of the magazine can ask the questions, "what is negligence," and "what is First Amendment

protection?" The other metaphor is the newsstand owner who has 100 magazines on his rack. One of them may happen to be *Soldier of Fortune*. We can ask questions like what is the negligence *there*, what is the First Amendment protection for the newsstand owner, the librarian, the distributor of information? This is the long way to come around to the answer. We know enough about newsstands to say that they are going to promote the flow of more controversial information, more robust ideas if they have less exposure to negligence than the magazine itself. Now, of course, the newsstand is somewhere between publishing and common carrier. There may still be some responsibility there, but less responsibility. That is the *Cubby* decision.

The newsstand metaphor is the better one at least for the list server. For VillaLink, we have to choose between the newsstand and the publisher. It will have certain responsibilities as a publisher that it will not have as a distributor. If you want to get the most information out there, you would look for the mix that maximizes First Amendment protection and minimizes the negligence risk. You get that with the newsstand metaphor rather than the magazine metaphor.

But suppose we reduce the risk of liability in order to make the information exchange more robust. Now the person wanting to place the information and being denied the opportunity says, "You ought to have an obligation to let me use your conduit. Let me use your newsstand so that I can get my information out there." Does not the framework take you there? Do not the VillaLinks of the world become electronic librarians?

Libraries are sui generis. Librarians traditionally exercise a lot of discretion over what goes into their holdings. In a sense they have complete discretion over whether to purchase something or not to purchase something or even to take material that is in their holdings and sell it or throw it in the garbage. If one simply extends that notion to the electronic medium, one would assume that if a public library is engaged in some kind of electronic venture, then the librarians can exercise discretion over the kinds of material that gets on or gets taken off. The First Amendment is not necessarily involved. The qualities of the new medium put some pressure on the law to recognize somewhat broader First Amendment limitations on the public library's discretion. How do you justify purely discretionary judgments by public officials called librarians on the basis of content?

Libraries are not entirely like newsstands. The newsstand

owner is not the kind of intellectual who reviews the contents of all of the material that is being sold. But libraries do have that opportunity. As books and materials come into the libraries they are reviewed as part of the acquisition and cataloging processes. The professional working with them, organizing them and describing their content really does review for quality. A lot of things are weeded out of the system and not ever processed at that point.

But there also is a certain amount of leniency. There is a value in having all viewpoints represented so even material that is personally offensive but that fits selection criteria will get processed to the shelves.

G. *Linking Immunity With Accessibility*

There is, of course, a contradiction in the policy logic. We are going to reduce the exposure to liability in order to enrich the information environment, so we immunize VillaLink, assuming that VillaLink is like a newsstand. But then Mr. Marks presents himself at VillaLink's front door and says, "I am here to enrich the information environment. I understand that you have been shielded from tort liability and the reason for that is that you will be a more flexible conduit for information of all different kinds. I have to put some information through you as a conduit." The conduit says, "No, I'm not handling it." We say that there is no remedy for the person who is offering to enrich the information environment.

One answer is that it depends on the bargain Marks made. We are trading off here between two different strategies to reach the same goal of enriching the information environment. Reducing liability on the part of somebody who connects with some other service or carries additional messages clearly tends to enrich the environment because the provider feels comfortable making bolder choices with regard to what to carry, consistent, however, with the mission of that publisher or distributor. Going one step further and saying you have to let people in, as the price for the reduced liability, is inconsistent with the theory of the First Amendment unless you could prove that there is scarcity in channels.

Scarcity in channel relates to the First Amendment problem like this: Suppose in order to get messages out to the public you had to go through one particular bookstore. Then you could justify inducing that bookstore to carry more material then it would

otherwise carry based on its private, professional and commercial judgment.

We have some case law in this area. If you are a union organizer and you need to reach the employees of the business to speak about labor concerns, there is a First Amendment interest in having access to the business premises. There is going to be some balancing there protecting the business interest, but there is a recognition that your intended audience, the people you need to get to, can only be reached through the business premises; that is where you have to go. Similarly, if you choose to picket a store, you are going to picket in front of the store. A picket line across the city will not work. That is where the restrictive channel analysis comes into the First Amendment claim.

IV. CONCLUDING REMARKS

Ms. Price concluded by observing the importance of the public library as a social good. A major concern is that the public library is becoming a thing of the past. Libraries are no longer open the number of hours really needed to provide the function. More and more we see libraries seeking cost recovery for essential services. We also see that this electronic marketplace allows us to go directly to information without needing the intermediary of the library. The Library of Congress sees a need to take its collections and to provide them to people everywhere in the world at all times of the day and night in a format where they are universally useable. The NREN offers the promise of doing that, but without having identified a cost mechanism that is going to support that kind of an operation. Nor have we worked out the mechanisms to have people speak common electronic and real languages for help screens to make that information user friendly. The Library of Congress is working with the United Nations, European communities, the Council of Europe and a variety of other indexes and abstractors of legal information to try to combine that information with commercially available databases to create an international legal information network.

We have, on the horizon, some really exciting developments. The Library has a pilot project that may be a precursor of electronic copyright deposits and a first step for making information available electronically in a universal format. Information could be kept in a distributed form, not in a single storage center. But this means a great deal of uncertainty as we face a future where the library does not exist in a single place but the library is univer-

sal. When we talk about control of information and freedom of access and legal liability we are really talking about information as a commodity that may be governed by a treaty rather than being governed by what we now think of as federal information policy. It is an exciting and an unknown world. We are essentially creating a world where we learn something from the Eastern European experience in terms of the power of people who have access to information.

Mr. Rotenberg concluded by identifying two ways in the legal realm to look at the types of issues that the panel discussed. One is prospective. That is what is done through the policy process and statutes. The second looks at facts on a case by case basis. It looks at interests and reaches judgments in a court. For the most part, these issues have been characterized by the prospective view, the policy based view. That is important because it helps you look ahead and identify core social goals. But there is great value at the same time in looking at the cases to try to extract whatever legal values, political values and social values have already given rise to the conflict that made its way to the courts. One case that we discussed quite a bit this afternoon was the *Cubby* case. It is a fascinating case. It is about how you treat the dissemination of information in a new electronic world. But there is another case. It is a 1928 wiretap case: *Olmstead v. United States*.[15] In that case there is a dissent by Justice Brandeis in which he tries to assess how the principles embodied in the Fourth Amendment should apply to the then new type of criminal investigation: the overhearing of a telephone call. Up until that point, the case law simply addressed physical searches, access to a person while taking a person's personal effects.

This was a new question brought on simply by changes in technology. It required an examination of the investigative method and of the consequences for the durability of the Fourth Amendment principle if there was no way to apply it in a world that was arising. *Olmstead* was an important case because it also tried to address how underlying public policy goals apply in new information environments.

It is true; there is something a little unsettling about posting a message, involving murder for hire. But if you look at the big First Amendment cases concerning what imminent harm is, the short answer is that it is protected speech. We have to go a bit

15. 277 U.S. 438 (1928).

further to find some reason to restrict it. We should look at the best underlying principles based on previous cases and ask questions about how they apply in new technological environments.

Professor Campbell agreed that one of the public policy goals should be to create an information rich environment. She disagrees with some of the ideas about how to get there. Maximizing editorial discretion of the electronic equivalent of newsstand owners is troublesome because it is not clear that we have anything like as many newsstand owners in the electronic environment as we do on street corners and building lobbies. It may be better to maximize overall information by limiting editorial discretion of intermediaries and by saying that you have to have an open access policy. If these newsstands or gateways are all commercial and operate to maximize their profits, they want to buy the kinds of materials the public wants. That raises a concern about unpopular ideas. Things that might offend some people are not going to get on the network. Bland network TV reproduced on computer networks is not the best potential of the new technology. What should be so wonderful about computer networks is that they can be interactive. Users should be able to choose for themselves what they want and should not really have their selections limited. Users ought to be able to choose from anything available instead of having it filtered with someone else's idea on whether it is going to be profitable or good for them.

Professor Katsh tries to understand the times that we are experiencing by looking over law as a reflection of culture. We assume that law has a lot of power and authority and that we can change and make the law. But on the other hand, Justice Holmes once wrote that the life of the law is not logic; it is experience. If you look at the law over a period of time, you find that, in a perhaps surprising way, there has been this interaction between the law and whatever culture of which the law is a part. One of the interesting time periods that tells us a lot about the kinds of conflicts we are looking at today is not recent history but history that goes back several centuries, the period of time that followed the development of printing. That was the last major medium that caused many similar kinds of controversy and raised questions about the ownership of information.

The period of years after printing was a time in which the people were concerned about an information explosion. It was a time period in which people were concerned about who would own information. Previously, a very viable system of copyright

had not really existed. We really did not have censorship until after printing.

We are engaging in conversations about issues that are predictable. Conflicts and disputes are arising because information is such an important part of our society and an important part of our economy. We are going to engage in this as a continuing conversation because the technology is really an emerging technology. The technology provided relates to the law because it provides a new relationship with information and a new relationship with people. We have the opportunity to interact with people who are located at extraordinary distances. It also puts the citizen in a different relationship with the body politic. It puts the citizen in a different relationship with the legal process. We cannot know the answers yet, but we are going to have to struggle with the question over the next decade.

Ms. Steele concluded by emphasizing the excitement in the development of the law. We are taking laws that were developed for face-to-face, paper and telephone voice communications and we are plugging in new situations. Sometimes it is working pretty well and sometimes it is not. As the years go by, we are going to see a new body of law come into being. There are going to be cases that say the old way just does not work with this new situation. We should keep an eye on networks like the Internet and identify what important social policy protections should be provided for this communication. We should look to the tiny electronic bulletin board systems that are not necessarily connected through networks. These are the real places where interesting innovative speech occurs. We may need more protection for speech in these particular arenas.

There are different ways to effectuate legal change. One is through legislation. That is an important place where we do need to spend some of our energy. We need some sort of electronic Freedom of Information Act so when you make a request under FOIA you can get those requests answered in electronic format. If you want to look for specific trends or interesting pieces of information, you should be able to do electronic searches to find that rather than going to a stack of papers. We need an Electronic Communications Forwarding Act so a person who only forwards a message, who had nothing to do with the creation of the messages, can avoid liability for the content.

It is also important to look at individual cases. We will be seeing a lot more of them. So far, most of the cases have been

settled out of court so we are not developing law in this area. But as the years go by, we are going to see more. This is one of the most exciting areas of civil liberties right now. Civil liberties law, like all law, constantly evolves.

As these networks develop, we should make the network affordable to anybody. We should have something like the common carrier provision for telephone companies, where there are subsidies for people who cannot afford it. We must seek a universal access like telephone service because otherwise we will have a situation of information "haves and have nots." Look around this room. We are the cultural elite. We need to make sure that everybody is connected and that everybody gets to take advantage as the network develops.

Mr. Johnson believes that asking questions about communication policy really leaves a question about the nature of one's self. The Internet is significant because it arose without any central plan. It arose from a collection of individual initiatives. This has implications for the historically important information intermediation role. There were always intermediaries: first, those who could read, then, after the invention of books, publishers. But, now, who intermediates screen messages that go to children? Is it VillaLink and other system operators? What do you do in a world in which those sources of care and duty are disappearing? The only thing we are sure we want to say to the VillaLinks of the world is to be thoughtful. This requires corporate responsibility. It is not any particular set of rules; it is a process of thinking about what the rules ought to be as the world changes. You need to be clear, signalling clearly what rules you have decided upon at any point in time. This empowers others to act in their own sphere of discretion.

The consideration of these subjects links to examination of the nature of the law itself. Just as the book undermined the regulatory power of pre-existing institutions, this technology is undermining the existing legal institutions, making it more difficult for them to impose rules even if they know what rules to impose. But the good news is that the communications are giving rise to new on line communities. One of the most interesting questions is what happens in the workplace or in electronic spaces in which strangers meet. The users themselves begin to decide what the rules are and what rights belong to the users. So we may be seeing not only difficult and challenging policy and legal questions, but also a shift in where it all comes from.

Mr. Plesser offered two thoughts. First, access. The technology really is extraordinary. This discussion revealed the tremendous opportunity for diverse sources and wide access to information along with clear concerns about common carriage and contract rights. The real truth is that the systems we are talking about, the technologies we are talking about, are creating an explosion of the ability of individuals to express themselves. Fifteen years ago, in the case of *Miami Herald Publishing Co. v. Tornillo*,[16] the United States Supreme Court said that a Florida statute was unconstitutional when it allowed a political candidate a forced right of reply in a newspaper. Poor Mr. Tornillo really had no way to respond to what was being said about him in the newspaper. Today that case almost is on the verge of seeming irrelevant. There are now so many opportunities. Some of the participants in this discussion have organized EMail campaigns where some 20,000-30,000 people were organized through the network to communicate on public policy issues. This is a kind of potent political force that we have not even begun to consider.

The other issue is the First Amendment. We should not be in a hurry to create new legislation. We should be concerned about the new wave of politically correct stuff getting into legislation. Prolaritarian and egalitarian reasons often justify limits on speech. On November 4, 1992 in New York, Justice Brennan was honored by the Libel Defense Resource Center. It was an extraordinary evening. Mrs. Graham of the Post and Floyd Abrams, the number one First Amendment lawyer in the country, spoke. Andrew Young had a very short speech. He revealed the importance of the First Amendment and the importance of the issues we are talking about. He turned to Justice Brennan and he said, "On behalf of Martin Luther King and Ralph Abernathy, I want to thank you for *New York Times v. Sullivan*.[17] You may not realize the extraordinary importance of that case and what that case did for the civil rights movement. It was the cornerstone and the keystone of our success in the civil rights movement." He went on to explain that they never had a demonstration after 2:00 in the afternoon and never did one on Friday because they were interested in press coverage. National press coverage was essential to what they were doing. It was essential that the national press cover the civil rights movement. They felt that, in the end, the country would not tolerate the kinds of things that were going on

16. 418 U.S. 241 (1974).
17. 376 U.S. 254 (1964).

in the South during that period. So it was essential to get the press in. Then, the politicians in the South started to use common law libel. It was not just the *Sullivan* case; there were forty or fifty cases being brought over the South, by public officials against newspapers and broadcasters to try to discourage them from covering the events in the South. Even if they did not win those cases, it would discourage active coverage. Young said the *New York Times*, during the pendency of the *Sullivan* case, took all of its reporters out of Alabama for a year. It was really *Sullivan* and its creation of breathing for newspapers that was crucial. *Sullivan* is not an absolute case of First Amendment freedom; it is very much a balancing case. It allowed enough protection so the civil rights leaders could then get the national publicity.

One can just speculate about the Clinton election and many other things that have resulted from the Voting Rights Act and the Civil Rights Revolution in the South.

We are talking about free speech and we are talking about freedom of expression. These issues are of extraordinary importance to the future in ways that we cannot even imagine right now.

Professor Perritt summed up. There are five themes that emerge from this. The first theme was put well by Mr. Rotenberg. He said that we are not really adrift despite the fact that the technology may seem mysterious and the buzz words incomprehensible. In fact, we can look at a rich body of decided cases and historical legal experience that helps us understand more clearly the values that are at issue as the new technologies get implemented. Not only that, they also help us understand what balances have been struck in the past with respect to those values. So we have a kind of template that we can start with. Mr. Plesser gives a good example of effective use of past legal experience to solve apparently new problems. There are many people that agree with Ms. Steele that some kind of new electronic Freedom of Information Act is necessary. Mr. Plesser just won a case in an appellate court applying traditional paper Freedom of Information Act concepts to electronic material.

The second theme is that past legal experience addresses problems in the electronic context fairly well. A good example of that is negligence law. No one was motivated to argue very vigorously that we needed to depart from an analysis of potential for harm, the feasibility and expense of taking precautions, and the impact on the free flow ideas when we are imposing tort liability

on people who handle information. Those are not new concepts; those are old concepts. They have been used by the handful of courts to address liability questions in the context of these new technologies.

The third theme has to do with access. If there was any consensus that came out of the discussion, it is that there is only a limited role for state imposed duties to provide access. It is not zero, as Professor Campbell reminded us. There are certainly circumstances under which, if we do not have the law impose some duties to permit access, then the First Amendment's goal for a robust marketplace of information and ideas cannot be realized. But the state's role in forcing access should be limited because the best way to have a robust marketplace of ideas is to let individual people and individual private institutions make the decisions. Not only should we let suppliers of information services make the decisions, but by implication when we do that we also let the individual consumers make their decisions. We leave them the freedom to shop around, and necessity to be creative and adaptive as they shop around, from one supplier to another. The normal desire to keep the law at the periphery in the access area is reinforced by some practical implications of the technology. The law has limits. Also, as Mr. Plesser said, some of the cases that seemed very important at the time in the access area like *Tornillo*, now seem almost irrelevant because now it is so obvious that there are alternative ways for the ideas to reach their intended markets.

Fourth, the First Amendment is important not so much as a separate compartment but because it has so much influence on the liability formula and on the access formula. The First Amendment was very much in the background as we talked about all of those other issues.

Fifth and finally, it is not enough to look backward and to look at the things that have been decided already. As Ms. Price pointed out, there are profound changes in the distribution channels for information. Mr. Johnson characterized that as an increasing disintermediation in the markets for information. Professor Katsh urged that we think not only about changes in the channels and about disintermediation in a commercial delivery sense, but that we also think about entirely new kinds of relationships becoming important.

Well, if the life of the law is not logic but experience, a sound body of law needs to respond appropriately to the reality of these

new experiences as opposed to being a prisoner of past technologies and past experiences. Ms. Steele was articulate in suggesting the kinds of opportunity that presents itself to all of us as lawyers. It gives us a chance not only to be creative with what went before; but also to be effective lawyers in understanding the social phenomena. We can probe the nature of the law, as Mr. Johnson suggested. There is abundant opportunity for all of us. This is the kind of opportunity that can give full expression to the relationship between our legal system and a free society.