

COMMENT

POST-MODERN PRINTING PRESSES: EXTENDING FREEDOM OF PRESS TO PROTECT ELECTRONIC INFORMATION SERVICES

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I. INTRODUCTION

“The communication lines are no more than our newspaper trucks, the personal computer is no more than our printing press.”

—Larry Fuller, *President of Gannett New Media Services*¹

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1. JEROME AUMENTE, *NEW ELECTRONIC PATHWAYS: VIDEOTEX, TELETXT, AND ONLINE DATABASES* 133 (1987).

When the Framers of the Constitution drafted the Press Clause of the First Amendment in 1791, they could not have anticipated the development of electronic publishing as an alternative to paper publishing.²

The notion of what constitutes the press has since grown increasingly complicated. Radio and television transmissions began providing the first alternative news outlets in the twentieth century. The U.S. Supreme Court has correspondingly rejected any attempts to view the Press Clause as conferring special status to a limited group because of the conceptual difficulty of identifying the institutional press.³

In the last ten years, the line between press and non-press has been further blurred by electronic online services, which perform many of the functions as traditional press.⁴ An online service is a system through which a user can access electronic databases and other services through remote terminals, which include personal computers.⁵ The terminals communicate with "host" computers through telephone lines by way of modulator-demodulators (modems), which allow the computers to "talk" by converting the digital pulses of computers into analog form for telephone wire transmission, and back to digital pulses at the other end.⁶ Online services include not only information services like LEXIS and WESTLAW, but a much wider range of electronic publishing—popular services such as Prodigy and CompuServe, as well as services aimed toward specialized audiences.⁷

2. In fact, they may not have been so concerned with publishing in general. Some historical scholars have argued that the Framers did not see a meaningful distinction between "press" as used in the First Amendment and "speech." Nevertheless, the Framers were concerned with prior restraints on both speech and publishing. LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 170-71 (1985); David Lange, *The Speech and Press Clauses*, 23 *UCLA L. REV.* 77, 88-99 (1975). *But see* David A. Anderson, *The Origins of the Press Clause*, 30 *UCLA L. REV.* 455, 533-35 (1983) (suggesting that while there may not have been much freedom of the press at that time, the Press Clause was still meant to be separate from the Speech Clause). The First Amendment itself is ambiguous, providing that: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.

3. For example, the Court has rejected a privilege for journalists to refuse to testify before a grand jury because "it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer . . . just as much as of the large metropolitan publisher . . ." *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972); *see also* *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 801 (1978) (Burger, C.J., concurring).

Examples of the institutional press include the *Los Angeles Times*, ABC News, and National Public Radio.

4. *See infra* notes 48-68 and accompanying text.

5. *E.g.*, Lawrence J. Magid, *Prodigy Impressive Despite Limits*, *L.A. TIMES*, Dec. 29, 1988, at D4.

6. AUMENTE, *supra* note 1, at 18.

7. *See infra* notes 48-68 and accompanying text.

The similarity between electronic services and newspapers has not gone unnoticed. The written press has analogized online services to magazines,⁸ newspapers,⁹ and a separate information medium equivalent to the quartet of magazines, newspapers, radio, and television.¹⁰ At least one online service considered itself similar enough to a magazine to request a circulation audit from the Audit Bureau of Circulation.¹¹

Until now, however, the courts have rarely addressed whether electronic information services are equivalent to the traditional press.¹² Instead, they have focused on the commercial aspect of online services, viewing them as businesses, rather than as media.

This comment argues that online services that serve as information sources should receive the same level of Constitutional protection as the institutional press. This issue is crucial because the press receives special privileges as a result of its status in statutory law. For example, the Freedom of Information Act¹³ makes government data available to the public for the cost of searching and copying, but waives this cost for the press.¹⁴ Examples of publishing that the First Amendment does protect include a qualified privilege against compelled testimony¹⁵ and protection from sanctions for dissemination of truthful information in the public interest.¹⁶ Also, shield laws protect media employees from

8. James Coates, *'Connectivity' the Modem's Awesome Secret*, CHI. TRIB., Feb. 14, 1993, at Business 7.

9. Don Steinberg, *Making Meaningful Connections*, PC MAG., Feb. 23, 1993, at 303.

10. Blayne Cutler, *The Fifth Medium*, AM. DEMOGRAPHICS, June 1990, at 25.

11. Bradley Johnson, *Prodigy 'Magazine': Computer Service Seeks Circulation Audit*, ADVERTISING AGE, Nov. 11, 1991, at 2. The Prodigy online service runs advertisements on a strip along the edge of the screen. These advertisements cannot be shut off, but users can seek more information about particular ads that interest them.

12. See *infra* notes 91-134, 136-159 and accompanying text.

13. 5 U.S.C. § 552 (1988).

14. According to the act,

[F]ees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use . . . ; fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by . . . a representative of the news media . . . and for any request not described [above], fees shall be limited to reasonable charges for document search and duplication.

Id. § 552(a)(4)(A)(ii).

15. *Baker v. F&F Inv.*, 470 F.2d 778 (2d Cir. 1972); *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394 (D.D.C. 1973).

16. See *Landmark Communications v. Virginia*, 435 U.S. 829, 845 (1978) (state law making it a crime to divulge confidential information concerning an internal review of the state's judiciary); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 567-68 (1976) (court order restraining the press from reporting on information obtained in an open hearing pertaining to the case struck down); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496-97 (1975) (state sanctions for broadcasting the name of a rape victim obtained from the public record struck down).

contempt of court sanctions for refusing to disclose the identities of confidential sources. At present, twenty-eight states have passed such shield laws.¹⁷ If online services and traditional press do not receive equal Constitutional protection, online services will be placed at an unfair and unjustifiable disadvantage. Under the Freedom of Information Act, online services that seek to computerize government information may have to pay search costs that competing newspapers would not have to pay. This would make online services less competitive by increasing their research costs. An online service might not be considered a clearly defined media entity, and therefore its employees might not qualify for shield laws.¹⁸ This would make online services less competitive by decreasing their access to information. Both results would, in turn, decrease public access to information.

Part I of this comment traces the historical development of electronic communication, surveys the present state of online services as news outlets, and considers trends in the field. Most importantly, the combination of declining newspaper readership and increasing availability of computers suggests that the future of journalism may be, to a large extent, electronic. Part II examines the mechanisms by which the law fails to recognize electronic publishing as equivalent to paper publishing. Part III presents a three-part argument that online services should be given the full Constitutional protection of the press. First, it points out that, as a semantic issue, a definition of "press" that turns upon function will include many online services. Second, it argues that differential treatment between the traditional media and online services violates the Equal Protection Clause of the Fourteenth Amendment. Finally, it proposes that such differentiation also violates the First Amendment by constituting content-based discrimination.

17. Jonathan Groner, *Media Push Broader Protection; ACLU Says DC Bill Shields Press Too Much*, LEGAL TIMES, Dec. 2, 1991, at 6; see, e.g., CAL. EVID. CODE § 1070 (Deering 1986).

18. E.g., CAL. EVID. CODE § 1070(a) (Deering 1986). The statute reads in relevant part:

A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, cannot be adjudged in contempt by a judicial, legislative, administrative body or any other body having power to issue subpoenas, for refusing to disclose . . . the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication

Id.

II. ELECTRONIC COMMUNICATION: AN OVERVIEW OF THE PREDECESSORS OF ONLINE SERVICES

A. Historical Development

Electronic communication began in 1844 when Samuel Morse invented the telegraph.¹⁹ Thirty-two years later, Alexander Graham Bell sent the first message by telephone, and in 1895, Guglielmo Marconi transmitted radio messages.²⁰

These inventions were adapted for the purposes of disseminating information. The telegraph, for example, led to an increase in the reporting of national and international news.²¹ In Budapest, Hungary, from 1893 until after World War I, the telephone was used to pass out news and entertainment.²²

After Radio Corp. of America (RCA) demonstrated a successful television broadcast in 1933, the next major development in the history of online services was the computer in 1946.²³ Information processors seized upon the power of computer databases, and by the mid-1960's, there were a few dozen, mostly scientific or technical, databases. Just ten years later, that number had multiplied to nearly 300.²⁴

At approximately the same time, European countries and Canada began to experiment with videotext,²⁵ a system for mass information

19. EVERETT M. ROGERS, COMMUNICATION TECHNOLOGY: THE NEW MEDIA IN SOCIETY 25 (1986).

20. *Id.*

21. *Id.* at 29-30. Associated Press (AP), a cooperative news agency, and Western Union, a telegraph company, profited together in the 1800's. AP used only Western Union telegraph lines to transmit stories, and Western Union refused to transmit the stories of any other news agency. The use of the telegraph also provided the impetus for the style of American journalism known as the "inverted pyramid," whereby the most important information in a story is placed in the lead sentence. During the Civil War, telegraph lines were subject to disruption at any moment; therefore, reporters learned to place the critical information at the top, so that if the story were interrupted in the middle, the basic facts would still be available. *Id.*

22. This system was called "Hirmondó" and in function resembled radio transmission. At certain times, the telephone would ring, and the person would attach a loudspeaker to the telephone, from which the government would broadcast information. BRUCE STERLING, THE HACKER CRACKDOWN: LAW AND DISORDER ON THE ELECTRONIC FRONTIER 6-8 (1992).

23. ROGERS, *supra* note 19, at 25. These computers were vacuum tube driven behemoths. The invention of the transistor by William Shockley the following year helped reduce the size of computers. But it was not until Intel invented the microprocessor in 1971 that computers as we now understand them came into being. *Id.*

24. AUMENTE, *supra* note 1, at 76.

25. Some texts in the 1980's spelled the term "videotex." In the interest of continuity, it will be spelled "videotext" throughout this article.

transmission.²⁶ Videotext was defined as "computer-based interactive systems that electronically deliver screen text, numbers, and graphics via the telephone or two-way cable for display on a television set or video monitor."²⁷ Videotext grew from the work of Sam Fedida of the British Post Office, who in 1970 invented a user-friendly computer retrieval system designed for a modified home television set.²⁸ The motivation for developing these systems was partially to provide services that the users could interact with and customize.²⁹ In the spring of 1979, the British Post Office conducted public trials of a videotext service, Prestel.³⁰ Later that year, the Post Office offered Prestel to the public. As the first publicly available videotext system,³¹ Prestel grew quickly—in both the number of subscribers and the services offered. In 1981, it was providing users with access to 500 information sources. By 1983, it had 250,000 pages, or screens, in its own database, with access to others.³² The number of terminals in use had grown from an estimated 10,000 in 1981 to 50,000 in the mid-1980's.³³

In the United States, the first companies involved in testing videotext included media conglomerates Dow Jones,³⁴ Knight-Ridder,³⁵ the New York Times Company, Reader's Digest, and the Associated Press.³⁶ Fifteen field-test or full services were available by 1982.³⁷ Typical was Venture One, a joint project of American Telegraph and Telephone Co. (AT&T) and Columbia Broadcasting Service (CBS). Tested in a New Jersey suburb, it offered information, games, and banking and shopping transactions, with edited news among the more popular services.³⁸

26. In England, the system was called "Prestel"; in France, "Antiope"; and in Canada, "Telidon." EFREM SIGEL ET AL., *THE FUTURE OF VIDEOTEXT 2* (1983).

27. AUMENTE, *supra* note 1, at 14.

28. SIGEL, *supra* note 26, at 2.

29. For example, users could check on the status of hotel reservations or room availability. AUMENTE, *supra* note 1, at 28. Today, online services such as Prodigy provide a similar function with regard to airline tickets. Magid, *supra* note 5.

30. AUMENTE, *supra* note 1, at 28.

31. *Id.*

32. *Id.*

33. *Id.*

34. Dow Jones publishes the *Wall Street Journal* and *Barron's*.

35. Knight-Ridder is a newspaper chain whose major papers include the *Miami Herald* and the *Philadelphia Inquirer*.

36. JOHN TYDEMAN ET AL., *TELETEXT AND VIDEOTEX IN THE UNITED STATES 224* (1982). CompuServe and The Source both launched in the same year, although in much cruder forms than what online services provide currently. CompuServe and The Source were initially just electronic bulletin boards. Lawrence Magid, *On-Line Services Leaping Forward*, L.A. TIMES, July 13, 1989, at D3.

37. TYDEMAN, *supra* note 36, at 42-44.

38. AUMENTE, *supra* note 1, at 51-52.

Some of these trials proved unsuccessful. Times Mirror's Gateway and Knight-Ridder's Viewtron both shut down in 1986 after limited but expensive trials.³⁹ Yet the industry has found its niche. When the Gateway and Viewtron services closed, there were over a hundred other services available, with more than one million users subscribing to CompuServe, The Source, or the Dow Jones News Retrieval system.⁴⁰ Five years later, the number of users had doubled,⁴¹ with total sales of \$21 billion in the entire U.S. information services market.⁴² Industry analysts project sales of \$30 billion in 1994.⁴³

Last year, online services had an estimated four million subscribers, representing a growth of revenue of twenty-seven percent for the industry from 1992.⁴⁴ This steady expansion can be linked to two factors: the spread of personal computers (PCs), and the increased availability of information in computer-accessible form. The emergence of PCs meant that home users with modems could turn their computers into videotext terminal emulators without having to buy or rent special, single-purpose terminals.⁴⁵ The fact that more information was available online made videotext services more attractive. Major newspapers switched to electronic processing of stories by the early 1980's, so that reporters could write and editors could edit stories on screen.⁴⁶ Individual stories remained in the computer's memory after the paper had been laid out and printed. Selling those stories as information helped recoup the costs of gathering the information.⁴⁷ While it has always been possible to sell information, its availability in electronic form made it more accessible and marketable, especially to databases such as NEXIS, Dialog, Vu-Text, and the Dow Jones News Retrieval system.

B. Information from Online Services Today

Online services have not yet become commonplace. The successful ones have developed a limited core following, such as people seeking

39. *Id.* at 55, 60-61. Both videotext services suffered from the problem of requiring special terminals that had to be purchased or rented. The AT&T Sceptre terminal, which worked with either system, cost \$900 in 1983.

40. *Id.* at 44-45.

41. Evan Schwartz, *Adventures in the On-Line Universe*, BUS. WK., June 17, 1991, at 112.

42. This figure includes electronic mail and audiotext, but not cable television. Jonathan Weber, *Baby Bells Crawl Into Information Services*, L.A. TIMES, Nov. 11, 1991, at D1.

43. *Id.*

44. Amy Harmon, *Price War Erupts Among On-Line Computer Services*, L.A. TIMES, Apr. 21, 1993, at D1.

45. Single-purpose terminals were a drawback of the failed Viewtron and Gateway services. AUMENTE, *supra* note 1, at 58.

46. TYDEMAN, *supra* note 36, at 53.

47. Tom Badgett, *Dialing for Data*, PC MAG., May 12, 1987, at 238.

business information.⁴⁸ Even services like Prodigy or CompuServe, which are geared to the general public, have user demographics that are skewed toward the stereotypical computer user: ninety percent are young males.⁴⁹

Most online services, including electronic bulletin boards,⁵⁰ do function as news sources.⁵¹ The news may come from various sources—a direct link to news wires (CompuServe and GENie),⁵² the online service itself (Prodigy), or unprocessed source material, such as corporate or political documents.⁵³

1. DIRECT LINKS TO NEWS WIRE STORIES

Online services that provide users with access to news stories can be thought of as equivalent to libraries. Realistically, services that are only interested in providing such features will not need to compare themselves to the media, so long as they are able to access such wire services, which is a business issue. Like a library, these online services allow the user to select and organize the data.⁵⁴ Some of this information can come from specialized journals, magazines, and newsletters not easily accessible by consumers.⁵⁵

2. NEWS STORIES GENERATED BY ONLINE SERVICES

Online services that process news for users offer fewer stories than are available from wire services,⁵⁶ but they can guide readers toward the more significant events of the day more effectively, as well as providing side bars⁵⁷ to the major stories.⁵⁸ Furthermore, online services have a tremendous advantage over newspapers and television broadcasts because transmission across telephone wires is considerably faster than distribution of newspapers—which must be printed, packaged, and delivered—and even broadcasting, which usually takes place at

48. Jonathan Weber, *Electronic Publishing's Short Circuit*, L.A. TIMES, Sept. 3, 1989, at D1.

49. Prodigy, with its user-friendly graphics, may be changing the demographics. Thirty-five percent of its users are female. Don Steinberg, *Making Meaning Connections*, PC MAG., Feb. 23, 1993, at 303; see also Cutler, *supra* note 10, at 28; Schwartz, *supra* note 41.

50. Harmon, *supra* note 44.

51. *E.g.*, Steinberg, *supra* note 49.

52. The newspaper services NEXIS and Dialog, available through LEXIS and WESTLAW respectively, are other examples.

53. Schwartz, *supra* note 41.

54. SIGEL, *supra* note 26, at 3.

55. AUMENTE, *supra* note 1, at 71.

56. A wire service is a media organization that provides news reports for newspapers. These reports are sent in electronic form to "subscriber" newspapers.

57. A sidebar is a related news story accompanying the main story but is focused on slightly different aspects.

58. Schwartz, *supra* note 41. -

scheduled times.⁵⁹ Prodigy users, for example, can access a given day's events before the 6:00 p.m. television news broadcasts, and well before delivery of the next day's newspapers.⁶⁰ Videotext trials that put both major papers and a wire service, Associated Press (AP), online showed that AP's timeliness, among other factors, made it the most popular online information source.⁶¹

3. INFORMATION NOT IN NEWS STORY FORM

Perhaps the greatest strength of online services as information sources lies in the area of data not in direct competition with more traditional forms of the media.⁶²

The interactive nature of online services allows users to delve into issues of individual interest. Various services took advantage of the 1992 presidential election to offer access to extra political information, such as candidates' biographical data, voting records, and political platforms.⁶³ Workers for the Pat Buchanan and Bill Clinton campaigns posted messages on Prodigy's electronic bulletin boards.⁶⁴ Online services even served as conduits between the public and candidates.⁶⁵

Online services that cater to specific business audiences feed off the need for information not available from the traditional press. Interested individuals or companies can track the state legislature's bills and votes⁶⁶ or financial information about publicly held corporations⁶⁷ almost instantaneously.⁶⁸

C. Trends in the Future of Electronic Publishing

The public does not yet appear ready for online services to replace the more traditional forms of the media. When Times Mirror tested its Gateway videotext system in 1982, it found that despite their receptiveness to information services, seventy-five percent of users did

59. SIGEL, *supra* note 26, at 3.

60. Steinberg, *supra* note 49.

61. AUMENTE, *supra* note 1, at 118-19.

62. The public may not be ready to switch to computers as a primary information source. See *infra* notes 69-70 and accompanying text.

63. Mary Kathleen Flynn, *Election 1992*, PC MAG., Apr. 14, 1992, at 32; *From Prodigy: Snappy Answers to Election-Year Questions*, BUS. WK., Feb. 17, 1992, at 130M.

64. Evan Schwartz, *Putting the PC into Politics*, BUS. WK., Mar. 16, 1992, at 112.

65. Campaign workers for former California Governor Jerry Brown sent position papers by the candidate to inquiring voters across CompuServe's e-mail system. Another candidate, Larry Agran, used CompuServe in a similar fashion. *Id.*

66. For example, McClatchy's Legi-Tech provides online access to legislative bills. Don Clark, *Legislature Could Go Online at Lower Cost*, S.F. CHRON., May 14, 1993, at D1.

67. Joseph R. Duffus, *Going Online: The Bottom Line*, CONSUMERS' RES., Oct. 1991, at 14.

68. Weber, *supra* note 48. NEXIS and Dialog are services that fall into this category.

not want the information services to replace other sources of news. Fifty-two percent wanted it to help them cut down on the time spent on news.⁶⁹ Even as recently as 1990, information ranked fourth among the most popular uses of online services, behind chatting, entertainment, and commercial transactions, according to an industry analyst.⁷⁰

However, news from videotext does not have to be incompatible with news from more traditional sources. Some studies show a complementary, rather than substitutive, effect between broadcast news and newspapers;⁷¹ this relationship may also exist between traditional and electronic presses. Videotext news may help highlight stories of interest to the reader for perusal in the next day's newspaper.

More significantly, changes in reading habits and technology suggest that online services have the potential to become important players in the news industry. Online news may be able to capture the attention of readers that newspapers have lost, particularly young men and women. Newspaper readership has declined on a per capita basis, and, more importantly, readers under the age of thirty are not subscribing.⁷² The newspaper industry is beginning to realize that electronic publishing may attract the younger readers who do not read papers.⁷³ Several papers are now available in an online format.⁷⁴

From a technological standpoint, the growth potential of online services is tied to the availability of PCs and modems, and the ease of use of videotext. Since their introduction in the early 1980's, PCs have become nearly ubiquitous, growing in number from twenty-three million in 1985⁷⁵ to seventy-five million in 1993.⁷⁶ While modems are not nearly as common, studies indicate that as many as two-thirds of PC owners will

69. AUMENTE, *supra* note 1, at 115-20.

70. News ranks low partially because the analyst measured log-in time spent on each activity, and more log-in time is required for games or communicating than for reading news. Cutler, *supra* note 10, at 28.

71. David Shaw, *Young People Read, But Papers Aren't No. 1 Choice*, L.A. TIMES, Mar. 16, 1989, at A1.

72. David Shaw, *Luring the Young; For Papers, a Generation is Missing*, L.A. TIMES, Mar. 15, 1989, at A1.

73. E.g., Charles Haddad, *Cox's Electronic Newspaper May Be the Bait Needed to Get Kids Hooked*, ATL. J. AND CONST., July 11, 1993, at G6; David Shaw, *Inventing the 'Paper' of the Future*, L.A. TIMES, June 2, 1991, at A1.

74. Newspapers published by the Cox chain have been made available through Prodigy recently. *Cox Newspapers Going Online*, S.F. CHRON., July 8, 1993, at D3. The *San Jose Mercury News* has been available through America Online since May 1993. *Newspaper Starts Up Online News Service*, TIMES-PICAYUNE (New Orleans, La.), May 11, 1993, at C10; *America Online Expands Media Alliances*, LINK-UP, Nov. 1992, at 1.

75. AUMENTE, *supra* note 1, at 22.

76. Raymond Serafin, *Cars Find Ad Power in Computers*, ADVERTISING AGE, June 14, 1993, at 12.

eventually buy them.⁷⁷ Transmission speed⁷⁸ has been increasing steadily and prices have been dropping. In 1987, 300-baud modems were standard, with the cost of 1200-baud modems around \$200.⁷⁹ In 1992, 2400-baud modems cost less than \$100.⁸⁰

The other technologically limiting factor is the ease of use. One important difference between online news and traditional news is that the latter is organized by journalists for readers or viewers. Especially in a newspaper, readers can browse and jump around. Reading news online, on the other hand, may require the reader to know what he or she is seeking.⁸¹ Many industry executives involved with or formerly involved with videotext systems believe that extensive revision of text is necessary before news from papers can be made accessible to users. Such revision includes reformatting stories for the display dimensions of the screen or even rewriting the text.⁸² In the future, however, programs with rudimentary artificial intelligence capabilities may infer the user's preferences based on past searches.⁸³ Alternatively, "clipping" programs may help organize the deluge of information by having the user input his or her preferences for stories explicitly.⁸⁴

Finally, telephone companies can affect the future of online services significantly, depending on how they choose to respond to the lifting of restrictions against their entering the information market.⁸⁵ As of now, the telephone companies have been content to press for removal of the remaining restrictions on related aspects of the information market, without actual entry into the market.⁸⁶ Still, the fact that the telephone companies own a vast infrastructure of wires and cables connecting to nearly every home means that they have the potential to dominate the

77. AUMENTE, *supra* note 1, at 18.

78. Transmission speed is measured in bauds. A rate of 2400 baud is equivalent to six single spaced pages per minute. Duffus, *supra* note 67, at 12.

79. AUMENTE, *supra* note 1, at 18.

80. Duffus, *supra* note 67, at 12.

81. AUMENTE, *supra* note 1, at 24.

82. *Id.* at 139. In some cases, rewriting might be necessary because online readers would not flip through as many screens as would be necessary to offer the full story. *Id.*

83. *Id.* at 24-25.

84. John Eckhouse, *Choose Your Own News*, S.F. CHRON., July 26, 1993, at C1; Lawrence J. Magid, *Edited-Just-For-You News is Now Available in Your Desktop Computer Every Day*, L.A. TIMES, May 14, 1993, at D2.

85. As part of the 1982 consent decree obtained during antitrust litigation against AT&T, the Bell Operating Companies were prohibited from selling information electronically. U.S. District Court Judge Harold Greene lifted those restrictions in July, 1991. Warren G. Lavey & Dennis W. Carlton, *Economic Goals and Remedies of the AT&T Modified Final Judgment*, 71 GEO. L.J. 1497, 1503-05 (1983); Jennifer L. Rand, *Chapters: AT&T; The AT&T Consent Decree Revisited: Setting the Stage to Free the Baby Bells*, 59 Geo. Wash. L. Rev. 1103, 1103-04 (1992); Kent Gibbons, *A War on Hold; Newspapers, Phone Companies Edge Closer to Info-Truce*, WASH. TIMES, June 6, 1993, at A12.

86. Weber, *supra* note 42.

market.⁸⁷ This potential has frightened newspapers, who have tried to block the telephone companies' entry into market.⁸⁸ Yet there are indications that the telephone companies may be starting to test the market now. Pacific Bell recently announced plans to upgrade its communications system in California so that it may provide information and entertainment in addition to telephone service.⁸⁹ The project is expected to cost \$16 billion over the next seven years.⁹⁰

III. DIFFERING TREATMENT OF PAPER AND ELECTRONIC PUBLISHING: THE RIGGS (*PHRACK*) CASE

The law's inability or unwillingness to see the analogy between electronics and paper is illustrated by *United States v. Riggs*,⁹¹ a bizarre prosecution of a college student for wire fraud and interstate transportation of stolen property. The property consisted of an electronic copy of a phone company computer text file.⁹² Had the document been in paper form, legal precedent suggests that most of the charges filed against the defendants would have been dismissed.

The controversy in *Riggs* focused on an administrative document detailing BellSouth's enhanced 911 services (henceforth "E911 document").⁹³ In 1988, Robert Riggs, a twenty-year-old computer hacker,⁹⁴ tapped into BellSouth's computer network and came across the E911 document, which he duplicated electronically as a "trophy."⁹⁵

87. The question of which industry will dominate the interactive information services market may turn upon what the communications industry terms the "last mile" problem—the expense of extending to each home the fiber-optic wiring network that is in place for long-distance use. At present, most homes contain only copper telephone wire, which is in turn linked to fiber optic wiring at a local switching station. However, copper wire has a low "bandwidth," and therefore cannot yet accommodate two-way video data. The telephone companies are therefore faced with the choice of re-wiring, or developing compression technology. Cable companies, on the other hand, have the bandwidth, but not the market penetration; their wires extend to only 40% of households. Both industries are racing to capture the market, and it is unclear at this time who will be the first to enter. For background on this issue, see Philip Elmer-DeWitt, *Electronic Superhighway*, TIME, Apr. 12, 1993, at 50, and Andrew Kupfer, *The Race to Rewire America*, FORTUNE, Apr. 19, 1993, at 42.

88. Gibbons, *supra* note 85.

89. John Eckhouse, *PacBell Plans Information Superhighway*, S.F. CHRON., Nov. 12, 1993, at A1.

90. *Id.*

91. 739 F. Supp. 414 (N.D. Ill. 1990); *United States v. Riggs*, 743 F. Supp. 556 (N.D. Ill. 1990).

92. 739 F. Supp. at 416, 420.

93. *Id.* at 416-17. The title of the document was "BellSouth Standard Practice 660-225-104SV Control Office Administration of Enhanced 911 Services for Special Services and Major Account Centers dated March 1988." STERLING, *supra* note 22, at 116.

94. Hackers have been defined as "individuals involved with the unauthorized access of computer systems by various means." *Riggs*, 739 F. Supp. at 423. More generally,

Riggs then duplicated his copy of the E911 document and sent it electronically to Charles Neidorf, a nineteen-year-old University of Missouri student and publisher of *Phrack*, an electronic magazine.⁹⁶ Neidorf published *Phrack* regularly and had a list of subscribers to whom issues of the magazine were sent electronically.⁹⁷ Neidorf and Riggs edited the E911 document and published it in *Phrack*.⁹⁸ Those actions formed the basis for six of the eleven counts against Neidorf and Riggs.⁹⁹

The six counts in question were arranged in three pairs, each pair consisting of one count of wire fraud¹⁰⁰ and one of interstate transportation of stolen property¹⁰¹ for the same predicate act. Counts V and VI concerned Neidorf's retrieval of the E911 document from the electronic bulletin board where Riggs had deposited it.¹⁰² Counts VIII and IX concerned Neidorf's transmitting the edited document back to Riggs.¹⁰³ Counts X and XI concerned the publication of the issue of *Phrack* containing the edited document.¹⁰⁴ Because Neidorf lived in Missouri and Riggs lived in Georgia, each transmission between them crossed state lines.

Crucial to the prosecution's case was an estimate of the value of the allegedly stolen document. A conviction under 18 U.S.C. § 2314 requires that the stolen object be worth more than \$5,000.¹⁰⁵ The prosecutor in

hackers are individuals interested in opening up public access to computers and information. STERLING, *supra* note 22, at 53.

95. STERLING, *supra* note 22, at 116.

96. *Id.* at 128. The title is a mixture of "phreak" and "hacker." Whereas hackers are interested in computer systems themselves, phreaks manipulate systems to talk to one another in a manner such that a third party gets billed. *Id.* at 48-53.

97. *Id.* at 132.

98. *Id.* at 261-62.

99. *United States v. Riggs*, 743 F. Supp. 556, 558-59 (N.D. Ill. 1990). Four other counts charged Neidorf with wire fraud based on an alleged plot to "solidify the hacker community" against law enforcement officials. *Id.* These four counts raise freedom of speech issues beyond the scope of this comment. For more discussion on the general topic, see Eric C. Jensen, *An Electronic Soapbox: Computer Bulletin Boards and the First Amendment*, 39 FED. COMM. L.J. 217, 240-43 (1987); Edward J. Naughton, *Is Cyberspace a Public Forum? Computer Bulletin Boards, Free Speech, and State Action*, 81 GEO. L.J. 409, 419-28 (1992). One other count involved the Computer Fraud and Abuse Act. 18 U.S.C. § 1030(a)(6)(A) (1988).

100. 18 U.S.C. § 1343 (1988).

101. *Id.* § 2314.

102. *Riggs*, 743 F. Supp. at 558-59.

103. *Id.* at 559.

104. *Id.*

105. 18 U.S.C. § 2314. The statute reads in relevant part:

Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandize, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . [s]hall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

Riggs contended, based on a BellSouth estimate, that the E911 document was worth \$80,000.¹⁰⁶ During the trial, however, a BellSouth manager testified that the information in the E911 document was available to the public from a \$13 manual sold by Bell Communications Research.¹⁰⁷ At that point, the government dropped the charges against Neidorf.¹⁰⁸

Had Riggs made a paper copy of the E911 document rather than an electronic one, Neidorf probably would not have been prosecuted. A leading Supreme Court case, *Dowling v. United States*,¹⁰⁹ interpreted § 2314 as requiring "a physical identity between the items unlawfully obtained and those eventually transported, and hence some prior physical taking of the subject goods."¹¹⁰ Where the item taken is intangible, such as the copyright in *Dowling*,¹¹¹ § 2314 does not apply because the intangible rights are not stolen, converted, or taken by fraud.¹¹²

This holding does not mean that a good whose value stems from an "intangible component" cannot be stolen.¹¹³ The Court in *Dowling* cited two appeals court decisions, *United States v. Seagraves*¹¹⁴ and *United States v. Greenwald*,¹¹⁵ as examples of theft of goods where the value was intangible. In *Seagraves*, the goods were "geophysical maps identifying possible oil deposits," and in *Greenwald*, the goods were "documents bearing secret chemical formulae."¹¹⁶ *Dowling* makes clear that the results in these cases would have been different if the valuable information had not been contained in stolen goods.¹¹⁷

Riggs is distinguishable from these cases because Riggs did not take the original E911 document.¹¹⁸ BellSouth retained its original copy of the

Id.

106. STERLING, *supra* note 22, at 257; *Trial of Accused Computer Hacker Begins*, UNITED PRESS INT'L, July 24, 1990, available in LEXIS, Nexis Library, UPI File.

107. STERLING, *supra* note 22, at 276-77; 'These People Should Pay': *Neidorf Dismissal May Lead to Suits Against BellCore and BellSouth*, COMM. DAILY, July 31, 1990, at 2 [hereinafter 'These People Should Pay']. Bell Communications Research (BellCore) served as the research branch of the telephone companies. For an explanation of how BellSouth reached the \$80,000 figure, see STERLING, *supra* note 22, at 257-59.

108. STERLING, *supra* note 22, at 281; 'These People Should Pay,' *supra* note 107, at 2;

109. 473 U.S. 207 (1985).

110. *Id.* at 216.

111. The defendants manufactured "bootleg" vinyl records containing unreleased but copyrighted Elvis Presley recordings. *Id.* at 210.

112. *Id.* at 216-18.

113. *Id.*

114. 265 F.2d 876 (3d Cir. 1959).

115. 479 F.2d 320 (6th Cir. 1973), *cert. denied*, 414 U.S. 854.

116. *Dowling*, 473 U.S. at 216.

117. *Id.*

118. STERLING, *supra* note 22, at 117. The District Court opinion language is ambiguous, noting that Riggs "transferred" the document. *United States v. Riggs*, 739 F. Supp. 414, 417 (N.D. Ill. 1990). Interestingly, the Tenth Circuit considered a similar factual pattern in *United States v. Brown*, and concluded that computer programs did not fall within the

text file,¹¹⁹ so the most accurate analogy is not to theft but to photocopying. The fact that BellSouth retained its original copy of the document also militates against the *Riggs* court's analogy to theft of money by wire.¹²⁰ In wire theft cases, the original bank account is disturbed; in *Riggs*; the original document was not disturbed.

In a federal case, *United States v. Hubbard*,¹²¹ a court expressed serious doubts that photocopying documents could constitute theft, unless the theft consisted of the resources involved in making the copies.¹²² The court did not allow the prosecution to try the case based on a theft of information theory, but allowed the case to proceed on the theory that the photocopies made with government-owned copiers were government property.¹²³ This case suggests that *Riggs* could have been charged with theft on the theory that he used BellSouth's computer time to duplicate the E911 document.¹²⁴ *Riggs*' copy of the document, however, ceased to use BellSouth resources at the moment that he downloaded the copy into his computer. At that point, the copy became a series of 1s and 0s occupying a discrete portion of his computer's memory. When Neidorf accessed this copy, it had no "physical identity" with the binary digits of BellSouth's computer. *Riggs*' use of BellSouth's computer time differs from the use of a photocopier in *Hubbard*, though, because *Riggs* used only computer time. The equivalent act in *Hubbard* would have been for the defendants to have supplied their own paper and photocopier toner, so that their only impact was to deny others the use of the photocopier while they were using it. In this sense, *Riggs*' use is an intangible element, akin to labor.¹²⁵

scope of 18 U.S.C. § 2314. 925 F.2d 1301, 1308-09 (10th Cir. 1991). The court relied on an analysis similar to the one used in this comment involving *Dowling*. *Id.* at 1307-08. It also disagreed with the holding in *Riggs*. *Id.* at 1308. *But see* *Advent Systems Ltd. v. Unisys Corp.*, 925 F.2d 670, 672 (3d Cir. 1991) (concluding "that computer software is a good with the Uniform Commercial Code").

119. The text file consists of a series of binary digits, or bits, in the form of ones or zeros. The electronic copy that *Riggs* made created the same pattern of ones and zeros but left the original file undisturbed in the same memory address.

120. *Id.* at 420.

121. 474 F. Supp. 64 (D.D.C. 1979).

122. *Id.* at 79-80.

123. *Id.* at 80.

124. However, in *State v. McGraw*, 480 N.E.2d 552 (Ind. 1985), a court ruled that personal use of a government-leased computer did not constitute theft because the defendant did not deprive the city of "any part of the value or the use of the computer." *Id.* at 553. The court may have been influenced by the fact that the city leased the computer service at a fixed charge and that the city's use had not reached the limit of the computer's capacity. *Id.*

125. Intangibles are often not subject to being stolen. *See* *Chappell v. United States*, 270 F.2d 274, 276-278 (9th Cir. 1959) (having military personnel paint one's house held not to be theft). *But see* *United States v. Croft*, 750 F.2d 1354, 1359-1362 (7th Cir. 1984) (paying research assistants with public funds for private research held to be theft).

If the theory of the prosecution's case in *Riggs* were applied to the *Pentagon Papers* case,¹²⁶ one of the most famous clashes between government and major newspapers, it would lead to results inconsistent with existing authority. In the *Pentagon Papers*, Daniel Ellsberg, a former government analyst, photocopied a secret government study. Ellsberg had lawful possession of the study, subject to a prohibition against its reproduction.¹²⁷ In June 1971, he sent portions of the study from his office in California¹²⁸ to the *New York Times*, and on June 13, 1971, the *Times* began publishing a series of excerpts from the study.¹²⁹ The government obtained a temporary injunction barring further publication, beginning a controversy that eventually reached the U.S. Supreme Court.¹³⁰ Applying the government's interpretation of § 2314 and of Count VI in *Riggs* to *Pentagon Papers* suggests that the *Times* was guilty of receiving stolen property that had been transported across state lines. Similarly, Count XI, which charged Neidorf with transporting stolen property—the electronic magazine *Phrack*—across state lines suggests that once the *Times* published the edition that contained the *Pentagon Papers* stories, it, too, had transported stolen property across state lines.

Although the government took no criminal action against the *Times*, it prosecuted Ellsberg for theft and conversion of the *Pentagon Papers*.¹³¹ Because of "the totality of government misconduct," the court dismissed all charges.¹³² Because the trial was dismissed, there was no resolution of the merits of the government's case. Professor Nimmer has argued that Ellsberg could not have been found guilty of theft, primarily because Ellsberg did not have the requisite intent to deprive the government of the *Papers* permanently, intent being a crucial element of a theft charge.¹³³

When the two cases are compared, *Riggs* is analogous to Ellsberg and *Phrack* is analogous to the *New York Times*. Like Ellsberg, *Riggs* duplicated a confidential document and passed it to a publisher. Like the *New York Times*, *Phrack* accepted a duplicated confidential document and

126. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

127. Melville B. Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311, 312-13 (1974). For more information on the contents of the *Pentagon Papers*, see KENNETH W. SALTER, *THE PENTAGON PAPERS TRIAL* 1 (1975); *Pentagon Papers: The Secret War*, TIME, June 28, 1971, at 11 [hereinafter *Secret War*].

128. SALTER, *supra* note 127, at 1.

129. *Id.* at 2; *THE NEW YORK TIMES COMPANY V. UNITED STATES: A DOCUMENTARY HISTORY* 30 (1971).

130. The Supreme Court concluded that the government could obtain a prior restraint only in the event of the highest government interest. For more discussion, see *Secret War*, *supra* note 127, at 17.

131. *United States v. Russo*, No. 9373, *dismissed* (C.D. Cal. 1973); SALTER, *supra* note 127, at 14. The indictment naming Ellsberg and James Russo is reprinted in SALTER, *supra* note 127, at 14-17.

132. Nimmer, *supra* note 127, at 311.

133. *Id.* at 315-17.

published it. Because Riggs, like Ellsberg, did not possess the requisite intent to deprive Bell South of the E911 document permanently, he could not have "stolen" the E911 document.¹³⁴ If Riggs could not have stolen the document, then Neidorf could have neither received stolen property (Count VI), nor transported it across state lines (Count XI).

The *Riggs* case illustrates that courts have yet to see or to accept the analogy between the world of electronic publishing and the world of paper pulp. This lack of vision creates legal inconsistencies when online services seek to be classified as the press.

IV. ARGUMENT: THE LAW SHOULD TREAT ELECTRONIC SERVICES AS PART OF THE INSTITUTIONAL PRESS

A. The Conceptual Difficulty of Distinguishing the Press

The development of online services has made it virtually impossible to draw meaningful distinctions between the institutional press and online services without excluding some organizations that have traditionally been recognized as the press. Like the traditional media, online services provide information and specialized news such as stock market prices, sports scores, or headline events.¹³⁵ Like newspapers and magazines, online services provide this information in textual form. Although online services do not "publish" stories in paper form, neither do wire services such as Associated Press or Reuters.

1. THE LEGI-TECH CASES

A pair of conflicting federal cases involving a California corporation, Legi-Tech, illustrates the potential for confusion in trying to determine if an electronic service qualifies as a member of the press.¹³⁶

Legi-Tech takes legislative information from the California state government and makes it available to subscribers in an electronic online format.¹³⁷ The U.S. Court of Appeals for the Second Circuit held that Legi-Tech is a member of the press.¹³⁸ But when presented with the

134. As it was, he plea-bargained. *STERLING*, *supra* note 22, at 251-52; *ABA Examining Seizure Rules; Bell South Hackers Appeal Sentences*, *COMM. DAILY*, Nov. 28, 1990, at 2.

135. *See supra* notes 48-68 and accompanying text.

136. *National Republican Congressional Comm. v. Legi-Tech*, 795 F.2d 190 (D.C. Cir. 1986); *Legi-Tech v. Keiper*, 766 F.2d 728 (2d Cir. 1985).

137. Don Clark, *Legislature Could Go Online at Lower Cost*, *S.F. CHRON.*, May 14, 1993, at D1. Legi-Tech obtains much of its information from paper documents and scans them into computers optically. Robert Celaschi, *Legislation Breeds Computerized Cottage Industry*, *BUS. J. SACRAMENTO*, June 16, 1986, at 25.

138. *Keiper*, 766 F.2d at 730.

opportunity to hold the same way, the U.S. Court of Appeals for the District of Columbia Circuit declined.¹³⁹

In the Second Circuit case, *Legi-Tech v. Keiper*, the issue was whether a state statute denying Legi-Tech access to a "state-owned computerized database [containing] legislative information and . . . available through subscription to the general public" violated the corporation's First Amendment right of speech and of the press.¹⁴⁰ The statute prohibited the state from selling legislative information to "those entities which offer for sale the services of an electronic information retrieval system which contains data relating to the proceedings of the legislature."¹⁴¹ The legislature, in enacting the statute, appeared to be concerned that electronic services would be able to "free ride" on the state's expenditures in preparing the data.¹⁴² In its inquiry, the court consistently and explicitly accepted Legi-Tech as an "organ of the press"¹⁴³ and as "the private press."¹⁴⁴ It did so because providing information about legislative proceedings "is absolutely vital to the functioning of government and is . . . at the core of the First Amendment."¹⁴⁵

A year after *Keiper* was decided, *NRCC v. Legi-Tech* reached the D.C. Court of Appeals. The conflict in *NRCC* involved a provision of the Federal Election Campaign Act of 1971 (FECA)¹⁴⁶ that required political action committees to submit to the Federal Election Commission (FEC) a list of names and addresses of contributors who donated more than \$200 in any year.¹⁴⁷ These lists are public records and are available to the public for inspection and copying, although they may not be used for solicitation or commercial purposes.¹⁴⁸ An FEC regulation specifies that the commercial purposes ban does not apply to "newspapers, magazines, books or similar communications."¹⁴⁹ The commercial purposes ban perfectly illustrates the problem of defining the press, because it defines

139. *NRCC*, 795 F.2d at 190.

140. *Keiper*, 766 F.2d at 730. The court answered this question "maybe," remanding the case. The court recognized that a natural reading of the statute would deny access to "electronic newspapers," major wire services, LEXIS and WESTLAW. *Id.* at 732.

141. *Id.* at 731.

142. *Id.* at 735.

143. *Id.* at 730.

144. *Id.* at 733.

145. *Id.* at 732.

146. 2 U.S.C. § 434 (1988).

147. *Id.* § 434(b)(3)(A).

148. "[A]ny information copied from such reports or statements may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes . . ." *Id.* § 438(a)(4). The legislative history of the statute indicates that the solicitation and commercial uses ban was designed "to protect the privacy of the generally very public-spirited citizens who may make a contribution to a political campaign or a political party." 117 CONG. REC. 30,057 (daily ed. Aug. 5, 1971).

149. 11 C.F.R. § 104.15(c)(1992).

the protected class by way of analogy to newspapers, rather than by intent or function.

Legi-Tech began providing subscribers with online access to about 50,000 FEC reports in 1985.¹⁵⁰ Subscribers could create searches to identify, for example, which persons from a particular industry contributed to a particular candidate.¹⁵¹ Legi-Tech's database and sales brochures warned subscribers about the commercial uses and solicitation ban.¹⁵² The National Republican Congressional Committee, a political action committee, sought to protect its lists, which it considered one of its most valuable assets.¹⁵³ It attempted to copyright its donor lists and then sued Legi-Tech in U.S. District Court for copyright infringement.¹⁵⁴ The District Court rejected the Committee's claim on the ground that avoiding disclosure through a copyright "totally frustrated the Federal Election Campaign Act" ("FECA").¹⁵⁵ The Committee appealed to the D.C. Circuit, arguing that Legi-Tech's actions were expressly prohibited by the "commercial purposes" ban of the FECA.¹⁵⁶

The Court of Appeals rejected a literal reading of the commercial purposes ban, for such a reading "would bar newspapers and other commercial purveyors of news from publishing the information contained in those reports under any circumstances" and would be contrary to the intent of the disclosure provision of the FECA.¹⁵⁷ The court was also guided by the ban's legislative history, which indicated that its purpose was to protect donors from being pursued for contributions, for fear that such harassment would deter existing donors from making further donations.¹⁵⁸

The D.C. Circuit could have held that Legi-Tech, which the Second Circuit had deemed an organ of the press, qualified for the FEC regulation exempting newspapers and similar communications from the commercial purposes ban. However, the court declined to follow the

150. *NRCC*, 795 F.2d at 191. Legi-Tech supplemented the lists with phone numbers and addresses. Richard Corrigan, *GOP Draws Line Over Donors Going Online*, NAT'L J., Nov. 2, 1985, at 2489.

151. *NRCC*, 795 F.2d at 191.

152. *Id.* at 191 n.4.

153. Corrigan, *supra* note 150.

154. *NRCC*, 795 F.2d at 191. Subsequent U.S. Supreme Court cases cast serious doubts on whether a list of names could be copyrighted. *See Feist Publications, Inc. v. Rural Tel. Serv.*, 499 U.S. 340 (1991)

155. *Id.*

156. *Id.* at 192.

157. *Id.*

158. Senator Bellmon believed that without the ban, the Act would "open up the citizens who are generous and public spirited enough to support our political actions to all kinds of harassment." *Federal Election Comm'n v. Political Contributions Data*, 943 F.2d 190, 192 (2d Cir. 1991) (citing 117 CONG. REC. 30,057 (daily ed. Aug. 5, 1971)).

earlier decision. Instead, it held the case in abeyance until the FEC could interpret its regulation as applied to Legi-Tech.¹⁵⁹

Where interpretation of a statute is required, courts may defer to the agency responsible for administering the statute,¹⁶⁰ but deference is not absolute. This point can be clarified by the following hypothetical. Suppose a wire service, such as Reuters or United Press International, was preparing to distribute a list of donors as part of a story about campaign donations.¹⁶¹ Given the Republican Committee's possessiveness toward its donor list, it would likely have pursued similar action to enjoin its dissemination.¹⁶² A wire service is not a newspaper or a magazine, but the court could determine for itself that it is a "similar communication" without seeking the opinion of the FEC.¹⁶³ Therefore a court would most likely hold that Reuters or UPI falls within the FEC's exemption from the commercial purposes ban.

For a court to consider a wire service, but not an online service, "similar" to a newspaper,¹⁶⁴ ignores the fact that the two are equivalent in form and purpose. Both are subject to a literal reading of the commercial purposes ban because they are for-profit businesses whose incomes derive from the sales of news and information. Because they do not publish in paper form, they can qualify for the exemption only as a "similar communication" to a newspaper.

Newspapers are exempted from the ban because the FECA was designed to make the campaign contribution process accessible to the public.¹⁶⁵ To prohibit newspapers from printing information, even

159. NRCC, 795 F.2d at 194.

160. *Id.* at 193 (citing *Chevron, U.S.A. v. Natural Resources Def. Council*, 467 U.S. 837, 843 (1984), and *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981)).

161. The Associated Press wire service would not work for this example because it is a non-profit cooperative and therefore does not constitute commercial use. See THE ASSOCIATED PRESS STYLEBOOK AND LIBEL MANUAL 327 (Christopher French ed., rev. ed. 1987) [hereinafter A.P. STYLEBOOK].

162. See Corrigan, *supra* note 150.

163. Like newspapers, wire services present news and information in textual form, organized into discrete stories and often with by-lines identifying the person responsible for compiling and presenting the information. See generally, A.P. STYLEBOOK, *supra* note 161, at 327.

164. See generally *International News Service v. Associated Press*, 248 U.S. 215, 229 (1918) (noting that Associated Press is in the business of gathering and distributing news).

165. The following exchange between Senators Bellmon and Nelson from the legislative history makes clear that the commercial uses ban was not meant to apply to newspapers:

Mr Nelson: Do I understand that the only purpose is to prohibit the lists from being used for commercial purposes?

Mr. Bellmon: That is correct.

Mr. Nelson: The list is a public document, however.

Mr. Bellmon: That is correct.

names, would be contrary to the intent of the Act.¹⁶⁶ The court in *Keiper* considered information about pending legislation "absolutely vital to the functioning of government."¹⁶⁷ Information about the political contribution process is no less vital.¹⁶⁸ A wire service that disseminated the lists would contribute to the flow of information and ideas indirectly by way of the journalists who republish the information. An online service such as Legi-Tech increases public access to information in the same way. Conceivably, wire services or online services could contribute directly to public information through its subscribers.

One obvious difference between online services and newspapers is the ability of the former to sift through information selectively. Online services, moreover, can charge a variable fee based on number of items accessed, a feature that makes them resemble services that provide specialized donor lists.¹⁶⁹ It is this sale of potential political contributors' names, or list donors, that the FECA sought to prohibit.¹⁷⁰

For that purpose, the ban is unnecessary. The FEC already employs a tool known as salting to restrain list brokers. Each political action committee is allowed to submit, with its list of contributors, up to ten pseudonyms.¹⁷¹ If an organization subsequently solicits contributions from the pseudonyms, the political action committee can file a complaint with the FEC. Because the FEC knows which names are pseudonyms, it can determine if organizations are using its public lists. A comparison of *Federal Election Commission v. Political Contributions*¹⁷² with *Federal Election Commission v. International Funding Institute*¹⁷³ is informative. In *Political Contributions*, the defendant (PCD) sold the lists in hardcopy form as

Mr. Nelson: And newspapers may, if they wish, run lists of contributors and amounts.

Mr. Bellmon: That is right; but the list brokers, under this amendment, would be prohibited from selling the list or using it for commercial solicitation.

Federal Election Comm'n v. Political Contributions Data, 943 F.2d 190, 192 (2d Cir. 1991)(quoting 117 CONG. REC. 30,058 (daily ed. Aug. 5, 1971)).

166. National Republican Congressional Comm. v. Legi-Tech, 795 F.2d 190, 192 (D.C. Cir. 1986).

167. Legi-Tech v. Keiper, 766 F.2d 728, 732 (2d Cir. 1985).

168. Legi-Tech's slogan took advantage of this principle: "Now you can learn whose money talks. And who listens." Corrigan, *supra* note 150.

169. This difference, however, may not be sufficient to justify differential treatment. As discussed in Part I of this comment, some newspapers are going online. See *supra* notes 72-74 and accompanying text. These organizations could charge variable rates and still qualify as the press in all likelihood.

170. Federal Election Comm'n v. Political Contributions Data, 943 F.2d 190, 196 (2d Cir. 1991).

171. 2 U.S.C. § 438(a)(4)(1988).

172. 943 F.2d 190.

173. 969 F.2d 1110 (D.C. Cir. 1992).

political information, not as solicitation sources. PCD labeled every page of its reports with the warning: "This report may not be used or sold by any person for the purpose of soliciting contributions or for any commercial purpose."¹⁷⁴ Of the 100 persons who purchased PCD reports, only two intended to use them for solicitation purposes, and neither actually did so.¹⁷⁵ In holding that PCD had not violated the commercial purposes ban, the Second Circuit Court reasoned that the salting provision preserved the intent of the statute: to protect contributors.¹⁷⁶ On the other hand, in *International Funding*, the defendant sold the list to the co-defendant, who used the list to solicit political contributions. Even without the commercial purposes ban, the co-defendant would have been guilty of violating the solicitation ban; guilt would have become evident after the co-defendant sent mailings to the pseudonyms on the FEC list. Vigorous enforcement of the solicitation ban through salting would also deter list brokers, for it would make lists obtained from the FEC virtually worthless.¹⁷⁷

Political Contributions and *NRCC* also show the difference between the law's perception of paper versus electronics. Both organizations sold information based on the FEC's contributor lists, without intent to solicit and with warnings to customers about the solicitation ban. The fact that *Legi-Tech* included addresses in its database, while PCD did not, makes *Legi-Tech*'s service more valuable to a potential solicitor. However, PCD's reports could still be useful to a potential solicitor who did not wish to or was unable to subscribe to *Legi-Tech*. PCD's reports included contributions "by officers and upper-level employees of the 700 largest United States corporations."¹⁷⁸ A potential solicitor could, without much effort, take PCD's list, obtain the corporate addresses of the contributors, and solicit those donors. *Political Contributions Data* did not violate the commercial purposes ban, yet *Legi-Tech* did.

To the extent that the commercial purposes ban should be retained, it should address the intent behind the dissemination.¹⁷⁹ Thus, the ability of online services to organize and process information can benefit the

174. *Political Contributions*, 943 F.2d at 193.

175. *Id.* at 197. One of the two was dissuaded by PCD's warning label.

176. *Id.*

177. A list broker who lied about the source of the contribution list presumably would be guilty of fraud or misrepresentation. See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 728 (5th ed. 1984).

178. *Political Contributions*, 943 F.2d at 193.

179. Although this may present problems of proof in an action by the FEC, a scienter requirement is not insurmountable, as demonstrated through other actions with a similar requirement. Intentional misrepresentation, for example, has a scienter requirement. *Id.* at 741. Similarly, under libel, a public figure plaintiff must establish knowledge of falsity or reckless disregard for the truth on the part of the defendant. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

public through more efficient and thorough analyses of that information, or it can harm the public if donors are harassed, as Congress feared. Newspapers are presumed to benefit the public; online services should also be presumed to benefit, not harm, the public.

2. JUDICIAL AND SCHOLARLY COMMENTARY

An expansive reading of "press" to include online services is consistent with judicial and scholarly commentary on the Press Clause. In *von Bulow by Auersperg v. von Bulow*,¹⁸⁰ a federal court held that a qualified privilege to refuse to testify in a trial¹⁸¹ as to the identities of confidential sources extended to anyone "involved in activities traditionally associated with the gathering and dissemination of news, even though he may not ordinarily be a member of the institutionalized press."¹⁸² The entity claiming the privilege had to demonstrate an intent existing "at the inception of the newsgathering process" to disseminate information.¹⁸³ Under this test, employees of online services would qualify for the privilege, as they gather information with the intent of making it available (publishing it) for subscribers.¹⁸⁴

In *Branzburg v. Hayes*,¹⁸⁵ Justice White wrote for the majority, "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."¹⁸⁶ Therefore the Court did not limit its conception of freedom of the press to newspapers and periodicals.¹⁸⁷

Five years later, Chief Justice Burger continued this line of reasoning in a corporate speech case, *First National Bank of Boston v. Bellotti*.¹⁸⁸ In concurring that corporate speech informing the public on political matters could not be denied First Amendment protection, Burger saw "no difference between the right of those who seek to disseminate ideas by

180. 811 F.2d 136 (2d Cir. 1987).

181. *von Bulow*, 811 F.2d at 142.

182. *Id.* The holding in *von Bulow* diverges from that in *Branzburg v. Hayes*, 408 U.S. 665, 708-09 (1972), in which the Court refused to allow journalists to withhold the identities of confidential sources from grand juries. The *von Bulow* court reconciled its decision with *Branzburg* by noting the different settings in the cases: grand jury investigation versus civil trial. *Branzburg* was based on the "traditional importance of grand juries and the strong public interest in effective criminal investigation." *Id.*

183. *Id.* at 144.

184. An example of gathering information without the intent of dissemination is found in *von Bulow*. The person claiming the privilege worked as a paralegal in the defendant's murder trial and gathered the information at the heart of the auxiliary litigation in that capacity. Only later did she decide to write a book. *Id.* at 146.

185. 408 U.S. 665 (1972).

186. *Id.* at 704 (quoting *Lovell v. Griffin*, 303 U.S. 444, 452 (1938)).

187. *Id.*

188. 435 U.S. 765 (1978).

way of a newspaper and those who give lectures or speeches In short, the First Amendment does not 'belong' to any definable category of persons or entities: It belongs to all who exercise its freedoms."¹⁸⁹

These cases illustrate the judiciary's belief that freedom of the press should extend beyond the institutional press. This observation holds true even though *Bellotti* and *Branzburg* are cases in which the Court has declined to expand the rights of the institutional press beyond those enjoyed by the general public. What is significant is that the Court in these cases has read equality into the Press Clause. The Court refused to make the institutional press stronger than the non-institutional press. Therefore, the institutional press today should not receive more privileges than electronic information services operating as the electronic press.

Alternatively, online services can qualify as press under various definitions proposed by legal scholars. Many of these theories have in common the idea that the role of the press in American society is to monitor government abuses, and that "press" encompasses publications that disseminate political information and opinion.¹⁹⁰ Justice Potter Stewart, in a speech at Yale Law School, stated:

In setting up the three branches of the Federal Government, the Founders deliberately created an internally competitive system The primary purpose of the constitutional guarantee of a free press was a similar one: to create a fourth institution outside the Government as an additional check on the three official branches [T]he free press meant organized, expert scrutiny of government.¹⁹¹

Professor Blasi also considers the press' primary function to be that of checking the "particular problem of misconduct by government officials."¹⁹²

Such an approach helps determine which entities would qualify as the press. Any organization that acted in the role of the press would be protected as the press.¹⁹³ Thus, a manufacturer that decided to publish a newsletter would be, for the purposes of that newsletter, part of the press. Conversely, a newspaper that decided to manufacture a good could not claim First Amendment privileges with respect that product.¹⁹⁴

189. *Id.* at 802.

190. Randall P. Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731, 784-85 (1977); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 554-67; Robert D. Sack, *Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press*, 7 HOFSTRA L. REV. 629, 630-37 (1979); Potter Stewart, "Of the Press," 26 HAST. L.J. 631, 634-36 (1975).

191. Stewart, *supra* note 190, at 634.

192. Blasi, *supra* note 190, at 558.

193. Sack, *supra* note 190, at 632-33.

194. *Id.* at 633.

Under such theories, many online services would qualify as the press, so long as they provided up-to-date or recent news or information concerning the government or government activity.¹⁹⁵ The relevant information could be narrowly defined—limited to that relating to government abuse—or more broadly defined—including any information that enables the populace to make political decisions. A narrower definition obviously would mean that fewer online services would qualify as press. That same definition, however, would disqualify many traditional newspapers and magazines. In any case, *Legi-Tech*, which provides political information, should qualify as the press under any definition. *Phrack*, in publishing the E911 document, was providing information related to a local government service.¹⁹⁶ Therefore *Phrack*, in its irreverent way, was providing its subscribers with the sort of information in the role contemplated by these legal commentators.

In 1947, a group of mass communications academics formulated a more expansive definition of press. These academics formed the Commission on Freedom of the Press,¹⁹⁷ and issued a report in which they established five societal needs that the media should provide: (1) “a truthful, comprehensive, and intelligent account of the day’s events in a context which gives them meaning”;¹⁹⁸ (2) “a forum for the exchange of comment and criticism”;¹⁹⁹ (3) “a means of projecting the opinions and attitudes of groups in the society to one another”;²⁰⁰ (4) “a method of presenting and clarifying the goals and values of the society”;²⁰¹ and (5) “a way of reaching every member of society by the currents of information, thought and feeling which the press supplies.”²⁰²

195. See Blasi, *supra* note 190, at 556-58.

196. The effectiveness of the 911 system became an issue in a tragic 1993 San Francisco incident in which there was a four-minute delay in police response to a 911 call. During that time, a deranged gunman shot and killed eight lawyers in a highrise building. Ultimately, investigators found that the delay did not exacerbate the massacre, though they had to conduct a detailed inquiry. Susan Sward, *Probe Finds 911 Delay Didn't Cost Any Lives*, S.F. CHRON., July 10, 1993, at A1.

197. The Commission consisted primarily of a group of academics in the field of law, but also included a few prominent officials. Formed in 1943, the group’s purpose was to inquire “into the present state and future prospects of the freedom of the press.” COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS at v (1947) [hereinafter FREE PRESS].

198. *Id.* at 20.

199. *Id.*

200. *Id.* at 20-21.

201. *Id.* at 21.

202. *Id.* The Commission noted that all five criteria might not be satisfied, certainly not by one medium.

Online services meet these demands at least as effectively as newspapers.²⁰³ Truthfulness and accuracy of reporting is a function of the competence of the person compiling the information, so the means by which the information is disseminated is irrelevant.²⁰⁴ As it is, many online services simply provide links to existing wire services, in which case the truthfulness and accuracy of online services and the institutional press are identical.

Online services can fulfill the second purpose of the press, that of providing a forum for "public discussion,"²⁰⁵ in a manner superior to that of the institutional press. The Commission suggested that the press could serve this function in a number of ways, including letters to the editor, public statements reported as news, magazine articles, or advertisements.²⁰⁶ None of these options approaches a "public discussion" as closely as electronic bulletin boards.²⁰⁷ Discussion groups on these boards allow users to communicate with one another almost instantaneously.²⁰⁸

The ability of online services to fulfill the third and fourth goals of the Commission is also connected to the public discussion feature of online services. The Commission was concerned about stereotypical portrayals of different social and ethnic groups, for inaccurate stereotypes "tend to pervert judgment."²⁰⁹ The Commission hoped that the press would overcome this problem by exposing different groups "to the inner truth of the life of a particular group."²¹⁰ Through discussions on electronic bulletin boards and other related services, online services can expose different social groups to one another more efficiently than newspapers can.

Finally, online services are particularly well-suited to provide users with a variety of news and information. In this regard, they can meet the fifth criterion far more effectively than the traditional press.

Therefore, treating online services as equivalent to the press is consistent with judicial opinions that extend freedom of the press to any

203. Not all online services actually will, just as not all newspapers or magazines will. For example, the tabloid *National Enquirer* does not meet these criteria as much as the *Los Angeles Times* does.

204. In fact, the Commission seemed concerned about reporting biases. FREE PRESS, *supra* note 197, at 22.

205. *Id.* at 23.

206. *Id.* at 24.

207. Electronic bulletin boards are available through commercial online services or through private operators. The conferences on the private bulletin boards are similar to those through online services. Duffus, *supra* note 67, at 16; *see also* Jensen, *supra* note 99, at 218.

208. See Schwartz, *supra* note 64, for an example of an online political conference.

209. FREE PRESS, *supra* note 197, at 26.

210. *Id.* at 27.

organization engaged in the process of distributing information to the public. It also comports with academic theories that the press should include all organizations that disseminate information relating to the government and politics.

B. Equal Protection

Any statutory definition of press constitutes a classification scheme and is therefore subject to the Equal Protection Clause of the Fourteenth Amendment.²¹¹ The Equal Protection Clause guarantees that entities that are "similarly situated" will be treated similarly.²¹²

Historically, the Supreme Court has applied two levels of equal protection review.²¹³ Socioeconomic laws are generally subject to a "mere rationality" or "minimal scrutiny" test.²¹⁴ Statutes that impair so-called fundamental rights receive strict scrutiny.²¹⁵ If government regulations of online services are held to impair freedom of speech or of the press, both of which are fundamental rights, such regulations would receive strict scrutiny.²¹⁶ If not, such regulations would receive minimal scrutiny.

1. STRICT SCRUTINY

Under strict scrutiny, the Court applies a balancing test, considering the compelling state interest in the regulation against the burden it imposes on the affected class. In practice, strict scrutiny is generally fatal.²¹⁷

Any regulation that affects fundamental rights must serve a compelling state interest in order to be constitutional. Strict scrutiny

211. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

212. LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1437-38 (2d ed. 1988).

213. There is also an intermediate level of scrutiny, used primarily in gender discrimination cases. See *Craig v. Boren*, 429 U.S. 190 (1976). An in-depth discussion of Equal Protection analysis is beyond the scope of this article. For more background, see TRIBE, *supra* note 212, at 1436-55; Gerald Gunther, *The Supreme Court 1971 Term Foreword: In Search of Evolving Doctrine On a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Johnny C. Parker, *Equal Protection Minus Strict Scrutiny Plus Benign Classification Equals What? Equality of Opportunity*, 7 PACE L. REV. 213, 222-26 (1991); Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 162-63 (1984); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344-53 (1949).

214. TRIBE, *supra* note 212, at 1439; Shaman, *supra* note 213, at 162; see *F.S. Royster Guano v. Virginia*, 253 U.S. 412, 415 (1920); *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-80 (1911).

215. TRIBE, *supra* note 212, at 1451; Shaman, *supra* note 213, at 163; see *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (right to interstate migration); *Douglas v. California*, 372 U.S. 353, 357-58 (1963) (right to assistance of counsel on appeal).

216. See, e.g., *Harris v. McRae*, 448 U.S. 297, 322 (1980).

217. Gunther, *supra* note 213, at 8.

analysis therefore begins by examining the compelling state interest motivating the regulation. If there is no such state interest, the statute will be overturned.

One state interest that may justify unequal treatment of different media is technological scarcity. In *Red Lion Broadcasting Co. v. Federal Communications Commission*,²¹⁸ the Court imposed an affirmative duty on a radio station to adhere to a so-called "Fairness Doctrine." In *Miami Herald Publishing Co. v. Tornillo*,²¹⁹ the Court refused to impose a similar duty on a newspaper. Neither case involved the Equal Protection Clause, but the material facts were so similar that only a compelling state interest could justify the differing treatment.

In *Red Lion*, the Court upheld the FCC's Fairness Doctrine, which required radio and television broadcasters to cover all sides of public issues fairly. The radio station broadcast a program that personally attacked an author, and alleged that he had been fired for making false accusations and had worked for a Communist-affiliated publication. When the radio station denied the author equal reply time, he successfully sued for relief.²²⁰ Just five years later, however, the Court in *Tornillo* refused to uphold a Florida statute that required newspapers to provide a "right of reply" to candidates attacked in the press.²²¹

Curiously, *Tornillo* makes no mention of *Red Lion*.²²² The *Tornillo* Court supported its decision on the grounds that the right of reply forced newspapers to publish items they did not want to publish and therefore was similar to a restraint on publication.²²³ Furthermore, by compelling papers to print replies, the government imposed a penalty in the form of printing costs and reduced space, so that editors could not freely determine the content of their papers.²²⁴ All of these concerns were present in *Red Lion*. Forcing the radio station to air a reply acts as a restraint on broadcasting. Compelling the station to air a reply also reduces the amount of airtime available for other items,²²⁵ and intrudes on the rights of broadcasters to determine the content of their broadcasts.

The Court's rationale in *Red Lion* stemmed from a perceived scarcity of broadcast frequencies.²²⁶ In the absence of government licensing

218. 395 U.S. 367, 375 (1969).

219. 418 U.S. 241, 244, 258 (1974).

220. *Red Lion Broadcasting Co. v. Federal Communications Comm'n*, 395 U.S. 367, 371 (1969).

221. *Tornillo*, 418 U.S. at 258.

222. Justice White, who wrote the majority opinion in *Red Lion*, filed a concurring opinion in *Tornillo* and also ignored the earlier case.

223. *Tornillo*, 418 U.S. at 256.

224. *Id.* at 258.

225. In fact, the Court in *Tornillo* recognized that this problem affected newspapers less than it did broadcasters. *Id.* at 256-57.

226. *Red Lion*, 395 U.S. at 375-76.

during the first quarter of the twentieth century, broadcasters cluttered the airwaves and interfered with one another's broadcasts in an attempt to capture frequencies.²²⁷ Government licensing solved that problem, but limited the number of broadcasters.²²⁸ To counteract this reduction in diversity of voices, the government imposed on the broadcasters a duty to uphold the public's right to receive a diverse range of ideas.²²⁹ The Court held that "[i]t is the right of the viewers and listeners, not the right of broadcasters, which is paramount."²³⁰

Online services, however, are not subject to technological scarcity.²³¹ The operation of one service does not preclude another from operating in the way that one broadcast precludes others. In *Red Lion*, the Court showed its concern with this problem by comparing competing broadcasts to sound-amplifying equipment with the potential to drown out other speech.²³² Rather than competing, online services may complement each other. To disseminate information, an online service requires a computer, database, multiple telephone lines, and modems. Those same computer, telephone lines, and modems can be used to access another online service.²³³

Spectrum scarcity, which justifies the regulation of broadcasters, represents the compelling state interest justifying discriminatory treatment between print publishers and broadcasters; it does not justify different treatment of online services and print publishers. Thus, strict

227. *Id.*; see ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 115, 117 (1983); Lynn Becker, *Electronic Publishing: First Amendment Issues in the Twenty-First Century*, 13 *FORD. URB. L.J.* 801, 839-40 (1985).

228. *Red Lion*, 395 U.S. at 377; POOL, *supra* note 227, at 116-19; Becker, *supra* note 227, at 840.

229. *Red Lion*, 395 U.S. at 377, 389.

230. *Id.* at 390.

231. Pool argues that spectrum scarcity was no longer a problem even as early as the time of *Red Lion* (1969). POOL, *supra* note 227, at 142. Other commentators have criticized the theory of spectrum scarcity as being inaccurate. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 31-33 (4th ed. 1992) (arguing that broadcast frequencies can be thought of as transferable property rights that will end up in the hands of those willing to pay the most for them). Furthermore, empirical evidence indicates that most major cities have several different news broadcasts from the major networks, plus additional local broadcasts. Most, however, have only one or two competing newspapers. Eric J. Gertler, *Michigan Citizens for an Independent Press v. Attorney General: Subscribing to Newspaper Joint Operating Agreements or the Decline of Newspapers?*, 39 *AM. U.L. REV.* 123, 129-31 (1989) (discussing the decline in number of newspapers per city); Robbie Steel, *Joint Operating Agreements in the Newspaper Industry: A Threat to First Amendment Freedoms*, 138 *U. PA. L. REV.* 275, 277-79 (1989) (same). By the end of the 1980's, only 44 cities had competing newspapers. Almost half the states had only one paper. MELVIN MENCHER, *NEWS REPORTING AND WRITING* 67 (5th ed. 1991).

232. *Red Lion*, 395 U.S. at 387.

233. This assumes many small online services, somewhat like the proliferation of electronic bulletin board services..

scrutiny will invalidate all regulations distinguishing between online services and print publishers.

In the event that a statute regulating online services does serve a compelling state interest, the statute must be necessary to serve that interest. Thus, a statute regulating online services cannot survive strict scrutiny if there is a less onerous means of achieving the state interest.²³⁴

Under such analysis, the FEC statute in the Legi-Tech case, for example, should almost certainly be struck down. The compelling state interest of protecting donors from harassment does not require a ban on commercial purposes; a ban on solicitations will serve the state interest without infringing on online services' freedom of speech and press.²³⁵

2. MINIMAL SCRUTINY

Not every regulation will receive strict scrutiny. The Court will not hold that a statute impairs freedom of speech or press simply because it makes some aspect of publishing more difficult. For example, the First Amendment does not give the press a right of access superior to that of the public, even though denial of access to government information or property impairs the ability of newspapers to gather information for stories.²³⁶ The Court will evaluate regulations that do not impair fundamental liberties under minimal scrutiny. Such regulations will survive if there is a rational connection between the "nature of the class singled out" and the purposes intended by the legislative or administrative rule.²³⁷

Exactly what constitutes a rational connection is not clear. In *Lindsley v. Natural Carbonic Gas Co.*, the Court said a classification scheme would be overturned only if it was "purely arbitrary."²³⁸ Nine years later, the Court promulgated an apparently stricter standard: the scheme must have "a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."²³⁹ In the 1980s,

234. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Dunn v. Blumstein*, 405 U.S. 330 (1972).

235. See *supra* note 171 and accompanying text.

236. *Houchins v. KQED*, 438 U.S. 1, 9-12 (1978); see also *Los Angeles Free Press v. Los Angeles*, 9 Cal. App. 3d 448, 455-57 (1970) (upholding a city policy of issuing press passes only to members of the press who report regularly on police and fire news).

237. *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966). At times, the Court has invalidated laws where the purposes of the legislative rule were not legitimate. E.g., *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 876-882 (1985) (invalidating a statute aimed at promoting domestic business by discriminating against nonresidents as illegitimate in purpose). For the purposes of this section, however, illegitimate purposes will not be considered.

238. 220 U.S. 61, 78. (1911)

239. *Royster Guano v. Virginia*, 253 U.S. 412, 415 (1920).

some cases have followed this tighter standard,²⁴⁰ others have cast doubt on it.²⁴¹

Professors Joseph Tussman and Jacobus tenBroek have suggested that the rationality of a classification be analyzed by considering the relation between the trait defining the target group and the harm sought to be prevented (or the good sought to be furthered).²⁴² Five possible relations exist between the trait and the harm:

- (1) Perfect Correlation: Everyone with the trait contributes to the harm, and everyone contributing to the harm has the trait. This is the paradigmatic goal of a classification scheme.
- (2) Perfect Lack of Correlation: No one with the trait contributes to the harm. Without any correlation, there obviously is no rational relationship, and the statute would fail minimal scrutiny.
- (3) Underinclusive: Everyone with the trait contributes to the harm, but some who contribute to the harm do not have the trait.
- (4) Overinclusive: Everyone contributing to the harm has the trait, but some with the trait do not contribute to the harm.
- (5) Under and overinclusive: Some, but not all, with the trait contribute to the harm, and some, but not all, who contribute to the harm have the trait.²⁴³

Any definition of the press will likely be both underinclusive and overinclusive. Consider the FEC classification in the *Legi-Tech* case. The trait in this case is paper publication.²⁴⁴ The good sought is increased disclosure of the campaign process.²⁴⁵ The classification is underinclusive because not all newspapers, books, and magazines lead to increased disclosure of the campaign process, only those with political coverage.²⁴⁶ But the classification is also overinclusive because some entities that contribute to the disclosure of the campaign process are not newspapers, books or magazines.²⁴⁷ Classifications that are under and overinclusive are not necessarily unconstitutional, though they may appear to be

240. *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *Quiban v. U.S. Veterans Admin.*, 713 F. Supp. 436, 443 (D.D.C. 1989).

241. *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 294 (1982) ("[I]t is unclear whether this Court would apply the *Royster Guano* standard to the present case.").

242. Tussman, *supra* note 213, at 344-53.

243. *Id.* at 347-48.

244. 11 C.F.R. § 104.15(c)(1993)..

245. See *supra* note 157 and accompanying text.

246. For example, the tabloid *National Enquirer* covers only celebrity news, and yet it is certainly a magazine. See *Burnett v. National Enquirer*, 193 Cal. Rptr. 206, 210 (Cal. App. 1983) (basing decision on the fact that the *Enquirer* was a magazine and not a newspaper for the purposes of California retraction statute).

247. E.g., *Legi-Tech*.

unreasonable. Underinclusive statutes are often upheld on the theory that the government is allowed to solve problems piecemeal.²⁴⁸

The Court almost always upholds statutes under minimal scrutiny.²⁴⁹ Two of the unusual decisions in which it has not are *Zobel v. Williams*²⁵⁰ and *United States Department of Agriculture v. Moreno*.²⁵¹

Zobel concerned the state of Alaska's 1980 distribution scheme of revenue from oil reserves to residents. The plan allotted each resident one dividend unit for each year of residency since 1959, the first year of statehood. Thus, a person who began residing in Alaska in 1979 would receive one unit in 1980, while a person who began residing in 1959 would receive twenty-one units in 1980.²⁵² Alaska claimed that its plan created a "financial incentive" for migration to the state, encouraged prudent management of its income stream, and recognized contributions made by residents during residency.²⁵³ The Court held that the first two objectives were not rationally related to the distinction made between residents who had been in the state since 1959 and those who arrived after 1959 but prior to 1980 when the plan was enacted.²⁵⁴ Any incentive to stay would not be increased by issuing larger dividends for residency during the twenty-one years prior to the enacting of the plan. Similarly, providing benefits for the prior twenty-one years of residency did not rationally serve the state interest in managing the fund prudently. The Court also held that the third objective was not a legitimate legislative purpose.²⁵⁵

Moreno struck down a provision of the Food Stamp Act of 1964 that denied food stamp access to households containing individuals not related to other members of the household.²⁵⁶ The Court held that the provision was not rationally related to a governmental goal of preventing fraud, because it would tend to affect "not those persons who are 'likely to abuse the program' but, rather, *only* those persons who are so

248. *Railway Express Agency v. New York*, 336 U.S. 106, 110 (1949) ("[I]t is no requirement of equal protection that all evils of the same genus be eradicated or none at all."). But see Justice Jackson's concurring opinion: "The equal protection clause ceases to assure either equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those left free." *Id.* at 115.

249. *E.g.*, *Shaman*, *supra* note 213, at 162; see also *TRIBE*, *supra* note 212, at 1442-43.

250. 457 U.S. 55 (1982).

251. 413 U.S. 528 (1973); see also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (striking down an Illinois statute that randomly deprived persons of claims of employment discrimination).

252. *Zobel*, 457 U.S. at 57.

253. *Id.* at 61.

254. *Id.* at 61-63.

255. *Id.* at 63.

256. *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 529 (1973).

desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility."²⁵⁷

Zobel and *Moreno* demonstrate that the Court can give the minimal scrutiny test some bite. These are, of course, exceptionally rare cases, and the vast majority of statutes survive minimal scrutiny. Still, *Zobel* suggests that a statute that favors one class of persons over others will be invalidated if the beneficial treatment does not advance the statute's objective. *Moreno* suggests that a law is irrational if it can be easily avoided by those it is intended to affect, but cannot be avoided by a different, unrelated group.

Therefore, a statute that distinguishes between the paper and electronic presses could be struck down under *Zobel* if the special treatment afforded the paper press does not advance the statute's objectives. Since the major difference between the two media is their manner of transmission, the objective of the statute must bear some nexus to the use of paper pulp instead of digital electronics. This is not inconceivable. A statute dealing with the production side of the media's production business, as opposed to its dissemination of information, could differentiate rationally between paper and electronic presses. But a provision such as the FECA's commercial purposes ban could be struck down under *Moreno*, since its targets—list brokers—can avoid punishment by putting their lists into a form similar to those of Political Contributions Data²⁵⁸ and by claiming that they sell the lists for academic or political use, not for solicitation purposes.

Although the courts generally defer to legislatures when applying minimal scrutiny, statutes distinguishing between the institutional press and online services may not survive even this lowest level scrutiny.

C. Speaker-Based Discrimination

The First Amendment, independent of the Equal Protection Clause, may invalidate regulations or statutes that treat online services differently from newspapers. Scholars have suggested that the First Amendment includes a concept of equality not unlike that guaranteed by the Equal Protection Clause.²⁵⁹ This position helps explain why the court reviews

257. *Id.* at 538 (emphasis in original).

258. See *supra* note 175 and accompanying text.

259. Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 201-02 (1983) see *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

content-based and content-neutral regulations under different standards of analysis.²⁶⁰

Content-based regulations, those that discriminate on the basis of the content of the speech, bear a strong presumption of unconstitutionality.²⁶¹ The Court reviews such regulations under strict scrutiny similar to the standard applied in equal protection cases.²⁶² Constitutional protection from content-based discrimination stems from the principle that the government should not be able to foreclose views of which it disapproves.²⁶³ Content-neutral regulations—otherwise known as “Time, Place, and Manner” regulations—affect the noncommunicative impact of speech without reference to the inherent ideas or data.²⁶⁴ Content-neutral regulations will be upheld so long as they do not “unduly constrict the flow of information or ideas.”²⁶⁵

Regulations affecting online services generally would not be content-based, but rather speaker- or medium-based, because they treat some speakers differently from others.²⁶⁶ It is not clear whether speaker-based restrictions should be treated as equivalent to content-based or content-neutral regulations, or as something in between.²⁶⁷ Speaker-based regulations do not necessarily infringe on the First Amendment more than content-neutral regulations.²⁶⁸ On the other hand, like content-based regulations, speaker-based regulations empower

260. Stone points out that the explanation is not adequate by itself because it fails to account for the Court’s use of two standards for content-based discrimination, one of which does not focus at all on equality. Stone, *supra* note 259, at 202.

261. Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 202, 203-07 (1982); Stone, *supra* note 259, at 189-90; Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 616 (1991); see TRIBE, *supra* note 212, at 789-92.

262. *Widmar v. Vincent*, 454 U.S. 263, 269-70 n. 6 (1981); TRIBE, *supra* note 212, at 791-92; Stone, *supra* note 259, at 47-48 (noting that most such regulations in the past 30 years were ruled unconstitutional). The irony that the Court must examine the content of speech to determine the level of protection it receives from content-based discrimination has not been lost on commentators. See Stephan, *supra* note 261, at 211-14.

The First Amendment, however, does not protect categories of speech such as obscenity and fighting words, and regulations prohibiting such speech will generally not be analyzed under content-based discrimination. TRIBE, *supra* note 212, at 837-38.

263. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972); TRIBE, *supra* note 212, at 790 & nn. 10-11; Geoffrey Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 55-56 (1987); Williams, *supra* note 261, at 618.

264. TRIBE, *supra* note 212, at 789-90. Tribe defines the noncommunicative impact of speech as “the harmful consequences of [the] particular form of expressive behavior, quite apart from any ideas it might convey.” *Id.* at 791

265. *Id.* at 792. *Contra* Stone, *supra* note 259, at 54 (“Although the Court at times may underestimate the extent to which content-neutral restrictions threaten first amendment values, it does not test all such restrictions with a ‘minimal’ level of scrutiny.”).

266. *Id.* at 244.

267. *Id.* at 250-51.

268. Stone, *supra* note 259, at 247.

the government to decide what or who will be discriminated against, a power that violates the principle of equal expression inherent in the First Amendment.²⁶⁹

Two recent cases involving speaker-based discrimination demonstrate that the Court tests such regulations under a standard of reasonableness.²⁷⁰ In *Perry Education Association v. Perry Local Educators' Association*,²⁷¹ the Court held that it was acceptable to grant one teachers' union preferential access to an interschool mail system because the union was the "exclusive representative of all Perry Township teachers."²⁷² The statute discriminated, therefore, on the basis of status, not views. The union that was the exclusive representative of teachers, PEA, had special responsibilities as a result of its status.²⁷³ In *Regan v. Taxation With Representation*,²⁷⁴ the Court upheld a section of the Internal Revenue Code that exempted veteran's organizations from a general rule that prohibited tax deductions of contributions to tax exempt organizations that engaged in substantial lobbying.²⁷⁵ The Court held that the IRS had not infringed on a fundamental right, but rather had chosen not to subsidize an exercise of that fundamental right.²⁷⁶

In the first case, the statute affected specific speakers (rival school unions), but did not impair constitutional right of access to the interschool mail system. Therefore, denying the rival school union the right to use that mail system did not infringe the union's First Amendment right. The case is thus similar to *Houchins v. KQED*,²⁷⁷ in which the Court held that

269. See *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 223, 233 (1987) (striking down a sales tax that exempted newspapers and "religious, professional, trade, and sports journals" because it allowed the Commissioner of Revenue to decide which magazines qualified for the exemption.); *Minneapolis Star & Tribune Co. v. Minnesota Comm'n of Revenue*, 460 U.S. 575, 591 (1983) (holding that a tax on ink and paper used by newspapers, but with an exemption for the first \$100,000 of ink and paper consumed, violated the First Amendment because it targeted a small group of papers).

270. *Stone*, *supra* note 259, at 247-48.

271. 460 U.S. 37 (1983).

272. *Id.* at 51 (emphasis in original).

273. For example, the Court noted that PEA had the responsibility of "negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances." *Id.* at 52 (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 221 (1977)).

Another factor that swayed the Court was the fact that the Court did not consider the interschool mail system a public forum, where parties have a constitutional right of access. *Id.* at 55. Since the competing union did not have a right of access to the mail system, the regulation did not burden a fundamental right, and therefore, as an equal protection matter, strict scrutiny analysis was not applicable. *Id.* at 54. See generally *supra* notes 217-235 and accompanying text.

274. 461 U.S. 540 (1983).

275. *Id.* at 542, 551.

276. *Id.* at 545.

277. 438 U.S. 1, 9-12 (1978).

denying the press access to a place in which the public had no constitutional right to be did not violate the First Amendment. In *Taxation With Representation*, the statute neither impaired nor interfered with the right to speech; it just failed to make lobbying easier for all groups.

Thus, a regulation that prevents online services from obtaining confidential government information, but allows newspapers to do so, may be an acceptable form of speaker-based regulation because there is no right of access to the information in the first place. On the other hand, a regulation such as the FEC's that impairs the ability of online services to publish does infringe on a constitutional right, and therefore would not be acceptable. This doctrinal analysis is unsatisfactory, however, since it appears to allow government to disburse information selectively. Seen in this light, such regulations might be analogized to content-based discrimination, which is presumptively unconstitutional.

1. CONTENT-BASED DISCRIMINATION

Although discriminatory content-based regulations are often struck down, the First Amendment does not forbid all preferential treatment of organizations based on content. In *Burson v. Freeman*,²⁷⁸ the Court upheld a statute that prohibited political solicitors from standing closer than 100 feet from polling places, even though the regulations constituted content-based discrimination. The Court agreed that Tennessee had a compelling interest in "protecting the right of its citizens to vote freely for the candidates of their choice."²⁷⁹ The Court furthermore agreed that the 100-foot boundary line did not significantly impinge on constitutionally protected rights.²⁸⁰

These exceptions to the Court's general hostility toward content-based discrimination rest on narrow principles that would not apply to regulations discriminating against online services in favor of the institutional media. In *Burson*, the exercise of free speech clashed with the fundamental right to vote "free from the taint of intimidation and fraud."²⁸¹ The Court accepted the discriminatory regulation after balancing two competing rights.

In contrast, if an online service's exercise of free speech conflicts with another fundamental right, the conflict is caused by the dissemination of information. The exercise of free speech by newspapers and other forms of the media through publication or broadcast would similarly conflict with the fundamental right. To be narrowly tailored,

278. 112 S. Ct. 1846, 1857-58 (1992).

279. *Id.* at 1851.

280. *Id.* at 1857.

281. *Id.* at 1858.

striking a balance between the two rights, any regulation would have to apply to both newspapers and online services. An exemption for either type of media would undermine the balancing of rights called for in *Burson*.

In *Perry*, the status of the union as the exclusive bargaining representative carried with it the right to use the interschool mail system. While online services and newspapers might be in economic competition,²⁸² neither has any special status with regard to government regulation. To suggest otherwise is to allow the government to choose between newspapers or broadcasters when it applies regulations. Such a situation would resemble government licensing,²⁸³ an abhorrent system under the Constitution.²⁸⁴

2. CONTENT-NEUTRAL REGULATIONS

Content-neutral regulation of online services may be valid and proper. However, the concept of equality underlying the First Amendment requires that regulations be applied equally to all organizations in the business of disseminating news, as long as the organizations are substantially similar. The Court has upheld content-neutral regulations provided "that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information."²⁸⁵

The first element of this three-part test takes the regulation out of the realm of content-based discrimination. The second element carries with it a requirement that the regulation be narrowly tailored to serve a significant governmental interest. In practice, the state simply must avoid selecting means "substantially broader than necessary to achieve the

282. It is not clear whether the two types of media are, in fact, in competition. Broadcast news and newspapers often complement each other. See *Shaw supra* note 71.

283. See *supra* notes 188-189 and accompanying text.

284. E.g., *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 801 (Burger, C.J., concurring) ("The very task of including some entities . . . whether undertaken by legislature, court, or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country.").

285. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976). The analysis of content-neutral regulations often turns on whether the inhibition occurs in a public or a nonpublic forum. In public forums, content-neutral regulations are subjected to a higher level of scrutiny because public forums are places traditionally connected with First Amendment activities. *TRIBE, supra* note 212, at 982, 987.

Unfortunately, the public forum/nonpublic forum distinction is not helpful with regard to analyzing regulations of online services because it is location or context specific. The latter point is illustrated by *Martin v. Struthers*, 319 U.S. 141, 146 (1943), in which the Court invalidated a content-neutral regulation that disproportionately affected a group that could not afford access to alternate, more expensive means of communication.

government's interest."²⁸⁶ It does not matter that an alternative method would achieve the same interest with less interference. The level of review is similar to that of the minimal scrutiny test.²⁸⁷

As to the third element, the Court has left the meaning of "ample alternatives" ambiguous. In *Metromedia, Inc. v. San Diego*²⁸⁸, the Court found that a regulation banning outdoor advertising did not leave ample alternatives because "other forms of advertising [were] insufficient, inappropriate and prohibitively expensive."²⁸⁹ Thus, the Court refused to assume that alternative channels of communication were available.²⁹⁰ But a few years later, in *City Council of Los Angeles v. Taxpayers for Vincent*,²⁹¹ the Court held that a regulation that barred the posting of signs on public property left ample alternatives, such as "the right to speak and to distribute literature in the same place."²⁹²

These cases are contradictory. In both instances, the governments asserted identical interests: reducing traffic hazards and improving city aesthetics.²⁹³ Therefore, it is difficult to predict whether a hypothetical content-neutral regulation barring electronic publishing would leave ample alternatives for the electronic publishers. On the one hand, the Court might consider paper publishing an ample alternative. On the other hand, the Court might view paper publishing as inappropriate for the electronic subscribers and unable to offer the same services that online services provide at an equivalent price. The Court should rule consistently on the issue of ample alternatives to publishing, whether electronic or paper. Thus, if a ban on electronic publishing of certain information would leave ample alternatives such as paper publishing or broadcasting, then a similar ban on paper publishing should be held to leave ample alternatives such as broadcasting or electronic publishing. The Court, however, is unlikely to so hold.²⁹⁴

VI. CONCLUSION

Computer technology has already powered revolutionary changes in society, and it will undoubtedly continue to do so. Many of these

286. *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989).

287. *Williams*, *supra* note 261, at 644; *see supra* notes 236-258.

288. 453 U.S. 490 (1981).

289. *Id.* at 516.

290. *Id.*

291. 466 U.S. 789 (1984).

292. *Id.* at 812.

293. *Vincent*, 466 U.S. at 795; *Metromedia*, 453 U.S. at 493. Even more puzzling is the fact that *Metromedia*, in which the ban was invalidated, involved political speech, while *Vincent* involved commercial speech.

294. *See, e.g., Schneider v. State*, 308 U.S. 147 (1939) (state's interest in keeping streets clean was insufficient to justify a ban on leaflets).

changes will be as unfathomable to us today as laptop computers would have been to a person from the middle of the century. As a result, our laws may be unable to deal with tomorrow's computer-related legal problems.²⁹⁵ It may be that the technological aspect of computers will necessitate new legal theories in certain areas.

But today's electronic press, in the form of online services, presents few of these problems.²⁹⁶ Electronic online services provide up-to-date information on current political and social events, sports scores, and business news. In short, online services already disseminate information as effectively as newspapers—if not more so. Moreover, the combination of years of declining newspaper readership and burgeoning interest in online services means that online services, while not likely to replace newspapers, will assume a significant role in the First Amendment's goal of fostering a robust marketplace of ideas.

Moreover, failing to treat electronic information services as part of the institutional press violates the Fourteenth Amendment's guarantee of equal protection of the laws. Most government attempts to regulate online services will impair the First Amendment rights of those services directly. Such regulations would be reviewed under strict scrutiny, a standard nearly impossible to meet. Spectrum scarcity, the compelling state interest that allows the government to regulate broadcasters, does not apply to online services. Even under the looser standard of minimal scrutiny, the regulations would still have to bear some rational relation to the difference between electronic and paper publishing. Finally, regulating electronic information services violates the First Amendment's

295. One area of special concern is that of privacy, where the number-crunching power and massive storage capacities of computers have created fears that computers will erode or even destroy notions of personal privacy. See generally DEBORAH G. JOHNSON, *COMPUTER ETHICS* 56-66 (1985); STEVEN L. MANDELL, *COMPUTERS, DATA PROCESSING, AND THE LAW* 172 (1984) (discussing the threat posed by computers to databases which can sift through a wide collection of data too vast for human sorting and thereby create cross-matched lists of people with certain desirable or undesirable traits); ARTHUR R. MILLER, *THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS* 37 (1971) (concerning a computer fed information on alleged professional gamblers to produce a list of indictments against those individuals); Kenneth James Langan, *Computer Matching Programs: A Threat to Privacy?*, 15 COLUM. J.L. & SOC. PROBS. 143, 151 (1979) (discussing a 1978 attempt by New York to use computers to reduce welfare fraud by cross-referencing wage earnings with welfare receipts).

Refusing to treat online services as the press will not alleviate the problem, as the problem stems from the capabilities of computers, not legal definitions. Conversely, treating them as the press will not exacerbate the problem because it creates no additional incentive for such services to violate personal privacy. There is an invasion of privacy tort action that applies to newspapers as well as individuals. RESTATEMENT (SECOND) OF TORTS, § 652D (1977).

296. Perhaps the major problem posed by today's information services is an economic one, that some online services are prohibitively expensive for widespread public access. See Jube Shiver, Jr., *On-Line Networks Spark New Bottom-Line Anxieties*, L.A. TIMES, Oct. 22, 1993, at A1.

concept of equality because such regulations constitute speaker-based discrimination.

As the Court noted in *Time, Inc. v. Hill*,²⁹⁷ the Constitutional protections of speech and press "are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society."²⁹⁸

In those areas in which the electronic press resembles the institutional press, it should be treated as the institutional press. To do otherwise is to overlook numerous cases and commentaries indicating that the First Amendment protects not only the "press," but also the public in public discourse.

297. 385 U.S. 374 (1967).

298. *Id.* at 389.