

Access to Private Networks,
Closer User Groups and Public Networks
In a Broadband Network Environment

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A. Assumptions and Elements Defined

In pursuing this topic, I have made some basic definitional assumptions regarding networks and users which color the observations and conclusions.

1. Networks

For the purposes of the paper, networks are defined as collections of interconnected users.¹ The type of transmission and the receive/send machinery employed varies. These points may or may not be capable of engaging in interactive communication. This definition acknowledges that cable and broadcast television systems may be deemed to be networks just as the public switched interexchange and local exchange systems constitute networks. This definition also facilitates the exploration of the broader array of access solutions presently employed and likely to be employed in the regulation of future networks.

The paper assumes that interconnection between networks and/or potential users of networks can and does take place. It does not address directly the need for common languages, protocols and conventions, speeds, as well as procedures of machine interaction, all of which are critical technical issues involved in network

¹ National Telecommunications and Information Administration, NTIA Infrastructure Report: Telecommunications in the Age of Information, October 1991, at 13-20, 92.

interconnection.² These issues are addressed, if at all, solely from the perspective of the network facilities, pricing and service configurations which the network owner(s) may choose in providing services and the impact such choices may have on the potential user class. It is recognized that these choices in significant measure will determine the eligible class of users.

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

2. Users

Users may be divided into two major groups composed of facilities based and non-facilities based users. The vast majority of users are non-facilities based. These individuals, firms or groups have no ownership of the networks and services they use. They may purchase access to some of the networks (telephone) over which they may interact. They are most often semi-passive recipients of information transmitted one way over other networks (broadcasting and cable). The communications needs of these users vary substantially, are evolving at different speeds and in multiple directions. For instance, many businesses already have

² For an excellent lay explanation of network interconnection and nomenclature, see, Dertouzos, Communications, Computers and Networks; and Cerf, Networks, 265 Scientific American 62 and 72, respectively, September, 1991.

significant needs for high speed, high capacity broadband communication networks.³ By comparison, the general public has not yet generated needs sufficient to precipitate demands for greater network speeds and capacities.⁴ Customer-users include residential as well as business customers.

2. Networks and Access Rights

a. Network Types

Networks may be categorized in a number of different ways including technology, information and ownership. For the purposes of this paper, networks will be categorized in terms of ownership. On this basis, they may be deemed to be government, public, private, video or customer owned.⁵

State and federal government owned networks are established to meet internal government user needs. At the federal level, the networks may conveniently be divided into defense and domestic related functions. In either event, a relatively closed set of users and cohesive sets of needs as well as eligibility, procurement and financing criteria set these networks apart from

³ See, Dertouzos, Communications, Computers and Networks, 265 *Scientific American* 62, 64, September 1991; Gore, Infrastructure for the Global Village, 265 *Scientific American* 150, 152; Dertouzos, Building the information Marketplace, 94 *Technology Review* 28, 31-32, January 1991; Gilder, supra note _____, at _____.

⁴ Dertouzos, Building the Information Marketplace, at 31-32; Dertouzos, Computers, Communications and Networks, at 65.

⁵ See, McGarty, Alternative Networking Architectures: Pricing Policy and Competition, Presented to the Information Infrastructure For the 1990s Workshop/Symposium, Kennedy School of Government, Harvard University.

others.⁶

Similarly, "customer" [corporate or research] networks are created to meet the needs of their respective users for transmission of high speed data, information processing and/or voice traffic.⁷ They too serve closed sets of users with relatively cohesive sets of needs, as well as eligibility, procurement and financing criteria. The difference between these networks and their government counterparts is their tendency to outsource only the construction of, and possibly the troubleshooting on the network. Government agencies tend to outsource day to day network management of the network as well.

Video distribution networks provide entertainment information to residential users. Whether spectrum or wire based, these networks at present tend to be one-way, simplex transmission media. The networks, though privately owned, are deemed to rely on the use of "scarce" government resources (spectrum or public street and rights of way). As a consequence, governments from which the network owner receives use of the scarce resource, require limited access to the networks be provided to identified classes of users. A small subset of the spectrum based subscription technologies essentially have been exempted from any access requirements.

There are two other property based categorizations of networks; public switched networks and private networks. Public switched networks may be interexchange [long distance companies] or local exchange [regional operating companies]. In either case

⁶ McGarty at 42-43.

⁷ McGarty at 56.

the network is composed of transmission and switching facilities requiring massive capital investment to assure relatively universal access, interconnection and carriage of information.⁸ Public network providers own most of the telecommunications network switching and transmission facilities which are part of the public switched network. They are essentially common carriers by their own election (MCI and Sprint) or by regulation (AT&T and the Regional Bell Operating Companies).⁹

Finally, private networks typically offer discount bulk transport services to a limited segment of the larger general market and are typically owned and operated by entities which are essentially private carriers switching and transporting information

⁸ McGarty at 44, and NTIA Infrastructure Report at 92.

⁹ The FCC exercises varying degrees of regulation over telephone carriers based on their economic power in the market. Dominant carriers such as AT&T and the RBOCs are those deemed to be those which have the opportunity and incentive to subsidize the rates for their competitive services with the revenues from their monopoly or near monopoly services. Dominant carriers have been regulated under the full panoply of Title II regulations, including required tariff filings with public comment periods, no presumption of a tariff's lawfulness, and the necessity to apply for authorization to increase or augment facilities. Carriers such as MCI Communications Corp. and Sprint are deemed non-dominant by the FCC. They have reduced or eliminated tariff filing requirements, tariffs are presumed to be lawful, and reduced reporting requirements. They also have the option to forgo filing tariffs. See, Competitive Common Carrier, Sixth Report and Order, 99 F.C.C.2d 1020 (1985) vacated and remanded sub. nom. MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (1985).

Recently, the FCC has proposed to "streamline" regulation of certain classes of dominant carriers' services including packet switched and competitively procured services. In Re Decreased Regulation of Certain Basic Telecommunications Services, Notice of Proposed Rulemaking, (CC Docket No. 86-421) (Released Jan. 9, 1987).

for specific customers.¹⁰ They are usually facilities based carriers in that they own their own bypass transport (and sometimes switching) facilities.¹¹ They are interconnected with the public switched network and sometimes lease capacity from public network providers.

Inherent in the status of the ownership, however, is an underlying bundle of property rights which include control over who may have access to the network owners' facilities and/or services. While the degree of control over access varies with the type of owner, ultimately, as long as ownership includes the right to decide access, some segment of potential users are likely to be excluded for a variety of oftentimes unrelated reasons. Reasons may vary from particular pricing or service configurations, equipment requirements, information format, capacity needs, or discrimination based on economic or normative value considerations.

3. Access Rights

User access rights typically vary depending upon the legal status of the network owners. Legal status in turn depends on a number of **factors** including: economic or technological market power and/or the **use** of a public resource. Where none of the aforementioned factors are implicated, access is determined on the basis of "market forces" i.e. entrepreneurial decisions and market

¹⁰ There are an estimated 700,000 private networks in the United States. See Guilder, *supra* note ____, at p. ____.

¹¹ McGarty at 52.

demand.

a. Market or Contractually Based Access Rights

Where network providers are deemed to own and control basic communications facilities essential to the efficient delivery of user communication, they are deemed to have market power.¹² In these instances, the government has sought to create protections to assure user access. In the case of dominant carriers, the general public's access rights are presumably protected by the general requirements that common carriers issue tariffs and refrain from discrimination between like users seeking access to like services. The FCC has also sought to require comparably efficient interconnection (CEI) and ultimately, open network architecture (ONA) to assure that users which may compete with the telephone carrier can acquire sufficient non-discriminatory access.

In the absence of market power, user access is determined by "market forces" and contracts. Here, the network owner sets the parameters of service and price, and, subject to competition from other providers and consumer demand (market forces), establishes the entitlement of various classes of users.

b. Constitutionally Based Access Rights

Historically, market entry and technological considerations

¹² The Federal Communications Commission has previously defined market power as being a matter of network dominance. For instance, with regard to AT&T, the determination of market dominance was deemed to turn on AT&T's alleged ability to: control price in the market place; control of essential bottleneck facilities; and realize disproportionate revenues in the absence of competitive market entry. See _____, 5 FCC Rcd 2627 (1990).

have affected the apportionment of the First Amendment rights between media owner-providers and the public. Media owners in each industry have been accorded different First Amendment rights based on differing assessments of the alleged ease of economic and technological entry into each market.

The initial scarcity of broadcast frequencies relative to public demand for access made acquisition of the means of transmission more problematic. All those who sought to broadcast could not do so without substantial signal interference. Those who received government licenses had sole use of the frequency. By requiring the broadcast licensee to share his/her frequency with the public, government regulation sought to reduce the impact of the broadcasters' control over the channel of communication.¹³

Similarly, cable television franchises were deemed scarce because of the physical limits inherent in the use of public rights of way. The physical scarcity was further exacerbated by the economies of scale inherent in the provision of cable service. Again, because all who sought to cable cast could not do so, the cable franchisee was required to share his/her channels of communication with the public.¹⁴

In telephony, the need for interconnection and the economies of scale inherent in provision of local telephone service led to the creation of government sanctioned telephone monopolies.

¹³ Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969).

¹⁴ See, The Cable Communications Policy Act of 1984. Pub. L. No. 98-549, 98 Stat. 2779, (reprinted in 47 U.S.C. §§ 521-59, (1987)). See 47 U.S.C. §§ 531 (mandatory public access channels), 532 (leased commercial access channels) and 611 (1987).

Government then sought to assure the public access to the monopoly provider by requiring that the provider not discriminate between customers on the basis of facilities or the price paid for the services provided. As a further means of assuring non-discrimination, the telephone company was not allowed any control over the content of information it transmitted.

Current developments in network technology will exacerbate the confusion which currently resides in the network, technology and information distinctions made for purposes of speech/access regulation of communications media. It will do so by combining them in one medium as it integrates network functionalities and information transmission into one network or transmission path.

Because decisions regarding ownership and regulation implicitly apportion speech rights in society, Congress and the FCC must carefully consider the impact their decisions regarding broadband networks ownership and regulation will have on the speech rights of broadband network providers and their users.

In order to protect these rights, Congress and the FCC must confront and resolve or seek meaningful accommodation of the conflict between competing interpretations of First Amendment. One interpretation views the First Amendment as protecting only the transmission owner's individual liberty to speak. While another interpretation views the First Amendment as enhancing the public's access to the means transmission (social equality). broadband networks' potential for expanding user speech, access, assembly and diversity rights provide substantial opportunities for the realization of such rights by broadband providers and users and

that such rights are protected by the First Amendment.

Reliance on any of the current regulatory schemes places too great a burden on one or another class of speakers. Either the public or the network provider would find their respective rights diminished or usurped by the private media owner or the government respectively. Further, none of the schemes properly address the full range of future network's interactive and integrative capacity and utility.

B. Public and Private Forums

Several commentators have suggested that the "public forum" doctrine might provide an excellent tool for allocating speech rights in the context of hybrid technology.¹⁵ They argue the doctrine is useful where the hybrid technology possesses similarities to existing technologies such as print and broadcasting, as well as unique characteristics of its own.¹⁶ Because use of the doctrine is not premised on the particular characteristics of a technology, it is useful in analyzing speech rights within the context of the new technology.

1. Traditional Public & Private Speech Fora

As a practical matter, speech fora exist in several guises and classifications. Among them are traditional public fora such as public streets, sidewalks and parks which have traditionally been

¹⁵ Wirth & Cobb-Reilly, *supra* note 64, at 401-04; Meyerson, *supra* note 98, at 31-40.

¹⁶ Wirth & Cobb-Reilly, *supra* at 402.

associated with expressive activity,¹⁷ as well as public facilities or institutions created for the primary purpose of public communication.¹⁸ There are also quasi-public fora, which are usually public facilities, such as schools and libraries, created for other purposes but having a close relationship to expression.¹⁹ The openness of these facilities to expressive activity is often a function of whether the government has designated them to be a public forum.²⁰ The Supreme Court has recognized the constitutionally approved existence (under state law) of private forums or facilities which a private owner may make open to the public.²¹

Under current public/private forum definitions, media of communication may be argued by analogy to be public, quasi-public or private fora open to the public.²² For instance, the telephone public switched networks may be argued to be public fora because traditionally they have been regulated to be open to the public at large on a non discriminatory basis. Broadcasting and cable television may be argued to be quasi-public fora in that they are designated as open to the public under limited circumstances. By

¹⁷ **Hague v. CIO** (1939); Tribe at 688.

¹⁸ **Tribe** at 688-689.

¹⁹ **These** facilities are labelled "semi-public forums." Tribe at 690.

²⁰ **Heffron v. International Society for Krishna Consciousness** (1981).

²¹ **Pruneyard Shopping Center v. Robbins**, 447 US 74, (1980); Tribe at 693-696.

²² **Tribe** at 696-700; **Meyerson** at 36-37; and **Nadel** at 175-176.

comparison, print media could be categorized as private fora because absent the election of the publisher/owner, print media are not open to the public.

Alternatively, telephony, cable and broadcasting can be argued to be public fora by virtue of their use of scarce public resources (government property). For example, both telephone and cable television firms make use of public streets and rights of way. Broadcasting makes use of the electromagnetic spectrum.

Under the media oriented definition of speech forums referenced above, a public forum may be argued to exist where an individual owner or entity is granted monopoly control of a medium of communication or possesses sufficient economic power to effectively censor messages of others seeking access to the forum (telephone, cable and arguably broadcasting).²³ A quasi-public forum may be said to exist where essentially private facilities are opened to the public for limited purposes (broadcasting or cable). A private forum may be said to exist where a private individual or entity lacks monopoly control or sufficient economic power to be required to open its facilities to the public, but nevertheless elects to do so (other subscription technologies).²⁴ Print media do not fit as neatly into this formulation of the doctrine as their economic status as local monopolies (in many cases) may render them more akin to cable television and broadcasting, yet they are deemed private and not subject to any access requirements. The public/private forum doctrine has met with significant criticism

²³ Nadel.

²⁴ Pruneyard, Nadel.

in the non-media context. First, the distinction between government and private property *is said to obscure* the fact that what is at issue is nevertheless access to property.²⁵ And, this access is usually sought by non-property owners.²⁶ In this context, the exercise of property rights by a government or private owner affects the realization of public speech rights to the extent access to property is necessary for the effective realization of the public's speech right.

The impact of owner control on public non-owner access applies regardless of whether one examines traditional forums such as public parks and streets or media fora such as broadcasting, cable or telephony. However, communication via electronic technology has become increasingly more effective than communication by more traditional means. As this trend continues, access to communications technology will become increasingly necessary if not critical to the realization of effective speech.²⁷

Second, to the extent that government or private owners may withdraw the designation of a forum as "public," that portion of the public with insufficient wealth or an unpopular message effectively may be precluded from speech.²⁸ This second criticism also applies equally to electronic media.

2. Application of the Public/Private Forum Doctrine to

²⁵ Balkin, *Frontiers of Legal Thought II, The New First Amendment: Some Realism About Pluralism*, 1990 *Duke L.J.* 375, 397-400.

²⁶ *Id.*

²⁷ Carter *supra* at note _____, Balkin, *supra* at note _____.

²⁸ Balkin at 397; Ignber at 42.

Network Communications

Before the public/private forum doctrine could be applied to broadband communications, however, interactive broadband networks and on-line data bases must be found to be "public forums." Such a designation might follow from the broadband provider's use of the public streets and rights of way,²⁹ or the electromagnetic spectrum.³⁰ In either instance, the government could presumably license one or more broadband providers to operate over (or under) certain public streets and rights of way, or, on certain frequencies to the exclusion of others seeking access to the same government provided resources.

Another critical component would be a determination that the privately owned fiber optic cables and assorted digital equipment resident in or over the streets "are an essential part of the public forum and subject to the same First Amendment mandates and the same limits on government regulation."³¹ The RBOCs and the cable television systems, the most likely providers of interactive broadband services,³² already enjoy the use of public rights of way and streets.³³ Historically, the quid quo pro for use of these

²⁹ **See Id.** *See also* Tele-communications of Key West, Inc. v. United States, 757 F. 2d 1330 (D.C. Cir. 1985); Preferred Communications, Inc. v. City of Los Angeles, 754 F. 2d 1396 (9th Cir. 1985).

³⁰ Emerson, *supra* note 48, at 823; Wirth & Cobb-Reilly *supra* at 402; Meyerson, *supra* note 98, at 24, and 36-37.

³¹ Wirth & Cobb-Reilly, *supra* at 402.

³² Cite articles

³³ *See* Wirth & Cobb-Reilly, *supra* note 643, at 400-02; Meyerson, *supra* note 98, at 24-26.

public resources has been public use of the facilities of common carriers, and more recently, cable operators for the communication and expression.

Public forum status could also be justified on the grounds that the switching and transmission provider possesses an economic or natural monopoly. Here, the legislative body also would have to provide the courts and the FCC with guidelines for determining when market, technological or government sanctioned power became so great as to allow the owner to effectively censor the speech of others seeking access to the forum.

Quasi-public forum status may be said to apply to private providers of switched transmission services and owners of private on-line data services. The rationale would be that the owners, in order to conduct business, have elected to open their media of communication to the public.³⁴

The public/private forum doctrine could provide an appropriate

³⁴ It might be argued that the FCC has taken a contrary position with regard to the regulation of video subscription technology services such as multi-channel mutipoint distribution. See, _____ Under the FCC's reasoning, making services available to a mass audience does not constitute opening one's facilities to the public where each individual customer enters into a separate contract with the provider for the provision of service.

The viability may turn on the relative similarity or difference between the facilities of an MMDS operator and those of an on-line data base service or network provider. In both cases the public gains access to the service provider's network and the services provided. In the case of subscription technologies, the public has no right to compose or transmit messages, they may only receive programming delivered via the network. In the case of on-line database and network providers, the public makes use of the transmission and data facilities to send and receive their own messages. Thus they are actually making use of the data and network facilities rather than simply receiving services at the end of the network pipeline.

foundation for a skeletal regulatory framework to balance speaker-owner and public-user speech rights. However, in order to do so effectively, it must address several important issues. First, a viable easily accessible public forum must be established as an alternative to private forum speech. Adequate incentives must be developed to assure the continued cost effective existence of public forums. As second, adequate workable criteria must be established for determining when an entity should be deemed a public or private forum. The criteria must also address transitions between public and private forum status. Finally, the public/private forum model must protect against private and government censorship. Within the public forum, the owner's exercise of property rights and the government's exercise of the licensing power must be circumscribed in order to limit government or private censorship of speech. The goal would be to create and preserve meaningful opportunities for public access and speech as well as the owner's exercise of speech. ³⁵

³⁵ Emerson, *supra* note 48, at 823.

3. A New Model for Public and Private Fora

a. Developing A Viable Accessible Public Forum

The creation of a viable enduring public fora will depend on several factors. First, entrepreneurs must have incentives to create and maintain them. This can be accomplished in part by extending the limited liability protections currently enjoyed by common carriers to the providers of the broadband public fora. Limitations on liability would include the absence of responsibility or liability for the speech of any user of the fora, as well as, a limitation of liability for service failures to the charge made for the service provided. Liberal tax and financing incentives also could be implemented to encourage the development and maintenance of such network fora.³⁶

Second, the fora must be accessible to the general public and have significant utility to the average user. In this regard the government incentives mentioned above may have a constructive impact on the development of the fora. In any event, the fora must be widespread and interconnected to insure their accessibility to the general public. Aside from government incentives, efforts must be made to encourage public use of the network and services by creating a minimum service configuration that assures all users effective use of the network.³⁷

³⁶ There are alternative incentive structures proposed. Some argue that advanced network features be provided on a demand and cost sensitive basis, with targeted subsidies where necessary. See NTIA Infrastructure Report supra note ___ at ____, and Barrett, supra note ___ at ___.

³⁷ See Dertouzous, supra note ____.

b. Public and Private Fora Defined

Public and Private fora may exist on at least two if not three levels. Some fora will exist at the transmission channel and/or network level. Some will exist at the equipment or receiver/display level. Finally, some will be a combination of both transmission and communications equipment. Regardless of level, public and private fora should be constructed to possess distinct criteria.

Public fora would be deemed to exist in two major categories, per se public fora and voluntary public fora. Transmission providers possessing natural, physical or economic monopoly power, or possessing essential facilities would be regulated as per se public fora. Monopoly status would be defined by statute and agency regulation, subject to modification or expansion of the definition on a case by case adjudicatory basis. Voluntary public fora would consist of entities possessing no monopoly or essential facilities status but electing to be public fora by virtue of making their transmission or speech facilities available to the public for expressive activity.

In either case, public fora would enjoy limited liability for service degradation or outages absent gross negligence or evidence establishing that the provider sought to censor user speech. The public fora would also enjoy immunity from liability for the content of any user speech carried, presented or displayed over public fora facilities. Finally, the public fora would be eligible for tax incentives and/or other financial incentives to encourage system and service upgrades.

Private fora would be composed of firms or services possessing no monopoly power or essential facilities attributes. For the most part, these entities would be using dedicated (if owned) or leased facilities providing service to distinct, specialized users. These entities would provide public notice of their intent to offer private forum services. They would maintain full control over access to their channels and/or networks and full editorial control over any speech over their facilities. Consequently, they would have full liability for any loss of service (subject to their ability to negotiate a lesser liability with users) and full liability for what is said over their facilities. To the extent they rely on interconnection to public fora facilities to provide service, they would have to make available some portion of their transmission capacity to other interconnected entities and users on the public fora networks.

Procedural and evidentiary rules would have to be established to govern entity requests to change their status from public to private or private to public. At a minimum, it would appear prudent to make allowance for such a transition mechanism from private to public fora status where the provider voluntarily seeks public fora status, or, where users and/or representatives of the public successfully allege that a private entity has attained monopoly or essential facilities status. Similarly, a public forum entity or interested parties could petition to change a public forum's status. The forum and/or interested parties would have to establish that the forum no longer possessed monopoly power or essential facilities.

Proceedings to determine public or private fora status may not be precipitated or motivated by a concern for the content of user speech. Evidence tending to show such intent or concern as the motivation for a petition would constitute sufficient grounds for dismissing the petition.

c. Limitations on Government and Private
Censorship

With regard to public fora, protections would have to be implemented to protect against government and private censorship of user and owner access or speech. Public fora owners would exchange access and content control over significant portions of their channel and network facilities or communications receiver/display fora for receipt of limited liability (or exemption from liability) for foreseeable and consequential damages arising out of their provision of service. They would also be absolved of liability for the content of user speech. Any residual control of access or speech by public forum owners would be in the form of content neutral determinations of the adequacy of available channel or network capacity and access or speech queuing. Under no circumstances would the government be able to penalize or hold the public forum provider liable for any user initiated and conducted speech. Under no circumstances would a potential public fora user be denied access to a public fora absent constitutionally neutral criteria.

Public fora owners, through a fully owned subsidiary, would have the right to communicate over their facilities or those of any other public fora. Users of the public fora facilities would be

allowed to petition at any time alleging inappropriate censorship activities on the part of public fora owners. Congress and the FCC would develop standards regarding the burden of proof and of going forward in such proceedings.

C. Summary

The public forum doctrine comes closest to providing an appropriate framework to begin constructing a constitutional regulatory model that structurally accomodates private and public speech rights. However, the doctrine must be broadened to encompass media of communication and revised to assure the creation and preservation of viable public forums. Inherent in the remodeled doctrine must be a recognition that private censorship power is as dangerous as government censorship and must be proscribed as well. Such a formulation of the doctrine would arguably encompass both the limitation on government power to infringe upon the rights of speakers as well as the requirement that the government affirmatively act to limit private infringement upon the right to speak.

The **concededly general proposals for a modified public/private forum model set out above** constitute a modest attempt to address **speech related issues** likely to arise in the context of broadband services. **The proposal of a modified public/private forum model** is an attempt to move past the current regulatory morass which could result from an attempt to regulate the new communications media under the old regulatory schemes. The model as modified attempts to address some of the criticisms of the current public/private forum doctrine.

Specifically, efforts to institutionalize viable public fora and distinguish them from private fora are aimed at preserving the existence of an inexpensive electronic public forum alternative. When combined with government and industry initiatives to render public fora widely accessible public utilities, efforts at institutionalization should result in the benefits of broadband technology accruing to the vast majority of American society.

The model also incorporates a modest attempt to address some of the concerns raised by the anticipated provision of integrated broadband services by vertically integrated broadband service providers. In particular, there is a proposal that public fora exchange their access and content controls for substantially limited business and speech liability. This proposal addresses concerns regarding private censorship precipitated by RBOC, on-line database provider and cable company attempts to deny, control or limit the access of certain classes of users to their respective networks or censor user speech.

The model also attempts to address concerns about government censorship. Under the proposal, government determinations of access and speech entitlement are premised on relatively objective, non content oriented evidentiary considerations of whether a firm possesses monopoly power or essential facilities. The only other way an entity may be deemed a public forum is for its principals to voluntarily elect such status. Beyond determinations of forum status, the government may only work to assure equality of access in terms of facilities and services. This proposal incorporates the thrust of the government's current open network architecture

(ONA) and comparably efficient interconnections (CEI) policies.

Finally the government may not penalize or hold a public forum provider liable for user speech, nor may a public forum be required to exercise control over user access or speech beyond making capacity and services available on a nondiscriminatory basis. Government or public attempts to modify a forum's status which are motivated by an intent to control or modify the content of speech or efforts which give the appearance of being motivated for such reasons would be per se illegal.