William Henry Harrison, the ninth President of the United States, would be astounded at the way politicians advertise themselves today. His political advertisements took the form of "parades, banners, torches, transparencies, flags," and stump speeches. While these methods persist, they are now complemented by spots on radio and television. Harrison would even be surprised to see the changes that have taken place in political advertising in just the last few years. Candidates' campaigns have found their way onto personal computers in many homes, schools, and offices via the Internet.

The 1992 candidates were among the first to take advantage of the computer network for their campaigns. Recent developments in technology have created even more advertising opportunities for political candidates. Software now exists to facilitate the delivery of live, or real-time, audio and video over the Internet.

The advancements in computer network technology are novel, but may present a series of legal challenges. For instance, it is yet undetermined whether or not the government should regulate the Internet. Any regulation could discourage investors of Internet services.

The "packet switched" network (or network of the Internet) is different from the "circuit switched" network (network of the phone lines). During a "circuit switched" phone call, one line opens to the other end, thus, continuously creating a designated route for the information. In a "packet switched" network information is broken up into "packets" and each packet is delivered through whatever route can be found. Id. They are sent along with millions of other packets only to reassemble themselves at the other end. Id. This makes for a more efficient use of the lines. Id. There are reportedly five million host computers on the Internet.

During the 1992 election, President Clinton posted position papers and other documents on CompuServe and GEnie. President Bush also made use of the available services. One of the Democratic primary candidates, Larry Agran, hosted a computer chat session on CompuServe. Campbell, supra note 3, at 517-18. Political hopefuls are setting up sites on the Internet's World Wide Web as fast as they can in preparation for the 1996 election. Mitch Betts, Politicos Blazing Cyberspace Trail, COMPUTERWORLD, July 17, 1995, at 1. The World Wide Web is a web of information on the Internet that organizes the information in "pages." The term "pages" is used because the photos, illustrations, text, and graphics are displayed on the screen in an image similar to a page in a magazine. Schwartz, supra note 3.

See, e.g., Dean Goodman, The Stones Hit Cyberspace, DET. NEWS, Nov. 14, 1994, at 2A (stating that the Rolling Stones made history when they broadcast a concert live in cyberspace); Daniel Akst, Take Me Out to the Internet, L.A. TIMES, Sept. 6, 1995, at D1 (explaining that the New York Yankees and Seattle Mariners game on September 5, 1995, marked the first time a baseball game was broadcast live over the Internet). Although using the term "broadcast" may be unclear, it is merely being used as a "metaphor of convenience." E-mail from Daniel Akst, Columnist for the Los Angeles Times (Oct. 5, 1995) (on file with COMM LAW CONSPECTUS).
products and services, thereby stunting the Internet’s growth. Critics of this supposition maintain that the potential for abuse by political candidates in this new medium may outweigh considerations of the Internet’s growth potential. It has been suggested by certain experts and academicians that legislation, formatted similarly to political broadcasting rules, should be applied to the Internet to curtail any potential abuse. However, it is unclear whether political transmissions over the Internet will be considered “broadcasts” or analogous to other communications forms such as print publications or transmissions over common carriers. In reality, it could be detrimental to impose any regulation on the Internet. A better suggestion would be to let the market forces play-out the Internet’s future. However, a market approach may not directly address the concept of equal opportunity for politicking on the Internet.

This Comment focuses on political broadcasting concepts to examine whether equal opportunity regulation can and should be applied to the Internet. This Comment also explores the growth of the Internet and the legal challenges technology presents. Part I discusses the right to equal opportunities in political campaign advertising and analyzes what it means to broadcast and to use a broadcast station for the purposes of campaigning. Part II takes the reader into some of the more recent developments in political broadcasting law and the recent technological growth of the Internet in addition to discussing the current positions the United States government has taken regarding the Internet. Part III examines how the concepts of political broadcasting law could relate to the Internet and how concepts from other areas of communications law would affect political information over the Internet. This Comment concludes that the Internet inherently provides equal opportunities for political candidates to express their views. Thus, there is no need to regulate the Internet according to the broadcast model or any specific communications model.

I. PRIOR HISTORY: POLITICAL CAMPAIGN ADVERTISING

A. Equal Opportunities for Political Candidates

When Congress established the Communications Act of 1934 (“1934 Act”), its drafters could not have imagined a system with the magnitude of the Internet. Congress designed the equal opportunity provision of Section 315 of the Communications Act of 1934 to ensure that an opponent of a legally qualified candidate would not be able to gain an unfair advantage through “favoritism of a station selling or donating time or in scheduling political broadcasting.” These concepts were derived from the Radio Act of 1927.

The Radio Act of 1927 recognized the airwaves as a public resource. Because there were not enough frequencies to accommodate the many entities desiring to broadcast, the Federal Radio Commission (“FRC”) was authorized to choose between hopeful broadcasters and license those chosen. Title III of the 1934 Act, incorporates many of the provisions of the Radio Act of 1927, including the equal opportunities provision.

The 1934 Act embodies the importance of political broadcasting by requiring stricter standards than it does for other types of broadcasts. The Federal Communications Commission’s (“Commission” or “FCC”) codified version of Section 315 requires that when a broadcaster chooses to make time available to political candidates for public office, it must do so indiscriminately in all aspects of the service it provides. Section 315 protects incumbent politicians from being favored in political advertising.

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* See generally Campbell, supra note 3.
* Id. Drafters of Section 315 of the Communications Act of 1934, 47 U.S.C. § 315 (1988), and its predecessor Section 18 of the Radio Act of 1927, 44 Stat. 1162 § 18 (1927), recognized the potential for this abuse in radio broadcasts and determined that when a licensee grants permission to a legally qualified candidate for public office to use his broadcast station, he shall afford equal opportunities to all other such candidates for that office. See S. REP. NO. 562, 86th Cong., 2d Sess. 7 (1959).
* David R. Johnson & Kevin A. Marks, Mapping Electronic Data Communications Onto Existing Legal Metaphors: Should We Let Our Conscience (And Our Contracts) Be Our Guide?, 38 VILL. L. REV. 487, 487-97 (1993)(discussing legal metaphors and the proposal that they should only be used to explain and examine the legal state of cyberspace).
* Id.
* Before the Radio Act of 1927, radio was in a state of chaos. There were nearly 800 stations on the air using any frequency they desired without regard to interference. National Broadcasting Co., 319 U.S. at 210-12.
* 47 C.F.R. § 73.1914(e) (1994).
from the media power of a challenger and allows lesser known challengers access to the public eye.

Congress exempted certain types of broadcasts, including newscasts, from the stricture of Section 315.19 Congress may have been concerned that a station would be discouraged from airing news coverage of the campaigns if it had to grant equal opportunities once it exposed one of the candidates through its coverage.20 Recognizing that the newscast exemption could enable a licensee to favor one political candidate over another with media saturation, Congress determined that “the substantial benefits the public will receive through the full use of this dynamic medium” outweighed this risk.21

In Farmers Education & Co-op. Union v. WDAY,22 the Supreme Court noted that Congress passed Section 315 to promote the “full and unrestricted discussion of political issues by legally qualified candidates.”23 The Court interpreted the provision as Congress’ intent to maximize the potential of radio as a powerful medium in the expression of political ideas.24 To further this interest, the Court held that licensees would be immune from liability for libelous remarks made by candidates in broadcasts falling under the equal opportunities rule.25

The second part of Section 315 pertains to rates, ensuring that rates will be reasonable for legally qualified candidates.26 It does this by requiring broadcasters to sell political advertising at their lowest rate available.27 Section 312(a)(7) is another part of the Act that

18 MIDDLETON, supra note 14, at 513.
19 Id. at 516-20.
20 Id. at 517.
21 S. REP. NO. 562, supra note 11, at 14.
22 360 U.S. 525 (1959) (holding that the licensee shall have no censorship power over a material broadcast by a legally qualified candidate but that this also grants the station immunity from liability for libelous statements made by the candidates).
23 Id. at 529.
24 Id.
25 Id. at 525.
27 MIDDLETON, supra note 14, at 513; see also 47 U.S.C. § 315(b) (1988).
29 Id. For Section 315, the broadcaster has no duty unless he or she decides to act, but in Section 312(a)(7), the duty to provide reasonable access to federal candidates is an automatic one imposed on all licensees. The Federal Communications Commission has noted that “[T]he presentation of political broadcasts while only one of the many elements of service to the public... is an important facet, deserving the licensee’s closest attention, because of the contribution broadcasting can thus make to an informed electorate—in turn so vital to the proper functioning of our Republic.” In re Licensee Responsibility as to Political Broadcasts, 15 F.C.C.2d 94 (1968). This was part of the reasoning behind the now defunct “fairness doctrine.” See Arkansas AFL-CIO v. Federal Communications Comm'n, 11 F.3d 1430 (8th Cir. 1993). The fairness doctrine was developed from case law and consisted of a two part test: the broadcaster must cover public issues adequately, and such coverage shall adequately reflect views inapposite to those issues. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 377 (1969). While the fairness doctrine has been overruled, its counterparts, Section 315 and Red Lion, have been consistently upheld by the courts. Campbell, supra note 3, at 542-43 n.100.
32 274 F.2d 543 (D.C. Cir. 1958).
33 Id. at 548.
34 Id.
35 MIDDLETON, supra note 14, at 515.
36 Id.
37 Id. at 516. An example of a so-called non-political appearance that would trigger the Section 315 requirements might be when a candidate makes an on-air appearance on behalf of a charity. Id.
There is an apparent inconsistency as to whether the picture or voice component of a broadcast is integral in establishing “use.” In *Telecommunications Research and Action Center v. FCC,* the Court analyzed the way the FCC applied political broadcast regulation to the technology of teletext. Teletext signals are sent through the vertical blanking interval, or the time between the pulses of regular television broadcasting. Its “pages” or screens of information can be flipped through by the viewer and consists of news, catalog pages, entertainment, and advertising.

The Commission determined that one of the reasons teletext was unregulable was because it differed from traditional broadcasts. That is, it lacked an immediacy, making it more akin to magazines and newspapers. Television, on the other hand, has the ability to communicate ideas through picture and sound immediately and is unique in that respect.

The immediacy argument is ingrained in the scarcity doctrine. Although the TRAC Court showed disdain for the scarcity rationale as a basis for regulation in general, it rejected the Commission’s decision that teletext was unregulable by Section 315 because the service “used” broadcast frequencies.

In TRAC, the Court disagreed with the Commission’s conclusion that teletext does not constitute “traditional broadcast services” because the Commission’s decision implied that teletext communication was neither “radio communications” nor intended to be received by the public. In terms of radio communications, teletext fits neatly under the Act’s definition for “radio communication” as a broadcast “writing.” The Court further determined that teletext passed the *Functional Music* test finding that the licensee’s “programming can be, and is, of interest to the general ... audience” thus marking an intent for public distribution.

Critics of the proposition that broadcast law can be applied to the Internet often claim that Internet transmissions are more akin to the print medium. In *Miami Herald Publishing Co. v. Tornillo,* the Supreme Court held that a Florida statute which required a newspaper with columns that attacked the character of a political candidate to offer free space to an opposing candidate for a reply was unconstitutional. Thus, a candidate has no “right of reply” in the print medium. The scarcity argument that enables some regulation of broadcast content can not justify regulation of print. After all, the materials needed to publish a newspaper may, theoretically, be endlessly available. But the *Tornillo* Court recognized a different aspect of scarcity. The Court recognized that, “as an economic reality, a newspaper should not be required to unreasonably expand in order to provide space for editorial replies.” Even if the newspaper could economically accommodate such a right of reply, the Court further held that the Florida statute violated an editor’s rights guaranteed by the First Amendment. The decisions made regarding how the paper will appear and what it will say are a function of “editorial control and judgment.”

It has also been suggested that information systems working with the Internet should be treated like common carriers. This would grant them immunity from liability for content, yet require them to...
carry all content without discrimination. If Internet systems were deemed common carriers, their facilities would have to be available to all customers, would be subject to FCC approval, and in fact could not enter the market without such approval in advance.

There may be some flexibility to the "discrimination" component of common carriage requirements, at least on the state level. In Carlin Communications, Inc. v Mountain States Tel. & Tel. Co., the Court held that Mountain Bell could exclude "adult entertainment" messages from the 976 network despite the state public utility law which required it to offer its services to all without discrimination. The Court reasoned that Mountain Bell made the conscious choice to exclude all adult entertainment. It was also noted that, as far as 976 lines were concerned, the telephone was serving more as a medium by which companies like Carlin could broadcast their messages than as a traditional public utility.

B. The Law of the Internet or the Lack Thereof

While the law pertaining to political advertising in most mediums is well established, there is little applicable law, and no regulation for political campaigning, on the Internet. The Internet does not fall neatly under the regulatory rubric of broadcasting, common carrier, cable, or print. Legal entities may be reluctant to tackle some of the legal issues arising from the Internet's growth because of constitutional prohibitions on restraining free speech and the probable difficulty to enforce any regulation as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy . . . " 47 U.S.C. § 153(h) (1988).

See generally Carlin Communications, Inc. v Mountain States Tel. & Tel. Co., 827 F.2d 1291 (8th Cir. 1987).

Id. at 1293.

Id. at 1294. The court also took into consideration that Mountain Bell faced potential criminal liability for carrying such messages under Arizona state obscenity laws. Id.

Id. The court noted that the phone company in this instance was more similar to a "small radio station" than a common carrier. Id.

See generally Richard Raysman & Peter Brown, On-Line Legal Issues, N.Y.L.J., Feb. 15, 1995, at 3, 11. The increased popularity and growth of the Internet has created many legal issues and open ended questions. Id.; see also Loftus E. Becker, Jr., The Liability of Computer Bulletin Board Operators for Defamation, 22 CONN. L. REV. 203 (1989) (proposing that when a computer bulletin board's public message and file areas make the posted information provided by third parties generally available, it is similar to a news vendor or distributor and should be accountable as secondary publishers for any defamatory information when fault is shown).

MIDDLETON, supra note 14, at 574.

See Steve Lohr, The Net: It's Hard to Clean Up, N.Y. TIMES, June 18, 1995, at D6 (noting that "the sprawling pro- tean nature of computer network technology means that any ma- jor regulatory effort to 'clean up the Net' would require dra- conian forms of censorship unfamiliar to Americans").


Id.

Id. at 137, 140-41.

CompuServe did not have the opportunity to review the material distributed on the subject forum and could not have known or had reason to know of the defamatory statements in question. Id. at 137.

In re Request of King World Productions, Inc., Staff Ruling, 9 FCC Rcd. 6394 (1994).

Id. para. 6.

II. THE INTERNET: A HYBRID MEDIUM

The difficulty in trying to apply broadcasting law to the Internet falls mainly in the nature of the medium. While it could be argued that the function and purpose of both broadcasting and Internet communication are the same, the technology enabling each medium is extremely different.

Even if it was that the Internet is a broadcast system for the purposes of political communication, recent trends have indicated that political broadcasting rules have been somewhat relaxed. In particular, "talk-shows" and shows with an entertainment oriented format have been considered " bona-fide news interviews" and "bona fide newscasts" respectively. This means that a candidate could appear on a show such as Rolanda, Jerry Springer or Entertainment Tonight and the licensee would be exempt from equal opportunity mandates under Section 315(a)(1)-(4). The Commission determined that a
bonafide newscast is one that "reports news of some area of current events . . . in a manner similar to more traditional newscasts."78

In 1992, the Commission decided the following factors would be considered in order to determine whether a program would qualify as a "bona fide news interview[.] . . . (1) whether [the program] is regularly scheduled; (2) whether the broadcaster or an independent producer controls the program; and (3) whether the broadcaster's or independent producer's decision on format, content, and participants are based on newsworthiness rather than on an intention to advance an individual's candidacy."77

The recent debate over how the Internet should be used and regulated sparked most figures in government to announce their respective positions. The Commission, for instance, determined that it has no place in regulating the Internet.78 In fact, the Commission stressed its desire to do anything in its power to boost the development of the Internet without regulating it.78

Congress indicated its desire to take a "hands-off" approach to the Internet as well. In its proposed 1995 reform of the 1934 Act, Congress stressed its wish to maintain the competitive free market status of the Internet in an environment "unfettered by State or Federal regulation."80 In this regard, the new Act specifies that "[n]o provider or user of interactive computer services shall be treated as the publisher or speaker of any information provided by an information content provider," and that "[n]othing in [the] Act shall grant any jurisdiction or authority to the Commission with respect to content or other regulation of the Internet or other interactive computer services."81

It is ironic that the persons responsible for the power to grant jurisdiction over the Internet are the same persons or future candidates who can exploit the Internet for political purposes. The World Wide Web has made the Internet very attractive to political candidates because it allows pictures to be transferred as well as text.82 It is hard to tell at this point whether the Internet and other forms of media are actually converging or if the Internet is simply mimicking the way television and radio function.83 Either way, the developers of this new technology appear to be appealing to people through the familiar. They are adapting the Internet to what our senses have grown comfortable with and grown up with, radio and television. In turn, political candidates can take advantage of these technological developments and reach voters in unique ways. Many politicians have already taken advantage of this new technology to sources to citizens . . . offer a forum for true diversity of political discourse, unique opportunities for cultural development . . . and have flourished with a minimum of government regulation. Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

78 Id. The Commission decided not to concern itself with the quality or significance of the topics and stories selected for coverage by the broadcaster and opted to rely on the "good faith news judgment" of the broadcaster. Id.

77 Id. para. 9 (referring to the Request for Declaratory Ruling on Independently Produced News Interviews, 7 FCC Rcd. 4681 (1992)).

79 David Hoye, Campaigners Skip Cyberspace, Few Seek Votes on Info Superhighway, PHOENIX GAZETTE, Sept. 30, 1994, at A1. According to Milt Gross, the former chief of the political programming branch of the FCC, the Commission does not want any involvement in the issue of politicians and candidates using the Internet. Id. "[T]he Commission's] jurisdiction is only over broadcasters," he said. "We're not concerned with the Internet. The First Amendment gives them the right to speak. It's only because of the scarcity of frequencies that Congress gave us the power to regulate broadcasters." Id.

80 See Commissioner Susan Ness, Remarks to Panel at TELECOM95, Geneva, Switzerland (Oct. 7, 1995) [hereinafter Remarks of Commissioner Ness](on file with COMMLAW CONSPECTUS). Commissioner Ness addressed the group and noted, "the Internet is a fundamental building block for the realization of a Global Information society. Governments should embrace its promise; not become obstacles to its fulfillment." Id.

81 Id. at C.51; see also The Fine Print, A Side-by-Side Comparison of the House and Senate Telecommunications Bills, CONG. Q. Wkly. Rep., Sept. 23, 1995. Internet issues in both the House (HR-1555) and Senate (S-652) bills have managed to remain in the public spotlight; see Telecom Bill Conference Opens With Hope For a Quick Ending, COMM. DAILY, Oct. 25, 1995, at 1. Co-sponsor of the House bill, Rep. White (R-Wash.) said he intends to maintain a role on the aspect of the legislation that prohibits economic or content regulation of the Internet. Id.

82 Some corporations sell advertisements on their Web pages. Netscape Communications Corporation claims that their Netscape site is the most accessed site on the Internet and because of that they charge anywhere from $5,000 to $30,000 per month for advertising on their web pages. E-mail from Rick Gunshor, Netscape Communications Corporation (Oct. 8, 1995)(on file with COMMLAW CONSPECTUS).

83 Richard A. Shaffer, Multimedianet, FORBES, May 22, 1995. The Internet is imitating other communications devices as well. Software exists which enables one to use the Internet and a personal computer at each end to call anywhere, circumventing the long distance carriers. Id. Thus, the Internet can also mimic the telephone. Id.
approach the electorate. However, there are skeptics of this new style of campaigning, and its potential to leave out many voters. The basis of this criticism stems from the fact that many people do not have access to the Internet which might further the trend in society to separate “the have’s and the have nots.” However, the “have-nots” might not be outsiders to the technology much longer given President Clinton’s recent pledge to “wire” our schools. His Administration also plans on forming a “tech corps,” a group of telecommunications and computer professionals that will assist teachers in learning how to use this new technology.

Other skeptics either do not believe campaigners will use the information superhighway to garner voter acceptance or will not have much to gain by doing so. Perhaps at one time this was the case but now it seems that if campaigners do not attempt an Internet campaign they will appear out of touch with the voters. Whether or not Internet campaigning will be a productive vote-getting tool should not be as much of a concern to candidates as the anti-technology persona they could create if they do not try cyberpoliticking. One candidate remarked that America “doesn’t need a President who uses a rear-view mirror as a road map to the 21st Century.”

Notwithstanding the stance politicians and the government have taken regarding the Internet, there is a recent case that may indicate the legal direction which libel on the Internet is headed. In Stratton Oakmont, Inc. v Prodigy Services Co., the computer network Prodigy was differentiated from CompuServe for liability purposes. The companies differed in that Prodigy allegedly held itself out as retaining the right to control content. Although Prodigy claimed that its policy of “manually reviewing all messages prior to posting” changed before the subject posting at issue, the Court was not presented with evidence of such a change and held the company responsible for the effects of its prior policy. Prodigy’s alleged change in policy is inconsistent with its frequent public claims insisting it is not a common carrier and reserves the right to reject submissions. The Court found that Prodigy represented to the public that it exercised control of the content of its service evidenced by both its software screening program and a board it used to enforce content guidelines. Thus, Prodigy was deemed a publisher as opposed to a distributor.

Even though this case has since been dropped, Justice Ain, the judge presiding over the case, has yet to set aside or overturn his earlier decision. The state of the law in this area is unsettled and this case, in particular, has made on-line service providers nervous.

84 The following is a partial list of the sites concerning the upcoming '96 elections:
  Campaign '96 (http://www.comeback.com.countdown)
  Pat Buchanan for President (http://www.buchanan96.org)
  Lamar Alexander for President (http://www.nashville.net/lamar)
  Bob Dole for President(http://www.dole96.org/dole)
  Arlen Specter for President(http://bizserve.com/specter)
  American Conservative Union(http://www.townhall.com/townhall/ACU)
  Democratic Leadership Council(http://www.dlcppi.org)
  New Hampshire primary(http://www.cmoniter.com/primary/)
  Pat Paulsen for President(http://www.amdest.com/Pat/pat.html)
86 Internet Campaigning Said To Leave Out Many Voters, COMM. DAILY, Sept. 1, 1995, at 3. Douglas Bailey, a political consultant and publisher noted that one survey determined that only 21% of on-line users utilized the political information they found on line to make voting decisions. Id. at 4.
86 Id. at 3. While this may be true, it could also be argued that the Internet reaches a part of the population that is known for its poor voter turn-out, the eighteen to twenty-something group.

87 Clinton Pushes Program to Put Computers in the Classrooms, ASS. PRESS, Oct 10, 1995. On October 10, 1995, he announced he was awarding $9.5 million in grants to schools that were “aggressively buying computers.” Id.
89 See generally Hove, supra note 78.
90 Michael Tackett, Candidates Go On-Line to Net Votes, CHIC. TRIB., May 25, 1995, § 1, at 1, 22.
91 Id. at 22.
92 Id. Lamar Alexander, who can be credited with this quote, announced his presidential campaign in an on-line “chat session” on America Online. Id.
94 Id. at *4. The Court determined Prodigy was subject to liability damages for a posting on one of its bulletin boards. Id. at *1. Stratton, the investment firm charging Prodigy with libel has since dropped the case. Peter H. Lewis, For an Apology, Firm Drops Suit Against Prodigy, N.Y. TIMES, Oct. 25, 1995, at D4.
95 Stratton, 1995 WL 323710 at *4.
96 Id. at *2, *3.
97 Goldstein, supra note 3, at B2.
99 Id.
100 Lewis, supra note 94, at D4.
III. THE FUTURE OF POLITICAL CAMPAIGN “BROADCASTING”

At one time, political advertisements could only be assumed to reach people at times when they would be listening to the radio and television. These are presumably moments of leisure time in the average person’s life. However, political advertisements on the Internet can reach persons at times when they were formerly inaccessible. An Internet transmission is always there waiting for the user to access it at his or her convenience. One of those formerly inaccessible environments is academia. Computing is becoming increasingly integrated into the academic world and this may affect the outcome of political endeavors. There are two reasons supporting this proposition. First, currently people of high school and college age who are just making their entrance into the voting arena may depend on the Internet and its resources for guidance in their voting decisions and as a source for campaign and candidate information. Second, the younger generation is growing up with the Internet and may grow dependent on it for several needs as they enter their adult lives. Thus, the possible trend of relying on the Internet for political information, although just blossoming, is not likely to dissipate. This does not necessarily mean that there will be a need to monitor the Internet for equal opportunity in political campaigning from a regulatory standpoint.

A. What Is A “Broadcast” Anyway?

It looks like broadcasting, smells like broadcasting, tastes like broadcasting, has all the benefits of broadcasting, but it’s not regulated like broadcasting because it didn’t exist when the Communications Act was adopted.

Certain people in the communications industry may become frustrated with the notion of lawyers and scholars philosophizing ways to apply a broadcast model to the Internet for regulatory purposes. Perhaps, this frustration is well founded because the technical nature of the Internet precludes it from being regulated as a broadcast entity. The Internet does not use the public airwaves, therefore, eliminating the possibility that broadcast law can be applied to it.

If for some reason broadcast law is applied to the Internet, the transmissions might be considered to be intended for public distribution and meant to be of interest to the general “user” audience. The “use” proponent of political broadcast regulation would require the candidate’s picture or voice to be posted on a site or page; recent technology could facilitate such regulation. Currently, there is no way to reconcile the holding in TRAC which would classify the Internet as non-broadcast with a holding that a candidate can “use” the Internet in the fashion described in Functional Music. Also, it is improbable that such a broad interpretation of “broadcast” and “use” would be acceptable for the purposes of regulating the Internet and its related industry, an industry that the government and the public hope will flourish.

Not all agree that regulation of the Internet will

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106 This is different than political advertisements which are broadcast over the radio or television because if a potential viewer misses the broadcast, the chance to pass on the candidate’s message is lost.

108 See generally Lawrence J. Magid, Computing on Campus: What the College-Bound Should Know, WASH. POST, Sept. 5, 1994, at F20; see also Fern Shen, Mouse, Modem and Identity: Students Get Personal With Home Pages, WASH. POST, Apr. 25, 1995, at A1. “A 1993 survey found that seven out of ten of the nation’s colleges and universities provide students access to the Internet . . . .” Id.


110 Allen S. Hammond, To Be Or Not To Be: FCC Regulation of Video Subscription Technologies, 35 CATH. U. L. REV. 737, 756 n.115 (1986) (quoting former FCC Commissioner Henry M. Rivera, Commissioner, Federal Communications Commission, before the American Law Institute—American Bar Association (Mar. 29, 1984)). This Comment does not propose that computer networks are similar to broadcast but does insist that as convergence grows and live programs are being “broadcast” over the Internet, the purpose and function of the two are becoming similar.

107 See Filtering News, NAT’L L. J., Apr. 17, 1995, at A20 (explaining that cyberspace is more similar to a bookstore than it is to a broadcast entity, “once ‘inside’ one must know what to look for,”); E-mail from Dan Akst, Columnist, Los Angeles Times (Oct. 5, 1995)(on file with CommLaw Conspectus) (stating that the FCC cannot regulate anything over the Internet because it only has jurisdiction over content carried over the public airwaves and when computer technology discussions employ the use of “broadcast” they are only using it as a “metaphor of convenience”).
have a chilling affect. Some legal scholars are concerned that without a regulatory framework, investors and service providers will be hesitant to implement services for fear that their investments will be lost due to confusion on how to run the Internet. While the Communications Act of 1934 was formulated without the foresight of an information superhighway, some of its provisions could be a helpful guide for the pioneers of this new technology. However, it is doubtful that the Internet could ever be regulated according to a broadcast model. To do so would force regulators to explain how a complex network of computer systems could be considered a "broadcaster" while the basis for broadcast regulation is scarcity of the airwaves.

B. Other Models

There are critics who claim that Internet transmissions lack similarity to broadcasts and are more similar to the print medium. Applying this model to the Internet for the purposes of maintaining equal opportunities in political advertising would be ineffective because the Internet does not provide a right of reply. Also, the application of this standard would be misplaced in that not all information service providers claim to exercise editorial control. Editorial control is one of the main features of the print media.

Other commenters tried to extend the common carrier metaphor to the Internet. This would require providers to grant access to any candidate wanting to reach the public over the Internet. Such a concept would negate the need for any equal opportunity provision because equal opportunity would be a natural effect of mandatory access for candidates.

The problem this would pose for information service providers is that they would have no control of what was transmitted through their networks. This could be a detriment for providers from a market perspective because some provider companies may be image oriented and the messages from some candidates may not adopt that particular image.

The Internet's recent technological advancements such as real time voice, radio transmissions and video, which can be found on specified sites, raises other questions about the common carrier model. These advancements blur the distinction between a computer and a television. There is something to be said for seeing the personal likeness of a candidate on a screen or hearing her voice rather than reading a candidate's position papers or biography in textual form on the screen. Even though technological advancements bring an immediacy or intimacy to the Internet, they do not change the fact that the Internet operates without the use of a scarce radio frequency. The "dispositive fact" is that the Internet is not transmitted over broadcast frequencies.

Recent rulings regarding political broadcasts, classifying talk shows as newcasts and bonafide news interviews, could render regulation of political broadcasts moot. Certain political sites on the Internet are sponsored by persons or entities other than the candidates themselves. These could constitute the Internet's version of talk shows and, thus, qualify for the "newscast" exemption. However, "bona fide news interview" standards would be more difficult to apply. Unless a live "broadcast" over the Internet is at issue, Web sites are not "scheduled" to come on line at set times, they are constant. As for the other recent standards, Internet transmissions are not set up from a typical broadcast station. Therefore, the

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111 See generally Middleton, supra note 14, at 574 (noting it is "[t]ronic [that] the lack of regulation [in the early 1990s] probably slowed the development of some new technologies"); Ilene Knable Gotts, For the Information Highway to Become Super, Federal Regulators May Have to Overhaul the Present System and Design a More Comprehensive Structure, Nat'l L.J., June 13, 1994, at B6. The author did not mean to suggest inflexible regulations would solve the problem, but instead suggested constructing regulations in certain "key areas" to guide the network in the right direction. Id.

112 Id. Actually, business is growing on the Internet and while some companies are larger than others, it seems that competition is sparking this industry's growth. See Remarks of Commissioner Ness, supra note 79.

113 See generally Campbell, supra note 3, at 518-19; see also Johnson & Marks, supra note 10, at 487-97.

114 Congress has changes in store for political broadcasting which would affect the Internet if indeed one could apply broadcast regulation to it. A bill called the Fairness in Political Adver-
typical programmers or producers found in broadcast are not found in cyberspace.\textsuperscript{180} Also, there may be Internet transmissions in which the “producer is clearly attempting to further an individual’s candidacy.”\textsuperscript{181} This may come into conflict with the third prong of the “bona fide news interview” standard which removes the exemption if the producer is attempting to further an individual’s candidacy.\textsuperscript{182} Additionally, it is hard to fit transmissions over the Internet neatly into the model of a news interview format. The closest Internet equivalent to such a format would be a “chat room”\textsuperscript{183} in which a moderator can ask the candidate questions live over the Internet.\textsuperscript{184} Transmissions over the Internet vary so greatly that a strict application of one type of recent political broadcast regulation would probably produce inconsistent results between different types of transmissions.

C. Equal Opportunities Are Inherent on the Internet

Even if the Commission could regulate the Internet in some way, it would have a difficult time figuring out what parties were responsible for any wrongdoing.\textsuperscript{185} In the context of political advertising, it would be hard to imagine how the Internet would violate a political candidate’s right to equal opportunity.\textsuperscript{186} If for some reason an information service company only provided access to one candidate in a particular political race, the rest could find plenty of other outlets on the Internet to advertise. The size of this outlet would not matter as long as the candidate got his or her story, image or both onto the World Wide Web. The World Wide Web is the most traveled portion of the Internet.\textsuperscript{187}

The availability of outlets relates back to the “scarcity doctrine” relied on to justify the regulation of broadcasting. Political candidates looking to campaign on the Internet will not encounter a scarcity problem. However, in evaluating political campaigning on the Internet it is probably more important to look at the benefits to the public and not just what is accessible to the candidates.

As the Court stated in \textit{Red Lion}, “it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”\textsuperscript{188} This is a central standard used in broadcast law and, although regulation of the Internet is not called for, evaluating it from a public interest standard is useful and convenient.\textsuperscript{189} It serves the public interest to have another forum for open and free political discourse. Voters are granted opportunity to see, read or hear the candidates’ positions and, in many cases, respond. What is superior about the Internet, in terms of politicking, is that the potential voter has more information at his or her disposal in one convenient location than he or she can gain by watching a 30 second commercial or a one minute news clip.\textsuperscript{190} What could serve the public interest better than a more fully informed voting population? Retrieving information through the use of one’s computer may also have a more personal appeal to it than the television or radio.

By leaving the Internet completely unrestrained by political broadcast laws, Congress has left open the possibility that candidates will abuse this new method of exposure. The abuse could take many forms, but most likely will be in the form of misrepresentations of themselves to the voters. Because politicians essentially create their own Web pages, they has changed the landscape of the Internet dramatically with its appealing colors and graphics. \textit{Id.}

\textsuperscript{180} \textit{Staff Ruling}, supra note 72, at 6395.
\textsuperscript{181} \textit{Id.}
\textsuperscript{182} \textit{Id.} Most likely, the “producer” for cyberspace purposes would be the candidate, or someone not too remote from the candidate, and arguably someone who wants to further the candidacy through the transmission.
\textsuperscript{183} See John Burgess, \textit{Showing Your Face in Cyberspace}, Wash. Post, Apr. 10, 1995, at F21. “Chat lets people trade messages in real time, in some cases character by character as each key is pressed, and get real exchanges going.” \textit{Id.}
\textsuperscript{185} There are so many components to the Internet that it is hard to tell which parties are providing access to candidates.
\textsuperscript{186} For an opposing view see Campbell, supra note 3, at 522 n.14, 523 n.15, 537 nn.78-79.
\textsuperscript{187} Schwartz, supra note 3, at 4E. In 1995, the Web became the fastest-growing portion of the Internet. It reportedly was accountable for 26% of Internet traffic. \textit{Id.} The World Wide Web
are in full control of what those pages say. If the content of those pages consist of libel or slander, the information service provider may be held partially responsible.181

There would be one beneficial aspect of applying the broadcast political campaign laws to the Internet. If the Prodigy holding is not overturned and gains acceptance, the large commercial information service companies will remain open to the risk of being sued for libel.182 This is especially true where a company holds itself out as an editor or reserves the right to change advertisements.183 Although it is one thing to actually pour over the multitude of information that goes through the lines, it is quite another thing to be generally aware of what is being communicated; courts might tend to impose liability on entities that purport to be content controlling.184

Unfortunately, the courts could apply traditional concepts while unbending rules to this non-traditional medium. One suggestion to the providers of Internet services is to form a consortium that addresses some of the legal issues cyberspoliticking has raised. This would be a responsible action in the sense that it might quell the anxiety of groups concerned with the nature of certain transmissions found on the Internet.185 It would serve the growth of technology better if the persons who understand the innerworkings of the Internet attempt to sort out some of its problems and create solutions themselves. Perhaps participants in the industry will find a need for some legislative guidelines in order to further their purposes, but this would occur only where they need a shield from liability in some areas such as libel and defamation law.186 The industry could also look toward contract law in establishing guidelines designed to limit liability in certain instances.187

IV. CONCLUSION

An analysis of political campaign advertising over the Internet may be better served by treating the Internet as a hybrid communications entity with features derived from broadcasting, the print media, and common carrier technologies. As the Internet becomes increasingly user friendly,188 it will become more attractive for public use. Likewise, political candidates will be more inspired to set up Web sites or home pages to reach the public.189 It has yet to be demonstrated that the Internet reaches a large portion of the electorate, yet its potential to do so is supported by the speed at which politicians are setting up pages full of speeches, biographical details, and family photos.190

Users and third parties from such messages. Id.

188 It seems that some companies have already been working towards that goal. For instance, in Netscape’s “Electronic Advertising Sponsorship Agreement” it lists a “right to refuse unacceptable advertising[,]” which states that due to its extensive involvement with the education community, Netscape does not accept advertising from companies that produce or provide tobacco, alcohol, or pornographic products or services (which Netscape shall have complete discretion to define), or their subsidiaries, or foundations funded by such companies whose function is to improve acceptance of such products by the public.

Id.

Failure to disclose these attributes renders the Agreement voidable by Netscape. Additionally, Netscape states that it may “in its complete discretion refuse the use of any other advertising that it deems appropriate.” Netscape Electronic Advertising Sponsorship Agreement (on file with CommLaw Conspectus); see also Johnson, supra note 10, at 490.

191 Id.

192 See Lohr, supra note 69. The Senate passed the Exon bill in June that banned “obscene, lewd, lascivious, filthy or indecent” material from computer networks. Id.

193 The investment firm that filed a $200 million libel law suit against Prodigy, Stratton Oakmont, Inc., dropped the case in return for an apology from Prodigy. Although Justice Ain has not overturned his decision which held Prodigy liable for comments made by its user, critics of his ruling view the decision of Stratton to drop the suit as a win for users and free expression and privacy advocates. Lewis, supra note 94, at D4. Stratton attorney Jacob Zamansky believes that the case served the purpose of heightening the awareness of the computer services industry of the damage defamatory messages can create and of the need for on-line providers to take more responsibility in protecting
is extremely well travelled and provides many outlets for candidates to appeal to voters. Thus, equal opportunity for political candidates is an inherent attribute of the Internet making regulation of the political information found on it unnecessary and undesirable.

America OnLine and Prodigy, the three biggest on-line services began providing access to the Web, which will result in more in-depth coverage of the 1996 elections. *Id.*