LEGAL ISSUES IN FACSIMILE USE

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I. Introduction

Alexander Graham Bell's invention of the telephone has come a long way. Technological development has brought Bell's primitive invention from an instrument that could only carry sound to one that can send text and images across the globe in just a matter of seconds. Contrary to the belief of many, the facsimile machine ("fax" or "fax machine") is not a new idea. The concept of transmitting images by wire was first proposed in 1842 by Alexander Bain. However, the prototype Bain invented took over a century to develop. The Pentelegraph Corporation in Paris, France introduced the public facsimile service in 1863. However, the idea of the fax machine sat dormant until the 20th century. The fax machine of today is fast, accurate, versatile, and inexpensive to own and maintain.

Many companies use fax machines to run their business more efficiently. Recently, fax machines have become more common in residential homes. The increased use of the fax has raised issues of law regarding such matters as privacy and defamation tort law; intellectual property issues such as trade secrets and copyright infringement; the service of process by fax; use of fax transmissions in the formation of contracts; parol evidence; and the best evidence rule. This article discusses the possible problems and solutions for these legal issues, as well as the applicable law, if any, regarding faxes in the aforementioned situations.

II. History of Invention: What is it and How Does it Work?

The use of fax machines was ignited in the early 1970's when a standardized fax machine was introduced. However, the first fax machines used analog technology, and transmission was slow and the analog signals transmitting the data were easily manipulated. In the 1980's fax machines were transformed using digital technology, cutting transmission time in half and making the signals less susceptible to interference.

The most common machine, a "stand alone" fax, operates by scanning a document, converting its image into a signal which is transmitted through telephone wires. When the sending fax machine connects with the receiving fax machine, the machines exchange "protocols," enabling the machines to exchange data.

As the original document passes through the "scanning head," the sending machine converts the information by detecting the different patterns and varying gray areas. The machine then assigns each shade an appropriate value to be read by the receiving machine. The receiving machine, in turn, converts the information and then prints the information. The only equipment other than a fax machine needed is telephone line. A telephone line can be used in conjunction with regular telephone use or be dedicated solely for fax use (a "dedicated line").

In order to complete transmissions, most machines are equipped to detect any errors that may occur, such as "Out of Paper," "Paper Jam," "Bad Connection," etc., while a fax is in transmission. Many problems may result, affecting the accuracy of the transmission of the fax, but most problems can be detected by either the sending or receiving machine. If an error occurs, either machine would most likely display a message which should alert both the sender and receiver that the transmission was unsuccessful.

Most fax machines now carry a feature that allows the owner to print out a record of all the transmissions sent and received. This transmission record is an account of all the transmissions sent and received, including the time, date, and the fax number that either sent the fax or the number of the machine to which the fax was sent. This information is stored and can be printed at the owner's discretion and can be used as proof that a fax was sent or received. The transmission record can serve as evidence in the event a dispute arises as to the receipt or sending of a document, especially for service of process by fax and as parol evidence in contract disputes.

Fax machines provide businesses and individuals with a new medium of communication that can expedite information and documents in the time it takes to make a phone call. This form of transmitting hard copy of documents is also less expensive and more convenient than using an express mail service or carrier service. However, the fax machine has also opened a new door for unwanted solicitors to enter into business and homes.

III. Privacy and Confidential Information

One concern of using a fax machine, particularly for confidential communications of any sort, is the possibility that the fax will not reach its intended receiver. Particularly where a fax machine is shared in an office, transmissions can be lost, misdelivered, or intercepted. This scenario could pose problems if

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2. Id.
3. Id.
4. Id. at 3.
5. Id.
6. Id.
a fax message is intercepted and the information contained in the fax is misused. In order to prevent such problems, many fax cover sheets contain a disclaimer at the bottom, such as this example used by a law firm:

This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copy of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and return the original message to us at the above address via the U.S. Postal Service. Thank You.

In 1825, federal law made it a crime to take U.S. mail before delivery to the intended receiver with the intent to obstruct or "pry into the business or secrets of another, or to open, secrete, embezzle or destroy." However, fax communications lack the protection of federal statutes provided to U.S. Mail, as the statutes only cover mail in the possession of and delivered by the U.S. Postmaster.

In 1991, President Bush signed the Telephone Consumer Protection Act ("Consumer Protection Act") which addresses issues regarding the privacy rights of telephone subscribers against unsolicited advertising and solicitation. The Consumer Protection Act covers standard telephone equipment -- including cellular phones, emergency service providers, residential customers -- and fax machines. According to the Consumer Protection Act, the Federal Communications Commission ("the Commission") is responsible for interpreting and implementing the Consumer Protection Act's requirements in order to develop policies protecting the privacy rights of subscribers. The Consumer Protection Act provides for the establishment of a national database to record those subscribers who wish not to be solicited by telephone. However, this database would be extensive and quite costly to create; it has yet to be completed.

Most importantly, the Consumer Protection Act creates a private right of action to sue upon violation of its provisions. This private right of action allows the individual to sue and collect actual damages or $500 for each violation. Although facsimile transmissions lack the federal protection provided to the U.S. Mail, some federal protection of telephone services and facsimile transmissions does exist specifically to protect business and consumers' privacy rights under the Communications Act of 1934 (47 U.S.C. §227) and the Telephone Advertising Consumers Rights Act of 1991.

Section 227 of the Communications Act was amended to include facsimile transmissions, providing some statutory protection of telephone subscribers' privacy rights. Section 227 requires that manufacturers of fax machines provide "line identification" for fax owners so that the machine prints the telephone number, date and time of the particular fax transmission on the top or bottom of each transmission sent or received. All facsimile manufacturers were required to comply with this requirement by 1992. This feature cannot be altered by the sender. The identification line's purpose is "not only to allow the receiver to know from whom the fax is being sent, but also to identify and report the source of any unsolicited and/or annoying fax transmissions." Where a fax machine is shared by several departments and/or people, fax transmissions may go through different people before it is delivered to its intended receiver. In such an instance, a brief period may exist where a fax transmission is vulnerable to mistaken delivery or even interception. Fortunately, some protection is afforded to telephone communications and facsimile transmissions through federal statutes.

A. Tort Liability: Defamation

Defamation: A publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule, is a libel. The convenience of communicating by fax raises the issue of a defamatory fax. What protections does a victim have? Are there any laws or case law against defamation by fax? What is the extent of the liability of the fax owner or of the fax service provider that sends the fax for an independent third party? Does a fax transmission constitute publication in the context of defamation?

The Restatement (Second) of Torts, §577, defines what constitutes publication of defamatory material:

(1) Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed.
(2) One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication.

Comment (e) to the section states:

* Id.
* * Id.
* Id.
* Id.
The fact that the defamatory matter is communicated to an agent of the defamer does not prevent it from being a publication sufficient to constitute actionable defamation. The publication may be privileged, however, under the rule stated in s593. So too, the communication to a servant or agent of the person or a request from the other or his agent, the publication may not be actionable in defamation.37

Publication by fax can be easily achieved by transmitting a fax to a person whose knowledge of the defamatory information would cause harm to the defamed subject. Because faxes are often urgently anticipated, many employees make it a point to check the fax machine on a regular basis. Thus, faxing defamatory material brings immediate attention to the faxed material.

Publication of defamatory information by fax would be virtually untraceable if sent by a fax service or even if sent off a public fax/modem hook-up service, because a fax service provider services many different people who may have not given any identification. This scenario causes liability problems for fax service providers or the fax machine owner who allows a third party to use his machine. Currently, there are no cases or statutes directly addressing such an issue; however, defamation by fax can be analogized to other forms of modern communication media, such as on-line service providers.

Although fax service providers are not identical to on-line or internet service providers, they are analogous in that they distribute other people’s information. In Cubby, Inc. v. CompuServe, Inc.,24 the U.S. District Court for the Southern District of New York held that under New York law, a computer service company that provided its subscribers with access to electronic library news publications put together by an independent third party and loaded the publication onto the company’s computer banks was a “distributor” of information, which could not be held liable for defamatory statements therein absent a showing that the computer service company either knew or had reason to know of defamation.25 The court further held that the company could not be held liable on an unfair competition claim based on such defamatory statements. No liability could be imposed, on either a libel, trade libel, or business disparagement theory, where news publications were loaded directly by a third party for immediate access by the company’s subscribers with no opportunity for the company to review the contents of the publications.26 The court reasoned that without actual knowledge of defamatory statements, on-line service providers could not possibly monitor all the information uploaded and sent via its service without undue burden. An on-line provider is a distributor of information and does not usually edit or control most of the information that is distributed through its service. This lack of control and reasonable means to monitor and censor all information going through its service precludes on-line providers from tort liability.

Similar arguments can be made for fax service providers. Like an on-line internet access provider, a fax service provider is merely acting as the vehicle for the transportation of information by wire, lacking the control of the information being transmitted through its service. Thus, the current case law holding on-line providers immune to tort liability of information which their service may transmit, should apply to fax service providers under similar circumstances.

B. Unsolicited Advertisements and Privacy

With the rising popularity of fax machines in homes and offices, telemarketers began soliciting consumers with little or no cost—by facing “junk fax” to dedicated fax numbers. However, fax telemarketing has been distinguished from telemarketing by phone. In Destination Ventures, the court addressed the constitutionality of the Telephone Consumer Protection Act27 which prohibits the use of fax machines to send unsolicited advertisements. The plaintiffs sought injunctive relief, claiming that the content-based restriction violated their right to free speech and equal protection.28 The court held that although the statute was a content-based restriction on commercial speech, the statute met constitutional requirements because it directly advanced substantial government interests in a manner that was no more extensive than necessary to serve that interest, and did not violate equal protection.29 The court reasoned that because fax machines are designed to accept and print all messages received, fax advertisers take advantage of the fax machine by shifting the costs of advertising to the recipient and rendering the fax machine unavailable to receive legitimate business fax transmission while processing the “junk fax.”30 The fax machine user pays for the cost of maintaining the machine, in particular, fax paper.31 When solicitors fax advertisements at random to a large number of fax owners without their request, the cost of advertising is shifted from the advertiser to the consumer. This transfer of advertising costs was the primary governmental interest in implementing the Consumer Protection Act.

IV. Intellectual Property and Copyright Infringement

Fax machines have also raised concerns about the protection of intellectual property and copyright infringement. Most new computers come equipped with fax/modems, opening new doors to obtain and send confidential information. Intellectual property and copyrighted material are more vulnerable to infringement as internet access to such material on-line may ease the downloading and faxing of information.

28 Destination, supra note 14.
29 Id
30 Id
31 While most new fax machines use ordinary copy paper, many older machines use “thermal paper,” which is more expensive.
The same problem addressed in defamation liability exists with the misappropriation of trade secrets and copyright infringement. Who should be held liable? Are fax service providers liable for allowing a third party to use its services to publish trade secrets or copyrighted material? These questions have yet to be answered. However, cases involving the use of the fax for trade secret and copyright infringement will emerge. However, we can analyze any potential problems with the current law and cases which are similar in nature.

A. Misappropriation of Trade Secrets

A trade secret is information that is classified as a trade secret, usually used in a business, that is in fact a secret, and that gives a competitive advantage to the person with knowledge of it. The information must not have been in the public domain and the owner of the trade secret must have taken appropriate measures to keep it a secret.

Misappropriation of a trade secret exists when there is:
1) acquisition of trade secret means through the use of improper means,
2) use or disclosure of a trade secret in breach of confidence, or
3) use or disclosure of a trade secret with actual or constructive knowledge that the trade secret:
   a) was acquired by improper means,
   b) was disclosed in violation of a duty arising out of a special relationship, and
   c) was acquired by mistake.

In the event a fax machine owner receives a transmission containing trade secrets, an owner can be held liable for the misappropriation if the receiver uses the information to his advantage, even if he received the fax by mistake. Acquisition, use, or disclosure of a trade secret can trigger a third party's liability for trade secret misappropriation, even though the third party itself did not use improper means to obtain the trade secret. However, in order for the unintended receiver to be liable, he must have actual knowledge or have reason to know that the information is a trade secret. A solution for those transmitting information containing a trade secret by fax is to place a notice in bold letters on the cover letter and the document that the information is a trade secret and any use of the information except for its intended receiver would render the actor liable for misappropriation of that trade secret.

B. Innocent Infringement

Currently, since no cases involving the innocent infringement of fax transmissions exist, fax transmissions of copyrighted material can be analyzed using the case law applicable to on-line access providers. The U.S. District Court held in Religious Technology Center v. Netcom On-line Communication Services, Inc. that an access provider was not directly liable for copies that were made and stored on its computer. In the event that a fax transmitted through a fax service provider of a copyrighted manuscript or document is copied and distributed in violation of copyright laws, the fax service provider should not be held directly liable for the copies made from that fax. As in defamation law, on-line providers and fax service providers do not have the control or the ability to monitor the information that is transmitted through their services, and therefore cannot be held liable for any copyrighted material that is infringed upon unless they had actual notice of the misuse of the copyrighted material using their services. Thus, fax service providers should not be held liable for innocent infringement of copyrighted material transmitted via their services without their knowledge.

V. Procedural Issues

A. Fax as a Service of Process

Service of initial process by fax has not been readily accepted in the courts. Legislatures and courts are reluctant to specifically provide for the service of process by fax because of several concerns, including the opportunity to commit fraud, delivery to the wrong recipient, and the quality of fax transmission. However, there are many benefits made by allowing for service of process by fax. Sending a service of process by fax is time-efficient and cheaper in comparison to service by U.S. Mail, UPS, FedEx or process server. Also, service of process by fax can serve as an alternative method to serve reluctant defendants who have refused service by mail or by process server.

Since service of process notifies the defendant of the commencement of an action, the Constitution requires certain criteria be met for service of process in order to ensure due process of law. In Mullane v. Central Hanover Bank, the Supreme Court held that service of process must give notice to the defendant and must be 'reasonably calculated, under all circumstances, to apprise interested parties of the pending of the
action and afford them an opportunity to present their arguments.44

Service of process by fax provides a replica of the original pleadings to the defendant and can then be followed up by mailing the original by U.S. Mail.45 Service of process by fax can be instrumental where a statute of limitations is in danger of running out. Service of process by fax would also be an additional form of service without having to resort to service known as "mail and mail." This method is usually only allowed when the person to be served cannot be located or when the person is avoiding service and after due diligence was used in several attempts to serve the person personally or through an agent.46

Using fax for service of process would alleviate the difficulty of attempting to personally serve a person. If the person to be served has a published fax number, the summons can be served upon the person at any time the fax machine is available to receive documents and followed up by a copy mailed to the person's last known address to ensure receipt of the summons.

However, there are some problems associated with the use of a fax machine for service of process. One of the problems is that a fax transmission can be incomplete. Pages or lines of a document do not always go through, possibly omitting critical information related to the action. Also, some fax machines require the use of thermal paper which can fade and/or deteriorate if exposed to bright light.47

Although these concerns are significant, they can be minimized. Most faxes include a cover sheet which states the number of pages the receiver should expect. Therefore, if all the pages are not received, the recipient will know and can contact the sender. Further, most new fax machines do not use thermal paper. Instead, they use plain copy paper, resolving the preservation and cost issues of thermal paper. Even if a plain paper fax machine is not available, the recipient can photocopy the fax transmission onto regular paper if preserving the transmission is a concern. The few problems of using fax machines in service of process are strongly outweighed by the benefits of time conservation and providing immediate notice, particularly to those who have previously refused service.

There are no states that specifically allow service of initial process by fax, but some states, such as Montana, Idaho, and Utah allow service of process of secondary legal papers by telegraphic or telephonic facsimile transmission.48 The first service of process by fax in the United States recognized by the courts as sufficient occurred in New York in Calabrese v. Springer Personnel of New York, Inc.49 The court held that the service of paper upon an attorney through the use of a fax machine satisfied the requirements of CPLR 2103 (b)(3). In Calabrese, plaintiff's counsel faxed a copy of a court order to defendant, but defendant's counsel immediately rejected the order as insufficient service according to the CPLR.50

The court paraphrased rule 2103(b)(3) of the CPLR which outlines listing instructions for service of process for faxes as follows:

At the sending end an operator phones the intended recipient's machine. If the recipient's machine does not give a busy signal, the document is then transmitted and comes out of the recipient's machine in much the same manner as with a copy machine. It then remains in a tray or other container along with the prior and subsequent transmission until picked up by the recipient.51

The Calabrese court also set guidelines which roughly define a successful service of process by fax. The Court further interpreted the rule as inferring that an office is open when the fax machine is receiving.52 Delivery occurs when an operator is present.53 If no operator is present, then delivery occurs when the document is eventually picked up from the fax machine.54 Therefore, the faxing at issue satisfied the intent of rule 2103 of the CPLR of New York. Although use of the fax is not yet specifically provided for in most state procedural statutes, courts and legislatures will eventually have to address the issue as the use of the fax becomes increasingly common.

B. Evidence

1. Parol Evidence rule

Fax transmissions containing preliminary terms of a contract may serve as evidence unless the parties have reduced their agreement to an actual contract. The parol evidence rule requires that in the absence of fraud, duress, or mutual mistake, all extrinsic evidence must be excluded if the parties have reduced their agreement to an integrated writing.55 When the parties to a written contract have a complete and final embodiment of their agreement and its terms, parol evidence cannot be used to add or vary its terms unless only part of the agreement is integrated. In such an instance, parol evidence can be used to prove elements of the agreement not reduced to writing.56

The Uniform Commercial Code §2-202 states:

Final Written Expression: Parol or Extrinsic Evidence

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44 Id. at 314.
45 Id.
48 Sokates, David A. supra note 8 at p. 531.
49 334 N.Y.S 2d 83 (Civil Ct. New York County, 1988).
50 Id. at 314.
51 Id.
52 Id.
53 Id.
54 Id.
55 Plater v. Bailey, Mont. 139 (Sup.Ct. 1999), 782 P.2d 1266.
56 Masterson v. Sinc, 436 P.2d 561 (Sup.Ct. 1968); 68 Cal.2d 222; 63 Cal.Rptr. 545.
Termus with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and
(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.59

A writing containing preliminary terms of a contract transmitted by fax clearly can be considered a writing of the intention of either party to do business with one another. An argument can hardly be made that a writing transmitted by fax should not be considered evidence solely for the reason it was transmitted by fax. Many businesses use faxes to communicate deals and agreements. It would be contrary to equitable law not to allow the fax transmission to serve as purport evidence in breach of contract cases or other contract disputes as faxes regarding the formation of a contract are writings that would most likely contain pertinent information.

2. Best Evidence Rule

"The best evidence rule applies to the contents of a writing or recording. It is triggered when the proponent tries to prove what the writing said, rather than the identity, existence, or delivery of a writing."60 The Federal Rules of Evidence ("FRE") 1001(1) defines "writings" and "recordings" as letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, photostating, photographing, magnetic impulse, mechanical recording, or other form of data compilation.61 Clearly, fax transmissions fit into this category, even though the statute does not specifically call for the use of fax transmission. One would have a difficult time proving that a fax transmission does not constitute a form of "copying" or even a handwriting, printing, typewriting, or other form of data compilation. Faxes are essentially a copy of the original; its only difference from regular photocopies is that faxes simultaneously copy the document as it sends the document to its receiver by telephone, rather than being copied in an office, then sent via U.S. Mail to its recipient. In the event original documents do not exist, a fax transmission of the original would serve as a photocopy of the original. Certainly, a fax transmission would be better than having no evidence of the original document.

VI. Fax Transmission in Commercial Transactions

A. Contracts: Offer and Acceptance

An offer is an expression by one party of his assent to certain definite terms, provided that the other party involved in the bargaining transaction will likewise express his assent to the identically same terms. An acceptance is a voluntary act of the offeree whereby he exercises the power conferred upon him by the offeror, and thereby creates the set of legal relations called a contract.62

As discussed earlier, many businesses allow customers to place orders by fax; it has become commonplace for many catalog companies. This common practice most certainly fits into contract law; however, the offer is usually given by a catalogue received in the regular mails. Offers may be given by fax in cases where the service provider or supplier and the customer have been regularly been working together for a period of time. In this case, each party would have each other's fax numbers and each specific people with whom they work regarding their accounts, so offers could be specifically made directly to regular customers. The offeror has the prerogative to choose the mode of communication in which to do business. If the offeree chooses to send an offer by fax, if acceptance terms are not specified, an acceptance should be expected by fax.

An issue concerning all contracts, but especially contracts negotiated by fax transmissions, is whether the fax can be considered a writing under the statute of frauds. In Bazak International Corp. v. Mast Industries63 the New York Court of Appeals held that annotated purchase order forms signed by an alleged purchaser of textiles, sent to an alleged seller by telecopier (fax) and retained without objection, came within "merchant's exception" to the statute of frauds.64 In Bazak, the defendant-seller sent five purchase orders to the plaintiff-purchaser by fax, and received written confirmation of plaintiff's receipt of the orders.65 The defendant made no objection to the terms set forth in the purchase orders, yet failed to deliver the textiles ordered by plaintiff. Plaintiff filed a complaint alleging breach of contract, but the defendant moved to dismiss for failure to state a cause of action due to lack of documentary evidence.66 The defendant claimed that the purchase orders sent by fax were insufficient under the UCC 2-201 to satisfy the statute of frauds.67 The court explained that "the UCC 2-201(1) requires that the writing be 'sufficient to indicate' a contract, while UCC 2-201(2) calls for

59 Summers and Hillman supra n. 35 at p. 655.
61 Id. at 504.
62 Id.
63 Id. quoting CPLR 3211(a)(7).
64 Id.
writing in confirmation of the contract." The court found the faxed purchase orders satisfied the UCC 2-201 (1) requirement.

In American Multimedia v. Dalton Packaging, the New York Supreme Court held that a seller was bound by the arbitration clause contained on the reverse side of an order submitted by fax even when the seller did not receive the reverse side of the document. The court reasoned that the seller agreed in the terms of the contract, one of which clearly stated that the contract was subject to the terms listed on the reverse side of the page, which the seller failed to request when the reverse side was not received. Clearly, a typewritten or even handwritten fax containing the terms of a contract can be considered a writing whether they were sent by U.S. Mail or by fax, as long as the parties have formally or informally agreed to use fax as their form of communicating.

VII. Conclusion

The fax machine opens up a new medium for communication, allowing for faster and more efficient communication. However, the benefits of fax use demand a coherent, reasonable policy for fax communication. Very little case law and statutory law specifically address the legal implications of fax use. Given the increase in popularity and use of faxes, it would be in state legislatures' best interest to address these issues. By providing protection of fax users and telephone subscribers' privacy rights, as in the delivery of the U.S. Mail, state legislatures risk infringing on other individuals' First Amendment freedom of speech rights.

OVNS, CONTINUED FROM PAGE 20

While present mergers and deals do not indicate a move toward an OVS platform, now that the Commission has adopted its Third Report, perhaps interest in OVS will increase. Pacific Telesis has indicated that creating an OVS remains a "possibility." BellSouth and Ameritech have also not ruled out the possibility of becoming OVS operators, saying the decision depends on how large a role OVS operators can play in providing their own content. Bell Atlantic is the closest of any telco to endorse the open video approach, saying that the company was "leaning toward" the approach where it builds full-service networks.

Advantages of an OVS include the freedom from franchise authorities and avoiding the complications that can arise with a merger. While US West was successful in its merger with Continental, other mergers have been problematic. When Bell Atlantic attempted to merge with Tele-Communications Inc., the largest cable operator in the nation, the $21.4 billion deal fell through after TCI's stock dropped and Congress passed new cable regulation. Another merger -- Southwestern Bell and Cox Communications -- also failed. Additionally, the US West/Time Warner Entertainment merger has resulted in a bitter lawsuit. While mergers may create economies of scale and increase a company's position in the market, shareholders, government regulation -- or deregulation, and clashing corporate cultures can limit the success of such mega-mergers.

Although there is no immediate rush to become an OVS operator, telcos acknowledge that as technology advances, OVS becomes more attractive. The greatest regulatory handicap -- the relinquishing of two-thirds of the system's capacity -- may be countered by the explosion of digital technology, eliminating a major concern of prospective system owners.

III. Conclusion

Now that the Commission adopted its Third Report on OVS, telcos and other potential applicants will be better able to evaluate whether becoming an OVS operator is the best way to enter into the video programming market. Telcos want to enter the video programming market and compete with cable operators, as demonstrated by the purchasing of and mergers with cable franchises throughout the country as well as the interest in VDT prior to the 1996 Act. However, the deregulation of the telco-cable markets gives LECs a variety of ways to become video programmers that are faster and less costly than OVS. The future of OVS as a viable entrant into the video programming market may be determined by a few issues. First, additional regulation -- or deregulation -- may make entrance as an OVS operator more attractive. Second, advances in digital compression which would increase channel capacity would counter the disadvantage of relinquishing editorial control of two-thirds of its system. Third, and perhaps most important, is the success -- or failure -- of alternate methods of market entry. If telcos can successfully purchase or merge with cable companies, they may not wish to experiment with an untested OVS. However, if telco entry as a cable operator fails and technological advances continue to alter the video programming market, entry into the video programming market as an OVS operator may be a viable and attractive alternative.

164 Id. at 506.
165 540 N.Y.2d 410 (Sup. 1989).
166 Id. at 412.
167 Id.
169 Richard Tewdrick, BellSouth Reaches Atlanta Interactive Trial, BROADCASTING & CABLE, Mar 11, 1996, p. 75.
170 Kent Gibbons, Telcos Taking Active Look At New Open Video Systems, MULTICHANNEL NEWS, Feb 26, 1996, at p. 49.
171 Borges, supra note 95.
172 Michael Katz, OVS: Other Door To Cable Entry -- Open Video Systems, BROADCASTING & CABLE, Feb 12, 1996, at p. 54.