

LAW AND THE INFORMATION SUPERHIGHWAY

By Henry H. Perritt, Jr.¹

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Henry H. Perritt, Jr., in *Law and the Information Superhighway*, is successful not only in providing a technological and historical framework for understanding cyberspace, but also in presenting a wide array of legal issues involving the information superhighway. Also known as the National Information Infrastructure ("NII"), the "infobahn," or the Global Information Infrastructure ("GII"), the information superhighway is an area legal scholars view as a domain needing innovative legal reform to keep up with the changing technology. Perritt, in contrast, asserts that "the information superhighway does not necessitate scrapping legal principles and procedures that have been worked out over a couple of centuries in our legal tradition" (p. v).

Perritt suggests that two postulates have governed the relationship between law and technology (p. 2). The first is that technological change has always "been a major source of human problems that the law must address" (p. 2). The second is that "law lags technology" — that market economics and the common law tradition require "that the legal system should not predetermine the course of technological application and product development" (pp. 2-3). Perritt argues that the law should be a background mechanism for resolving disputes that the market and private accommodation are unable to untangle. He believes that combining knowledge of the new technology with an appreciation of traditional legal concepts can reconcile conflicts raised by the new technology (pp. v-vi). His text is designed to help the reader integrate familiar legal concepts into the framework of modern information technology. In each chapter, Perritt analyzes discrete areas where law and information technology converge, and discusses the state of the present law. These discussions are thorough but bland. His goal appears to be to create a reputable and even-handed reference tool, for he is careful not to adopt strong positions.

Chapter 1 introduces the NII. Perritt begins by defining basic technological terms and concepts. He discusses the relationship between different computer and communication technologies, and asserts that as the information superhighway has developed, the boundaries of

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traditional legal categories of information technology — broadcasting, telephone and telegraph, and publishing — have blurred (pp. 27-28).

In Chapter 2, Perritt discusses access rights to networks and facilities as a method for developing the NII (p. 34). Under a perfect market, all parties willing to pay a price close to marginal cost would have access to all facets of the information superhighway. However, an imperfect market may prevent complete access, and Perritt asserts that in such cases the legal system should intervene (p. 34). Under current law, the author explains, plaintiffs may assert claims based on common carrier duties, antitrust law, or eminent domain (pp. 40-80). He also discusses possible ways to combat access right assertions, including the First Amendment (free speech immunities) and the Fifth Amendment (property-based immunities provided by the due process and takings clauses) (p. 81). He reserves, however, a full discussion of constitutional issues for Chapter 6.

Chapter 3 focuses on privacy issues, which are particularly salient to the NII due to the ease of access to very private information. This chapter details both the wide array of laws involving governmental invasion of privacy and those governing private sector privacy interference. Perritt focuses particularly on laws that protect certain information (insurance and financial records) and that regulate particular industries (credit reporting) as possible methods for handling NII privacy concerns. He also touches upon common law, federal constitutional law, and state protections. Last, Perritt explores European approaches and encryption, as well as other possibilities, as alternatives to the current privacy regime.

Chapter 4 involves liability for harmful communications — tortious acts that harm third parties. Perritt surveys the actions currently available, including defamation, invasion of privacy, and misrepresentation and false advertising, adapting them to the information superhighway. Of particular interest, because of the heightened role of intermediaries on the infobahn, is Perritt's in-depth analysis of intermediary liability for harmful conduct resulting from the use of the intermediary's facility or services. Because the data for many NII products comes from government agencies, Perritt also explores the availability of the sovereign immunity defense.

Service provider liability to customers based on product failure is the topic of Chapter 5. Perritt competently applies the traditional doctrines of breach of contract, breach of warranty, licensing, fraudulent misrepresentation, and damages to liability for service failures.

Constitutional issues pervade the information superhighway. In Chapter 6, Perritt applies modern constitutional law to the infobahn, considering especially the First Amendment, Fifth Amendment, and Interstate Commerce Clause. The scope of this chapter is very broad.

The chief First Amendment issues considered are the right to expression (pp. 263-68), right to limit access (pp. 268-71), prior restraint and copyright (pp. 278-80), and the First Amendment as a source of *private* duty (when action taken by private actors is sufficiently state action) (pp. 282-88). Perritt examines the Fifth Amendment as a source of private property protection through the due process and takings clauses (pp. 288-91). He also provides a solid summary of how the Interstate Commerce Clause is implicated when states burden the information superhighway via regulation (pp. 288-97).

Chapter 7 examines the Federal Communication Commission's ("FCC") regulation of the NII as a mechanism available for shaping the NII. Perritt explains new regulatory doctrines, such as price cap regulation as applied to common carriers (pp. 315-17), and details general common carrier (pp. 307-18), broadcast (pp. 318-24), and cable (pp. 324-30) regulation. Additional topics dealt with in this comprehensive chapter include the regulation of video dial tone services (pp. 331-33), antitrust limitations on pricing (pp. 333-35), proposed federal legislative changes (pp. 335-36), and state regulation (pp. 336-39). Lastly, Chapter 7 explores the possibility for self-governance of the NII, recognizing the limitations of such a system while encouraging actors to support it (pp. 339-43).

Chapter 8 concentrates on the standardization of the NII via compatibility and interoperability standards. Once again, Perritt maintains that most of the NII is made compatible and interoperable by market forces, and that the law's function in this arena should only be to deal with the problems that result from an imperfect market (p. 346). These problems include the use of standards to inhibit competition and situations in which no standard is adopted due to a breakdown of the market (p. 346). Perritt explains the currently available legal framework for imposing standards on the market (pp. 350-60). He also discusses the use, efficacy, and legal limits (such as antitrust violation) of private standards agreements as a market mechanism for developing interoperability and compatibility (pp. 361-68).

In the realm of electronic commerce and contracting, Perritt claims that although there are problems unique to the NII, traditional contract law is generally capable of ordering rights and duties between parties (pp. 376-77). In Chapter 9, he reviews contract formation and interpretation, agency principles, and the use of formalities to circumvent problems (such as the statute of frauds and attestation) within the context of electronic commerce (pp. 379-92). Perritt also argues that encryption and trading partner agreements that delineate the electronic techniques parties will use are helpful private methods for reducing contract formation and interpretation problems (pp. 392-99). He is hopeful that current electronic funds transfer law can be employed with contract law

to develop a framework for payment systems that will serve as a model for all electronic contracting (pp. 377, 399-407). Finally, Chapter 9 explains how digital cash, the expanded use of credit cards, and securities sales may further commerce on the information superhighway (pp. 408-11).

Chapter 10 surveys intellectual property law on the NII. After describing the historical development of intellectual property law, it summarizes the copyright (pp. 421-36), trademark (pp. 436-46), trade secret (pp. 447-49), and patent (pp. 449-53) doctrines, including changes made by the General Agreement on Tariffs and Trade (pp. 433-34, 445, 449, 451-52). The author then applies these traditional doctrines to the infobahn and demonstrates that intellectual property on the NII may be sufficiently protected already. Perritt usefully presents numerous methods for "creators of content and added value [to] protect themselves against free riding without relying exclusively on copyright law" (p. 458). Finally, the author discusses proposed changes to intellectual property law and their potential impact on the infobahn (pp. 464-66).

Chapter 11 addresses the current legal issues surrounding public information on the Internet. Public information, particularly legal information, was an important early focus of the NII's electronic publishing and information retrieval capabilities (p. 469). Perritt contends that there is a need for private sector and individual citizen access to basic data collected by public entities, but that this does not mean that the public entities must give away such information without recovering dissemination costs (pp. 469-70). Nonetheless, the government cannot maintain or allow a monopoly by appropriating the public information and selling it or by imposing restrictions on other vendors and distributors of public information (pp. 470, 472). Perritt suggests that current notions of equal access must be the focus of federal, state, and local information policy (p. 470). Governments must make electronic formats available when they exist and must also allow and promote a diversity of channels and sources of public information (p. 473). He reviews possible actions against public entities under the Freedom of Information Act (pp. 477-82), public contracting law (pp. 488-89), copyright law (pp. 482-88), and antitrust law (pp. 491-93). He also touches upon constitutional law issues dealing with public information access (pp. 489-91, 494).

Perritt analyzes, in Chapter 12, civil procedure and dispute resolution in the peculiar context of the NII. He focuses on the well-recognized problem of determining jurisdiction (along with the corresponding choice of law problem) (pp. 506-14, 527-35). He also covers issues dealing with service of process, venue, arbitration, and discovery of electronic formats. The author does provide model clauses on choice of law, forum selection, and service of process and several other subjects

as materials intended to assist practitioners with these issues (pp. 517, 539-51). Evidentiary matters peculiar to the NII are also analyzed, such as the admissibility of evidence, authentication, the original documents rule, video depositions, and video trials (pp. 551-67).

Chapter 13 covers the substantive aspects of current criminal law within the context of the NII. Perritt's discussion of substantive crimes is comprehensive and includes wire fraud, computer fraud and abuse, pornography, transportation of stolen, converted, or fraudulently taken property, and threatening communications. Perritt also briefly discusses criminal procedure in Chapter 13. He raises some of the more intriguing effects that technology has had on the law in this area, including search warrants, which may be obtained by emailing information to a judge (pp. 604-05), and which may be used to discover electronic information (pp. 594-602).

Recognizing the inherently international character of the information superhighway, in Chapter 14, Perritt provides a basic background on modern international institutions and international law. Although the international nature of the Internet pervades the text, Perritt uses the final chapter to briefly examine the international dimensions of the NII, including a discussion of GATT, the World Trade Organization, NAFTA, the European Union, and U.S. export controls (pp. 628-55). He also expands on subjects raised in earlier chapters that have international implications, including transnational data flow regulation (pp. 655-56), international electronic money transfer (pp. 656-59), competition regulation (pp. 659-61), enforcing judgments in other nations (pp. 661-68), international arbitration (pp. 668-72), and access to information in other countries (pp. 672-73).

Perritt's *Law and the Information Superhighway* is an ambitious piece that successfully provides a comprehensive and focused analysis of the infobahn within the context of the law. Perritt is able to analyze an extremely wide range of issues in a fairly thorough fashion. The nature of this textbook is largely descriptive, but Perritt sets up the policy framework applicable to each chapter in brief chapter introductions. He also provides model agreements and other language useful to practitioners in many of the chapters. Of course, since the text is an overview of the legal issues surrounding the information superhighway, it is not completely exhaustive and does not cover all aspects of each issue intricately. Furthermore, Perritt does not *explicitly* follow through with his thesis of the current legal system's adequacy in addressing issues involving the information superhighway beyond his introductory chapter. However, *Law and the Information Superhighway*, through its comprehensive presentation of the current infobahn legal system, provides implicitly a strong argument for maintaining the present legal paradigm: the current law is wide, intricate, various, and, thus, flexible. The book

is successful in providing the reader a sound basis for understanding the present and future of the current legal framework governing the infobahn and the ways in which the law may improve the usefulness of the infobahn as a tool for commerce and information dissemination.

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