
REGULATING CHIMERIC COMMUNICATIONS TECHNOLOGY: THE FUTURE OF MOBILE TV

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I. INTRODUCTION

If it looks like a duck, walks like a duck, and quacks like a duck—isn't it a duck? Not necessarily, if your ducks are mobile devices like PDAs and cell phones. These communication handsets are hybrids, chimeric¹ devices capable of delivering a myriad of mobile services including telephone, Internet, and now video. Recently, wireless telecommunication providers and program content providers have been turning their attention to mobile video services, known as Mobile TV² or the “third screen.”³

Industry forecasters predict that Mobile TV is poised to become the “next great broadband opportunity.”⁴ “It's all about the third screen,” com-

¹ In Greek Mythology, a chimera was a monster with the head of a lion, body of a goat and tail of a serpent. In the science community, chimera molecules, organisms, or substances are created from differing proteins or genes from two separate and distinct species. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 154 (3d ed. 1994). For the purposes of this Comment, “chimeric” technology refers to communication technology that is comprised of hybrid technologies.

² For definitions of Mobile TV see PCMag.com, Encyclopedia, http://www.pcmag.com/encyclopedia_term/0,2542,t=mobile+TV&i=55911,00.asp (last visited Nov. 20, 2006); Olga Khanf, *TV Phones Prep for Prime Time*, BUS. WK. Dec. 1, 2004, http://www.businessweek.com/technology/content/dec2004/tc2004121_1328_tc119.htm.

³ NEWTON'S TELECOM DICTIONARY 910 (22d ed. 2006) (“The first screen was your television set. The second screen was the PC. The third screen is now the screen on your digital cell phone.”)

⁴ Leslie Cauley, *New Sprint Nextel Will Focus on 3rd Screen*, USA TODAY, Aug. 9, 2005, at 3B; see also JUNIPER RESEARCH, *TV on the Move 1* (White Paper, Sept. 2005), [hereinafter *TV on the Move*] available at http://www.juniperresearch.com/pdfs/white_paper_mobiletv.pdf (discussing how Mobile TV has already increased in subscription numbers in countries such as France and Ger-

mented Sprint CEO, Gary Forsee.⁵ Although Mobile TV technology is in its infancy, the global revenues for the service are projected to increase from \$136 million in 2005 to more than \$7.6 billion by 2010.⁶ The total number of users worldwide is expected to rise from 26 million in 2005 to over 211 million by 2009.⁷ The bulk of the market penetration is expected to be derived from the provision of sports and infotainment content.⁸

Currently, Mobile TV services are delivered via third generation mobile technology ("3G"),⁹ a platform that also supports wireless broadband, voice, and text.¹⁰ 3G is a vast improvement over the so-called second generation technology ("2G"),¹¹ and has allowed for improved picture quality and download speeds in Mobile TV services.¹² Moreover, 3G technology allows consumers to watch real-time video instead of downloading clips, and it provides an optimal platform for downloading large amounts of video content.¹³

With potential revenues estimated in the billions of dollars over the next five years, it is not surprising that a variety of content providers, including ESPN, its parent company Disney, CBS, NBC and even adult entertainment companies, are actively seeking to solidify their share of this new

many, which suggests that Mobile TV could become a large revenue for the communications industry).

⁵ Cauley, *supra* note 4.

⁶ *TV on the Move*, *supra* note 4, at 3.

⁷ JUNIPER RESEARCH, *Mobile Sport & Infotainment Essentials 2* (White Paper, Feb. 2005) [hereinafter *Mobile Sport & Infotainment*], available at http://www.juniperresearch.com/pdfs/white_paper_msportandinfo2.pdf (discussing that sports and infotainment content have become increasingly popular with the advancement of 2G technology and the immediacy of such information due to increased capabilities such as live streaming of events and through mobile channel usage). Infotainment includes a range content form news media to soap operas. *Id.* at 1.

⁸ *Id.*

⁹ See Cauley, *supra* note 4 (noting that Tim Donahue, CEO of Nextel, predicts that 4G technology will be deployed as early as 2008, but the technology is still under development).

¹⁰ *Press Release*, WirelessDevNet.com, Nortel and NSERC Establish Advanced Telecommunications Technology Research Chair (June 9, 2006), available at <http://www.wirelessdevnet.com/news/2006/jun/09/news5.html> ("3G networks will make possible such services as mobile telehealth, instant Internet applications, new online financial and shopping capabilities, as well as entertainment services that include rapid music downloads, live sports, and mobile gaming.").

¹¹ *Mobile Sport & Infotainment*, *supra* note 7, at 2 (noting that the primary uses of 2G technology which includes the dissemination of news).

¹² Cauley, *supra* note 4; see also Ben Charny, *For Cell Phones, It's TV to the Rescue*, CNET NEWS.COM, Oct. 25, 2004, http://news.com.com/2100-1039_3-5423178.html.

¹³ See *TV on the Move*, *supra* note 4. "A 3G cellular network . . . is required to provide control functions to support interactivity and facilitate user authorization to the service. Equally important, the 3G network provides a basis for interactivity, including purchase and download transactions." MEDIAFLO, QUALCOMM, FLOW TECHNOLOGY OVERVIEW 6 (2005), [hereinafter *MediaFLO Technology Detailed*] available at http://www.qualcomm.com/mediaflo/news/pdf/flo_tech_overview.pdf.

video marketplace.¹⁴ On the transmission side of the Mobile TV industry, wireless service providers have added Mobile TV in an effort to preserve their customer base.¹⁵

Mobile TV service is analogous to other video services such as cable and broadcast in that it requires both a network operator and a content provider.¹⁶ However, because it is neither broadcast nor cable television service, the question arises: do content regulations apply? In the past, the method of service transmission has dictated whether and how content is regulated. Transmission of video content to mobile devices does not fall easily into a regulatory paradigm because it utilizes three communications technologies—broadband, wireless telephone spectrum, and interconnection to the Internet—that traditionally have been subjected to distinct regulatory frameworks.¹⁷

This Comment explores if and how video content transmitted on mobile devices should be regulated. Part II begins by considering the public policy reasons in favor of regulating Mobile TV in light of the technology's potential to increase the exposure of indecent material to children. Part III of this Comment examines how Mobile TV service would be classified within the existing communications regulatory framework established by the 1996 Telecommunications Act ("1996 Act").¹⁸ Part IV discusses potential First

¹⁴ See, e.g., Verizon Wireless.com, Verizon Get it Now, <http://getitnow.v2wshop.com/index.aspx?i2=vcast> (detailing how Disney, CBS, and NBC work with current telephone service operators like Verizon, Sprint, and Cingular to offer pre-recorded video clips that can be downloaded onto mobile devices) (last visited Nov. 11, 2006) [hereinafter Verizon Get It Now]; SprintPCS.com, Sprint TV, <http://www1.sprintpcs.com/explore/ueContent.jsp?scTopic=multimedia> (last visited Nov. 20, 2006) [hereinafter Sprint TV]; see also Gary Krakow, *The First Cell Phone for Sports Fanatics*, MSNBC.COM, Feb. 2, 2006, <http://msnbc.msn.com/id/11146561/>; see generally Marguerite Reardon, *Big Brands Go Cellular*, CNETNEWS.COM, Feb. 3, 2006, http://news.com.com/2100-1039_3-6034596.html; Xobile, <http://www.xobile.com> (last visited Nov. 11, 2006).

¹⁵ Sprint TV, *supra* note 14; Verizon Get it Now, *supra* note 14.

¹⁶ See discussion *infra* Part III.

¹⁷ Louis Trager, *FCC 'Family Friendly' Rules Seen Vulnerable to Challenge*, COMMUNICATIONS DAILY, vol. 26 (Aug. 4, 2006) ("[hybrid technologies will] erase traditional legal distinctions among electronic media. . . Cellphone video. . . will challenge traditional regulatory structures."). Professor Roy Moore of Georgia College and State University commented to Communications Daily that "the technology that probably is going to have the biggest impact or face the most regulation is cell phones . . . since no one has even considered regulating wireless phone use for content." *Id.* (internal quotations omitted). See also Posting of Adam Thierer to Progress and Freedom Foundation's Center for Digital Media Freedom, http://blog.pff.org/archives/2005/03/is_cell_phone_c.html (Mar. 10, 2005) [hereinafter "Adam Thierer Remarks"], for the remarks of Adam Thierer, Senior Fellow and Director of the Progress and Freedom Foundation's Center for Digital Media Freedom, stating that "[w]ithin the next two years, legislation will be introduced proposing the extension of the FCC's current clear-as-mud indecency rules to mobile content and devices."

¹⁸ Telecommunications Act of 1996, Pub.L.No. 104-104, 110 Stat. 56 (codified as amended in scattered section of 47 U.S.C.).

Amendment pitfalls of government imposed content-based regulations. Part V applies the First Amendment lessons from content-restrictions in other mediums to conclude that similar regulations of Mobile TV would be unconstitutional. Having concluded that government imposed content-based regulations are not a viable option, Part VI of this Comment examines the positive role parents and industry members can play furthering the public interest by protecting children from indecent content.

II. ANTICIPATING THE CALL FOR REGULATION: MOBILE TV AND INDECENT CONTENT

A. The Adult Entertainment Industry is Positioned to be a Dominant User of Mobile TV Technology

Mobile TV offers the ability for consumers and content providers to interact in a new and innovative way. Mobile TV content providers include traditional television broadcasters, movie studios, and non-mainstream providers.¹⁹ The adult movie industry has already begun to market content for Mobile TV, a move that has prompted concerns about children gaining access to indecent or other inappropriate material.²⁰ As of late 2006, regulations regarding content distribution over mobile devices are nonexistent. However, many telecommunications service providers have taken the initiative to restrict their customers through customer service agreements from accessing content that is considered indecent.²¹ Yet, while these licensing agreements exist, they do not provide the wireless service provider

¹⁹ See discussion *supra* Part I; see also Mark Halper, *Warner Takes TV, Movies Mobile*, VIDEO BUSINESS ONLINE, Feb. 17, 2006, <http://www.videobusiness.com/index.asp?layout=article&articleid=CA6308729> (discussing Warner Brothers' creation of its own mobile Internet site).

²⁰ See Press Release, CTIA, Wireless Carriers Announce "Wireless Content Guidelines", (Nov. 8, 2005) [hereinafter CTIA Press Release], available at http://www.ctia.org/news_media/press/body.cfm?record_id=1565 (describing the content classification standard of the Wireless Content Guidelines which would allow for the division and regulation of "generally accessible" content from "restricted content").

²¹ See, e.g., Cingular Wireless, Cingular Wireless Acceptable Use Policy, http://www.cingular.com/acceptable_use_policy (lasted visited Sept. 4, 2006) [hereinafter Cingular Use Policy]. Cingular's customer service agreement provides that:

Content Harmful or Offensive to Third-Parties: Do not upload, download, post, distribute, publish, or otherwise transmit (collectively, "Disclose") any message, data, information, image, text, or other material (collectively, "Content") that is unlawful, libelous, defamatory, slanderous, obscene, pornographic, indecent, lewd, harassing, threatening, harmful, invasive of privacy or publicity rights, abusive, inflammatory, or otherwise harmful or offensive to third parties...

Id.

with the means to prevent customers from accessing offensive content.²² Accordingly, the wireless service providers have extensive exculpatory clauses releasing the carrier from third-party liability should the customer access offensive content.²³ The players in the Mobile TV arena have varied and often conflicting agendas: the consumer wants unbridled access to content of his or her choosing; the content publisher wants to increase its viewing audience; the wireless provider wants the most profitable arrangement; and the regulator wants to ensure the protection of community standards by restricting access to indecent material.

Many adult entertainment providers see an opportunity for significant revenue. Larry Flynt, founder of Hustler Entertainment, recently remarked, "Hustler Mobile is doing exceedingly well in Europe . . . I feel that wireless is the wave of the future, the crown jewel in the electronic distribution and delivery of content."²⁴ This is largely because mobile devices provide an optimum platform for the consumption of adult entertainment due to their easy access, privacy, and overall mobility.²⁵

Xobile.com is one of the first adult Internet firms to offer its customers pornographic video formatted exclusively for mobile devices.²⁶ Customers can purchase two-minute videos for about forty-four cents with a credit card on Xobile.com,²⁷ and can elect to stream the video onto a mobile device for immediate viewing or download the video to view at a later time.²⁸ Xobile.com provides content for Mobile TV applications even though it is not a Mobile TV service provider. This niche has proven successful: as a result of offering mobile content, Xobile.com added six thousand custom-

²² See CTIA Press Release, *supra* note 20 ("In the interim, consumers may choose individually whether or not to purchase wireless Internet service.").

²³ An example of a wireless carrier's exculpatory clause is demonstrated by Cingular's Use Policy:

Our Responsibility: We take no responsibility and assume no liability for any Content uploaded, transmitted, or downloaded by you or any third party, or for any mistakes, defamation, slander, libel, omissions, falsehoods, obscenity, pornography, or profanity you may encounter. As the provider of the Cingular Sites and Service, we are only a forum and are not liable for any statements, representations, or Content provided by our users in any public forum. . .

Cingular Use Policy, *supra* note 21.

²⁴ Colin Gibbs, *CTIA Sets Adult Content Guidelines as Hustler Comes to U.S. Wireless Users*, RCR WIRELESS NEWS, Mar. 10, 2005, http://www.spyonit.com/lib/img/resourcetr/RCR_03.10.05.pdf.

²⁵ Matt Richtel & Michel Marriott, *Ringtones, Cameras, Now This: Sex is Latest Cell-phone Feature*, N.Y. TIMES, Sept. 17, 2005, at A1. Industry analyst Roger Entner, commented that Mobile TV "has every component that has proven conducive to the consumption of adult entertainment." *Id.*

²⁶ Xobile, *Why Xobile?*, <http://www.xobile.com/pc/webmaster.cfm> (last visited Nov. 11, 2006).

²⁷ Richtel & Marriott, *supra* note 25.

²⁸ Xobile, *How it Works*, www.xobile.com/pc/howitworks.cfm (last visited Nov. 11, 2006); Richtel & Marriott, *supra* note 25.

ers.²⁹ Other adult entertainment industry leaders such as Playboy and Vivid Entertainment are also developing methods to tap into the Mobile TV market.³⁰

Juniper Research forecasts that there is a “strong market for adult to mobile services . . . and alongside games and infotainment, adult will be one of the leading content types that will drive the initial use of mobile entertainment services.”³¹ Juniper estimates that the total global market value for mobile adult content will triple to nearly \$2.1 billion by 2009.³² These projections are based on the value of the global adult market, which is estimated between \$31 billion and \$75 billion dollars (the latter including everything from strip clubs to magazines, and DVDs to phone sex lines).³³ The proliferation of wireless video-capable devices will enable these predicted expansions of the mobile adult entertainment market.³⁴ But, as these devices become widely available, the danger exists that children will increasingly gain access to the potentially troublesome content available through Mobile TV.³⁵ Therefore, it is realistic to anticipate that there will be challenges to adult video-content distribution on such devices.³⁶

How Mobile TV is classified is critical to the level of governmental intrusion that it will receive. If the service is classified like broadcast then it will be subject to greater content restrictions.³⁷ Conversely, if Mobile TV is designated an information service, then any attempts by the Government to regulate content will be challenging.³⁸ Under the 1996 Act, Congress explicitly determined that services that fell within the category of “information services” were to remain unhindered by excessive restrictions so that

²⁹ Richtel & Marriott, *supra* note 25.

³⁰ See, e.g., Cassell Bryan-Low & David Pringle, *Sex Cells—Wireless Operators in Europe, Asia Find that Racy Cellphone Video Drives a Surge in Broadband Use*, WALL ST. J., May 12, 2005, at B1 (“Playboy is working with Dwango Wireless Inc., a provider of wireless technology, to strike deals with U.S. cellphone operators to offer its product to subscribers. Pictures are likely to cost between 99 cents and \$1.99 . . . according to Dwango”); see also Richtel & Marriott, *supra* note 25; Monica Hatcher, *Porn Coming to a Cell Near You*, TIMES LEADER, Jan. 29, 2006, at D1.

³¹ Windsor Holden, *Adult to Mobile: Personal Services*, (Juniper Research, White Paper 2d ed. Feb. 2005), http://www.juniperresearch.com/pdfs/white_paper_madult2.pdf [hereinafter *Adult to Mobile*].

³² *Id.* at 3.

³³ *Id.* at 1.

³⁴ Gary Strauss, *Cellphone Technology Rings in Pornography in USA*, USA TODAY, Dec. 12, 2005, at 1D.

³⁵ See Letter from John Muleta, Chief, Wireless Telecom. Bureau, FCC, to Steve Largent, President, CTIA—the Wireless Association, (Feb. 15, 2005) [hereinafter *FCC-to-CTIA Letter*], available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-256795A1.pdf (“The development of new wireless technologies presents both benefits and risks to consumers, especially those consumers who are most vulnerable—children.”).

³⁶ See *id.*

³⁷ See discussion *infra* Part IV.D.1.

³⁸ See discussion *infra* Part IV.D.4.

nascent technologies would have the opportunity to make their way onto the market thereby benefiting the consumer.³⁹ In keeping with its original purpose, Congress has been careful when developing content-based legislation that pertains to information services.⁴⁰ Indeed, the courts have repeatedly reviewed content based restrictions affecting the medium under the strictest scrutiny and have not hesitated to determine statutes unconstitutional.⁴¹ Accordingly, the Government would be unjustified in imposing anticipatory content restrictions on Mobile TV because it is a burgeoning technology that is best classified as an information service.

B. Government Intervention and Regulation of Mobile TV Content

The courts have repeatedly held that protecting children from indecent or harmful content is a legitimate governmental objective.⁴² However, assuming that Mobile TV is classified as an information service, case law has sufficiently demonstrated that this type of service is to operate with minimal government intrusion so as to preserve an open marketplace of ideas.⁴³ Additionally, preemptive legislative action concerning obscenity and indecency on the Internet has been struck down as unconstitutional because the proposed statute is either overly broad, has a chilling effect on speech, or because there are normally less restrictive alternatives on the market that will achieve the same goal of protecting children from harmful content.⁴⁴

III. MOBILE TV UNDER THE COMMUNICATIONS ACT: THE CLASSIFICATION CHALLENGE

The Communications Act of 1934, as amended, (the “Act” or “Communications Act”) applies a “silo” model of regulation in which communications are distinguished based on transmission technology and thus regulated according to different principles.⁴⁵ In other words, Mobile TV classi-

³⁹ See 47 U.S.C. § 230(b)(2) (2000).

⁴⁰ See discussion *infra* Part IV.D.4.

⁴¹ See *id.*

⁴² See, e.g., *Ginsberg v. New York*, 390 U.S. 629, 640 (1968) (holding that the government has a compelling interest to protect children from pornographic material).

⁴³ See *Reno v. ACLU*, 521 U.S. 844, 875 (1997); *Ashcroft v. ACLU*, 542 U.S. 656, 670 (2004).

⁴⁴ See *Reno*, 521 U.S. at 875; *Ashcroft*, 542 U.S. at 670; see also discussion *infra* Part IV.

⁴⁵ See generally Communications Act of 1934, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.); Adam Theier, *Are “Dumb Pipe” Mandates Smart Public Policy?: Vertical Integration, Net Neutrality, and the Network Layers Model*, 3 J. TELECOM. & HIGH TECH. L. 275, 280 (2005) (“The traditional vertical ‘silo’ model of communications industry regulation views each industry sector as a distinct set of entities that do not interact and which should be regulated under different principles.”).

fication under the silo approach is complicated by the fact that the service blends elements of wireless telephone service, Internet, broadcast, and cable, all of which receive distinct treatment under the Act. Thus, classification of Mobile TV under the Act is the key to assessing the potential need for and application of content regulations.

A. Although Mobile TV Uses Wireless Telephony Service to Transmit Content, It Should Not be Classified as “Telecommunications” or “Telecommunications Service”

Mobile TV relies on wireless, or mobile, telecommunications for its transmission.⁴⁶ The 1996 Act,⁴⁷ the last major overhaul of communications law, classified telecommunications as the “transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”⁴⁸ Moreover, a service that offers “telecommunications for a fee directly to the public . . . regardless of the facilities used” is considered a “telecommunications service” under the Act.⁴⁹ Thus, “[a] telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, cable, satellite, or some other infrastructure,”⁵⁰ so long as the transmission does not change in form or content between the source and the destination, and is provided for a fee. The telecommunications service classification arose out of the public-switched telephone network (“PSTN”) model where voice information is transferred linearly from one fixed point to another.⁵¹ A land-line phone user with plain old telephone service connects directly with the PSTN, which switches the call to the intended destination.⁵² Mobile telephone service works in much the

⁴⁶ JUNIPER RESEARCH, *Mobile TV Watch it Grow* 1–2 (White Paper, July 2006), available at http://www.juniperresearch.com/pdfs/whitepaper_mobiletv2.pdf.

⁴⁷ Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.)

⁴⁸ 47 U.S.C. § 153(43) (2000).

⁴⁹ § 153(46).

⁵⁰ *In re* Federal-State Joint Board on Universal Service, *Report to Congress*, 13 F.C.C.R. 11,501, ¶ 59 (Apr. 10, 1998).

⁵¹ NEWTON’S TELECOM DICTIONARY 738 (22d ed. 2006) (“[T]he worldwide voice telephone network accessible to all those with telephones and access privileges.”).

⁵² *Id.* at 718 (“Plain Old Telephone Service [“POTS”] . . . [is t]he basic service supplying standard single line telephones, telephone lines and access to the public switched network. . . . Just receive and place calls All POTS lines work on loop start signaling”); see also Chérie R. Kiser & Angela F. Collins, *Regulation On The Horizon: Are Regulators Poised To Address the Status of IP Telephony?*, 11 COMMLAW CONSPECTUS 19, 20-21 (2003) (explaining circuit-switched technology over PSTN and phone call transmission).

same way as traditional wireline telephony.⁵³ The voice is digitized and then transmitted via radio waves to cellular towers.⁵⁴ The towers then use the PSTN switching network to relay the communication to an end-user.⁵⁵ Like traditional wireline, the content of the communication is not changed during transmission.⁵⁶ Because the two services function similarly, mobile telephone service providers are treated the same way as traditional wireline telephone carriers in the regulatory scheme.⁵⁷

Wireless telephony is clearly a telecommunications service. Although classification as a telecommunications service does not carry with it any content restrictions, it does impose a complex regulatory regime⁵⁸ that could prove detrimental to the growth of the nascent Mobile TV if it were deemed strictly a wireless telecommunications service. Regardless, Mobile TV, while relying on mobile telecommunications service networks, cannot be classified as a telecommunications service because it does not merely transmit unmanipulated information. Mobile TV uses wireless telecommunications to enable the transmission of interactive and variable content.⁵⁹ With Mobile TV, the user inputs information, which is transmitted as if it were normal telecommunications, but then is routed to an Internet Service

⁵³ NEWTON'S TELECOM DICTIONARY 595-96 (22d ed. 2006) ("Mobile telephone service is provided from a broadcast point located within [a] range . . . called a 'cell.' The broadcast point in turn is connected to the public network so that calls can be completed to or from any stationary telephone."). Mobile Service is defined under the Communications Act as:
a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (A) both one-way and two-way radio communication services, (B) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation, and (C) any service for which a license is required in a personal communications service

47 U.S.C. § 153(27).

⁵⁴ JOSEPH A. PECAR & DAVID A. GARBIN, THE NEW MCGRAW-HILL TELECOM FACTBOOK 20, 140, 614 (McGraw-Hill 2d ed. 2000) [hereinafter TELECOM FACTBOOK].

⁵⁵ *Id.* at 20.

⁵⁶ See *In re* Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither a Telecommunications nor a Telecommunications Service, *Memorandum Opinion and Order*, 19 F.C.C.R. 3307, ¶ 3 (Feb. 12, 2004) [hereinafter Pulver.com Petition].

⁵⁷ See *id.* 47 U.S.C. § 332(c) ("Regulatory treatment of mobile services. (1) Common carrier treatment of commercial mobile services. (A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter").

⁵⁸ See § 332(c).

⁵⁹ See Jennifer LeClaire, *Sling Media, Symbian to Bring Mobile TV to Smartphones*, TECHNEWSWORLD, Oct. 20, 2006, <http://www.technewsworld.com> (describing television broadcasts on mobile phones and user ability to record, pause, and rewind live television on mobile phones); see also Nancy Gohring, *Mobile TV Fans Get New Options*, PCWORLD, Oct. 17, 2006, <http://www.pcworld.com/printable/article/id,127541/printable.html>.

Provider (“ISP”) allowing the user of Mobile TV to interconnect with the Internet.⁶⁰

The Internet is a distributed, packet-switched network that encompasses “the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected worldwide network of computer networks that employ the Transmission Control Protocol/Internet Protocol.”⁶¹ A user initiates communication with a specific site on the Internet to facilitate the exchange of information much like a user of a telecommunications service dials a number to connect to a specific destination. But these means of initial connection are where the similarities end.⁶² Transmission over the Internet is not considered a telecommunications service because packet-switching alters “form or content.”⁶³ In packet-switching, digital data bits are reassembled at the final destination in the order in which they arrive.⁶⁴ Unlike a PSTN, packet-switched networks do not utilize the same transmission route every time information is exchanged between the same parties.⁶⁵ Instead, the data bits are routed through the network in the most efficient path possible.⁶⁶ Mobile TV relies on both a packet-switched network for transmission of information via the Internet, as well as a wireless telephone network to generate and retrieve content. Accordingly, because the underlying technology components of Mobile TV are not passive “telecommunications services” but rather are ones that alter content, Mobile TV itself cannot be classified as a telecommunication service.

⁶⁰ Nokia Mobile TV Forum Overview, Mobile TV Vision, <http://www.mobiletv.nokia.com/overview/vision> (last visited Nov. 20, 2006); Nokia Mobile TV Forum, Technology-IP Datacasting, <http://mobiletv.nokia.com/technology/ipdc> (last visited Nov. 20, 2006).

⁶¹ 47 U.S.C. § 231(e)(3).

⁶² See Susan P. Crawford, *Panel V: Responsibility and Liability on the Internet—Shortness of Vision: Regulatory Ambition in the Digital Age*, 74 *FORDHAM L. REV.* 695, 700 n.17 (2005) (explaining the contrast between the Internet and telephone networks).

⁶³ Pulver.com Petition, *supra* note 56, ¶¶ 3–4 (defining “Internet” and “telecommunications”); see also *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm’n*, 290 F.Supp.2d 993, 999–1000 (D.Minn. 2003), *aff’d* 394 F.3d 568 (8th Cir. 2004).

⁶⁴ TELECOM FACTBOOK, *supra* note 54, at 249; see also Crawford, *supra* note 62 at 699–700 note 17.

⁶⁵ See LEVEL 3 COMM’NS, *Telecom Regulation and Voice Over IP 3* (Position Paper, Feb. 16, 2004), [hereinafter Level 3 Position Paper], available at http://www.level3.com/userimages/dotcom/pdf/Telecom_Regulation_and_Voice_Over_IP.pdf.

⁶⁶ *Id.* (commenting that time and distance are immaterial to an IP network where as application and bandwidth are of great importance); see also Crawford, *supra* note 62, at 700 n.17. Packet-switched networks are extremely advantageous when transmitting enormous quantities of data. See NEWTON’S TELECOM DICTIONARY 678 (22d ed. 2006) (defining packet-switching).

B. Mobile TV Cannot Be Classified as a Broadcast Service

As a hybrid technology, Mobile TV service also contains elements similar to a broadcast service. “Broadcasting” is defined under the Act as “the dissemination of radio communications *intended to be received by the public*, directly or by the intermediary of relay stations.”⁶⁷ Broadcast signals are transmitted through the public airwaves and, as a consequence of their limited and scarce nature, broadcast frequencies are subject to government regulations.⁶⁸ The Federal Communications Commission (“FCC” or “Commission”) has the authority to issue licenses to broadcasters and to regulate broadcast content “to assure that broadcasters operate in the public interest.”⁶⁹ Mobile TV, however, may not be classified as a broadcast service subject to this regulatory oversight even though it utilizes airwaves for wireless transmission of content. Strengthening this assertion, Mobile TV, unlike broadcast television or radio, is a subscription service that is unavailable to the public at large. Because wireless device users must take affirmative steps to request and accept content, the public interest demanding broadcast regulation is lessened.⁷⁰

C. Mobile TV Cannot Be Classified as a Provider of Cable Video

A cable video service utilizes “one-way transmission to subscribers” to deliver video content.⁷¹ In other words, cable video service consumers pay a fee for the ability to receive content; there is no return transmission from the subscriber.⁷² Whereas Mobile TV operates on a subscription or fee-per-use model, it is unlike cable in that it is an interactive two-way service. Mobile TV users communicate with the program provider by inputting information and preferences into the mobile device to indicate content selection, and the provider disburses accordingly.⁷³ Because the service is two-way, rather than a one-way transmission, Mobile TV is distinguished from cable service and cannot come under the cable video regulatory regime.

⁶⁷ 47 U.S.C. § 153(6) (2000) (emphasis added).

⁶⁸ See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376, 380, 383, 390 (1969); *FCC v. Pacifica Found.*, 438 U.S. 726, 732, 748 (1978).

⁶⁹ *Red Lion*, 395 U.S. at 380; see also 47 U.S.C. §§ 203, 301, 303. See generally *In re Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program “Without A Trace,” Notice of Apparent Liability for Forfeiture*, 21 F.C.C.R. 2732 (Feb. 21, 2006) (explaining that the FCC may prohibit certain broadcast content pursuant to 18 U.S.C. § 1464) [hereinafter *Notice of Apparent Liability*].

⁷⁰ See *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 637–640 (1994).

⁷¹ 47 U.S.C. § 522(6)(A).

⁷² See generally *TV on the Move*, *supra* note 4 (providing a brief overview of Mobile TV and its differences from the common cable format).

⁷³ *Id.*

D. Applicability of the “Information Service” Classification to Mobile TV

Although it encompasses characteristics of telecommunications, broadcast, and cable, Mobile TV cannot be categorized as any single one of these communications services. However, the remaining regulatory classification, “information service,” is appropriate. An information service is:

[T]he offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.⁷⁴

In general, information services are unlike telecommunications, broadcast, and cable services in that they enjoy greater freedom from governmental intrusion.⁷⁵ Congress provided that information services operate unfettered by regulations because the services represented a valuable resource for the dissemination of information to citizens.⁷⁶ Moreover, Congress codified its “hands-off” approach, finding that:

The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens. . . . The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation. . . .⁷⁷

Information services now play a valuable role in society by providing a forum for open political and social discourse as well as entertainment services. As such, regulations that could burden these benefits are disfavored.⁷⁸ Congress “explicitly elected not to impose common carrier obligations (regulating content, prices, or access by others) on interactive computer services.”⁷⁹ Furthermore, the Commission and the courts have deter-

⁷⁴ 47 U.S.C. § 153(20).

⁷⁵ See § 230(b) (codifying U.S. policy to preserve free market economy conditions in the Internet and other interactive computer services).

⁷⁶ *Id.* Pursuant to this section:

It is the policy of the United States—

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
- (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
- (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
- (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material;. . .

Id.

⁷⁷ § 230(a)(1), (4).

⁷⁸ § 230(a)(3)–(4).

⁷⁹ Crawford, *supra* note 62, at 704–05.

mined that the Internet falls within the information service category,⁸⁰ and thus services which utilize the Internet for transmission should also be classified as information services.

1. Vonage Holdings Corporation v. Minnesota Public Utilities Commission

In 2004, the Eighth Circuit considered whether the offerings of Vonage Holdings Corporation should be classified as a “telecommunications service” under the 1996 Act.⁸¹ Vonage provides an IP-enabled service that permits voice communications over an Internet connection via technology known as Voice over Internet Protocol (“VoIP”).⁸² In evaluating the issue of telecommunications classification, the court examined the mechanics of VoIP technology. Essentially, VoIP uses a packet-switched network rather than the traditional, point-to-point PSTN circuit-switched network to transmit voice calls.⁸³ To place a call, a VoIP customer uses special computer premises equipment that formats his voice communication into packets of bits.⁸⁴ These packets are then transmitted over the Internet to the destination.⁸⁵ Vonage provides only the technology for the VoIP service; a third party provides the broadband ISP service.⁸⁶ When a VoIP customer places a phone call, the ISP service must distinguish whether the destination is to a PSTN customer or a VoIP customer.⁸⁷ The ISP then routes the packets accordingly to connect the call.⁸⁸

The court examined Congressional findings to aid in analyzing the appropriate classification of VoIP service.⁸⁹ The court juxtaposed “basic services” and “information services” under the 1996 Act.⁹⁰ During the drafting of the 1996 Act, Congress envisioned a time when computer-based

⁸⁰ See Nat'l Cable & Telecomms. Ass'n. v. Brand X Internet Servs. (*Brand X*), 125 S. Ct. 2688 (2005) (holding that the FCC's conclusion that broadband services should be subject to minimal regulation was not arbitrary or capricious); *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 290 F.Supp.2d 993 (D.Minn. 2003), *aff'd* 394 F.3d 568 (8th Cir. 2004) (concluding that VoIP service is an information service because it has the capacity to generate, store, transform, process, retrieve, utilize, and make information accessible via telecommunications); *Pulver.com Petition*, *supra* note 56 (explaining that the FCC determines peer-to-peer VoIP service is classified as an information service).

⁸¹ See *Vonage Holdings Corp.*, 290 F. Supp. 2d 993.

⁸² *Id.* at 993–99.

⁸³ *Id.* at 995 (citing Chérie R. Kiser & Angela F. Collins, *Regulation On The Horizon: Are Regulators Poised To Address the Status of IP Telephony?*, 11 COMMLAW CONSPPECTUS 19, 20-21 (2003)).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 995.

⁸⁸ *Id.*

⁸⁹ *Id.* at 997.

⁹⁰ *Id.* at 997–98. Prior to the 1996 Act, information services were known as “enhanced services.” *Id.* at 998.

services would integrate with traditional methods of communication.⁹¹ A “basic common carrier,” such as a traditional telephone service provider, offers communications limited to the linear movement of information.⁹² By contrast, information services “combine[] basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information.”⁹³ The court held that the technological composition of the service and the legislative history supported the proposition that Vonage’s VoIP service should not fall under the category of telecommunications.⁹⁴ “[T]he VoIP service provided by Vonage constitutes an information service because it offers the ‘capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.’”⁹⁵

2. In the Matter of Petition for Declaratory Ruling that Pulver.com’s Free World Dialup is Neither a Telecommunications nor a Telecommunications Service: Memorandum Opinion and Order

Shortly after the Eighth Circuit decided that Vonage’s VoIP service was an information service, the FCC considered whether a peer-to-peer VoIP service should be treated similarly.⁹⁶ Pulver.com’s Free World Dialup service (“FWD”) was an exclusively peer-to-peer VoIP service, meaning that the service did not connect to the PSTN network.⁹⁷ The *Memorandum Opinion and Order* was significant because it established for the first time that VoIP would be regulated by the FCC as an information service rather than a telecommunications service.

A critical factor underpinning the Commission’s decision to declare peer-to-peer VoIP an information service was that Pulver.com did not offer a transmission service; FWD was enabled through a computer software application that allowed users to connect to each other via existing Internet connections.⁹⁸ “Transmission” is at the heart of the definition of “telecom-

⁹¹ *Id.*

⁹² *Id.* at 997–98 n.2 (“[W]e adopt a regulatory scheme that distinguishes between the common carrier offering of basic transmission services and the offering of enhanced services. . . .” (quoting *In re* Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), *Final Decision*, 77 F.C.C. 2d 384 at ¶ 5 (1980)).

⁹³ *Id.* at 998.

⁹⁴ *Id.* at 998–99.

⁹⁵ *Id.* at 999 (quoting 47 U.S.C. § 153(20) (2000)).

⁹⁶ Pulver.com Petition, *supra* note 56.

⁹⁷ *Id.* ¶¶ 4–7 (explaining that Pulver.com’s FWD service is dependent upon its members establishing connections with each other over the Internet).

⁹⁸ *Id.* ¶ 9.

munications” under the 1996 Act.⁹⁹ FWD did not offer the transmission component integral to meet the definition of “telecommunications” under the 1996 Act because its users had to “‘bring their own broadband’ transmission to interact with the FWD server.”¹⁰⁰ Some commentators argued that because FWD connected to the Internet “via some form of transmission” it should qualify as a telecommunications service.¹⁰¹ The Commission rejected this argument, concluding that “Pulver may ‘use’ some telecommunications to provide its FWD directory service but that does not make FWD itself telecommunications.”¹⁰² Accordingly, the lack of transmission service disqualified FWD as either telecommunications or a telecommunications service provider.¹⁰³

Additionally, the Commission determined that FWD further deviated from the definition of telecommunications because it did not always transmit “information of the user’s choosing without change in the form or content of the information as sent and received.”¹⁰⁴ Instead, because FWD provided new information to the customer by informing them when other members are “present” online and by providing voicemail and email responses,¹⁰⁵ the Commission concluded that FWD satisfied the criteria to qualify as an “information service.”¹⁰⁶

3. *National Cable & Telecommunications Association v. Brand X Internet Services*

In *National Cable & Telecommunications Association v. Brand X Internet Services* (*Brand X*), the Supreme Court held that broadband Internet service provided by cable operators does not constitute “telecommunications” under the 1996 Act,¹⁰⁷ affirming the FCC’s determination.¹⁰⁸ Broad-

⁹⁹ *Id.*; see also *supra* discussion Part III.A.

¹⁰⁰ Pulver.com Petition, *supra* note 56, ¶ 9.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at ¶¶ 9–10.

¹⁰⁴ *Id.* at ¶ 9.

¹⁰⁵ *Id.* The Commission summarized these features as “computing capabilities.” *Id.* at ¶ 11.

¹⁰⁶ *Id.* The Commission found that because FWD offered “‘a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.’” it was deemed to be an information service, not a telecommunications service. *Id.* (quoting the 1996 Telecommunications Act definition of an information service, 47 U.S.C. § 153(20) (2000)).

¹⁰⁷ Nat’l Cable & Telecomms. Ass’n. v. Brand X Internet Servs. (*Brand X*), 125 S. Ct. 2688 (2005).

¹⁰⁸ *Id.* at 2695; see *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, *Declara-*

band Internet service consists of two core services: cable modem service and Digital Subscriber Line (“DSL”). Cable modem service utilizes cable video lines owned by the cable company to transmit IP-enabled content between customers’ computers and the Internet.¹⁰⁹ DSL service is provided by local telephone companies and allows high-speed, or “broadband,” access to the Internet using a network of telephone lines owned by the telephone company.¹¹⁰ The cable operator or the telephone service provider itself can operate as the ISP, “or [they] can lease [their] transmission facilities to independent ISPs that then use the facilities to provide consumers with Internet access.”¹¹¹ These third party entities are called “non-facilities based ISPs” because they do not own their own infrastructure, but rather they utilize the existing cable or telephone networks and integrate their own technology onto the existing hardware to enable connection to the Internet.¹¹²

In the 2002 *Declaratory Ruling & NPRM* discussed in *Brand X*, the Commission determined that cable modem broadband provision was an information service per the 1996 Act.¹¹³ This determination was upheld by the Court which found that the Commission acted reasonably when it determined not to treat broadband Internet providers differently than non-facilities-based ISPs.¹¹⁴ The Court’s decision was based, in part, upon the fact that the two services were analogous. Broadband Internet providers and ISPs offer “a single, integrated service that enables the subscriber to utilize Internet access . . . [and] Internet access provides a capability for manipulating and storing information . . .”¹¹⁵ Broadband Internet service does not offer the end user a telecommunications service, but rather utilizes existing telecommunications infrastructure as a conduit to transmit infor-

tory Ruling and Notice of Proposed Rulemaking, 17 F.C.C.R. 4798, ¶ 7 (Mar. 14, 2002) [hereinafter *Declaratory Ruling & NPRM*].

¹⁰⁹ *Brand X*, 125 S. Ct. at 2696.

¹¹⁰ *Id.* (citing *WorldCom, Inc. v. FCC*, 246 F.3d 690, 692 (D.C. Cir. 2001)) (explaining DSL technology).

¹¹¹ *Brand X*, 125 S. Ct. at 2696. The Court recognized that broadband Internet service was not limited to cable modem or DSL service and that there were emerging technologies that provided high-speed Internet service to homes “including terrestrial- and satellite-based wireless networks.” *Id.* (quoting *Declaratory Ruling & NPRM*, *supra* note 108, ¶ 6).

¹¹² *Brand X*, 125 S. Ct. at 2697–98 (citations omitted).

¹¹³ *Declaratory Ruling & NPRM*, *supra* note 108, ¶ 7.

¹¹⁴ *Brand X*, 125 S. Ct. at 2698, 2708; *see also* *Pulver.com Petition*, *supra* note 56, ¶ 11. Non-Facilities base ISPs are considered information services under the 1996 Act. *See Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm’n*, 290 F.Supp.2d 993 (D.Minn. 2003), *aff’d* 394 F.3d 568 (8th Cir. 2004).

¹¹⁵ *Brand X*, 125 S. Ct. at 2698 (discussing the Commission’s rationale for treating broadband service providers and non-facilities based ISPs similarly in *Declaratory Ruling & NPRM*, *supra* note 108, ¶ 38).

mation.¹¹⁶ Accordingly, because broadband Internet service closely resembled the service of non-facilities based ISPs which were classified as information services, the Court held that the two should be treated under the same regulatory scheme.¹¹⁷

4. Mobile TV is Most Appropriately Classified as an Information Service

Mobile TV service is analogous to other hybrid communications technologies which are classified as information services under the 1996 Act.¹¹⁸ Like VoIP and broadband Internet services, Mobile TV does not act as a transmission service, but instead utilizes telecommunications to convey Internet content. Additionally, Mobile TV content is altered during the transmission process, a characteristic antithetical to the statutory requirement that telecommunications be transmitted from source to destination without alteration in form or content.¹¹⁹ Furthermore, the user of a telecommunications service specifies the path by which information must flow, whereas Mobile TV relies on dynamic routing across a packet-switched network.¹²⁰ Once the packets leave the user's computer, they are distributed according to efficiency of transport and, although the user may send the same information multiple times, he has no control over the path that content travels.¹²¹ For these reasons, Mobile TV is not a telecommunication service itself, but rather a conduit over which information and content flows. Because Mobile TV works in a manner analogous to VoIP and other IP-enabled services, it too should be classified as an information service.

¹¹⁶ *Brand X*, 125 S. Ct. at 2716.

¹¹⁷ The Court afforded the FCC deference pursuant to *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Chevron* stands for the proposition that when there is statutory ambiguity and an agency reasonably interprets the meaning of the ambiguity by powers within its jurisdiction, the court must grant deference to the interpretation so long as the agency's decision is neither arbitrary nor capricious. *Id.* at 844.

¹¹⁸ See *Brand X*, 125 S. Ct. 2688, 2716 ("Since . . . the broad-band connection between the customer's computer and the cable company's computer-processing facilities [are] downstream from the computer-processing facilities, there is no question that it merely serves as a conduit for the information services that have already been 'reassembled' by the cable company in its capacity as ISP."); see also *Vonage*, 290 F.Supp.2d at 999 ("[T]his Court finds that Vonage uses telecommunications services, rather than provides them"); *Pulver.com* Petition, *supra* note 56 ¶ 11 ("[The Commission] declare[s] that FWD is neither 'telecommunications' nor 'telecommunications service' as defined in the Act and as interpreted by the Commission.").

¹¹⁹ 47 U.S.C. § 153(43) (2000).

¹²⁰ See discussion *supra* Part III.A.

¹²¹ See *id.*

IV. CONTENT REGULATION AND THE FIRST AMENDMENT: THE GOVERNMENT'S INTEREST VERSUS PRIVATE INDUSTRY AND CONSUMER INTEREST

Both Congress and the Commission have recently been pushing a crack down on indecency. Since the 2004 Super Bowl Halftime show where Janet Jackson had her now infamous “wardrobe malfunction,”¹²² the Government has taken a stricter stance on content that could rise to the level of indecency. VIACOMM was sanctioned an aggregate amount of \$550,000 (\$32,000 for each of its directly owned stations) for broadcasting a performance in which only 19/32 of a second actually depicted a portion of Ms. Jackson’s bare breast.¹²³ At the time, this was the highest penalty that was ever issued against a broadcaster. In March of the same year, the Commission reversed the Enforcement Bureau and determined that an excited utterance by Bono when he won an honor at the 2003 Golden Globes Award Show rose to the level of indecency.¹²⁴ Since then, the Commission has used these decisions to create a stricter precedent when evaluating whether broadcast material is indecent.¹²⁵ The Commission’s power to sanctioning power was given teeth in June 2006 when President George W. Bush signed into effect the Broadcast Decency Enforcement Act which raised the minimum penalty for broadcasting indecency to \$325,000 per station.¹²⁶

The trend toward stricter content regulation is not limited to broadcast, but is permeating into other areas as well. Chairman Martin has been a forceful advocate of “Family Friendly” tiers of programming compelling cable and satellite providers to voluntarily accept such Commission suggestions or risk enhanced governmental scrutiny.¹²⁷ The strategy worked

¹²² *In re* Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, *Notice of Apparent Liability for Forfeiture*, 19 F.C.C.R. 19230 (Aug. 31, 2004) [hereinafter Super Bowl NAL] (aff’d *In re* Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, *Order on Reconsideration*, 21 F.C.C.R. 6653 (May 4, 2006)).

¹²³ *Id.* at ¶ 13.

¹²⁴ *In re* Complaints Against Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, *Memorandum Opinion and Order*, 19 F.C.C.R. 4975, 4926 (Mar. 3, 2004) (finding that Bono’s use of the “F-word” was qualified as indecent language).

¹²⁵ See *In re* Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, *Notices of Apparent Liability and Memorandum Opinion and Order*, 21 F.C.C.R. 2664 (Feb. 21, 2006).

¹²⁶ Broadcast Decency Enforcement Act, Pub. L. No. 109-235, 120 Stat 491 (2006) (to be codified at 47 U.S.C. § 503(b)(2)).

¹²⁷ In September 2006, the cable and satellite industry collectively agreed to offer “family friendly” tiers which consist of programming suitable for audiences of all ages. Adam Thierer commented to Michael Scherer of Salon.com, “[t]here is an element of regulatory extortion at work here, everybody in town knows that.” Michael Scherer, *Sex, drugs and*

and in September 2006, cable and satellite providers agreed to begin offering these tiers of service within the next year. Using a similar strategy, in October 2006, Commissioner McDowell warned members of the media that the FCC was watching their actions and that “[i]n the absence of self regulation, government-mandated regulation is sure to fill the vacuum.”¹²⁸ Congressional and regulatory action has been applauded by various consumer groups such as the American Family Association,¹²⁹ Concerned Women for America,¹³⁰ and the Parents Television Council.¹³¹ These recent events are indicia that there will likely be calls to regulate indecent Mobile TV content as they mark a pattern of regulatory conservatism.

A. Obscene Material is Not Afforded First Amendment Protections

The First Amendment to the Constitution states, “Congress shall make no law . . . abridging the freedom of speech.”¹³² The FCC, as an administrative agency and thereby an extension of Congressional authority, is prohibited generally by the First Amendment from regulating content such that can be construed as abridging speech, and is specifically prohibited from censoring program content pursuant to Section 326 of the Communications Act.¹³³ However, there are certain types of speech that can be regu-

cable TV, <http://archive.salon.com/news/feature/2005/12/12/cable>; *see also FCC Warns Cable, Satellite: Clean Up TV Raunch*, FOX NEWS.COM, Nov. 29, 2005, http://www.foxnews.com/printer_friendly_story/0,3566,177055,00.html.

¹²⁸ John Eggerton, *McDowell Offers Content-Reg Carrot/Stick*, BROADCASTING & CABLE, Oct. 16, 2006, <http://www.broadcastingcable.com/index.asp?layout=articlePrint&articleID=CA6381706>.

¹²⁹ The American Family Association is a conservative group that “believes that the entertainment industry, through its various products, has played a major role in the decline of those values on which our country was founded and which keep a society and its families strong and healthy.” AFA General Information, <http://www.afa.net/about.asp> (last visited Nov. 11, 2006). *See* Jody Brown, *Bush’s Pen Strengthens FCC’s Teeth in Enforcing Decency*, AGAPEPRESS (Jun. 15, 2006), <http://headlines.agapepress.org/archive/6/152006e.asp> (stating that the AFA strongly supported the Broadcast Decency Enforcement Act).

¹³⁰ Press Release, Concerned Women For America, CWALAC Calls on Senate Commerce Committee to Act on Indecency Legislation Immediately (Jan. 18, 2006), *available at* <http://www.cwfa.org/articles/9931/MEDIA/family/index.htm>.

¹³¹ *See* Cable Consumer Choice Campaign, <http://www.parentstv.org/PTC/cable/main.asp> (last visited Nov. 11, 2006) (listing the organizations current campaigns to afford consumers family-friendly tiered programming for cable service).

¹³² U.S. CONST. amend. I.

¹³³ 47 U.S.C. § 326 (2000) which states:

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

Id.

lated without infringing Constitutional guarantees. Obscene material is not entitled to any protection under the First Amendment, and the dissemination of such material constitutes a criminal offense.¹³⁴ By law, the dissemination of “any obscene, indecent or profane language by means of radio communication” is strictly prohibited.¹³⁵

The Supreme Court set forth a three-prong test in *Miller v. California* to determine whether material is obscene.¹³⁶ The trier of fact must determine:

(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹³⁷

Although the *Miller* test can be applied to any material made available for public view, the test has most frequently been invoked for material which involves or depicts sexual conduct.¹³⁸ While not all sexually explicit material is classified as obscene, the Court indicated that “hard core” pornography is not entitled to First Amendment protection.¹³⁹ Yet, classifying the type of material that rises to the level of obscenity is challenging; “[t]he problem is . . . that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so.”¹⁴⁰ Moreover, the Court has held some material to be obscene when viewed by children, while only rising to the level of indecency when viewed by adults.¹⁴¹

¹³⁴ *Miller v. California*, 413 U.S. 15, 23 (1973); FCC, Obscenity, Indecency & Profanity Frequently Asked Questions (last visited Nov. 11, 2006), <http://www.fcc.gov/eb/oip/FAQ.html#TheLaw> [hereinafter FCC FAQs] (citing 18 U.S.C. 1464 (2000)).

¹³⁵ 18 U.S.C. § 1464.

¹³⁶ *Miller*, 413 U.S. at 24.

¹³⁷ *Id.* (citations omitted).

¹³⁸ *See id.*; *cf. Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964). It is noteworthy that Justice Stewart only nine years earlier in *Jacobellis* declared that hard core pornography was best categorized as obscene, yet in *Miller* he joined Justice Brennan’s dissenting opinion which asserted that the lines between the variances of the genre were too blurred to make an accurate distinction. In this regard, he recanted his initial proposition in favor of granting more First Amendment protection to certain types of pornography. *Miller*, 413 U.S. at 26. The majority opinion states that Justice Brennan “has abandoned his former position and now maintains that no formulation of this Court, the Congress, or the States can adequately distinguish obscene material unprotected by the First Amendment from protected expression.” *Id.* at 27; *see also Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69–70 (1973).

¹³⁹ *Miller*, 413 U.S. at 29 (“[T]his Court has agreed on concrete guidelines to isolate ‘hard core’ pornography from expression protected by the First Amendment.”).

¹⁴⁰ *Id.* (quoting *Paris Adult Theatre I*, 413 U.S. at 93); *see also Jacobellis*, 378 U.S. at 197 (Stewart, J., concurring) (“I imply no criticism of the Court, which in those cases was faced with the task of trying to define [obscenity, which] may be indefinable.”).

¹⁴¹ *Ginsberg v. New York*, 390 U.S. 629, 633 (1968). In *Ginsberg*, the Court upheld the constitutionality of a New York statute that prohibited the sale of material to children under 17 years of age if it could be deemed obscene for children, even if it was not considered to

B. Indecent Material is Protected by the First Amendment

Unlike obscene material, indecent speech is protected under the First Amendment,¹⁴² but is subject to enhanced or diminished Constitutional protection depending upon a variety of factors, including the method of communication.¹⁴³ In *FCC v. Pacifica*, the Supreme Court set forth the standard for indecency, holding that material is indecent if it is “patently offensive as measured by contemporary community standards . . . [and depicts] sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience.”¹⁴⁴ While indecency embodies characteristics of obscenity, no singular aspect of the indecency test is dispositive.¹⁴⁵ Instead, the context in which the material arises is critically evaluated to determine whether it rises to the level of indecency.¹⁴⁶

Traditionally, the FCC has greater latitude when regulating to protect children in broadcast material as compared with other forms of communication.¹⁴⁷ Accordingly, when the Commission seeks to limit content, it must strike an appropriate balance between protecting children on one hand, and enabling a free and open forum for the communication of ideas on the other.¹⁴⁸ In order to achieve this balance, the purpose of any restrictive regulation must be explicit and its language must be narrowly drawn to achieve the desired end.¹⁴⁹

be obscene to adults. *Id.* at 634. The Court rejected the defendant’s argument that “the scope of the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend on whether the citizen is an adult or a minor.” *Id.* at 636; *see also* *Reno v. ACLU*, 521 U.S. 844, 864 (1997) (reaffirming the *Ginsberg* rationale).

¹⁴² *Reno*, 521 U.S. at 874–75; *see also* *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

¹⁴³ *See* *FCC v. Pacifica Found.*, 438 U.S. 726, 750–51 (1978).

¹⁴⁴ *Id.* at 732. Although the *Pacifica* involved broadcast media, the criteria have been used as a guidepost in subsequent cases involving other communications media. *See, e.g., Reno*, 521 U.S. at 566–67 (finding portions of the Communications Decency Act were content-based blanket restrictions on speech); *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 815 (2000) (distinguishing between cable systems which have the capacity to block unwanted television channels on a household-by-household basis); *Ashcroft v. ACLU*, 542 U.S. 656, 675 (2004) (holding that the Child Online Protection Act burdens speech on the Internet).

¹⁴⁵ *Pacifica*, 438 U.S. at 741.

¹⁴⁶ Whether or not material is “patently offensive” depends on context, degree, and time of the broadcast. *See* FCC Fact Sheet on Cable Program Content Regulations, <http://www.fcc.gov/mb/facts/program.html> (last visited Nov. 11, 2006) [hereinafter FCC Fact Sheet].

¹⁴⁷ *See generally* *Sable*, 492 U.S. 115 (1989); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996); *Playboy*, 529 U.S. 803.

¹⁴⁸ *See Notice of Apparent Liability, supra* note 69, ¶ 3.

¹⁴⁹ *See id.* (“Broadcast material that is indecent but not obscene is protected by the First Amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what people may say and hear. . . [and any] potential chilling effect of the FCC’s generic definition of indecency will be tempered

C. First Amendment Analysis Varies with the Medium

As discussed above, the method of content transmission dictates the regulatory scheme. Communications media are subject to varying regulatory treatment depending on the type of technology employed and the degree of accessibility that technology affords to the public. Broadcasting necessarily involves spectrum, which is considered a finite natural and public resource. By its public nature, broadcasting provides ubiquitous accessibility to anyone with a receiver such as a television or radio.¹⁵⁰ The pervasive nature of broadcast service, combined with its universal availability, provides a legitimate rationale for greater governmental restrictions on content transmitted via the broadcast medium.¹⁵¹ Cable service, on the other hand, requires the consumer to establish a voluntary relationship with the cable provider to permit the physical installation and the initiation of the subscription service for the content delivery.¹⁵² In the past, cable providers were subjected to a regulatory “middle ground” wherein content could be regulated, but to a lesser extent than broadcasters.¹⁵³ However, recent Supreme Court decisions have raised the level of judicial scrutiny, affording cable operators and content providers greater First Amendment protections.¹⁵⁴

By contrast, the Internet is subject to less governmental intrusion in the form of content regulation than other forms of media because it is classified as an information service.¹⁵⁵ Likewise, telephony has traditionally been viewed as a conduit for the transmission of content rather than as a

by the Commission’s restrained enforcement policy.” (quoting *Action for Children’s Television v. FCC*, 852 F.2d 1332, 1344, 1340 n. 14 (1988)).

¹⁵⁰ See *Pacifica*, 438 U.S. at 748–49.

¹⁵¹ See *id.* Compare *id.* and *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, Notices of Apparent Liability and Memorandum Opinion and Order*, 21 F.C.C.R. 2664, 2730 (Feb. 21, 2006) (Commissioner Deborah Taylor Tate) (“One of the bedrock principles of the Communications Act of 1934, as amended, is that the airwaves belong to the public. Much like public spaces and national landmarks, these are scarce and finite resources that must be preserved for the benefit of all Americans.”). See generally *Sable*, 492 U.S. 115 (distinguishing broadcast media from Dial-a-Porn); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375–76 (1969) (noting that broadcast frequencies are considered a scarce resource which justifies their regulation by the government).

¹⁵² See generally *Playboy*, 529 U.S. 803.

¹⁵³ See *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 661 (1994); *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180, 224–25 (1997) (holding that “must carry” requirements are constitutionally valid); see also 47 U.S.C. § 532(c)(2) (2000) (stating that cable operators themselves are prohibited from editorializing program content); *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 741 (1996).

¹⁵⁴ See discussion *infra* Part IV.D.3 (discussing the trend of stricter scrutiny in reviewing restrictions).

¹⁵⁵ See 47 U.S.C. § 153(20) (2000); *Ashcroft v. ACLU*, 542 U.S. 656, 670 (2004); *Playboy*, 529 U.S. at 813–14; *Reno v. ACLU*, 521 U.S. 844, 875 (1997).

pervasive communication medium like broadcast or cable.¹⁵⁶ Because these four media are treated differently under the 1996 Act, content that may be considered indecent for broadcast purposes may be deemed appropriate for either cable or the Internet.

D. Mobile TV Regulation will be Guided by the Permissible Regulations of Its Underlying Components

1. First Amendment in Broadcast Media: Government has Broader Discretion to Regulate Certain Types of Content

The FCC has generally been entitled to greater latitude to regulate broadcast speech because of the scarcity of spectrum and the corresponding government interest in managing this natural resource for the public.¹⁵⁷ The FCC transfers its duty as a public fiduciary to the broadcaster when it grants a broadcast license.¹⁵⁸ In exchange for the license, the broadcaster owes a duty to the public to create programming that is properly tailored to all segments of society.¹⁵⁹

In *Red Lion Broadcasting Co. v. FCC*, the Supreme Court held that the FCC had the authority to require broadcasters to provide equal airtime to political opponents.¹⁶⁰ The Court's decision rested upon two premises.¹⁶¹ First, the Court reasoned that broadcast frequencies are a scarce resource and, as such, they are subject to greater regulation in a manner responsive to the public "convenience, interest, or necessity."¹⁶² Second, with regard to the First Amendment, the Court declared, "the right of the viewers and listeners, not the right of the broadcasters, . . . is paramount It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market" whether by the government or by a private

¹⁵⁶ See *Sable*, 492 U.S. at 127.

¹⁵⁷ See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *Turner I*, 512 U.S. at 637–38.

¹⁵⁸ *Turner I*, 512 U.S. at 650.

¹⁵⁹ See *id.* at 650–51 (discussing the duty to the public).

¹⁶⁰ See *Red Lion*, 395 U.S. at 400–01. The "equal time" requirement has since been repealed. See *In re Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, Report*, 101 F.C.C. 2d 145, ¶ 5 (Aug. 7, 1985) ("[W]e no longer believe that the fairness doctrine . . . serves the public interest."). However, the First Amendment and the public interest with regard to the airwaves analysis remains a cornerstone of content regulation jurisprudence. See *e.g.* *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Turner I*, 512 U.S. at 622; *Sable*, 492 U.S. 115.

¹⁶¹ *Red Lion*, 395 U.S. at 377, 390, 394.

¹⁶² *Id.* at 376–77.

licensee.¹⁶³ *Red Lion* has been a cornerstone in subsequent FCC regulations of First Amendment issues, bolstering the Commission's authority to regulate certain types of broadcast content by diminishing the level of First Amendment scrutiny that the Court will impose upon such action.

The holding of *Red Lion* was reaffirmed in *FCC v. Pacifica* and extended to support the Commission's regulation of an indecent radio broadcast.¹⁶⁴ At two-o'clock in the afternoon, a Pacifica Foundation radio station in the New York area broadcast a pre-recorded monologue by comedian and satirist George Carlin entitled, "Filthy Words."¹⁶⁵ In this monologue, Carlin repeatedly used profanity and made references to sexual and excretory activities and organs.¹⁶⁶ The Commission determined that the monologue was indecent and could have warranted sanctions against Pacifica.¹⁶⁷ Critical to the Commission's determination was the deliberate repetitive nature of the words, the activities that they described, and the fact that children would likely be in the audience because the monologue was aired in the middle of the afternoon.¹⁶⁸ In sum, the culmination of these qualities made the monologue patently offensive as measured by contemporary community standards.¹⁶⁹

The Court determined that indecent content was entitled to First Amendment protection, yet it imposed a reduced level of judicial scrutiny due to the unique nature of broadcast media.¹⁷⁰ One key factor pivotal to the Court's decision was the idea that radio broadcast was pervasive and listeners were a captive audience.¹⁷¹ The Court reasoned that while the broadcaster had given a warning prior to airing the monologue, if a listener tuned

¹⁶³ *Id.* at 390.

¹⁶⁴ *See Pacifica*, 438 U.S. at 742.

¹⁶⁵ *Id.* at 729–30.

¹⁶⁶ *Id.* at 732 (quoting *In re Citizen's Complaint Against Pacifica Foundation Station WBAI (FM)*, *Memorandum Opinion and Order*, 56 F.C.C. 2d 94, ¶ 11 (Feb. 12, 1975)).

¹⁶⁷ *Id.* at 730.

¹⁶⁸ *Id.* at 732. The Commission described the language in the monologue as "patently offensive," and asked the Court to approve the regulation of such content by "principles analogous to those found in the law of nuisance where the law generally speaks to channeling behavior more than actually prohibiting it." *Id.* at 731–32 (internal quotations and citation omitted).

¹⁶⁹ *Id.* at 732.

¹⁷⁰ *Id.* at 738 (looking to the legislative history, the Court ultimately determined that there was significant traditional support that Congress intended that obscene and indecent language.) "Respect for that intent requires that the censorship language be read as inapplicable to the prohibition on broadcasting obscene, indecent, or profane language." *Id.* at 737–38.

¹⁷¹ *Id.* at 748–49. *Cf.* *Cohen v. California*, 403 U.S. 15, 25 (1971) (holding that the "captive audience" rationale was inapplicable to a situation where a man wore a shirt with the words "Fuck the Draft" emblazoned upon it. The Court reasoned that onlookers could avert their eyes if they were offended by Cohen's shirt, thereby remedying the situation themselves.) *Id.* at 21.

in mid-broadcast, they would still be subject to the indecent speech.¹⁷² In this way, prior warnings were impracticable, if not impossible, to ensure that unwilling listeners would not be in the audience.¹⁷³ The damage was done the moment that an unwilling listener heard the broadcast.¹⁷⁴

Another key factor in the Court's decision was the Commission's overall goal of protecting children from indecent material.¹⁷⁵ The Court reasoned that when the government acts to restrict content, it must be done in the least restrictive means possible to achieve the desired end.¹⁷⁶ In this case, the Court held that the FCC's purpose was legitimate and its corresponding action was reasonable since the limitations imposed on broadcasters were limited to certain hours of the day when children were likely to be listening.¹⁷⁷ *Pacifica* granted the FCC the authority to regulate the broadcast of indecent speech and to impose temporal limitations on content to protect children.¹⁷⁸

2. *Indecent Phone Messages Over Telephone Service*

While the Court in *Pacifica* supported FCC restrictions on broadcast content, the Court has been less sympathetic of restrictions on content delivered by other media. In *Sable Communications v. FCC*, the Court rejected the Commission's attempt to enforce a statute that completely banned sexually indecent and obscene phone messages called "dial-a-porn."¹⁷⁹ At issue was whether Congress was empowered to amend § 223 of the Communications Act to prohibit the transmission of sexually indecent and obscene telephonic communications.¹⁸⁰ Although the Court upheld the statute insofar as it applied to obscene messages,¹⁸¹ it struck down the statute as applied to indecent messages.¹⁸² Critical to the Court's decision was the fact that the statute posed a complete, rather than partial, proscription of indecent speech.¹⁸³ Again the Court emphasized that the gov-

¹⁷² *Pacifica*, 238 U.S. at 748.

¹⁷³ *Id.* at 758–59 (Powell, J., concurring).

¹⁷⁴ *Id.* at 748–49 (majority opinion).

¹⁷⁵ *Id.* at 749–50.

¹⁷⁶ *Id.* at 757–58 (Powell, J., concurring) (explaining how narrowly tailored restrictions are allowable in order to protect children from particular harmful conduct).

¹⁷⁷ *Id.* at 758–59.

¹⁷⁸ *Id.* at 749–50 (majority opinion).

¹⁷⁹ *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 131, 124 n.4 (1989) (explaining the ban of interstate dial-a-porn messages).

¹⁸⁰ *Sable*, 492 U.S. at 124.

¹⁸¹ *Id.* The Court agreed with the district court, which upheld the statute insofar as it prohibited obscene telephone messages, stating that "the protection of the First Amendment does not extend to obscene speech." *Id.* (citing *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973)).

¹⁸² *Sable*, 492 U.S. at 126.

¹⁸³ *Id.*

ernment may regulate otherwise protected speech only if it chooses the least restrictive means to achieve its objective.¹⁸⁴ The Court found that the Commission's attempt to completely ban the phone sex messages was "contrary to the First Amendment."¹⁸⁵ The FCC's position made it "illegal for adults as well as children to have access to the sexually explicit messages" and thus was overly broad.¹⁸⁶

The Court distinguished its holding in *Sable* from that in *Pacifica* by stating that "the government may not reduce the adult population . . . to . . . only what is fit for children."¹⁸⁷ In applying strict scrutiny, the Court further distinguished *Sable* from *Pacifica*, reasoning that, even if § 223(b) was narrowly tailored to achieve its purpose of protecting children, the transmission of dial-a-porn was inherently different than broadcast radio.¹⁸⁸ Specifically, dial-a-porn requires affirmative steps by the individual to access the content.¹⁸⁹ The individual must physically pick up the phone, dial a certain number, and pay a fee to hear the message.¹⁹⁰ Conversely, broadcast is "uniquely pervasive" and the content can be easily accessed by adults and children without warning.¹⁹¹ The Supreme Court noted that "[u]nlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it."¹⁹² The Court held that the "captive audience" problem found in *Pacifica* was not applicable in the dial-a-porn situation because "callers will generally not be unwilling listeners."¹⁹³

3. Judicial Review of Restrictions on Cable Services

The Court has extended First Amendment protection to cable programmers and cable operators because they are engaged in the transmission of

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* ("The Government may serve this legitimate interest, but to withstand constitutional scrutiny, 'it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms'") (internal citations omitted) (quoting *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980) ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends.")).

¹⁸⁶ *Sable*, 492 U.S. at 123, 131.

¹⁸⁷ *Id.* at 128 (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)) (internal quotations omitted).

¹⁸⁸ *Sable*, 492 U.S. at 127–28.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 128.

¹⁹¹ *Id.* at 127 (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 748-749 (1978)).

¹⁹² *Sable*, 492 U.S. at 128.

¹⁹³ *Id.*

speech.¹⁹⁴ However, unlike broadcast, the Court initially declined to extend strict scrutiny review to content regulation via cable service,¹⁹⁵ instead favoring an intermediate level of judicial review.¹⁹⁶ This was due in large part to the structure of cable content transmission which distinguished it from other forms of media.¹⁹⁷

a. Turner I and II

In 1994, cable operators and programmers challenged the constitutionality of the “must-carry” provisions of the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”), as well as the FCC’s authority to impose content-based regulations on the cable industry, in *Turner Broadcasting v. FCC* (“*Turner I*”).¹⁹⁸ The 1992 Cable Act was enacted in response to the refusal of many cable operators to provide broadcasting content to their subscribers.¹⁹⁹ To correct what was seen as a competitive imbalance in the market between cable operators and broadcasters, Congress enacted legislation mandating cable carriage of local broadcasting content.²⁰⁰ The cable industry sued on grounds that these “must-carry” requirements violated operators’ First Amendment rights to transmit speech of their choosing, and challenged the FCC’s imposition of specific regulations to achieve that end.²⁰¹

The Court began its analysis by noting that not all governmental interference with speech dictates the same level of judicial review.²⁰² Here, the Court distinguished cable service from broadcast, specifically stating that it did not suffer from the same “unique physical limitations of the broadcast medium,” and, therefore, the government was not entitled to the level of deference afforded in broadcast content restrictions.²⁰³ The Court also rejected the cable industry’s contention that the must-carry provisions trig-

¹⁹⁴ *Turner Broad. Sys., Inc. v. FCC* (*Turner I*), 512 U.S. 622, 636 (1994) (citing *Leathers v. Medlock*, 499 U.S. 439, 444 (1991)).

¹⁹⁵ See *Turner I*, 512 U.S. at 637, 661–62. See generally *Turner Broad. Sys., Inc. v. FCC* (*Turner II*), 520 U.S. 180 (1997); *Denver Area Educ. Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996).

¹⁹⁶ *Turner I*, 512 U.S. at 661–62.

¹⁹⁷ *Id.* at 639.

¹⁹⁸ *Id.* at 630.

¹⁹⁹ *Id.* at 630–33.

²⁰⁰ *Id.* at 633.

²⁰¹ *Id.* at 626.

²⁰² *Id.* at 637.

²⁰³ *Id.* The Court specifically distinguished cable from broadcast because it did not deal with limited spectrum frequencies, as cable wire and fiber optic transmission combined with digital compression technology was making it increasingly more likely for an unlimited number of speakers to communicate via the same route. Additionally, there was little risk of interference between programmers because each was allocated a specific channel per the cable operator. *Id.* at 639.

gered a strict scrutiny review which would justify the regulation only if it was narrowly tailored to support a compelling government interest and did not favor one set of speakers over another.²⁰⁴ Instead, the Court focused on the unique characteristics of the cable medium in which cable operators enjoyed a bottleneck monopoly, permitting them the power to choose the programming content that they deemed to be most economically beneficial rather than the one most beneficial to the marketplace of ideas.²⁰⁵ The Court reasoned that this power severely threatened the viability of the broadcasting industry, and such a concern constituted a legitimate government interest.²⁰⁶

The Court noted that a content-neutral regulation will be upheld and is entitled to an intermediate level of review, if “it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free speech; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”²⁰⁷ The Court found the must-carry obligations to be constitutionally valid provided that the Government could support such a law with quantifiable data to demonstrate its legitimacy, and that the Government could prove that these obligations would not “burden substantially more speech than necessary to further those interests.”²⁰⁸

In *Turner Broadcast Systems, Inc. v. FCC* (Turner II), the Court again considered must-carry provisions, this time with regard to the specific means mandated by the statute.²⁰⁹ The Court upheld its finding that Congress had a legitimate government interest and that must-carry provisions were indeed necessary to prevent anticompetitive behavior in the cable industry²¹⁰ and to protect television broadcasters’ economic viability.²¹¹ In *Turner II*, the Court evaluated whether the must-carry provisions constrained speech within the cable medium more than necessary to achieve

²⁰⁴ *Id.* at 653, 657. The cable industry argued that “a regulation is presumed invalid under the First Amendment because the government may not ‘restrict the speech of some elements of our society in order to enhance the relative voice of others.’” *Id.* at 657 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)). The Court went on to say that such a proposition is only sustainable when the speaker-based law “reflect[s] the Government’s preference for the substance of what the favored speakers have to say . . .” *Turner I*, 512 U.S. at 658 (citing *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983)).

²⁰⁵ *Turner I*, 512 U.S. at 661.

²⁰⁶ *Id.* at 660–61.

²⁰⁷ *Id.* at 662 (quoting *United States v. O’Brien*, 391 U.S. 367 (1968) (internal quotations omitted)).

²⁰⁸ *Turner I*, 512 U.S. at 662 (internal citations omitted).

²⁰⁹ *Turner Broad. Sys., Inc. v. FCC* (*Turner II*), 520 U.S. 180 (1997).

²¹⁰ *Id.* at 196, 203–04, 213.

²¹¹ *Id.* at 208, 213 (“We think it apparent must-carry serves the Government’s interests ‘in a direct and effective way.’ Must-carry ensures that a number of local broadcasters retain cable carriage, with the concomitant audience access and advertising revenues needed to support a multiplicity of stations.”).

the legitimate government objective.²¹² The Court held that must-carry obligations were a reasonable solution to the problem because “Congress took steps to confine the breadth and burden of the regulatory scheme,”²¹³ and, although the Court recognized that there were other theoretical alternatives to the must-carry requirements, “[o]ur precedents establish that when evaluating a content-neutral regulation which incidentally burdens speech, we will not invalidate the preferred remedial scheme because some alternative solution is marginally less intrusive on a speaker’s First Amendment interests.”²¹⁴

b. Denver Area Educational Telecommunications Consortium, Inc. v. FCC

In addition to the competitive concerns between the cable industry and broadcast, the 1992 Cable Act addressed the issue of indecent programming. Section 10 of the 1992 Cable Act imposed constraints on the provision of indecent programming over cable networks in order to protect children from viewing sexually graphic material.²¹⁵ The first subsection, § 10(a), *permitted* the cable operator autonomy to elect (or refuse) to broadcast programs that “[it] reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.”²¹⁶ The second and third subsections of § 10, however, *required* the cable operator to, at a minimum, segregate and block indecent programming.²¹⁷

In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, the Court held that mandating cable operators to isolate and block indecent material constituted an unjustifiable content-based restriction on speech in violation of the First Amendment.²¹⁸ As in *Turner I* and *Turner II*, the Court ultimately determined that the appropriate level of review was a heightened intermediate standard rather than a diminished level for broadcast or the strict scrutiny of telephony. This decision was based

²¹² *Id.* at 213–14.

²¹³ *Id.* at 216.

²¹⁴ *Id.* at 216–18. Justice O’Connor in her dissent argued that the must-carry provisions were wholly at odds with the Courts prior decision in *Turner I* which stated that the obligations were “a means of preserving ‘access to free television programming *whatever its content*,’” because the organic law favored some speech over others. Due to this fact, Justice O’Connor argued that the statute should be reviewed under strict scrutiny which, in her opinion, it would necessarily fail. *Id.* at 234–35.

²¹⁵ *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 728 (1996).

²¹⁶ *Id.* at 734 (quoting the 1992 Cable Act, 102 P.L. 385, 106 Stat. 1486, § 10(a)(2)).

²¹⁷ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-358 §10, 106 Stat. 1460, 1485–86 (1992).

²¹⁸ *Denver Telecomms. Consortium*, 518 U.S. 727.

largely on the flexibility that the language of § 10(a) embodied,²¹⁹ which the Court determined struck an appropriate balance between the competing interests of the government's desire to protect children, the cable industry's right to broadcast certain types of content, and the consumer's right to receive such programming.²²⁰ However this sentiment was short lived, and only three years after deciding *Denver Telecommunications Consortium*, the Court determined that content-based speech restrictions for cable should be evaluated under the strictest scrutiny.

c. U.S. v. Playboy Entertainment

In reaction to the litigation over indecency regulation of cable programming, Congress included in the 1996 Telecommunications Act more specific language to address indecent programming and "signal bleed" on cable networks.²²¹ Section 505 of the 1996 Act required that cable operators either "fully scramble or otherwise fully block" channels primarily dedicated to sexually-oriented programming, or to limit their transmission to hours when children were unlikely in the viewing audience "so that only paying customers had access to certain programs."²²² In addition, § 505 required that cable operators fully scramble sexually indecent programming in a way that eliminated "signal bleed."²²³ "Signal bleed" is the phenomenon by which the scrambling process does not fully disguise all images and sounds.²²⁴ The goal of § 505 was to guard children from exposure to sounds or images resulting from signal bleed, yet the statute targeted only sexually-oriented programming.²²⁵ If a programmer was found to be in violation of section 505, the programmer was subject to sanctions.²²⁶ The result was that many programmers only allowed customers access to the material between 10 p.m. and 6 a.m., pursuant to the time-channeling criteria set forth in *Pacifica*.²²⁷

Cable programmer Playboy Entertainment challenged the "signal bleed" requirement of the 1996 Act, arguing that the regulation violated the First Amendment because § 505 targeted only sexually-explicit content, and

²¹⁹ *Id.* at 755–56.

²²⁰ *Id.* at 747.

²²¹ *United States v. Playboy Entm't. Group*, 529 U.S. 803, 806 (2000).

²²² *Id.* (quoting 47 U.S.C. § 505, *repealed* 2000). "The purpose of § 505 is to shield children from hearing or seeing images resulting from signal bleed." *Playboy*, 529 U.S. at 806.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* Section 505 "'focuses *only* on the content of the speech and the direct impact that speech has on its listeners' . . . [t]his is the essence of content-based regulation." *Id.* at 811–812 (quoting *Boos v. Barry*, 485 U.S. 312 (1988) (opinion of O'Connor, J.)).

²²⁶ *Playboy*, 529 U.S. at 805.

²²⁷ *Id.* at 806–07.

“focus[ed] *only* on the content of the speech and the direct impact that speech ha[d] on its listeners.”²²⁸ Playboy argued that the statute imposed content restrictions on speech both facially and in effect because application of § 505 resulted in a “significant restriction of communication, with a corresponding reduction in Playboy’s revenues.”²²⁹ Furthermore, Playboy argued that the statute was unnecessarily restrictive and that there were less burdensome alternatives that would achieve the same objective.²³⁰

The Court determined that strict scrutiny was the appropriate standard of review because the chilling effect of § 505 on a particular genre of speech was apparent and quantifiable.²³¹ Applying the doctrine set forth in *Sable*, the Court affirmed that “[t]he Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.”²³² The overriding justification for § 505 was the need to protect children from indecent content,²³³ yet the Court found that the Government provided no quantifiable data to show that children were actually being harmed by content accessed because of signal bleed.²³⁴ Instead, the Court saw a situation in which protected speech was silenced for two-thirds of the day in homes serviced by cable operators.²³⁵ As in *Sable*, the Court observed that the effect of § 505 was to significantly prohibit constitutionally protected communications “between speakers and willing adult listeners.”²³⁶

While the Court recognized that the purpose of § 505 was aimed at preventing children from inadvertent exposure to indecent material, another section of the 1996 Act provided a viable solution for parents to exercise

²²⁸ *Id.* at 811–12 (“The statutory disability appl[ied] to channels ‘primarily dedicated to sexually-oriented programming.’” (quoting 47 U.S.C. § 561(a) (1994, Supp. III)).

²²⁹ *Playboy*, 529 U.S. at 803, 809, 813 (noting that according to one survey sixty-nine percent of operators complied with § 505 through time channeling).

²³⁰ *Id.* at 807.

²³¹ *Id.* at 809, 813.

²³² *Id.* at 813 (quoting *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)). “‘Content-based regulations are presumptively invalid,’ and the government bears the burden to rebut that presumption.” *Id.* at 817 (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992)).

²³³ *Playboy*, 529 U.S. at 811.

²³⁴ *Id.* at 819. Specifically the Court stated:

[A] central weakness in the Government’s proof. [Is that] [t]here is little hard evidence of how widespread or how serious the problem of signal bleed is. . . . To say that millions of children are subject to a risk of viewing signal bleed is one thing; to avoid articulating the true nature and extent of the risk is quite another.

Id. Additionally, the Government failed to show that society wanted more stringent protection for children from signal bleed. *Id.* “A survey of cable operators determined that fewer than 0.5% of cable subscribers requested full blocking during that time.” *Id.* at 816.

²³⁵ *Id.* at 812.

²³⁶ *Id.* at 812. “[E]ven where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative.” *Id.* at 814.

their discretion and block the programming without eliminating the ability of willing adults to access it.²³⁷ Section 504 required that cable operators facilitate and comply with individual consumer requests that specific channels be blocked.²³⁸ Section 504 presented a content-neutral approach that applied equally to all cable programming, as customers could elect to block any channel, not just sexually-explicit content.²³⁹ In this regard, § 504 presented a viable and less restrictive alternative to § 505 and consequently, imposed less restraint on Playboy's First Amendment right to free speech.

The Court stated that when the goal of content-based speech restrictions are "to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where *no* less restrictive alternative exists. We are expected to protect our own sensibilities 'simply by averting [our] eyes.'"²⁴⁰ Thus, the Court acknowledged the role of individual autonomy in providing parents the ability to voluntarily block offensive content from entering their homes. Whereas the Court struck down § 505 as too burdensome on speech, it upheld § 504 because it presented a viable, less restrictive means of achieving the government's objective.²⁴¹

4. First Amendment Jurisprudence Regarding the Internet is Distinguished from Broadcast and Cable Services

Unlike broadcast and cable services, the Internet is subject to far less governmental intrusion due to its classification as an information service under the 1996 Act.²⁴² Congress intended that the Internet remain free from governmental intrusion in order to promote a robust forum for the discourse of political and social ideology as well as providing entertainment services.²⁴³ Congress determined that legislative attempts to restrict content on the Internet would impede rather than foster growth within that arena.²⁴⁴

²³⁷ *Id.* at 805.

²³⁸ *Id.* at 810.

²³⁹ *Id.* at 809–10 (citing the District Court which concluded that a regime in which viewers could order signal blocking on a household-by-household basis presented an effective, less restrictive alternative to § 505).

²⁴⁰ *Id.* at 813 (emphasis added) (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)); *cf.* *FCC v. Pacifica Found.*, 438 U.S. 726 (distinguishing cable signals from broadcast signals). Cable Signals involve a subscription so that they are not readily accessible by the general public and the consumer has the ability to block unwanted programming voluntarily. *Playboy*, 529 U.S. at 814. Conversely, a broadcast signal is free of charge, has a ubiquitous presence, and the listener or viewer is unable to block content before it reaches their home. *Pacifica*, 438 U.S. at 748–49.

²⁴¹ *Playboy*, 529 U.S. at 805.

²⁴² *See* 47 U.S.C. § 230(b)(2) (2000).

²⁴³ Congress' desire that the Internet operate unfettered by regulation can be found in the policy statement of § 509 of the 1996 Act (codified at 47 U.S.C. § 230).

²⁴⁴ 47 U.S.C. § 230 (2000); *see also* Crawford, *supra* note 62, at 704–05. Congressional findings on the Internet are set forth in 47 U.S.C. § 230 (a) which states:

However, this does not imply that the Internet operates free from regulation. In fact, Congress explicitly stated that the Internet is not to be used for criminal purposes such as child pornography.²⁴⁵ Additionally, laws that protect Internet users from spam and identity theft have been upheld,²⁴⁶ and Internet “luring laws”²⁴⁷ designed to protect children from sexual predators have been found constitutionally sound by many courts.²⁴⁸ Like other forms of media, when Congress does act to restrict content-based speech on the Internet, the regulation must be narrowly tailored to a particular government interest²⁴⁹ and must not chill more speech than necessary to achieve that objective.²⁵⁰

Federal legislation designed to protect children from indecent and obscene content available over the Internet has failed to meet this burden. The first attempt, the Communications Decency Act of 1996 (“CDA”), a part of the Telecommunications Act of 1996, was challenged in *Reno v. American Civil Liberties Union*.²⁵¹ Section 223(a) of the CDA prohibited the transmission of obscene or indecent messages and material over the Internet to anyone under the age of eighteen.²⁵² Section 223(d) prohibited

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens . . . (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation. . . .

§ 230.

²⁴⁵ 47 U.S.C. § 230 (b)(5) (“It is the policy of the United States . . . (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.”).

²⁴⁶ See generally CAN-SPAM Act of 2003, Pub. L. No. 108-187, 117 Stat. 2699 (2004) (codified as 15 U.S.C. §§ 7701-7713); *Gordon v. Impulse Marketing Group, Inc.*, 375 F. Supp. 2d 1040, 1044 (2005).

²⁴⁷ The Department of Justice prosecutes these actions under 18 U.S.C. § 2422 (2000), which criminalizes soliciting or enticing a minor to participate in sexual conduct. Many states have adopted their own Internet luring legislation which criminalizes conduct that is intended to lure children from their homes via the Internet. See M. Megan McCune, VIRTUAL LOLLIPOPS AND LOST PUPPIES: HOW FAR CAN STATES GO TO PROTECT MINORS THROUGH THE USE OF INTERNET LURING LAWS, 14.2 COMLAW CONSPECTUS 503, 507 n.25 (2006) (citing Internet luring statutes from across the United States).

²⁴⁸ See, e.g., McCune, *supra* note 247, at 507 n.25.

²⁴⁹ See *Reno v. ACLU*, 521 U.S. 844, 875 (1997) (“[W]e have repeatedly recognized the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults.” (citations omitted)); *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2002) (“[A] court assumes that certain protected speech may be regulated, and then asks what is the least restrictive alternative that can be used to achieve that goal.”)

²⁵⁰ *Ashcroft*, 542 U.S. at 666 (“The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to ensure that legitimate speech is not chilled or punished.”).

²⁵¹ *Reno*, 521 U.S. 844.

²⁵² *Id.* at 858–59 (discussing 47 U.S.C. § 223(a) (1994 ed., Supp. II)).

the knowing transmission or display of any “patently offensive” messages to anyone younger than eighteen.²⁵³

The Court found that the government had a legitimate interest in enforcing obscenity and child pornography laws.²⁵⁴ However, noting that the existing “cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to the Internet,” the Court wrestled with the appropriate form of review for content-based restrictions on the Internet.²⁵⁵ Particularly troubling to the Court was that the statutory language defining the term “indecent” was unclear and the fact that the statute imposed criminal sanctions based upon that loose definition of “indecent.”²⁵⁶ The vagueness of such a content-based regulation, coupled with its deterrent effect as a criminal statute, “raises special First Amendment concerns because of its obvious chilling effect on free speech.”²⁵⁷

In determining whether the indecency provision was valid, the Court suggested that while filtering technology that limited content may be an efficient and more importantly less intrusive alternative to the CDA, it was not widely available at the time.²⁵⁸ Accordingly, the Court determined that the CDA was unconstitutionally overbroad in light of a less invasive means of furthering the legitimate government interest of shielding children from harmful content.²⁵⁹ In doing so, the Court noted that “[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”²⁶⁰

²⁵³ *Id.* at 859–860. Specifically, 47 U.S.C. § 223(d) provides:

(d) Whoever—

(1) in interstate or foreign communications knowingly—

(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

(B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or

(2) knowingly permits any telecommunications facility under such person’s control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both.

Id. The breadth of these prohibitions is qualified by two affirmative defenses. *Reno*, 521 U.S. at 860.

²⁵⁴ *Reno*, 521 U.S. at 864.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 870–72 (citing *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048–51 (1991)).

²⁵⁷ *Reno*, 521 U.S. at 872 (citing *Dombrowski v. Pfister*, 380 U.S. 479 (1965)).

²⁵⁸ *Reno*, 521 U.S. at 877.

²⁵⁹ *Id.* at 874–82.

²⁶⁰ *Id.* at 885.

In 2004, the Court revisited the issue of content regulation on the Internet in *Ashcroft v. ACLU*.²⁶¹ In 1998, Congress passed the Child Online Protection Act (“COPA”) to, like the CDA, “protect children from being exposed to harmful material found on the Internet.”²⁶² The COPA imposed criminal penalties including jail time and a \$50,000 fine for the dissemination of sexually explicit material deemed “harmful to minors.”²⁶³ The regulation was aimed primarily at online content-providers and exclusively targeted sexually explicit material.²⁶⁴

The Court queried whether the COPA was the only means of protecting children from indecent Internet.²⁶⁵ Rejecting age verification as an effective substitute the Court ultimately found that filters “impose[d] selective restrictions on speech at the receiving end, *not* universal restrictions at the source,”²⁶⁶ and held that filters may pose a less restrictive alternative to COPA which may make the act unconstitutional, however, the case was remanded again for a factual determination on the matter.²⁶⁷

V. INHERENT FAILURES OF CONTENT REGULATION AS APPLIED TO MOBILE TV

If Congress continues its trend in seeking to regulate the dissemination of indecent content via communications media, it will likely seek to impose restrictions on the delivery of content over Mobile TV. The question remains whether such regulation could adequately address public policy concerns regarding children while withstanding First Amendment scrutiny. As

²⁶¹ *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

²⁶² Child Online Protection Act, Pub. L. No. 105-277, § 1402, 112 Stat. 2681 (1998) (codified at 47 U.S.C. § 231 (2000)).

²⁶³ 47 U.S.C. § 231(a)(1)(200). “Material that is harmful to minors” is defined as:

[A]ny communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. § 231(e)(6).

The term “minor” is defined as “any person under 17 years of age.” 47 U.S.C. § 231(e)(7). A person acts for “commercial purposes” “only if such person is engaged in the business of making such communications.” 47 U.S.C. § 231 (e)(2)(A).

²⁶⁴ See *Ashcroft*, 542 U.S. 656, 661–63 (2004).

²⁶⁵ *Id.* at 666–67.

²⁶⁶ *Id.* at 657 (emphasis added).

²⁶⁷ *Id.* at 666–67.

discussed above, Mobile TV is best classified as an information service analogous to VoIP.²⁶⁸ As an information service, Mobile TV should experience greater freedom in making available many types of content, including that which may be deemed indecent. The Court has spoken repeatedly that the government has a legitimate interest in enforcing sanctions against the dissemination of indecent content to children.²⁶⁹ However, that legitimate interest cannot withstand scrutiny if it is overly burdensome to speech. This section addresses the issues to be confronted should Congress determine that regulation of Mobile TV is warranted.

Should the government choose to impose content regulations on sexually explicit speech, it must be sure to enact legislation that is narrowly tailored to achieve a compelling interest.²⁷⁰ While the goal of protecting children from sexually indecent material has been held as valid, the Court has been willing to allow the enforcement of such measures if the legislation is the *only* means of effectively achieving the objective.²⁷¹ If an alternative exists that is less restrictive, the Court is apt to find that the legislation is invalid.²⁷² Applying these principles to Mobile TV, the judiciary will likely consider both the nature of the service, the manner in which the content is provided, and viable legislative alternatives.

It is unlikely that the arguments that sustained the regulation of broadcast services will be sufficient to support content-based restrictions on speech for Mobile TV. The government was permitted to dictate content requirements for radio transmission in *Red Lion* on the premise of broadcast spectrum scarcity.²⁷³ However, this argument is inapplicable to an information service as the content publisher does not utilize broadcast spectrum space to facilitate its communication. Although Mobile TV content is transmitted via spectrum, that spectrum is specifically dedicated to wireless telephony, not broadcast. Wireless spectrum is distinguished from broadcast spectrum in that it has *never* been deemed a public resource and it is not free to the public.²⁷⁴ Instead, the consumer of wireless telephony must pay a fee for the service. Thus wireless spectrum cannot be deemed to be ubiquitous in nature and any corresponding concerns must be dismissed. Additionally,

²⁶⁸ See discussion *supra* Part III.

²⁶⁹ See *Sable Commc'ns of California, Inc. v. FCC*, 492 U.S. 115, 119 (1989); *Reno v. ACLU*, 521 U.S. 844, 864 (1997).

²⁷⁰ See *Sable*, 492 U.S. at 119; see also *Notice of Apparent Liability*, *supra* 69, ¶ 3.

²⁷¹ See generally *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (holding that blocking indecent radio broadcast during the time when children are likely to be listening was the most effective means of protecting children who may be in the listening audience).

²⁷² See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2002); see also *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

²⁷³ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

²⁷⁴ Jason M. Kueser, *This LAN is My LAN, This LAN is Your LAN: The Case for Extending Private Property Rights to Wireless Local Area Networks*, 72 U. Mo. K.C. L. REV. 787, 794 (2004).

the network provider of wireless service has never been deemed to have control over the content of transmission between subscribers, but instead merely provides the conduit over which content flows. Thus, although one aspect of Mobile TV's transmission is via spectrum, it is not of the type that has historically involved governmental attempts to restrict the transmission of speech.

The divergence between broadcast and information services extends further. Broadcast licensees were treated as proxies for the listening community.²⁷⁵ However, the monopoly rationale that supported this proposition was applicable to the specific role of radio broadcast in 1969—a time when there were few outlets for the dissemination of communications.²⁷⁶ *Red Lion* is applicable to the regulation of information services insofar as the Court endeavored to “preserve an uninhibited marketplace of ideas”²⁷⁷ in accordance with tenets of free speech.²⁷⁸ This philosophy is consistent with Congress' goal to preserve an “under-regulated” Internet.

The distinction between broadcast communication and information services, particularly Mobile TV, is better illustrated by a comparison between the rationale in *Pacifica* and that of Internet service. In *Pacifica*, free access and broadcast signal ubiquity were critical to the Court's decision.²⁷⁹ The listener was considered subject to the will of the broadcaster once the radio is turned on and the damage from obscenity is inflicted the moment that the listener hears it, even if such content was accidental.²⁸⁰ In this way, the listener was held captive to the broadcast content. This passive-listener rationale, however, is not present in the Mobile TV context.

First, broadcast is considered a one-way transmission from the content provider (e.g. the broadcaster) to the entire listening or viewing audience. In contrast, the Internet involves two-way communications between the individual and the content publisher. Second, Mobile TV is not a free service. It is a subscription service based on fees charged by the wireless phone service provider, the content publisher, or both.²⁸¹ Thus, the consumer of Mobile TV takes at least two active steps: first, through the purchase of a device capable of carrying the video content, and second, in requesting and paying for the material. Because Mobile TV requires a subscription, its presence is certainly not ubiquitous or unavoidable. Therefore, unlike broadcast radio or television, there is no risk that someone may inadvertently access the content simply by turning on a mobile device.

²⁷⁵ See discussion *supra* Part III, IV.D.1.

²⁷⁶ See *Red Lion*, 395 U.S. at 388–90.

²⁷⁷ *Id.* at 390.

²⁷⁸ *Id.*

²⁷⁹ *FCC v. Pacifica Found.*, 438 U.S. 726, 748–49 (1978).

²⁸⁰ *Id.*

²⁸¹ See Marguerite Reardon, *Cingular Launches Mobile-TV Service*, CNETNEWS.com, Mar. 6, 2006, http://news.zdnet.com/2100-1035_22-6046551.html (last visited Nov. 19, 2006).

The constitutional issues addressed in cable content regulation appear relevant, but they are not yet applicable to the Mobile TV marketplace. While finding content-specific regulation unconstitutional, the Court in *Playboy* agreed that requiring content providers to offer consumers the option against receipt of unwanted content was a reasonable means toward achieving the goal of protecting children from unfettered access to indecency.²⁸² However, until Mobile TV technology develops more sophisticated mechanisms to allow consumers to block specific Mobile TV content, any regulation to restrict content delivery will fail the least restrictive means test.

For the appropriate regulatory paradigm, prospective Mobile TV content regulators must look to *Sable* and the attempt to restrict dial-a-porn. In *Sable*, the Court held that the individual volition necessary to access the offensive content ensured that its audience “will generally not be unwilling listeners” such as children.²⁸³ By its nature and mechanics, Mobile TV is similar to the dial-a-porn service at issue in *Sable*, as both require that consumers take active, physical steps in initiating the contact with the content provider, and require the consumer to make a series of voluntary selections to agree to the delivery of the content, including agreeing to a method of payment for the material. Accordingly, Mobile TV is not pervasive such that there is a risk that an unwilling consumer such as a child will be held captive to indecent material.

If lawmakers choose to impose content-based restrictions on Mobile TV in order to protect children, they must structure the statutory language such that it does not infringe upon the First Amendment rights of adults. An appropriate balance must be struck between the Constitutional protection to which sexually indecent speech is entitled and the legitimate interest of protecting children from harmful material.²⁸⁴ In striking such a balance in the case of Mobile TV, it is unlikely that the Court will uphold any content-based blanket restriction on indecent speech accessible through Mobile TV. The Court is willing to uphold restrictions on indecent content for a medium of communications only where there are no less-restrictive alternatives available.²⁸⁵ Due to the range of less-restrictive alternatives available, any such content-based restriction on Mobile TV would surely be struck down by the Court.

²⁸² *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 815 (2000).

²⁸³ *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989).

²⁸⁴ *Ashcroft v. ACLU*, 542 U.S. 656, 675 (2004) (Stevens, J., concurring).

²⁸⁵ *Playboy*, 529 U.S. at 813.

VI. NON-GOVERNMENTAL REGULATION: PARENTS AND INDUSTRY

A. Parents have the power

The Supreme Court has repeatedly said that one “should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.”²⁸⁶ Parents currently have numerous options to prevent their children from accessing harmful material over Mobile TV. First, parents have the power to select phones for their children that lack Mobile TV capability, or to choose phones with limited service options designed specifically for children.²⁸⁷ Second, parents who opt to purchase handhelds with Mobile TV capability can refrain from subscribing to the service. Third, parents who choose to allow their children access to Mobile TV have, in effect, “come to the nuisance.”²⁸⁸ As the primary consumers of Mobile TV, parents have both the ability and the responsibility to be informed as to the devices their children are using and to be aware of the material available through interactive services. While it may be a legitimate government interest, it is not the government’s duty to police Mobile TV for the possibility that children might access indecent content. Rather, it is incumbent upon parents to exercise supervision, whether by selecting the most appropriate device for their children, by monitoring service bills to ensure their children are not visiting offensive Web sites, or by restricting their children’s access to credit cards in order to ensure that, even if they access the sites, the children are unable to access the indecent content therein.²⁸⁹

²⁸⁶ *Id.* at 824.

²⁸⁷ *See, e.g.*, Firefly Mobile, The Mobile Phone for Mobile Kids, <http://www.fireflymobile.com> (last visited Nov. 11, 2006). Firefly Mobile markets a phone specifically designed for children. This phone has only five buttons and can only be used for voice services. *Id.* Likewise, Verizon offers a “kid-friendly wireless phone” with a simplified keypad and the ability to store four programmed phone numbers. In addition, Verizon explicitly explains that Migo does not support such features as Internet access or mobile content. VerizonWireless.Com, LG Migo, <http://www.verizonwireless.com/b2c/store/controller?item=phoneFirst&action=viewPhoneDetail&selectedPhoneId=2060> (last visited Nov. 11, 2006).

²⁸⁸ Property law rationale that individuals who know of a nuisance situation prior to moving into an area, and still choose to reside by it, have forfeited the legal right to challenge its existence. *See In re Complaints Against Various Broadcast Licensees Regarding their Airing of the “Golden Globe Awards” Program, Memorandum Opinion and Order*, 19 F.C.C.R. 4975, ¶ 13 (Mar. 3, 2004); *cf. FCC v. Pacifica Found.*, 438 U.S. 726, 731–32 (1978) (discussing how the FCC argued for indecent broadcasts to be governed by the principles of nuisance law).

²⁸⁹ *See* FCC-to-CTIA Letter, *supra* note 35. John Muleta, Chief of the Wireless Telecommunication Bureau of the FCC stated that, “[w]ith adult content available from a myriad of sources, now more than ever it is important for carriers, content providers, and par-

B. An Industry Solution

In November 2005, the Cellular Telecommunications and Internet Association (“CTIA”), an international trade association for the wireless telecommunications industry, adopted “Wireless Content Guidelines.”²⁹⁰ These guidelines demonstrate “a voluntary pledge by the industry to proactively provide tools and controls to manage wireless content offered by the wireless telephone service carriers or available via Internet-enabled wireless devices.”²⁹¹ The guidelines are an attempt by the wireless industry to develop a standardized rating system for mobile video content based upon the traditional movie rating system, a methodology chosen for its familiarity to a wide range of consumers.²⁹²

There are two phases for the implementation of the CTIA rating system. The first phase, which became effective in November, called for the classification of mobile video material as either “Generally Accessible Carrier Content” or “Restricted Carrier Content.”²⁹³ Generally Accessible Content is considered appropriate for people of all ages and no controls are required to offer the content via Mobile TV.²⁹⁴ Conversely, in order for a service provider to offer Restricted Carrier Content, the carrier must provide consumer controls to restrict access to content prior to offering the material.²⁹⁵ These guidelines were designed to provide parents with the ability to select the classification of content they deem appropriate for their children.²⁹⁶

The second phase of the Wireless Content Guidelines initiative, which has yet to take effect, “will be for carriers to develop and implement Internet Content Access Control technologies that will enable wireless account holders to block access to the [I]nternet entirely or provide tools to block access to specific websites that consumers might consider inappropriate.”²⁹⁷ This phase will be achieved as wireless carriers independently de-

ents to know what is being done by industry to prevent access to adult content by minors, as well as what they can do to protect their children.” *Id.*

²⁹⁰ CTIA Press Release, *supra* note 20.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*; see also CTIA, Wireless Content Guidelines Classification Criteria (Nov. 2005), available at http://files.ctia.org/pdf/CTIA_Board_Approved_Guidelines.pdf (last visited Nov. 19, 2006).

Content is generally considered “Restricted” if it contains any of the following restricted content identifiers: intense profanity, intense violence, graphic depiction of sexual activity or sexual behaviors, nudity, hate speech, graphic depiction of illegal drug use, any activities that are restricted by law to those 18 years of age and older, such as gambling and lotteries.” Any “Restricted Carrier Content” will be considered “Generally Accessible Carrier Content” and will be available to all consumers. *Id.*

²⁹⁴ *Id.*

²⁹⁵ CTIA Press Release, *supra* note 20.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

velop filters and other content-blocking technologies for their devices. The CTIA acknowledges that although carriers cannot control the actual content that their users access via the Internet, the proactive step is necessary to allow consumers the ability to limit Internet content accessible to their families.²⁹⁸ The CTIA sees the guidelines as a way for wireless service providers to offer a wider variety of content to consumers.²⁹⁹ Then-FCC Commissioner, Kathleen Q. Abernathy, supported the initiatives, saying that “[t]he voluntary initiative announced . . . by [the] CTIA demonstrates that the wireless industry appreciates these challenges and is willing to better empower parents.”³⁰⁰ However, former FCC telecommunications bureau chief and current Legg Mason telecommunications analyst, Rebecca Abrogast, believes that the guidelines are merely an attempt to forestall governmental regulation.³⁰¹

The guidelines might well be an effort to forestall regulation, but it is precisely for that reason they should not be disregarded. After several failed attempts in the 1990s to restrict sexually explicit and indecent programming on cable television, Congress eventually enacted a statute that mandated the implementation of a similar program to the CTIA guidelines.³⁰² Under the 1996 Act, cable service providers must provide their subscribers with the ability to fully block programs the subscriber determines are inappropriate for their households.³⁰³ Congress also mandated that a voluntary content ratings system be established and that every television set (of 13” or more) be equipped with content-blocking technology.³⁰⁴ In response, the cable, broadcasting, and movie industries developed the “TV Parental Guidelines” to provide parents with a tool for evaluating broadcast and cable programming for age-appropriateness according to the amount of sexual content, violence and adult language or themes in the

²⁹⁸ *Id.*; see also Matt Richtel, *Carriers Adopt Content Rating For Cellphones*, N.Y. TIMES, Nov. 9, 2005, at C5.

²⁹⁹ See Press Release, MobileMedia.com, CTIA To Create Ratings System For Wireless Content (Apr. 25, 2005), available at <http://www.mobiledia.com/news/30063.html>. Cingular Wireless VP of Data Product Management, Jim Ryan, has stated that,

until we can provide filtering and control for parents, we will offer only the broadcast version of content. When we can provide an 18-plus category, we’ll look at the ability to offer other things. Our job is not to restrict or to regulate access to content. Our job is to provide choice and provide control.

Id.

³⁰⁰ Associated Press, *Cell Phones Adopt Ratings for Content*, TELECOMDIRECT NEWS, Nov. 10, 2005, available at <http://www.telecomdirectnews.com/do.php/15377?tpl=/look/printfriendly.tpl>.

³⁰¹ Mark Rockwell, *Content Ratings: “V” Is for Voluntary*, WIRELESS WEEK, Dec. 1, 2005, <http://www.wirelessweek.com/index.asp?layout=articlePrint&articleID=CA6288012>.

³⁰² See discussion *supra* Part III.

³⁰³ 47 U.S.C. § 560 (2000); see also FCC Fact Sheet, *supra* note 146.

³⁰⁴ 47 U.S.C. § 303(x).

program.³⁰⁵ The ratings system was designed to work in conjunction with the V-Chip, a technological mechanism built into every television set manufactured after January 2000.³⁰⁶ “The V-Chip reads information encoded in the rated program and blocks programs from the [television] set based upon the rating selected by the parent.”³⁰⁷

The CTIA Guidelines demonstrate a viable alternative to the sort of federal intrusion into the industry that cable and broadcast saw in the 1996 Act. Once the CTIA Guidelines can be coupled with filtering or blocking technology comparable to the television V-Chip, arguments for additional safeguard measures or explicit prohibitions on content will lack credibility. Voluntary and universal adoption of the same measures mandated for broadcast and cable will demonstrate that regulations applicable to the Mobile TV industry are unnecessary to protect children from objectionable content.

VII. CONCLUSION

Mobile TV is a chimeric service that should be treated as an information service under the 1996 Act because it is strictly a means “for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”³⁰⁸ However, because Mobile TV encompasses characteristics of telecommunications, cable, and Internet service, attempts to impose content-based regulations on Mobile TV may be challenged and reviewed in light of First Amendment precedent regarding each of these media. Moreover, because less-restrictive alternatives to content-based regulation exist to undermine any federal legislation attempting to restrict Mobile TV content, Congress should refrain from legislating in this area. The public policy concern presented by Mobile TV, adult entertainment and children’s access is real, but the wireless industry has already undertaken preemptive initiatives to address potential problems in the nascent Mobile TV. The industry should be given the opportunity to develop technologies that allow consumers the ability to block or access content at their choosing. Furthermore, a collaboration between the industry and parents to address concerns of sexually indecent Mobile TV content should be encouraged. Such a unified effort will benefit society not only by shielding children from sexually indecent material, but also by

³⁰⁵ The TV Parental Guidelines, About the TV Ratings and V-Chip, <http://www.tvguidelines.org> (last visited Nov. 11, 2006); *see also*, FCC, V-Chip: Viewing Television Responsibly, <http://www.fcc.gov/vchip> (last visited Nov. 11, 2006) [hereinafter V-Chip].

³⁰⁶ V-Chip, *supra* note 305.

³⁰⁷ *Id.*

³⁰⁸ 47 U.S.C. § 153(20).

ensuring that the legitimate uses of this content are communicated to willing adult listeners.