



## 710 The Regulatory & Technology Future after the Merger of Telecom & IT

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U.S. Cellular

**The Honorable Michael D. Gallagher**  
*Assistant Secretary of Commerce for Communications and Information*  
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**Veronica Pastor**  
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**Jonathan R. Spencer**  
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## Faculty Biographies

### Raymond M. Coyne

Raymond M. Coyne is senior counsel for U.S. Cellular, in Chicago, the seventh largest wireless carrier in the U.S. He counsels the marketing, IT, engineering, sales, and B2B teams in his company on a variety of commercial law issues including transactions, sales practices, advertising, distribution, trademarks, and litigation. Currently, he is serving as U.S. Cellular's legal representative on the content rating committee of the CTIA-Wireless Association. The committee is addressing rating of wireless data and other content available on cellular phones.

Previously Mr. Coyne worked for Motorola in the cellular phone and e-commerce divisions, handling transactional work for the e-commerce, sales, and advertising groups. Before that Mr. Coyne was in-house counsel for Sears Roebuck & Co in Chicago.

He received his B.A. from the University of Illinois and is a graduate of DePaul University College of Law.

### The Honorable Michael D. Gallagher

Michael D. Gallagher serves as assistant secretary of commerce for communications and information and administrator of the National Telecommunications and Information Administration in Washington, DC. He was appointed to the post by President George W. Bush and was confirmed by the Senate. As a leading member of the Bush Administration's technology team, Mr. Gallagher has focused his efforts on bringing the benefits of new and exciting telecommunications technologies to consumers including fulfilling President Bush's national goal of affordable broadband Internet access for all Americans by 2007. As part of those efforts, Mr. Gallagher spearheaded the Bush Administration initiatives that enabled a number of world-leading technologies including ultra wideband, broadband over power lines (BPL), and new spectrum allocations for licensed and unlicensed communications.

Before his confirmation, Mr. Gallagher served as acting assistant secretary. Prior to that appointment, Mr. Gallagher served as deputy chief of staff for policy and counselor to Secretary of Commerce Don Evans. Prior to his service in the administration, Mr. Gallagher was vice president for state public policy at Verizon Wireless in Bellevue, Washington. Before that, he was managing director for government relations at AirTouch Communications Inc., also in Bellevue, Washington. Mr. Gallagher also served as administrative assistant to former Congressman Rick White (R-Washington). Subsequently, he established a government relations practice at Perkins Coie, LLP in the Pacific Northwest.

Mr. Gallagher received his B.A. from the University of California at Berkeley and his J.D. from the University of California in Los Angeles.

### Veronica Pastor

*Assistant General Counsel*  
Intelsat Global Service Corporation

### Jonathan R. Spencer

Jonathan R. Spencer is the general counsel and secretary of Shenandoah Telecommunications Company (Shentel) in Edinburg, Virginia. Shentel is a publicly traded provider of telecommunications services including, local, long distance, and wireless telephone, cable television, and voice, video, wireless, and high speed internet services.

Prior to joining Shentel, Mr. Spencer was vice president and associate general counsel of Cable & Wireless Global based in London and in Northern Virginia, where he was responsible for coordination of legal support with respect to operations, internet issues, marketing, intellectual property, and procurement on a global basis. Prior to joining Cable & Wireless, Mr. Spencer represented a wide range of telecommunications and e-commerce clients with respect to financial, regulatory, and transactional matters.

Mr. Spencer serves as vice chair of ACC's Information Technology and E-commerce Law Committee.

Mr. Spencer is a graduate of Brown University and Duke University School of Law.



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## Policy Post 11.15, June 09, 2005

This Section

A Briefing On Public Policy Issues Affecting Civil Liberties Online from The Center For Democracy and Technology

### CDT Challenges Utah Internet Censorship Law

(1) Broad Group Challenges Utah Internet Censorship Law  
(2) Utah Law Suffers from Constitutional Defects and Fails to Protect Children Online  
(3) Law Will Lead to Blocking of Access to Broad Range of Lawful Content

**(1) Broad Group Challenges Utah Internet Censorship Law**

Citing free speech violations, a broad group of Utah bookstores, artistic and informational websites, Internet service providers and national trade associations filed a federal lawsuit in Salt Lake City today, challenging as unconstitutional a Utah law that was meant to restrict children's access to material on the Internet but that will in fact restrict adults' access to a wide range of lawful material.

In a complaint filed by attorneys from the Center for Democracy & Technology and the ACLU of Utah, the plaintiffs challenged House Bill 260, which contains numerous provisions that infringe on the right of Internet users to publish and receive wholly lawful content. Prior to the law's passage and signing, CDT had warned leaders of the Utah legislature and the Utah Governor that the bill had serious problems and would likely face a constitutional challenge if enacted.

The lead plaintiff in the lawsuit is an independent bookstore in Salt Lake City, The King's English Bookshop, which sells books through its website in competition with national online book retailers. If the Utah law is allowed to stand, the bookstore would face criminal charges for advertising and selling a range of lawful books.

The June 9, 2005 complaint against H.B. 260 is available at <http://www.cdt.org/speech/utahwebblock/20050609hb260complaint.pdf>.

For a March 2005 analysis of the Utah law, see <http://www.cdt.org/speech/20050307cdtanalysis.pdf>.

**(2) Utah Law Suffers From Constitutional Defects And Fails To Protect Children Online**

One of the challenged sections of House Bill 260 makes it a crime to make content that is "harmful to minors" available to minors over the Internet. Because web sites have no practical way to prevent access to web content by minors, the Utah law means that anyone who posts adult-oriented content -- including educational materials on how to avoid sexually-transmitted diseases and other highly valuable speech -- could face criminal charges in Utah.

This part of the bill is very similar to the federal Communications Decency Act (CDA), which struck down by the U.S. Supreme Court in 1997. In that case, the Court declared that speech on the Internet deserves the highest level of constitutional protection, and that the government could not adopt rules for Internet web sites that would reduce all content on the Internet to a level suitable for children.

The Supreme Court also concluded that the availability of filtering software that parents could install was a "less restrictive" alternative way to protect children online. As CDT has long argued, such user-based filtering software is a far more effective way to protect children online, and does so without interfering with adults' right to access lawful content.

For more information on filtering software: <http://www.GetNetWise.org>.

### **(3) Law Will Lead To Blocking Of Access To Broad Range Of Lawful Content**

Other parts of the challenged Utah law are very similar to a Pennsylvania statute that CDT successfully challenged in 2004. Like the Pennsylvania law, the Utah law requires ISPs to block access to content designated by the state Attorney General. The Utah law specifically indicates that ISPs can use "IP Address blocking" to comply with the law.

As shown in the Pennsylvania litigation, however, blocking the IP (Internet Protocol) address of an undesirable website can block access to a massive number of lawful web sites that innocently share the same address. In the Pennsylvania case, CDT showed that, in an effort to block access to fewer than 400 objectionable web sites, the ISPs ended up blocking access to more than 1 million other unrelated -- and perfectly legal -- sites.

The Utah law is in fact more problematic than the Pennsylvania law, because the Utah law does not even require that a judge be involved in the decision to block access to a web site. Under the challenged Utah law, the state Attorney General can designate web sites for blocking, with no oversight by any court.

The plaintiffs in the case have asked the U.S. District Court to declare the Utah law unconstitutional and to enjoin its enforcement.

For information about the Pennsylvania case, see <http://www.cdt.org/speech/pennwebblock/>.



Expanding the Wireless Frontier™

**TARGETED INFORMATION****To:** Washington Regulatory Representatives and State Actions Caucus**From:** CTIA Public Policy**Date:** March 28, 2005**UTAH GOVERNOR SIGNS ADULT CONTENT BILL**

On Monday, March 21, Utah's governor signed a bill that requires Internet providers to identify users who are minors and block access to Web sites deemed pornographic. The legislation could also target e-mail providers and presumably wireless carriers.

The controversial law directs the attorney general to establish an official list of Web sites with publicly available material deemed "harmful to minors." The legislation requires service providers to provide their customers with a way to disable access to sites on the list or face felony charges, yet broadly defines who qualifies as a "service provider." In addition to criminal penalties, the legislation allows the attorney general to seek civil fines against a service provider that fails to properly block material harmful to minors.

The law will likely be challenged in court as a violation to the U.S. Constitution's First Amendment and the Commerce Clause. A federal judge struck down a similar law in Pennsylvania last year.

The text of the Utah bill is available at:  
<http://www.le.state.ut.us/~2005/bills/hbillenr/hb0260.htm>

For additional information, please contact Mike Altschul.

**H.B. 260 Enrolled****AMENDMENTS RELATED TO PORNOGRAPHIC****AND HARMFUL MATERIALS**

2005 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: John Dougall**

Senate Sponsor: Curtis S. Bramble

Sheryl L. Allen  
 Bradley M. Daw  
 Margaret Dayton  
 Brent H. Goodfellow  
 Gregory H. Hughes  
 Fred R. Hunsaker

Rebecca D. Lockhart  
 Ronda Rudd Menlove  
 Michael E. Noel  
 Curtis Oda  
 Paul Ray  
 Aaron Tilton  
 Peggy Wallace  
 Richard W. Wheeler

**LONG TITLE****General Description:**

This bill addresses pornographic materials and material harmful to minors.

**Highlighted Provisions:**

This bill:

- . requires the Division of Consumer Protection to make public service announcements;
- . requires the attorney general to establish and maintain a database, called

the adult

content registry, of certain Internet sites containing material harmful to minors;

- . defines terms;
- . subjects a person dealing in material harmful to minors to criminal

liability for certain distributions of material harmful to minors if the person negligently or recklessly fails to determine the proper age of a minor;

- . increases criminal penalties for distributing and inducing acceptance of pornographic materials;
- . requires a service provider to prevent certain access to Internet material harmful to minors, if requested by the consumer;
- . requires the Division of Consumer Protection to test the effectiveness of a service

provider's procedures to block material harmful to minors at least annually;

- . requires a service provider, under certain circumstances, to block material on the adult content registry;
- . requires Internet content providers that create or host data in Utah to properly rate the data;
- . allows the attorney general to seek a civil fine against a service provider that fails to properly block material harmful to minors;
- . provides criminal penalties for certain violations of the provisions requiring a service provider to block material harmful to minors;
- . provides a criminal penalty for a content provider's failure to properly rate content;

and

- . makes technical changes.

**Monies Appropriated in this Bill:**

This bill appropriates:

- . \$100,000 from the General Fund to the Division of Consumer Protection, for fiscal year 2005-06 only, for public service announcements;
- . \$50,000 from the General Fund to the Division of Consumer Protection, for fiscal year 2005-06 only, to conduct a research project; and
- . \$100,000 from the General Fund to the attorney general, for fiscal year 2005-06 only, to establish the adult content registry.

**Other Special Clauses:**

This bill provides an effective date.

**Utah Code Sections Affected:****AMENDS:**

**76-10-1204**, as last amended by Chapters 93 and 163, Laws of Utah 1990

**76-10-1205**, as last amended by Chapter 163, Laws of Utah 1990

**76-10-1206**, as last amended by Chapter 53, Laws of Utah 2000  
ENACTS:

**13-2-9**, Utah Code Annotated 1953  
**67-5-19**, Utah Code Annotated 1953  
**76-10-1230**, Utah Code Annotated 1953  
**76-10-1231**, Utah Code Annotated 1953  
**76-10-1232**, Utah Code Annotated 1953  
**76-10-1233**, Utah Code Annotated 1953

*Be it enacted by the Legislature of the state of Utah:*

Section 1. Section **13-2-9** is enacted to read:

**13-2-9. Internet -- Consumer education.**

*(1) The Division of Consumer Protection shall, subject to appropriation, contract with a person to make public service announcements advising consumers about the dangers of using the Internet, especially:*

*(a) material harmful to minors;*

*(b) steps a consumer may take to learn more about the dangers of using the Internet;*

*(c) information about how a service provider can help a consumer learn more about the dangers of using the Internet, including the service provider's duties created by this bill; and*

*(d) how a consumer can monitor the Internet usage of family members.*

*(2) Monies appropriated under Subsection (1) shall be paid by the Division of Consumer Protection to a person only if:*

*(a) the person is a nonprofit organization; and*

*(b) the person agrees to spend private monies amounting to two times the amount of monies provided by the Division of Consumer Protection during each fiscal year in accordance with Subsection (1).*

*(3) In administering any monies appropriated for use under this section, the Division of Consumer Protection shall comply with Title 63, Chapter 56, Utah Procurement Code.*

Section 2. Section **67-5-19** is enacted to read:

**67-5-19. Adult content registry.**

*(1) As used in this section:*

*(a) "Access restricted" means access restricted as defined in Section 76-10-*

1230.  
 (b) "Consumer" means a consumer as defined in Section 76-10-1230.  
 (c) "Content provider" means a content provider as defined in Section 76-10-1230.  
10-1230.  
 (d) "Hosting company" means a hosting company as defined in Section 76-10-1230.  
10-1230.  
 (e) "Service provider" means a service provider as defined in Section 76-10-1230.  
 (2) The attorney general, in consultation with other entities as the attorney general considers appropriate, shall:  
 (a) create a database, called the adult content registry, consisting of a list of content providers' sites, that shall be based on a Uniform Resource Locator address, domain name, and Internet Protocol address or a similar addressing system, that:  
 (i) are added to the database under Subsection (2)(b); and  
 (ii) provide material harmful to minors that is not access restricted;  
 (b) add a content provider site to the adult content registry only if the attorney general determines that the content provider is providing content that contains material harmful to minors that is not access restricted;  
 (c) when the attorney general determines that a content provider site should be placed on the adult content registry, if the content provider lists e-mail contact information, the attorney general shall notify the content provider and hosting company, if available, by e-mail:  
 (i) that the content provider is providing content that contains material harmful to minors that is not access restricted;  
 (ii) that the attorney general will place the content provider site on the adult content registry five business days after the notice is sent;  
 (iii) that the content provider can avoid being placed on the adult content registry if any material harmful to minors is access restricted; and  
 (iv) of the steps necessary for the content provider or hosting company to apply to be removed from the adult content registry;  
 (d) (i) if notification is required under Subsection (2)(c), place a content provider site on

the adult content registry five business days after the day on which the division makes the  
required notification; or  
(ii) if notification is not required under Subsection (2)(c), place a content provider site on  
the adult content registry five business days after the day on which the attorney general  
determines that the content provider should be placed on the adult content registry; and  
(e) if requested by a content provider, remove a content provider from the adult content  
registry within two business days from the day on which the attorney general determines that the  
content provider no longer provides material harmful to minors that is not access restricted.  
 (3) The attorney general shall make the adult content registry available for public dissemination in a readily accessible access restricted electronic format.  
 (4) The attorney general shall establish a system for the reporting of material transmitted to a consumer in violation of Section 76-10-1232.  
 Section 3, Section **76-10-1204** is amended to read:  
**76-10-1204. Distributing pornographic material.**  
 (1) A person is guilty of distributing pornographic material when he knowingly:  
 (a) sends or brings any pornographic material into the state with intent to distribute or exhibit it to others;  
 (b) prepares, publishes, prints, or possesses any pornographic material with intent to distribute or exhibit it to others;  
 (c) distributes or offers to distribute, exhibits or offers to exhibit any pornographic material to others;  
 (d) writes, creates, or solicits the publication or advertising of pornographic material;  
 (e) promotes the distribution or exhibition of material he represents to be pornographic;  
 or  
 (f) presents or directs a pornographic performance in any public place or any place exposed to public view or participates in that portion of the performance which makes it pornographic.  
 (2) Each distributing of pornographic material as defined in Subsection (1) is a separate

offense.

(3) It is a separate offense under this section for:

(a) each day's exhibition of any pornographic motion picture film; and

(b) each day in which any pornographic publication is displayed or exhibited in a public place with intent to distribute or exhibit it to others.

~~[(4) Each separate offense under this section is a class A misdemeanor punishable by:]~~

~~[(a) a minimum mandatory fine of not less than \$100 plus \$10 for each article exhibited up to the maximum allowed by law; and]~~

~~[(b) incarceration, without suspension of sentence in any way, for a term of not less than seven days, notwithstanding any provisions of Section 77-18-1.]~~

~~[(5) If a defendant has already been convicted once under this section, each separate further offense]~~

~~[(4) (a) An offense under this section is a third degree felony punishable by:~~

~~(i) a minimum mandatory fine of not less than \$1,000 plus \$10 for each article exhibited up to the maximum allowed by law; and [by]~~

~~(ii) incarceration, without suspension of sentence in any way, for a term of not less than 30 days.~~

~~(b) This Subsection (4) supersedes Section 77-18-1 .~~

~~(5) A service provider, as defined in Section 76-10-1230 , complies with this section if it complies with Sections 76-10-1231 and 76-10-1232 .~~

Section 4. Section **76-10-1205** is amended to read:

**76-10-1205. Inducing acceptance of pornographic material.**

(1) A person is guilty of inducing acceptance of pornographic material when he knowingly:

(a) requires or demands as a condition to a sale, allocation, consignment, or delivery for resale of any newspaper, magazine, periodical, book, publication, or other merchandise that the purchaser or consignee receive any pornographic material or material reasonably believed by the purchaser or consignee to be pornographic; or

(b) denies, revokes, or threatens to deny or revoke a franchise, or to impose any penalty,

financial or otherwise, because of the failure or refusal to accept pornographic material or material reasonably believed by the purchaser or consignee to be pornographic.

~~[(2) A violation of this section is a class A misdemeanor punishable by a fine of not less than \$500 and by incarceration, without suspension of sentence in any way, for a term of not less than 14 days.]~~

~~(2) (a) An offense under this section is a third degree felony punishable by:~~

~~(i) a minimum mandatory fine of not less than \$1,000 plus \$10 for each article exhibited up to the maximum allowed by law; and~~

~~(ii) incarceration, without suspension of sentence in any way, for a term of not less than 30 days.~~

~~(b) This Subsection (2) supersedes Section 77-18-1 .~~

~~(3) A service provider, as defined in Section 76-10-1230 , complies with this section if it complies with Sections 76-10-1231 and 76-10-1232 .~~

Section 5. Section **76-10-1206** is amended to read:

**76-10-1206. Dealing in material harmful to a minor.**

(1) A person is guilty of dealing in material harmful to minors when, knowing that a person is a minor, or having *negligently or recklessly* failed to [exercise reasonable care in ascertaining] *determine* the proper age of a minor, he:

(a) intentionally distributes or offers to distribute, exhibits or offers to exhibit to a minor any material harmful to minors;

(b) intentionally produces, presents, or directs any performance before a minor, that is harmful to minors; or

(c) intentionally participates in any performance before a minor, that is harmful to minors.

(2) ~~(a)~~ Each separate offense under this section is a third degree felony punishable by:

~~(i) a minimum mandatory fine of not less than \$300 plus \$10 for each article exhibited up to the maximum allowed by law; and [by]~~

~~(ii) incarceration, without suspension of sentence [in any way], for a term of not less than 14 days.~~

(b) This section supersedes Section 77-18-1 .

(3) (a) If a defendant has already been convicted once under this section, each separate further offense is a second degree felony punishable by:

(i) a minimum mandatory fine of not less than \$5,000 plus \$10 for each article exhibited up to the maximum allowed by law; and [by]

(ii) incarceration, without suspension of sentence [~~in any way~~], for a term of not less than one year.

(b) This section supersedes Section 77-18-1 .

(4) (a) A service provider, as defined in Section 76-10-1230, complies with this section if it complies with Sections 76-10-1231 and 76-10-1232 .

(b) A content provider, as defined in Section 76-10-1230, complies with this section if it complies with Section 76-10-1233 .

Section 6. Section **76-10-1230** is enacted to read:

**76-10-1230. Definitions.**

*As used in Sections 76-10-1231, 76-10-1232, and 76-10-1233:*

(1) "Access restricted" means that a content provider limits access to material harmful to minors by:

(a) properly rating content;

(b) providing an age verification mechanism designed to prevent a minor's access to material harmful to minors, including requiring use of a credit card, adult access code, or digital certificate verifying age; or

(c) any other reasonable measures feasible under available technology.

(2) "Adult content registry" means the adult content registry created by Section 67-5-19 .

(3) "Consumer" means a natural person residing in this state who subscribes to a service provided by a service provider for personal or residential use.

(4) "Content provider" means a person that creates, collects, acquires, or organizes

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electronic data for electronic delivery to a consumer with the intent of making a profit.

(5) (a) "Hosting company" means a person that provides services or facilities for storing or distributing content over the Internet without editorial or creative alteration of the content.

(b) A hosting company may have policies concerning acceptable use without becoming a

content provider under Subsection (4).

(6) (a) "Internet service provider" means a person engaged in the business of providing a computer and communications facility through which a consumer may obtain access to the Internet.

(b) "Internet service provider" does not include a common carrier if it provides only telecommunications service.

(7) "Properly rated" means content using a labeling system to label material harmful to minors provided by the content provider in a way that:

(a) accurately appraises a consumer of the presence of material harmful to minors; and

(b) allows the consumer the ability to control access to material harmful to minors based on the material's rating by use of reasonably priced commercially available software, including software in the public domain.

(8) (a) Except as provided in Subsection (8)(b), "service provider" means:

(i) an Internet service provider; or

(ii) a person who otherwise provides an Internet access service to a consumer.

(b) "Service provider" does not include a person who does not terminate a service in this state, but merely transmits data through:

(i) a wire;

(ii) a cable; or

(iii) an antenna.

(c) "Service provider," notwithstanding Subsection (8)(b), includes a person who meets the requirements of Subsection (8)(a) and leases or rents a wire or cable for the transmission of data.

Section 7. Section **76-10-1231** is enacted to read:

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**76-10-1231. Data service providers -- Internet content harmful to minors.**

(1) (a) Upon request by a consumer, a service provider shall filter content to prevent the transmission of material harmful to minors to the consumer.

(b) A service provider complies with Subsection (1)(a) if it uses a generally accepted and commercially reasonable method of filtering.

(2) At the time of a consumer's subscription to a service provider's service, or at the time



this section takes effect if the consumer subscribes to the service provider's service at the time

this section takes effect, the service provider shall notify the consumer in a conspicuous manner

that the consumer may request to have material harmful to minors blocked under Subsection (1).

(3) (a) A service provider may comply with Subsection (1) by:

(i) providing in-network filtering to prevent receipt of material harmful to minors; or

(ii) providing software for contemporaneous installation on the consumer's computer that

blocks, in an easy-to-enable and commercially reasonable manner, receipt of material harmful to

minors.

(b) (i) Except as provided in Subsection (3)(b)(ii), a service provider may not charge a

consumer for blocking material or providing software under this section, except that a service

provider may increase the cost to all subscribers to the service provider's services to recover the

cost of complying with this section.

(ii) A service provider with fewer than 7,500 subscribers may charge a consumer for

providing software under Subsection (3)(a)(ii) if the charge does not exceed the service

provider's cost for the software.

(4) If the attorney general determines that a service provider violates Subsection (1) or

(2), the attorney general shall:

(a) notify the service provider that the service provider is in violation of Subsection (1)

or (2); and

(b) notify the service provider that the service provider has 30 days to comply with the

provision being violated or be subject to Subsection (5).

(5) A service provider that violates Subsection (1) or (2) is:

(a) subject to a civil fine of \$2,500 for each separate violation of Subsection (1) or (2), up

to \$10,000 per day; and

(b) guilty of a class A misdemeanor if:

(i) the service provider knowingly or intentionally fails to comply with Subsection (1); or

(ii) the service provider fails to provide the notice required by Subsection

(2).

(6) A proceeding to impose a civil fine under Subsection (5)(a) may only be brought by

the attorney general in a court of competent jurisdiction.

(7) (a) The Division of Consumer Protection within the Department of Commerce shall,

in consultation with other entities as the Division of Consumer Protection considers appropriate,

test the effectiveness of a service provider's system for blocking material harmful to minors under

Subsection (1) at least annually.

(b) The results of testing by the Division of Consumer Protection under Subsection (7)(a)

shall be made available to:

(i) the service provider that is the subject of the test; and

(ii) the public.

(c) The Division of Consumer Protection shall make rules in accordance with Title 63,

Chapter 46a, Utah Administrative Rulemaking Act, to fulfil its duties under this section.

Section 8, Section **76-10-1232** is enacted to read:

**76-10-1232. Data service providers -- Adult content registry.**

(1) (a) Upon request by a consumer, a service provider may not transmit material from a

content provider site listed on the adult content registry created by Section 67-5-19 to a

consumer.

(b) A service provider complies with Subsection (1)(a) if it uses a generally accepted and

commercially reasonable method of filtering.

(c) At the time of a consumer's subscription to a service provider's service, or at the time

this section takes effect if the consumer subscribes to the service provider's service at the time

this section takes effect, the service provider shall notify the consumer in a conspicuous manner

that:

(i) the consumer may request to have material on the adult content registry blocked under

Subsection (1)(a); and

(ii) the consumer's request to have material harmful to minors blocked under Subsection

(1)(a) may also result in blocking material that is not harmful to minors.

(2) (a) A service provider may comply with Subsection (1) by:

(i) providing in-network filtering to prevent receipt of material harmful to

minors:

(ii) providing software for contemporaneous installation on the consumer's computer that blocks, in an easy-to-enable and commercially reasonable manner, receipt of material harmful to minors; or  
 (iii) complying with any federal law in effect that requires the blocking of content from a registry of sites containing material harmful to minors.  
 (b) A service provider may block material from the adult content registry by domain name or Internet Protocol address.  
 (c) (i) A service provider may not charge a consumer for blocking material or providing software under this section, except that a service provider may increase the cost to all subscribers to the service provider's services to recover the cost of complying with this section.  
 (ii) A service provider with fewer than 7,500 subscribers may charge a consumer for providing software under Subsection (2)(a)(ii) if the charge does not exceed the service provider's cost for the software.  
 (d) A service provider shall coordinate the service provider's list of content providers on the adult content registry with the attorney general's list of content providers on the adult content registry at least weekly.  
 (3) If the attorney general determines that the service provider violates Subsection (1) or (2), the attorney general shall:  
 (a) notify the service provider that the service provider is in violation of Subsection (1) or (2); and  
 (b) notify the service provider that the service provider has 30 days to comply with the provision being violated or be subject to Subsection (4).

(4) A service provider that violates Subsection (1) or (2) is:  
 (a) subject to a civil fine of \$2,500 for each separate violation of Subsection (1) or (2), up to \$10,000 per day; and  
 (b) guilty of a class A misdemeanor if the service provider knowingly or intentionally fails to comply with Subsection (1) or (2).

(5) A proceeding to impose a civil fine under Subsection (4)(a) may only be brought by the attorney general in a court of competent jurisdiction.  
 Section 9, Section **76-10-1233** is enacted to read:  
**76-10-1233. Content providers -- Material harmful to minors.**  
 (1) A content provider that is domiciled in Utah, or generates or hosts content in Utah, shall restrict access to material harmful to minors.  
 (2) The Division of Consumer Protection shall make rules in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, to establish acceptable rating methods to be implemented by a content provider under Subsection (1).  
 (3) If the attorney general determines that a content provider violates Subsection (1), the attorney general shall:  
 (a) notify the content provider that the content provider is in violation of Subsection (1);  
 and  
 (b) notify the content provider that the content provider has 30 days to comply with Subsection (1) or be subject to Subsection (4).  
 (4) If a content provider violates this section more than 30 days after receiving the notice provided in Subsection (3), the content provider is guilty of a third degree felony.  
 Section 10. **Appropriation.**  
 (1) (a) There is appropriated for fiscal year 2005-06 only, \$100,000 from the General Fund to the Division of Consumer Protection for public service announcements advising consumers about the dangers of using the Internet.  
 (b) It is the intent of the Legislature that the money appropriated in Subsection (1)(a) shall be used to publicize in various forms of media:

(i) the dangers of using the Internet, especially Internet pornography;  
 (ii) steps a consumer may take to learn more about the dangers of using the Internet;  
 (iii) information about how a service provider can help a consumer learn more about the dangers of using the Internet, including the service provider's duties created by this bill; and  
 (iv) how a consumer can monitor the Internet usage of family members.  
 (2) (a) There is appropriated for fiscal year 2005-06 only, \$30,000 from the

General

Fund, and for fiscal year 2005-06 ongoing, \$70,000 from the General Fund, to the attorney general to establish and maintain the Adult Content Registry created by this bill.

(b) It is the intent of the Legislature that the attorney general use existing technologies and systems to the extent possible in establishing the Adult Content Registry.

(3) (a) There is appropriated for fiscal year 2005-06, \$50,000 from the General Fund to the Division of Consumer Protection.

(b) It is the intent of the Legislature that the Division of Consumer Protection use the monies appropriated for fiscal year 2005-06 in Subsection (3)(a) to research the effectiveness of:

(i) existing and emerging technologies for limiting access to material harmful to minors

on the Internet;

(ii) obstacles to consumers limiting access to material harmful to minors on the Internet;

and

(iii) methods of educating the public about the dangers of using the Internet.

(c) The Division of Consumer Protection shall report the findings of the research for

which monies under Subsection (3)(a) are appropriated to the Utah Technology Commission before December 1, 2005.

Section 11. Effective date.

If approved by two-thirds of all the members elected to each house, this bill takes effect upon approval by the governor, or the day following the constitutional time limit of Utah

Constitution Article VII, Section 8, without the governor's signature, or in the case of a veto, the

date of veto override, except that Section 76-10-1231 takes effect on January 1, 2006, and

Sections 76-10-1232 and 76-10-1233 take effect on May 1, 2006.

**M.C.L.A. 752.1063**

Michigan Compiled Laws Annotated Currentness

Chapter 752. Crimes and Offenses (Refs & Annos)

\*Child Protection Registry Act (Refs & Annos)

**752.1063. Establishment and operation of child protection registry; registration of contact points with department; duration of registration; verification of compliance with registry; access to mechanism for sending messages to contact points; fees**

Sec. 3. (1) The department shall establish and operate, or contract with a qualified third party to establish and operate, the child protection registry. The department or a third party administrator shall establish procedures, to the extent possible, to prevent the use or disclosure of protected **contact points** as required under section 6. [FN1] If the department elects to contract with a third party, the department shall give due consideration to any person located in this state.

(2) A parent, guardian, individual, or an entity under subsection (4) who is responsible for a **contact point** to which a minor may have access may register that **contact point** with the department under rules promulgated by the department under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328. The department shall establish procedures to ensure that a registrant meets the requirements of this subsection.

(3) A registration under this section shall be for not more than 3 years. If the contact point is established for a specific minor, the registration expires the year the minor turns 18 years of age. A registration can be revoked or renewed by the registrant upon notification to the department.

(4) Schools and other institutions or entities primarily serving minor children may register 1 or more **contact points** with the department. An entity under this subsection may make 1 registration for all **contact points** of the entity, and the registration may include the entity's internet domain name under rules promulgated by the department under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328.

(5) No fee or charge shall be assessed or incurred by a person registering a contact point under this act.

(6) The department shall establish a mechanism for senders to verify compliance with the registry.

(7) A person desiring to send a message described in section 5 [FN2] shall pay the department a fee for access to the mechanism required under subsection (6). The fee required under this subsection shall be set by the department. The fee shall not exceed .03 cents and shall be based on the number of **contact points** checked against the registry for each time a **contact point** is checked. The mechanism to verify compliance under subsection (6) and the fee required under this subsection shall be established

under rules promulgated by the department under the administrative procedures act of 1969, 1969 PA 306, [MCL 24.201](#) to [24.328](#).

(8) The fees collected under this act shall be credited to the following:

(a) Eighty-five percent of the fees to the fund created under section 4. [\[FN3\]](#)

(b) Not less than 15% of the fees to the attorney general to cover the costs of investigating, enforcing, and defending this act and section 5a of 1979 PA 53, [MCL 752.795a](#). The department may reimburse the attorney general from the fund created under section 4 for any costs incurred under this subdivision that exceed the fees credited under this subdivision.

(9) The registry shall be fully operational not later than July 1, 2005.

CREDIT(S)

[P.A.2004, No. 241, § 3, Imd. Eff. July 21, 2004.](#)

[\[FN1\] M.C.L.A. § 752.1066.](#)

[\[FN2\] M.C.L.A. § 752.1065.](#)

[\[FN3\] M.C.L.A. § 752.1064.](#)

#### HISTORICAL AND STATUTORY NOTES

2005 Electronic Update

2004 Legislation

For contingent effect of P.A.2004, No. 241, see the Historical and Statutory Notes following [M.C.L.A. § 752.1061](#).

#### MICHIGAN ADMINISTRATIVE CODE

2005 Electronic Update

For Rules and Regulations, see Rule 484.501 et seq. Michigan Administrative Code.

M. C. L. A. 752.1063, MI ST 752.1063  
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From RCRNews.com  
June 24, 2005

#### MVNOs compete for lucrative wireless youth market

By Colin Gibbs  
Jun 24, 2005

The coming surge of mobile virtual network operators will target virtually every demographic, from ethnic groups to sports fans to rural users. But no group of consumers is being courted as much as America's youth.

As wireless enters the multimedia era, the market of teenagers and young adults is more highly coveted than ever. Youngsters who've grown up with cell phones view their handsets as portable entertainment centers, paying premiums to access games, music and video clips on the go.

A recent study by The Management Network Group Inc. found that nearly 25 percent of 13- to 24-year-old consumers would be likely to switch carriers to get advanced multimedia wireless content and services. Forty percent of respondents said they would even watch their phones like TVs, accepting commercials to view mobile broadcasts.

For MVNOs looking to push content, then, the youth market is a no-brainer. But those waters are about to become crowded.

"I'm seeing more activity from people looking to get into the (MVNO) sector in the last six months than I saw in the last two years-probably by a factor of five," said Craig Cooper, who co-founded Boost Mobile USA before becoming a partner at Softbank Capital. "I think there is such a wide range of what people are calling MVNOs that, ultimately, the market's not going to be able to support (all of them)."

A lack of funding will doom many of the upcoming MVNO efforts, Cooper said. A nationwide launch can cost as much as \$100 million in marketing alone; other substantial costs include billing, customer support and handset provisioning.

"We haven't funded any MVNO in the current batch that is being marketed," Cooper added.

But even deep-pocketed MVNOs will face a major obstacle in creating an identity in the marketplace.

Boost Mobile, which launched as an MVNO in 2002 before host carrier Nextel Communications Inc. bought the operation, gained traction among Generation X users with an extreme sports-themed marketing tack. Virgin Mobile USA, which earlier this year surpassed the 3 million customer mark, partnered with MTV to position itself as the operator of choice for music-loving wireless users.

Amp'd Mobile Inc., which is expected to launch on Verizon Wireless' EV-DO network this fall, is touting edgy, high-tech content and has already said it intends to make adult content from Hustler and other sources available to its adult subscribers. While Amp'd said its target audience is 18- to 24-year-olds, the operator is sure to lure younger users.

"We think we're naturally going to attract (teenagers)," said Don McGuire, chief marketing officer for Amp'd. "When you're 15, you want to be 21, and when you're 35, you want to be 21. Everybody wants to be 21."

Outside brands are eyeing the MVNO model as well. ESPN is sure to look to target young users with its wireless service, which is slated to come online early next year, and parent company Disney has said publicly it is considering launching a mobile service. But as more MVNOs come to the table, it will be harder for the startups to differentiate themselves-particularly those focusing on the older end of the youth market, according to Yankee Group analyst Marina Amoroso.

"I think those guys are starting to step on each other's toes," Amoroso said of the growing list of players. "They're going to have a lot of difficulty trying to make their way serving young adults and older kids."

There appears to be more room in the kiddie pool, however, where "tweens" and young teenagers may seek a branded service that's youth-targeted without being edgy. Firefly Mobile Inc., which sells a voice-only phone designed for kids between the ages of 8 and 12, will offer MVNO service through Target retailers starting next month. But while the smallish five-button handset may attract young users, its appearance may turn off kids looking for more high-tech handsets, Amoroso said. The result could be an opportunity for those marketing offerings specifically at young teens.

"I think there's probably some room" for providers targeting 12- to 16-year-olds, Amoroso said.

Of course, carriers don't necessarily have to take on MVNO partners to reach young users. Several continue to offer distinctly branded prepaid services targeted directly at the youth market, and they've gained considerable traction with add-a-line options. Indeed, nearly half of all postpaid users are opting for family plans, according to a recent Yankee Group report.

And the opportunity exists for both carriers and outside brands to offer wireless services to segmented markets without launching an MVNO. Software developers could provision branded handsets for a movie studio, for instance, allowing carriers to offer customized voice and data services for an MVNO-like user experience, just as Japanese carrier KDDI has done with Sanyo and Disney.

The key is to "make it hip and cool to be associated with a particular brand," said J. Mark Howell, president of Brightpoint North America, which handles distribution and logistics for several MVNOs.

"(MVNOs) have clearly identified the usage patterns and the purchase patterns of the youth market," said Howell, whose 12-year-old daughter is a Virgin Mobile user. "They've developed a relationship beyond just minutes used."

Analysts see about a half dozen MVNOs with 1 million or more subscribers surviving in the long-term, with only one or two of those directly targeted at youth consumers. But most agree there is plenty of space in the market for more niche services.

"I think the real proliferation of MVNOs will be among the smaller and medium-sized operators," said Howell.

The Yankee Group projects an MVNO market of 29 million subscribers by 2010, representing 14 percent of all U.S. subscribers. The MVNO market will generate \$10.7 billion in service provider revenues, the group predicts.

"It's going to be an interesting next 12 to 18 months," said Amp'd Mobile's McGuire. "Let the fun begin."

From RCRNews.com  
March 11, 2005

### CTIA sets adult content guides as Hustler comes to U.S. wireless users

Mar 11, 2005

WASHINGTON-The wireless carrier trade association agreed to produce guidelines for managing wireless porn, even as porn giant Larry Flynt announced plans to enter the U.S. wireless market.

CTIA said Thursday it would add adult content guidelines to its voluntary carrier code of conduct by the second quarter with implementation by the end of the year. Thus far, the group has outlined voluntary policies for labeling content as either unrestricted or available only to consumers ages 18 or older. The guidelines also call for controls and age-verification mechanisms to block minors attempting to access restricted content, CTIA President Steve Largent said.

"For much of the last year, CTIA ... has spearheaded an industrywide effort to understand and address the issues associated with content classification and restriction in the mobile wireless context," Largent wrote in an open letter to John Muleta, chief of the Federal Communications Commission's Wireless Telecommunications Bureau. "The current timeline aims for adoption of the guidelines and announcement of the industrywide agreement in the second quarter of 2005, with implementation of the guidelines by the end of 2005."

The letter was in response to an FCC note commending the trade organization for its work in controlling adult content, but urging it to adopt set guidelines for wireless porn. That communication was sparked by a February RCR Wireless News story chronicling CTIA's work to create a ratings system for content.

Meanwhile, in California, Larry Flynt Publications Inc. said it will team with Giant Mobile Corp. to deliver racy content to cellular subscribers in North America and Asia. Hustler Mobile will offer adult-themed images, downloadable and streaming video, text messaging, gambling and puzzle games based on the Hustler publication.

The move expands on Hustler's existing wireless offerings currently available in some European markets.

"Hustler Mobile is doing exceedingly well in Europe," said Flynt. "I feel that wireless is the wave of the future, the crown jewel in the electronic distribution and delivery of content."

From RCRNews.com  
March 10, 2005

### CTIA sets adult content guidelines as *Hustler* comes to U.S. wireless users

[By Colin Gibbs](#)

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"Hustler Mobile is doing exceedingly well in Europe," said Flynt. "I feel that wireless is the wave of the future, the crown jewel in the electronic distribution and delivery of content."

Earlier this week, Brickhouse Mobile said it is partnering with New Frontier Media to bring "moan tones" to U.S. subscribers, delivering voice tones from porn stars in the form of moans, groans and other audio clips.

## Opinion

From RCRNews.com

### Parental control

[By Tracy Ford](#)

Jul 15, 2005

As wireless consumers begin to wholeheartedly embrace data applications, be they ringtones, wallpapers, video apps or games, industry needs to step up its plans to implement parental controls to ensure that end users have the proper experiences. And it's better to come up with a solution sooner rather than later.

The success of family plans further underscores the need for industry to act quickly. No mother wants her child (unwittingly or not) to download a wireless porn app. Nor does a father want to pay \$2 a pop for premium text messages his teen daughter thought were free. Just ask Jamster, which is being sued by a San Diego man who doesn't like the way the company advertises its ringtones.

Meanwhile, Sen. Hillary Rodham Clinton (D-N.Y.) is asking the Federal Trade Commission to look into allegations that the console game Grand Theft Auto: San Andreas can be modified easily to include pornographic images, and whether, in light of those alterations, the game carries the proper M for mature rating, or needs a stronger one.

No matter how you feel about it, wireless porn is going to be big business. Informa Telecoms and Media predicts that erotic mobile content will explode into a \$2.3 billion market by 2010 if carriers, content providers and regulators can figure out how to manage it.

The report commends Vodafone U.K. and other U.K. operators for introducing controls that protect minors from pornography and other adult content while not restricting users who want access to such content. Operators that don't establish such controls may face stiff governmental regulations and could lose out on the lucrative market.

"The key to turning erotic mobile content into a sustainable revenue stream is to adopt a responsible approach, making sure subscribers who wish to view such content are age-verified and that those providers who are looking to make a quick buck are squeezed out of the

equation," said Daniel Winterbottom, who authored the report. "Without controls, operators will find themselves being used to distribute adult content whether they like it or not."

I suspect part of Disney Corp.'s MVNO strategy is to assure parents that their children will have a safe experience.

The U.S. wireless industry needs to get a comprehensive plan in place now, before more apps are introduced, if only to avoid the public-relations chaos that could ensue from mishandled content. Savvy underage users could spread the word quickly if a popular porn app is available, and likely it would be the carrier that would bear the brunt of the bad publicity.

CTIA and the rest of the industry are working to implement adult content guidelines as soon as possible.

The clock is ticking.

**From RCRNews.com**  
**June 13, 2005**

### **Wireless carriers should step up adult content protections, says Yankee Group**

Jun 13, 2005

BOSTON—Analyst firm the Yankee Group urged U.S. wireless carriers to take action to protect minors from adult content before the Federal Communications Commission is compelled to step in.

The firm advised carriers to establish a "road map for self-regulation," advising them to offer comprehensive protection software that parents can easily use, and suggested allowing parents to turn off wireless Web access on their handsets entirely. Also, the Yankee Group said a modest investment in filtering technology now could prove cheaper than potentially costly regulations down the road.

"How wireless carriers choose to respond to this growing industry concern will dictate the impact of their role with the government and within the industry," said Adam Zewel, a Yankee Group senior analyst. "With solid, strategic investment in self-regulation, wireless carriers can achieve the dual benefit of protecting minors from adult content while safely profiting from the opportunity."

The warning comes amid increasing efforts from public-interest groups lobbying the FCC to establish regulations for mobile content. FCC staffers met with the American Family Association and two other family-interest groups last month after an AFA-led campaign resulted in nearly 800,000 e-mail messages from concerned citizens to the agency.

"TV cannot regulate itself," said Randy Sharp, AFA's director of special projects, said last month. "It has only gotten nastier. Industry regulation is half-hearted."



From RCRNews.com  
May 13, 2005

**American Family Association discusses wireless porn protections with FCC staff**

By Heather Forsgren Weaver  
May 13, 2005

WASHINGTON-Public-interest groups interested in getting the attention of the Federal Communications Commission should take a hint from the American Family Association. AFA and two other family-interest groups met May 9 with eight key staffers of the FCC's Wireless Telecommunications Bureau.

"Our members were asked to contact the FCC and ask them to do something to protect children from porn on cell phones," Randy Sharp, AFA director of special projects, told RCR Wireless News, noting that 186,000 e-mails from AFA members were sent to each of the commissioners-nearly 800,000 total e-mails. "As a result of those e-mails, the FCC contacted us asking us to come in."

Sharp said AFA's concern is "this is a new media unlike TV, unlike computers that are in homes where parents can monitor their use. All of the kids are going to have cell phones that can download graphic images."

While mobile content is just barely catching on in the United States, where advanced networks are still novel, concerns about mobile content have been permeating around the world for several years.

At first the concerns revolved around spam but now have shifted to protecting children from mobile porn.

Earlier this year John Muleta, former chief of the wireless bureau, told RCR Wireless News that wireless carriers need to be aware that there are rules in place regarding under what contexts certain content can be delivered. These rules date back to the last century when access to sexually explicit content became available over wired phones.

The wired world took care of this by creating 1-900 numbers that then required age verification. Customers could block access to 1-900 numbers, thus allowing parents to protect their children.

Today, in theory someone can call a 900 number from a cell phone, provide a credit-card number and the mechanisms should be in place to verify the age and ability of the cardholder to receive the information.

It is unclear what the FCC officials told AFA and representatives of the Family Research Council and Morality in Media during the May 9 meeting. Another meeting with FCC staff and the National Coalition for the Protection of Children and Family is scheduled shortly, said Sharp.

"AFA requested to meet with the wireless bureau. The bureau set up the meeting to hear their concerns about adult content on mobile devices that many of their members have expressed in e-mails to the FCC," said Meribeth McCarrick, associate director of the FCC's Office of Media Relations.

Meanwhile CTIA continues to develop a content rating system that will allow for age-appropriate blocking.

"The Mobile Content Action Team is moving forward to develop not only the classification system but also systems to filter content through age-verification mechanisms," said Joseph Farren, CTIA director of public affairs.

Sharp said he is encouraged by CTIA's efforts, but worries that 10 years from now the marketing incentive for carriers may mean a loosening of any rating system.

"TV cannot regulate itself. It has only gotten nastier. Industry self regulation is half hearted," said Sharp. "What can the FCC do under its authority?"

From RCRNews.com  
February 18, 2005

#### **FCC urges CTIA to add adult content controls to code of conduct**

[By Colin Gibbs](#)  
Feb 18, 2005

The Federal Communications Commission this week lauded CTIA's efforts to control mobile adult content and urged the association to step up its efforts in keeping inappropriate material out of the hands of children.

In a letter to Steve Largent, CTIA president, FCC Wireless Telecommunications Bureau Chief John Muleta praised the group's plan to create a wireless content ratings system, suggesting CTIA also examine its carrier code of conduct to promote self regulation.

"With adult content available from a myriad of sources, now more than ever it is important for carriers, content providers, and parents to know what is being done by (the) industry to prevent access to adult content by minors, as well as what they can do to protect their children," Muleta wrote. "Through responsible action on the part of wireless carriers and content providers, this important social goal can be achieved without government intervention and without interference to the provision of content to adults."

An FCC spokesman confirmed Muleta's letter was in response to a Jan. 31 story in RCR Wireless News chronicling CTIA's work to create a ratings system. The FCC encouraged the association to inform parents about how to block adult content and services on children's handsets and to study efforts to control content in markets, including the United Kingdom, Australia and Israel.

"This issue is not confined to our borders," Muleta wrote, "and we should be mindful that other parts of the international telecommunications industry are facing similar circumstances."

From RCRNews.com  
March 4, 2005

#### **Porn's perfect storm**

[By Jeffrey Silva](#)  
Mar 4, 2005

The wireless industry's effort to curb smut on public airwaves reserved for mobile phones is laudable, but could end up being futile.

There's simply too much money on the line. History shows-and the cable TV industry has pompously proven-that porn is good business. The demand is there. That's why regulated radio and TV broadcasters keep pushing the edge of the envelope, prompting Congress and special interest groups into fierce debate about where, if anywhere, the line should be drawn.

It is a perfect, perverse storm of sorts.

First, there are the big bucks. Then, the technology. 3G and its successors will make imaging and video quality superb. From the beginning of time, porn has had smashing commercial success exploiting media-print, motion pictures, cable TV, the Internet and, now, cell phones in the earliest stages. How about profit pressures? Voice is still the workhorse, but carriers likely will rely increasingly on revenue from data and multimedia to keep Wall Street happy in the future. On top of it all: teens, the red-hot market for the mobile-phone industry.

Rick Schatz, president of the National Coalition for the Protection of Children and Families, was none too happy when the Dwango Wireless-Playboy deal was announced last December. "The fact is, we are entering a new era in the age of porn ... a time when pornography has jumped from the back alleys to cell phones and MP3 players," Schatz was quoted as saying.

The cell-phone industry is working to get a voluntary wireless content rating system-a la Hollywood-in place by year's end. The Federal Communications Commission is cheering industry on.

"Through responsible action on the part of wireless carriers and content providers, this important social goal can be achieved without government intervention and without interference to the

provision of content to adults," said John Muleta, chief of the FCC's Wireless Telecommunications Bureau, in a recent letter to CTIA President Steve Largent.

I have no doubt the FCC would like to see industry tackle the matter. But could it be about more than just governmental altruism? What government intervention does Muleta envision? I'm not sure the law is clear on adult content transmitted over mobile-phone frequencies. The FCC might well open a Pandora's Box if it were to jump into the fray of wireless adult content. Some might regard an FCC move in that direction as the beginning of a public-interest standard for mobile-phone operators.

While adult content is undeniably profitable, it could backfire on carriers if purchasers of mobile-phone family plans-America's moms and dads-boycott operators that propagate porn. Now there's a force to be reckoned with.

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The letter will be posted on the bureau's Web site, the spokeswoman said.

From RCRNews.com

#### **Adult content for wireless to reach \$1B, Juniper predicts**

[By Colin Gibbs](#)  
Feb 8, 2005

HAMPSHIRE, U.K.-Demand for racy video will drive the mobile adult content market past the billion-dollar mark this year, according to a new report from Juniper Research.

The consultancy predicts the global market for adult-oriented mobile text, audio and video will increase by more than 50 percent this year, reaching \$1.01 billion, and will top \$2 billion by 2009. While small businesses will continue to dominate the market in the short-term, the report forecasted that major adult publishers will begin to dip their toes in the water of wireless this year.

Juniper predicts that while Europe and the Asia-Pacific region will continue to generate the majority of revenues in the space, an increasing availability of services in the United States will push North American revenues past \$400 million by 2010. European users are currently the biggest spenders on mobile adult applications, spending an average of more than \$34 a year for the content.

"At the present time, the size of the U.S. market is extremely limited because customers are used to downloading content through the portal of their network operator, and the network operators are reluctant to offer adult content for fear of a regulatory or consumer backlash," said Dr. Windsor Holden, who authored the report. "But in the medium term, customers will become increasingly adept at browsing wireless Internet sites operated by aggregators or other independent providers, with the result that overall revenues will show a significant increase."

From RCRNews.com

**Industry to tackle ratings system for mobile content**

[By Heather Forsgren Weaver](#)

Jan 28, 2005

WASHINGTON-The wireless industry plans to meet this week to begin work on a wireless content ratings system similar to other entertainment industries.

"We are going to do something. Hopefully by the end of the year, the industry will have adopted a voluntary rating system. We are all in agreement that it is necessary. The feeling is, it is certainly not a problem at this point in time, but before it becomes one, the industry wants to draw up a set of ratings that will let all consumers know the nature of the content," said John Walls, CTIA vice president of public affairs. "Everyone is very enthusiastic about getting together and coming to terms on appropriate content ratings."

The Federal Communications Commission hailed news of the planned CTIA meeting to address the topic, noting it can only be a good thing if the industry gets out in front of the issue and makes sure consumers are aware mobile content will soon mean more than talking on a cell phone.

"Are consumers, like parents, aware that when they buy their kids a cell phone, they could have access to this content?" asked John Muleta, chief of the FCC's Wireless Telecommunications Bureau. "Having a rating system is not only about sexual content; it is about violence and age-appropriate content."

Wireless carriers need to be aware that there are rules in place regarding under what contexts certain content can be delivered. These rules date back to the last century when access to sexually explicit content became available over wired phones.

"There is a congressional intent that content providers have to provide means of protecting or verifying the viewer's ability to see the material," said Muleta, but he wondered whether carriers realize "they need to have all of these safeguards in place."

The wired world took care of this by creating 1-900 numbers that then required age verification. Customers could block access to 1-900 numbers, thus allowing parents to protect their children.

Today, in theory someone can call a 900 number from a cell phone, give them a credit-card number and the mechanisms should be in place to verify the age and ability to receive the information.

"All of those things still apply; just because they are on a cell phone they still apply. The only difference is are we prepared for the increasing bandwidth?" asked Muleta.

Regulating content on mobile networks was described recently as a "sleepier issue" for 2005.

"One thing that I have noticed recently that we haven't given a lot of attention to but that is going to come up and force our attention, is content and how we deal with that," Peter Tenhula, deputy wireless bureau chief, told a gathering of wireless telecommunications lawyers earlier this month.

But if it is a sleeper issue, CTIA seems to be the alarm clock. Indeed, Steve Largent told RCR Wireless News in December that developing a ratings scheme for mobile content was one of his priorities for 2005.

While mobile content is just barely catching on in the United States, where advanced networks are still novel, concerns about mobile content have been permeating around the world for several years.

At first the concerns revolved around spam, but now have shifted to protecting children from mobile porn.

It is the nature of mobile content-the fact that it is untethered-that makes it a bigger challenge than Internet or fixed content, according to a report on self regulation prepared for the European Commission last year by Oxford University.

"The fixed Internet experience has been learned from, but mobile is a more powerful platform for abuse than fixed, and filters do not work properly; they suffer from 'Goldilocks syndrome'-too hot on blocking or too cold, never just right," reads the report.

Deciding what to do about access to adult content is a continuing problem because "adult content distributors and users are regular early adopters of new technologies," said the Oxford report.

The Oxford Report did not speak too favorably on industry self-regulation.

"A code administered by a trade organization may face legitimacy deficit, and impartiality/independence of adjudication must be defended. Therefore, a dedicated structure is needed, including independent representation, external monitoring of compliance, public accountability and adequate publicity functions," said Oxford.

The Australia Communications Authority is seeking comment on regulations that would govern how premium content is made available. For example, when the content is adult in nature, the customer would be required to visit a carrier store in person to prove they are at least 18 years old. Comments are due Feb. 25

While the FCC is examining these various models-self vs. government regulation-Muleta believes the current rules developed for the wired world will still apply in a mobile world with pictures.

"We already have a set of regulation in place that is applicable," said Muleta. "The rules are pretty well developed. It is just making sure that the people who are now getting involved in the wireless platform are aware of them."

Muleta is doing his part. He spent part of last week at the National Association of Television Programming Executives convention.

"That is weird for a wireless regulator, but I wanted to make sure that the content providers understood the rules," said Muleta.



The Wireless Association™

Expanding the Wireless Frontier™

## TARGETED INFORMATION

**To:** Washington Regulatory Representatives  
and Content Classification Task Force

**From:** CTIA Public Policy

**Date:** February 15, 2005

### FCC COMMENDS CTIA'S INITIATIVES TO ADDRESS ADULT CONTENT

Today, the FCC's Wireless Telecommunication Bureau (WTB) commended CTIA and its members for addressing the important issues that arise with the delivery of content over mobile devices. In a letter to Steve Largent, released today, WTB Chief, John Muleta, encouraged wireless industry self-regulation, asking CTIA and its members to give parents the tools needed to protect children from inappropriate content.

Muleta noted that "[t]he development of new wireless technologies presents both benefits and risks to consumers, especially those consumers who are most vulnerable – children... As a result of the development of new mobile data technologies and applications, as well as the growing use of wireless devices by children, the issue of access to adult content by minors on mobile devices has come to the forefront."

Muleta suggested several recommendations that he believed the CMRS industry should take into account, as carriers educate parents about their options with regard to content access by minors. Specifically, he suggested that the industry should:

- Help educate parents about their options with regard to content access by minors, and "let parents know that they can block access to pay-per-call voice services and access to the mobile Internet through their children's handsets";
- Inform parents of the types of content that children will have access to through downloaded services;
- Consider whether the availability of adult content via mobile devices warrants changes to CTIA's carrier code of conduct to promote industry self-regulation; and

- Examine efforts of both government and industry in other countries to address the issue of access of adult content by minors.

The letter is positive in that it recognizes that an industry-driven approach is appropriate in this context, although the letter reflects some confusion about current blocking capabilities.

Today's new release is available at:

[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-256795A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-256795A1.pdf)

For additional information, please contact Diane Cornell, Mike Altschul or Mark Desautels.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH

THE KING'S ENGLISH, INC.; SAM WELLER'S ZION BOOKSTORE; NATHAN FLORENCE; W. ANDREW MCCULLOUGH; COMPUTER SOLUTIONS INTERNATIONAL, INC.; MOUNTAIN WIRELESS UTAH, LLC; THE SEXUAL HEALTH NETWORK, INC.; UTAH PROGRESSIVE NETWORK EDUCATION FUND, INC.; AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION; AMERICAN CIVIL LIBERTIES UNION OF UTAH; ASSOCIATION OF AMERICAN PUBLISHERS, INC.; COMIC BOOK LEGAL DEFENSE FUND; FREEDOM TO READ FOUNDATION; and PUBLISHERS MARKETING ASSOCIATION,

Plaintiffs,

V.

MARK SHURTLEFF, in his official capacity as ATTORNEY GENERAL OF THE STATE OF UTAH; VON J. CHRISTIANSEN, AMY F. HUGIE, N. GEORGE DAINES, GENE E. STRATE, DENNIS L. JUDD, MELVIN C. WILSON, KAREN ALLEN, DAVID A. BLACKWELL, WALLACE A. LEE, HAPPY J. MORGAN, SCOTT F. GARRETT, JARED W. ELDRIDGE, ERIC S. LIND, LERAY G. JACKSON, KELLY M. WRIGHT, MARVIN D. BAGLEY, GEORGE W. "JUDD" PRESTON, DAVID E. YOCOM, CRAIG C. HALLS, ROSS C. BLACKHAM, R. DON BROWN, DAVID R. BRICKEY, DOUGLAS J. AHLSTROM, JOANN STRINGHAM, CARLYLE KAY BRYSON, THOMAS L. LOW, BROCK R. BELNAP, MARVIN D. BAGLEY and MARK R. DECARIA, in their official capacities as UTAH DISTRICT and COUNTY ATTORNEYS,

Defendants.

Civil No. \_\_\_\_\_

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

**PRELIMINARY STATEMENT**

1. The Internet has revolutionized our society, representing the most participatory marketplace of mass speech yet developed – it is in many ways a far more speech-enhancing medium than radio or television, print, the mails, or even the village green. Hundreds of millions of people can now engage in interactive communication on a national and global scale via computer networks that are connected to the Internet. The Internet enables average citizens, with a few simple tools and at a very low cost, to participate in local or worldwide conversations, publish an online newspaper, distribute an electronic pamphlet, and communicate with a broader audience than ever before possible. The Internet provides millions of users with access to a vast range of information and resources. Internet users are far from passive listeners – rather, they are empowered by the Internet to seek out exactly the information they need and to respond with their own communication, if desired.

2. The Internet presents extremely low entry barriers to anyone who wishes to provide or distribute information or gain access to it. Unlike television, cable, radio, newspapers, magazines or books, the Internet provides the average citizen with an affordable means for communicating with, accessing and posting content to a worldwide audience.

3. The State of Utah has enacted a broadly restrictive censorship law that imposes severe content-based restrictions on the availability, display and dissemination of constitutionally-protected speech on the Internet. House Bill 260, enacted on March 2, 2005, and signed by Governor Jon Huntsman, Jr. on March 21, 2005 (the "Act"), among other things:

- Apparently expands existing Utah law with respect to distribution to minors of harmful to minors material to include Internet content and Internet service providers ("ISPs").
- Requires the Attorney General to create a public registry of websites that he has unilaterally declared to include constitutionally-protected harmful to minors material, without any judicial review.
- Requires ISPs either to block access to websites included in the registry and other constitutionally-protected content or to provide filtering software to users.
- Requires Utah-connected content providers to self-evaluate and label the content of their speech, at the risk of criminal punishment.

A copy of the Act is attached hereto as Appendix A.

4. The Act infringes the liberties of the residents of the State of Utah, imposing the restrictive hand of the State to supplant the power and responsibility of parents to control that which may be viewed by their children. It also infringes the liberties of millions of persons outside Utah who are affected by these restrictions.

5. Portions of the Act took effect on March 21, 2005, the date of the Governor's signature. The remaining provisions become effective at various times in 2006.

6. With respect to the application to the Internet of the criminal provisions relating to distribution to minors of harmful to minors materials, 18 federal judges, including three Courts of Appeal, as well as one State Supreme Court, have struck down as unconstitutional laws in Arizona, Michigan, New Mexico, New York, South Carolina, Vermont, Virginia, and Wisconsin similar to the Act. In addition, the United States Supreme Court invalidated a similar federal law on First Amendment grounds in Reno v. ACLU, 521 U.S. 844 (1997), aff'd 929 F. Supp. 824 (E.D.Pa. 1996).



7. With respect to requiring ISPs to block access to particular websites on the Internet, the U.S. District Court for the Eastern District of Pennsylvania recently invalidated a similar Pennsylvania state law, finding the law to be unconstitutional on both First Amendment and Commerce Clause grounds. Center for Democracy & Technology v. Pappert, 337 F. Supp. 2d 606 (E.D. Pa. 2004). In that case, the court found that as a result of the ISPs' attempts to comply with blocking orders requiring ISPs to block access to fewer than 400 websites, the ISPs unavoidably also blocked access to more than one million completely unrelated websites. Id. at 624, 642 (Findings of Facts ¶¶ 77, 189).

8. Since essentially all speech on the Internet is accessible in Utah, regardless of the geographical location of the person who posted it, the Act threatens Internet users nationwide and even worldwide. Moreover, because blocking a website often results in blocking wholly unrelated websites communicating constitutionally protected speech, the Act threatens an enormous array of websites and their users. This action seeks to have the Act declared facially unconstitutional and void, and to have the State enjoined from enforcing the Act, by reason of the First, Fifth, and Fourteenth Amendments to, and the Commerce Clause of, the United States Constitution.

9. Because of the way the Internet works, the Act's prohibition on distributing to minors material by the Internet that is "harmful to minors" effectively bans distribution of that same material to adults.

10. The speech primarily targeted by the Act – material that is asserted to be "harmful to minors"– is constitutionally protected for adults. This includes, for example,

valuable works of literature and art, safer sex information, examples of popular culture, and a wide range of robust human discourse about current issues and personal matters that may include provocative or sexually oriented language and images.

11. The Act inevitably means that Internet content providers will limit the range of their speech, because there are no reasonable technological means that enable users of the Internet to ascertain the age of persons who access their communications, or to restrict or prevent access by minors to certain content. Consequently, the Act reduces adult speakers and users in cyberspace to reading and communicating only material that is suitable for young children.

12. In addition, the Act prohibits speech that is valuable and constitutionally protected for minors, especially older minors.

13. To the extent any ISPs comply with the Act by blocking access to certain websites, the Act inevitably means that access to other unrelated and wholly innocent websites will also be blocked. Moreover, the blocking of websites (both those targeted by the Act and the unrelated websites) will in most cases prevent all customers of an ISP, both in Utah and elsewhere in the country, from accessing the websites. In some other cases, an ISP will not have the technical capability to block their customers' access to specified websites on the Internet.

14. Plaintiffs represent a broad range of individuals and entities who are speakers, content providers and access providers on the Internet. Plaintiffs post and discuss content including resources on sexual advice for disabled persons, AIDS prevention, visual art and images, literature and books and resources for gay and lesbian youth.

15. The Act violates the First Amendment and Commerce Clause rights of plaintiffs, their members, their users and tens of millions of other speakers and users of the Internet, and threatens them with irreparable harm.

16. In addition, the Act violates the Commerce Clause of the United States Constitution because it regulates commerce occurring wholly outside of the State of Utah, because it imposes an impermissible burden on interstate and foreign commerce, and because it subjects interstate use of the Internet to inconsistent state regulations. An online content provider outside of Utah cannot know whether someone in Utah might download his or her content posted on the Web; consequently, the content provider must comply with Utah law or face the threat of criminal prosecution.

17. Plaintiffs seek permanent injunctive relief prohibiting enforcement of the Act.

#### **JURISDICTION AND VENUE**

18. This case arises under the U.S. Constitution and the laws of the United States and presents a federal question within this Court's jurisdiction under Article III of the Constitution and 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3). It seeks remedies under 28 U.S.C. §§ 2201 and 2202, 42 U.S.C. §§ 1983 and 1988, and F.C.R.P. 65.

19. Venue is proper in this district under 28 U.S.C. § 1391(b).

#### **THE PARTIES**

20. Plaintiff THE KING'S ENGLISH, INC. is a 27 year-old, locally-owned independent book store in Salt Lake City. The King's English Bookshop carries a broad range of books, publishes a newsletter with book reviews and other news about books

and hosts frequent readings and signings by a variety of authors. It maintains a website at [kingsenglish.booksense.com](http://kingsenglish.booksense.com). The King's English, Inc. has its principal place of business in Salt Lake City, Utah. It sues on its own behalf and on behalf of users of its website.

21. Plaintiff SAM WELLER'S ZION BOOKSTORE was established in Salt Lake City in 1929. Sam Weller's Zion Bookstore carries a wide variety of new, used and rare books, and maintains an extensive online collection available through its website, [www.samwellers.com](http://www.samwellers.com). It also publishes its newsletter on the website. Sam Weller's has its principal place of business in Salt Lake City, Utah. It sues on its own behalf and on behalf of users of its website.

22. Plaintiff NATHAN FLORENCE is a Salt Lake City artist who sells and displays his artwork on the World Wide Web, as well as in local and regional galleries. Some of Mr. Florence's art depicts nude figures in a tradition that is centuries old. Mr. Florence maintains a website at [www.nflorencefineart.com](http://www.nflorencefineart.com). He sues on his own behalf and on behalf of users of his website.

23. Plaintiff W. ANDREW MCCULLOUGH was a candidate for Attorney General of Utah in the 2004 election, and operates a campaign website at [www.andrewmccullough.org](http://www.andrewmccullough.org). He anticipates running for state-wide office again in the future, and therefore continues to maintain his website. Mr. McCullough's website is dedicated to legal issues that are of interest to him and his supporters. His website shares an Internet Protocol Address with more than 45,000 other, unrelated sites, some of which contain material that may be deemed harmful to minors. Mr. McCullough sues

on his own behalf and on behalf of users of [www.andrewmccullough.org](http://www.andrewmccullough.org) on the World Wide Web.

24. Plaintiff COMPUTER SOLUTIONS INTERNATIONAL, INC., d/b/a CSolutions ("CSolutions"), is an Internet service provider that provides Internet access and web hosting services to customers in and outside of the state of Utah. CSolutions is incorporated in Utah and has its principal place of business in Salt Lake City. CSolutions sues on its own behalf, and on behalf of its customers, who are both users of the Internet and publishers of content available on the Internet.

25. Plaintiff MOUNTAIN WIRELESS UTAH, LLC ("Mountain Wireless") is an Internet service provider that provides Internet access and web hosting services to customers in and outside of the state of Utah. Mountain Wireless is organized in Utah and has its principal place of business in Park City, Utah. Mountain Wireless sues on its own behalf, and on behalf of its customers, who are both users of the Internet and publishers of content available on the Internet.

26. Plaintiff THE SEXUAL HEALTH NETWORK, INC. ("The Sexual Health Network") is a small, Internet-based company incorporated in the State of Connecticut. It maintains a Web site at [www.sexualhealth.com](http://www.sexualhealth.com). The Sexual Health Network was founded in May 1996, by Dr. Mitchell Tepper while he was working on his doctoral dissertation at the University of Pennsylvania Program in Human Sexuality Education. Dr. Tepper also has a Master in Public Health degree from the Yale University School of Medicine. Dr. Tepper is currently the President of the Sexual Health Network. The Sexual Health Network is dedicated to providing easy access to sexuality information, education and other sexuality resources for people with disability, chronic illness or

other health-related problems. The Sexual Health Network sues on its own behalf and on behalf of users of [sexualhealth.com](http://sexualhealth.com) on the World Wide Web.

27. Plaintiff UTAH PROGRESSIVE NETWORK EDUCATION FUND, INC. ("UPNet") is a coalition of organizations and individuals committed to promoting social, racial, economic and environmental justice. The groups involved in the coalition are committed to civil rights and liberties and use communication to unite people around a better understanding of issues. UPNet operates a website at [www.upnet.org](http://www.upnet.org) that serves as a resource for the community on a wide range of issues. Its website shares an Internet Protocol Address with more than 1700 other, unrelated websites, some of which contain material harmful to minors. UPNet sues on its own behalf, on behalf of its members, and on behalf of users of its website.

28. Plaintiff AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION ("ABFFE") was organized as a not-for-profit organization by the American Booksellers Association in 1990 to inform and educate booksellers, other members of the book industry and the public about the dangers of censorship, and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials. ABFFE is incorporated in Delaware and has its principal place of business in New York City. ABFFE, most of whose members are bookstores in the United States, sues on its own behalf, on behalf of its members who use online computer communications systems, and on behalf of the patrons of their member bookstores.

29. Plaintiff AMERICAN CIVIL LIBERTIES UNION OF UTAH ("ACLU of Utah") is the Utah affiliate of the American Civil Liberties Union, a nationwide, nonpartisan

organization of nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution, including the Bill of Rights. The ACLU of Utah has more than 2,300 members, is incorporated in Utah and has its principal place of business in Salt Lake City. The ACLU of Utah sues on its own behalf, and on behalf of its members who use online computer communications systems. The ACLU of Utah maintains a website at [www.acluutah.org](http://www.acluutah.org).

30. Plaintiff ASSOCIATION OF AMERICAN PUBLISHERS, INC. ("AAP") is the national association of the United States book publishing industry. AAP's approximately 300 members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses and scholarly associations. AAP members publish hardcover and paperback books in every field and a range of educational materials for the elementary, secondary, post-secondary and professional markets. Members of AAP also produce computer software and electronic products and services. AAP is incorporated in New York, and has its principal places of business in New York City and in the District of Columbia. AAP represents an industry whose very existence depends on the free exercise of rights guaranteed by the First Amendment. AAP sues on its own behalf, on behalf of its members who use online computer communications systems, and on behalf of the readers of its members' books.

31. Plaintiff COMIC BOOK LEGAL DEFENSE FUND ("CBLDF") is a non-profit corporation dedicated to defending the First Amendment Rights of the comic book industry. CBLDF, which has its principal place of business in Northampton, Massachusetts, represents over 1,000 comic book authors, artists, retailers, distributors,

publishers, librarians and readers located in Utah, throughout the country and the world. Some of the comic books created, published, distributed and offered for sale by CBLDF's members, though constitutionally protected, could be deemed to be harmful to minors and therefore subject to the Act. The First Amendment rights of CBLDF and its members will be adversely affected unless the Act is enjoined. CBLDF sues on its own behalf, on behalf of its members, and on behalf of the readers of their materials.

32. Plaintiff FREEDOM TO READ FOUNDATION, INC. ("FTRF") is a non-profit membership organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions fulfilling the promise of the First Amendment for every citizen, to support the rights of libraries to include in their collections and make available to the public any work they may legally acquire and to set legal precedent for the freedom to read on behalf of all citizens. FTRF is incorporated in Illinois and has its principal place of business in Chicago. FTRF sues on its own behalf, on behalf of its members who use online computer communications systems, and on behalf of the patrons of its member libraries.

33. Plaintiff PUBLISHERS MARKETING ASSOCIATION ("PMA") is a nonprofit trade association representing more than 4,200 publishers across the United States and Canada. The PMA represents predominantly nonfiction publishers and assists members in their marketing efforts to the trade. PMA is incorporated in California, and has its principal office in Manhattan Beach, California. PMA sues on its own behalf, on behalf of its members who use online computer communications systems, and on behalf of readers of its members' publications.

34. Defendant MARK SHURTLEFF is the Attorney General of the State of Utah and is sued in his official capacity as such. He is the chief law enforcement officer of the State of Utah. In addition to specific duties given to him under the Act, pursuant to Utah Code § 67-5-1, defendant Shurtleff shall "prosecute...all causes to which the state...is a party" and shall "exercise supervisory powers over the district and county attorneys of the state in all matters."

35. Defendants VON J. CHRISTIANSEN, AMY F. HUGIE, N. GEORGE DAINES, GENE E. STRATE, DENNIS L. JUDD, MELVIN C. WILSON, KAREN ALLEN, DAVID A. BLACKWELL, WALLACE A. LEE, HAPPY J. MORGAN, SCOTT F. GARRETT, JARED W. ELDRIDGE, ERIC S. LIND, LERAY G. JACKSON, KELLY M. WRIGHT, MARVIN D. BAGLEY, GEORGE W. "JUDD" PRESTON, DAVID E. YOCOM, CRAIG C. HALLS, ROSS C. BLACKHAM, R. DON BROWN, DAVID R. BRICKEY, DOUGLAS J. AHLSTROM, JOANN STRINGHAM, CARLYLE KAY BRYSON, THOMAS L. LOW, BROCK R. BELNAP, MARVIN D. BAGLEY and MARK R. DECARIA are District and County Attorneys for all of the counties in Utah and are sued in their official capacity as such. They have authority to prosecute criminal violations in their respective counties.

### **FACTS**

36. Many of the claims raised in this Complaint arise because of the specific technical aspects of Internet communications and the capabilities (or lack of capabilities) of Internet content providers and Internet service providers. The facts in this Complaint are organized into four major sections. First, the Complaint provides a general overview of Internet communications. Second, the Complaint describes a

number of technical details about how Internet content providers make content available as part of the "World Wide Web," and how the Web and other communications flow over the Internet. Third, the different elements of the Act challenged in this Complaint are identified. And fourth, the Complaint details the impact of the Act on Internet communications in general, and on the rights of the Plaintiffs in particular.

#### **A. An Overview of Internet Communications**

37. The Internet is a decentralized, local medium of communication that links people, institutions, corporations and governments around the world. It is a giant computer network that interconnects innumerable smaller groups of linked computer networks and individual computers. Although estimates are difficult due to its constant and rapid growth, the Internet is currently believed to connect more than 888 million users worldwide. In addition, in 2002, approximately 31 billion email messages were sent per day. It is expected that by 2006, this number should reach 60 billion email messages per day.

38. Because the Internet merely links together numerous individual computers and computer networks, no single entity or group of entities controls the material made available on the Internet or limits the ability of others to access such materials. Rather, the range of digital information available to Internet users—which includes text, images, sound and video—is individually created, maintained, controlled and located on millions of separate individual computers around the world.

#### **How People Access the Internet**

39. Individuals have several easy means of gaining access to the Internet. Many educational institutions, businesses, and local communities provide a variety of ways to allow users to easily access the Internet.

40. Almost all libraries provide their patrons with free access to the Internet through computers located at the library. Some libraries also host online discussion groups and chat rooms. Many libraries also post their card catalogs and online versions of material from their collections.

41. In the United States, most people access the Internet through companies known as Internet service providers ("ISPs"). Home Internet users are likely to contract on a monthly or annual basis with an ISP, and will access that ISP's network over a "dial-up" telephone line, or a higher-speed connection such as a cable "DSL," or wireless circuit. Some ISPs charge a monthly fee ranging from \$15-50 monthly, but some provide their users with free or very low-cost Internet access. National "commercial online services," such as America Online, serve as ISPs and also provide subscribers with additional services, including access to extensive content within their own proprietary networks.

42. Similarly, businesses in the United States commonly contract with an ISP to provide Internet access to their employees, or to connect their internal computer network to the ISP's network (which is in turn connected to the greater Internet). Many businesses connect to their ISP's networks (and the Internet) over dedicated high-speed connections, while other businesses access the Internet over dial-up telephone lines.

#### **Ways of Exchanging Information on the Internet**

43. Users need not identify themselves to access most of the information on the Internet. Although in many (but not all) cases, users identify themselves to their ISPs (or their schools, employers or other entities providing Internet access), but once connected to the Internet the users generally do not need to identify themselves further in order to be able to access content on the Internet. Further, the user names or email

addresses selected by many Internet users for their Internet communications seldom if ever provide enough information to indicate the users' real identities. Indeed, many user names are pseudonyms or pen names that often provide users with a distinct online identity and help to preserve their anonymity and privacy. America Online, for example, allows every subscriber to use up to six different "screen names," which may be used for different family members or for separate pseudonyms for a single individual.

44. Once an individual is connected to the Internet, there are a wide variety of methods for obtaining information, and for communicating with other users.

45. **Email.** The simplest and perhaps most widely used method of communication on the Internet is via electronic mail, commonly referred to as "email." Using one of many available "mailers"—software capable of reading and writing an email—a user is able to address and transmit via computer a message to a specific individual or group of individuals who have email addresses.

46. **Discussion Groups.** Online discussion groups are another of the most popular forms of communication via computer networks. Discussion groups allow users to post messages onto a public computerized "bulletin board" and to read and respond to messages posted by others in the discussion group. Discussion groups have been organized on many different computer networks and cover virtually every topic imaginable. Discussion groups can be formed by individuals, institutions or organizations or by particular computer networks.

47. "USENET" newsgroups are a popular set of discussion groups available on the Internet and other networks. Currently there are USENET newsgroups on more

than 30,000 different subjects, and over 100,000 new messages are posted to these groups each day.

48. "Web logs" or "blogs" are another very popular form of discussion forum, in which one or a small number of "bloggers" can lead discussions on whatever topics concern the bloggers or the discussion group. Estimates of how many blogs exist today range from 10 to 50 million separate blogs available on the Internet.

49. **Mailing Lists.** Similarly, users also can communicate within a group by subscribing to automated electronic mailing lists that allow any subscriber to a mailing list to post a particular message that is then automatically distributed to all of the other subscribers on that list. These lists are sometimes called "mail exploders" or "listservs."

50. **Chat Rooms.** "Chat rooms" also allow users to engage in simultaneous conversations with another user or group of users by typing messages and reading the messages typed by others participating in the "chat." Chat rooms are available on the Internet and on commercial online services. Although chat rooms are often set up by particular organizations or networks, any individual user can start an online "chat."

51. Users of any of the above methods of Internet communication can send or view images as well as text, and images are frequently distributed via these media to users throughout the world.

52. Online discussion groups, mailing lists, and chat rooms create an entirely new global public forum—a cyberspace village green—where people can associate and communicate with others who have common interests, and engage in discussion or debate on every imaginable topic.

### **The World Wide Web**

53. The World Wide Web (the "Web") is the most popular way to provide and retrieve information on the Internet. Anyone with access to the Internet and proper software can create "webpages" or "homepages" which may contain many different types of digital information—text, images, sound and even video. The Web comprises hundreds of millions of separate "websites" and "webpages" that display content provided by particular persons or organizations. Any Internet user anywhere in the world with the proper software can create her own webpage, view webpages posted by others, and then read text, look at images and video and listen to sounds posted at these websites.

54. The Web serves in part as a global, online repository of knowledge, containing information from a diverse array of independent and distributed sources that are easily accessible to Internet users around the world. Though information on the Web is contained on millions of independent computers, each of these computers is connected to the Internet through communications "protocols" that allow the information on the Web to become part of an interconnected body of knowledge accessible by all webusers.

55. Many large corporations, banks, brokerage houses, newspapers and magazines now provide online editions of their publications and reports on the Web or operate independent websites. Many government agencies and courts also use the Web to disseminate information to the public. For example, defendants Mark Shurtleff and David Yocom (the District Attorney of Salt Lake County) have posted Internet websites containing information available to the public, as have all of the plaintiffs. In addition, many individual users and small community organizations have established

individualized homepages on the Web that provide information of interest to members of the particular organization, communities and to other individuals.

56. To gain access to the information available on the Web, a person generally uses a Web "browser"—software such as Internet Explorer or Mozilla Firefox—to display, print and download documents that are formatted in the standard Web formatting language. Generally, each document on the Web has an address that allows users to find and retrieve it, but some websites dynamically create addresses so that a given document may not always have the same address.

57. Most Web documents also contain "links." These are short sections of text or image that refer and link to another document. Typically the linked text is blue or underlined when displayed, and when selected by the user on her computer screen, the referenced document is automatically displayed, wherever in the world it actually is stored. Links, for example, are used to lead from overview documents to more detailed documents on the same website, from tables of contents to particular pages, and from text to cross-references, footnotes, and other forms of information. For example, plaintiff Utah ACLU's Web homepage provides links to several other webpages, including publications, press releases and legislative information.

58. Links may also take the user from the original website to another website on a different computer connected to the Internet, a computer that may be located in a different area of the country, or even the world. For example, plaintiff ACLU of Utah's website links to the website of the National ACLU. This link appears seamless from the user's point of view; in fact the national website is located on an entirely separate computer that is not maintained or controlled by the ACLU of Utah.

59. Through the use of these links from one computer to another, a user can move from one document to another, unifying the diverse and voluminous information made available by millions of users on the Internet into a single body of knowledge that can be searched and accessed.

60. A number of "search engines" and directories—such as Google and Yahoo—are available free of charge to help users navigate the World Wide Web. Once a user has accessed the search service, he or she simply types a word or string of words as a search request, and the search engine provides a list of websites that contain or relate to the search string.

#### **The Interactive Character of Communication Over the Internet**

61. As can be seen from the various ways that people can exchange information and communicate via this new technology, the Internet is "interactive" in ways that distinguish it from traditional communication media. For instance, users are not passive receivers of information as with television and radio; rather, a user can easily respond to the material he or she receives or views online. In addition, "interactivity" means that Internet users must actively seek out with specificity the information they wish to retrieve and the kinds of communications in which they wish to engage. For example, to gain access to material on the World Wide Web, a user must know and type the address of a relevant website or find the website by typing a relevant search string in one of several available search engines or activate a website link. Similarly, a user wishing to view text posted to a newsgroup must log on to the Internet and then connect to a USENET server, select the relevant group, review the relevant header lines—which provide brief content descriptions—for each message and then access a particular message to read its content.



**The Range of Content Available on the Internet**

62. The information made available on the Internet is as diverse as human thought. Content on the Internet is provided by the millions of Internet users worldwide, and the content ranges from academic writings, to humor, to art, to literature, to medical information, to music, to news, to movie clips and to human sexuality. For example, on the Internet one can view the full text of the Bible, all of the works of Shakespeare and numerous other classic works of literature. One can browse through paintings from museums around the world, view in detail images of the ceiling of the Sistine Chapel, watch or download motion pictures or hear selections from the latest rap music albums. At any one time, the Internet serves as the communication medium for literally hundreds of thousands of global conversations, political debates and social dialogues. It is a global art museum, movie theater, bookstore, research facility and Hyde Park.

63. Although the overwhelming majority of the websites on the Internet do not involve nudity or sexual activity, such material is available on the Internet. For example, an Internet user can read online John Cleland's eighteenth-century novel, Fanny Hill: Memoirs of a Woman of Pleasure; view sixteenth-century Italian paintings of nude women, eighteenth-century Japanese erotic prints, and twentieth-century images; text discussing ways for married couples to improve their physical relationships, portraying methods of practicing safer sex, and depicting the method for conducting a breast self-examination; as well as commercial pornography. Much of this material is similar, if not identical, to material that is routinely discussed in cafes and on the street corners, and that is distributed through libraries, bookstores, record stores and newsstands.

**B. Technical Details About Internet and Web Communications**

64. As discussed above, most people access the Internet through ISPs. A network of a typical ISP is in turn connected, directly or indirectly, to all other ISPs in the world, which are in turn connected to their customers. Collectively, all of these ISPs and their customers comprise the global Internet.

65. For accessing content on the World Wide Web, the most common sequence is for a user to request content from a website, and for the website to return individual webpages to the user. This sequence is illustrated as follows, with the initial request shown by the arrows on the left, and the response shown by the arrows on the right:



66. In the vast majority of cases, the user's ISP is different from the website's ISP. Thus, the user's ISP does not typically have any knowledge of or relationship with the actual owner of the website.

67. Individuals, businesses, governments and other institutions (hereafter "web publishers") that want to make content broadly available over the Internet can do so by creating a website on the World Wide Web.

68. To make a website available on the World Wide Web, a web publisher must place the content or "webpages" onto a computer running specialized "web server"

software. This computer, known as a "web server," transmits the requested webpages in response to requests sent by users on the Internet.

69. Web publishers have a variety of options for making a website available over a web server. First, a web publisher can own and operate a web server on the web publisher's premises (including, possibly, the web publisher's home). In this case, a web publisher would contract with an ISP for Internet access, and through that connection would connect the web server to the Internet.

70. Second, and far more commonly today, a web publisher may contract with a "web host" (or an ISP that also operates as a "web host") to own and operate the necessary web server on the web host's premises (or third party premises arranged by the web host). A web host will typically operate one or more web servers that can store the webpages for customers and make those web pages generally available to users on the Internet.

71. Typically, when creating a website, a web publisher obtains a "domain name" that can be used to designate and locate the website. For example, plaintiff THE SEXUAL HEALTH NETWORK, INC., obtained the domain name "[sexualhealth.com](http://www.sexualhealth.com)" for use with its website.

72. A domain name can be coupled with additional information to create a "Uniform Resource Locator," or "URL," which represents a more complete way to designate the location of certain content or other resources on the Internet.

73. A URL is the commonly used textual designation of an Internet website's "address." Thus, for example, the URL of plaintiff's website referenced above is "<http://www.sexualhealth.com>." The "http" indicates that the "Hypertext Transfer

Protocol" (the main protocol used to transmit World Wide Web pages) is to be used. The "[www.sexualhealth.com](http://www.sexualhealth.com)" indicates a name that can be used to locate the specific web server(s) that can contain the content for the requested website.

74. A web page accessed by a URL like "<http://www.sexualhealth.com>" is commonly referred to as the "homepage" of the website. A URL could also contain a reference to a specific "sub-page" that is contained in a website (such as "<http://www.sexualhealth.com/aboutus.php>"). A single website can contain thousands of different webpages. Although in many cases the same web publisher is responsible for all pages and sub-pages on a website, in other situations (including but not limited to that described in the following paragraph) wholly different and independent web publishers are responsible for different sub-pages on a single website.

75. Beyond the methods described immediately above, web publishers can use another common method to make webpages available on the World Wide Web. A web publisher can place content with a service provider that operates a "community" of users on the Internet and offers to host webpages of the users as part of its service (hereafter "Online Community"). This type of Online Community exists only in "cyberspace," and does not relate to any particular physical community. In the United States, for example, GeoCities is a popular Online Community, and GeoCities hosts webpages of its tens of thousands of users (which commonly are individuals, or very small businesses or organizations). There are also smaller Online Communities that individuals might host out of their homes. A key difference with publishing web content through an Online Community is that web publishers' webpages do not typically have their own domain name. For example, the Green Party of Ogden, Utah, is part of the

GeoCities Online Community, and its webpages are available at the URL

"<http://www.geocities.com/greenpartyogden>."

76. Although a URL such as <http://www.sexualhealth.com> or <http://www.geocities.com/greenpartyogden> provides enough information for a human user to access the desired Internet website, the URLs alone are not sufficient for the user's computer to locate the website. The user's computer must first determine the numeric "Internet Protocol Address" or "IP Address" of the desired website. When a user seeks to access a particular URL, the user's computer does a "look up" through a hierarchy of global databases to determine the IP Address of the computer server that can provide the desired webpages.

77. In the most commonly used method, IP Addresses are expressed as a series of four numbers separated by periods. Thus, for example, the IP Address of the website designated by <http://www.sexualhealth.com> is 209.35.187.200. This numeric IP Address provides a user's computer with a precise address of the web server to which the user's computer must send a request for webpages with the URL <http://www.sexualhealth.com>.

78. Most ISPs receive and forward Internet communications based solely on the IP Address of the destination of the communication, wholly without regard to the specific content of the communication. Thus, a typical ISP would handle an email message addressed to a specific IP Address in exactly the same way that it would handle a webpage that is being sent to the same IP Address.

79. Indeed, for most ISPs, the network does not "read" or analyze the content of the communication in order to be able to determine whether the communication was

an email, a webpage or some other type of Internet communication. Moreover, the networks of most ISPs do not include the physical equipment that would be necessary to analyze every communication passing through the network, and do not have the ability to take any action based on the content of the communication.

80. Although a specific URL in general refers only to one specific website, the same is not true for IP Addresses -- there is not a one-to-one correlation between URLs and IP Addresses. An individual web server computer -- with a single IP Address -- can "host" tens, hundreds, thousands or even hundreds of thousands of different websites. Thus, many different websites (each with their own unique URLs) can be hosted on the same physical web server, and all can share the same IP Address of that web server.

81. For example, 209.35.187.200 is the IP Address of the website [www.sexualhealth.com](http://www.sexualhealth.com). But that exact same numeric IP Address is also used by more than 6,000 other wholly unrelated websites (including, for example, the websites of a local Kansas court, [www.14thjudicialdistrict-ks.org](http://www.14thjudicialdistrict-ks.org), a North Carolina radiology center, [www.Adcdurham.com](http://www.Adcdurham.com), and a bank in the Bahamas, [www.Bahamasdevelopmentbank.com](http://www.Bahamasdevelopmentbank.com)). If a user on the Internet seeks to access the [www.sexualhealth.com](http://www.sexualhealth.com) website, the user's ISP knows only that the user is sending a communication to 209.35.187.200. The user's ISP does not "open" or "read" the communication to determine which specific website is actually being requested.

82. Although ISPs transport most Internet communications without looking at any information other than the IP Address, a web server that supports multiple websites does "read" the full web request in order to determine which website is being requested. In the example of [www.sexualhealth.com](http://www.sexualhealth.com), the web server located at 209.35.187.200 will

read any web request it receives to determine which of the thousands of websites located at that address should be provided.

**C. The Provisions of the Act**

83. The Act has a number of different coordinating and overlapping provisions.<sup>1</sup> This Complaint challenges five components of the Act, as detailed below:

84. **Extension of Utah Harmful-to-Minors Law to the Internet.** Section 5 (amending Utah Code § 76-10-1206) expands existing Utah law with respect to distribution to minors of "harmful to minors" material to include Internet content publishers and ISPs. Plaintiffs challenge this section as unconstitutional.

85. **Mandatory Labeling.** Section 9 enacts Utah Code § 76-10-1233, which requires Utah-connected Internet content providers to self-evaluate and label the content of their speech, at the risk of criminal punishment. Plaintiffs challenge this section as unconstitutional.

86. **Creation of Adult Content Registry, and Mandated ISP Blocking of Listed Sites.** Sections 2 (enacting Utah Code § 67-5-19) and 8 (enacting Utah Code § 76-10-1232) require (a) defendant SHURTLEFF to create an "adult content registry" including websites that he alone determines, with no judicial or other review, to contain material that is "harmful to minors," and (b) ISPs to block access to websites that appear on the registry. Utah Code § 76-10-1232 specifies that the ISPs may "block material from the adult content registry by domain name or Internet Protocol address." Plaintiffs challenge these sections as unconstitutional.

<sup>1</sup> Plaintiffs challenge essentially the entire Act *except* Sections 1 and 3. Thus, when Plaintiffs ask the Court to enjoin the Act, they are seeking to enjoin the entire Act *except* Sections 1 and 3.

87. **Mandated ISP Blocking of "Pornographic" Material as Determined by the ISP's Customers.** Section 4 amends Utah Code § 76-10-1205 and effectively requires ISPs to block access to "any pornographic material or material reasonably believed by [a customer] to be pornographic." Plaintiffs challenge this section as unconstitutional.

88. **Mandated ISP Blocking of Harmful-to-Minors Material.** Section 7 enacts Utah Code § 76-10-1231, which requires ISPs to block access to "harmful to minors" material. Plaintiffs challenge this section as unconstitutional.

89. Some but not all of the challenged sections that impose obligations on ISPs to block access to certain content are triggered by the affirmative requests of individual customers of the ISPs. Because of the technical realities of the Internet and the operations of most ISPs, in many (if not most or all) circumstances the ISPs will implement any blocking across their entire network and thus the access to lawful websites by non-requesting customers will also be blocked. For this and other reasons, the "customer choice" approach does not cure the constitutional defects raised in this Complaint.

90. Many of the obligations imposed on ISPs by the Act can be satisfied if an ISP provides to a requesting customer filtering software that the customer can install on his or her own computer. Although plaintiffs believe that governmental promotion of the voluntary use of such filtering software is a constitutionally less restrictive alternative to the challenged sections of the Act, ISPs are specifically given the option by the Act of blocking access to websites using technical means that will also block access to unrelated websites. For this and other reasons, the inclusion of the "filtering software

option" does not eliminate the overall unconstitutional impact of the challenged sections under both the First Amendment to, and the Commerce Clause of, the U.S. Constitution.

**D. Impact of the Act on Internet Speech and Communications in General, and on the Plaintiffs in Particular**

91. The harmful impacts of the Act on Internet speech in general, and on the plaintiffs in particular, are far reaching. Because the Act is multi-faceted, the impacts on speech are discussed below with regard to each of the five different facets of the Act challenged in this Complaint. Following that is a discussion of the impact on interstate commerce that flows from all of the challenged sections of the Act. Concluding is a discussion of the impact on the individual plaintiffs.

**The Act's Impact on Internet Speech**

**Extension of Utah Harmful-to-Minors Law to the Internet (Section 5, Utah Code § 76-10-1206)**

92. Because of the nature of the Internet, this section of the Act bans certain constitutionally-protected speech among adults and substantially burdens the dissemination and receipt of other constitutionally protected speech.

93. The United States Congress and the states of Arizona, Michigan, New Mexico, New York, South Carolina, Vermont, Virginia and Wisconsin previously enacted laws similar to these sections of the Act, which were either held unconstitutional or enjoined on First Amendment and Commerce Clause grounds.

94. Speech on the Internet is generally available to anyone with access to basic communications technology. Anyone who posts content to the Web, chat rooms, mailing lists or discussion groups makes that content automatically available to all users worldwide, including minors. Because minors have access to all of these fora, any

"harmful to minors" communication in these fora could be punishable under the Act. Knowledge that the recipient is a minor is not required under the Act, and knowledge of the "character and content" of the material is presumed. Due to the very nature of the Internet, virtually every communication on the Internet may potentially be received by a minor and therefore may potentially be the basis for prosecution.

95. Because many of the terms in the Act are overbroad, the Act further chills the speech of content providers on the Web. For example, the Act fails to distinguish between material that is "harmful" for older as opposed to younger minors.

96. Further, the reference to "prevailing standards in the adult community [in the State of Utah] as a whole with respect to what is suitable material for minors" is overbroad because, due to the borderless nature of the Internet, it effectively imposes Utah standards on content providers and users in all other states even if other states have more liberal standards regarding what is considered "harmful to minors." As a consequence, content providers and users of the Web will likely err on the side of caution and not post content on the Web that they would otherwise have posted. In this way, the Act chills speech on the Web and thus causes irreparable harm to the First Amendment freedoms of online speakers.

97. Many of the hundreds of millions of users of the Internet are speakers and content providers subject to the Act. Anyone who sends an email, participates in a discussion group or chat room, or maintains a homepage on the Web potentially is subject to the Act, because his or her communication might be accessed by a minor in the State of Utah. Given the technology of the Internet, there are no reasonable means for these speakers to ascertain the age of persons who access their messages, or for

restricting or preventing access by minors to certain content. From the perspective of these speakers, the information they make available on the public spaces of the Internet either must be made available to all users of the Internet, including users who may be minors, or it will not be made available at all.

98. For instance, when a user posts a message to a USENET discussion group, it is automatically distributed to hundreds of thousands of computers around the world, and the speaker has no ability to control whom will access his or her message from those computers. Similarly, users who communicate on mailing lists have no way to determine the ages of other subscribers to the list. Finally, content providers on the Web have no reasonable way to verify the age of persons who access their websites. For these reasons, there is no practical way for content providers to withhold material that may be "harmful to minors"—as prohibited by the Act—from people younger than 18 years old.

99. Moreover, the Act is overbroad because it allows prosecution even if the sender had no knowledge or reason to know of the recipient's age. Although knowledge of the "character and content" of the material is required, knowledge that the recipient is a minor is not required.

100. Because Internet speakers have no means to restrict minors in Utah from accessing their communications, the Act effectively requires almost all discourse on the Internet—whether among citizens of Utah or among users anywhere in the world—to be at a level suitable for young children. The Act therefore bans an entire category of constitutionally protected speech between and among adults on the Internet.

101. In addition, any person who disagrees with or objects to sexual content on the Internet could cause a speaker to be prosecuted under the Act by having a minor view the online speech, resulting in a "heckler's veto" of Internet speech. Further, any person who disagrees with sexual content on the Internet could cause a speaker to fear prosecution under the Act by claiming to be a minor, whether or not the person actually is one.

102. The Act also prohibits older minors from communicating and accessing protected speech. Even if some depictions or discussions of nudity and sexual conduct may be considered by some to be inappropriate or "harmful" for younger minors, many depictions and discussions—including safer sex resources—are valuable, at least for older minors.

103. Even if there were means by which speakers on the Internet could ascertain or verify the age of persons who receive their content (and there are no such means), requiring users to identify themselves and to disclose personal information in order to allow verification of age would prevent Internet users from maintaining their privacy and anonymity on the Internet.

104. Because of the global nature of the Internet, defendants cannot demonstrate that these sections of the Act are likely to reduce the availability in Utah of material that may be "harmful to minors" on the Internet.

105. It is estimated that in excess of 40% of the content provided on the Internet originates abroad. All of the content on the global Internet is equally available to all Internet users worldwide and may be accessed as easily and as cheaply as content that originates locally. Because it is not technologically possible to prevent

content posted abroad from being available to Internet users in the State of Utah, these sections of the Act will not accomplish their purported purpose of keeping inappropriate content from minors in Utah.

106. Conversely, there are many alternative means that are more effective at assisting parents in limiting a minor's access to certain material, if desired.

107. Some ISPs and commercial online services like America Online provide features that subscribers may use to prevent children from accessing chat rooms and to block access to websites and news groups based on keywords, subject matter, or other designations. These services also offer screening software that blocks messages containing certain words and tracking and monitoring software to determine which resources a particular online user, such as a child, has accessed. They also offer children-only discussion groups that are closely monitored by adults.

108. Online users also can purchase special software applications, known as user-based filtering software, that enable them to control access to online resources. These applications allow users to block access to certain websites and resources, to prevent children from giving personal information to strangers by email or in chat rooms and to keep a log of all online activity that occurs on the home computer.

109. User-based blocking programs are not perfect, both because they fail to screen all inappropriate material and because they inadvertently block valuable Internet websites. However, a voluntary decision by concerned parents to use these products for their children constitutes a far less restrictive alternative than the Act's imposition of criminal penalties for protected speech upon the universe of Internet users. Moreover,

the Act itself demonstrates that the voluntary use by customers of filtering software would satisfy the governmental interests sought to be advanced by the Act.

**Creation of Adult Content Registry, and Mandated  
ISP Blocking of Listed Sites (Sections 2 & 8, Utah Code §§ 67-5-19, 76-10-1232)**

110. Defendant SHURTLEFF's designation of a website for inclusion on the Adult Content Registry is wholly without any judicial review of his determination, either before or after such designation.

111. No website, ISP or Internet user is afforded an opportunity to participate in any adversarial proceeding before defendant SHURTLEFF designates a website for inclusion on the Adult Content Registry.

112. The operation of the Adult Content Registry is similar to the censorship system held to be unconstitutional by the United States Supreme Court in Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

113. Most ISPs cannot as a technical matter effectively comply with a requirement to block specific websites designated in the Adult Content Registry by blocking content based on the specific URL of a website or a webpage. To effectively comply with the blocking requirement, most ISPs can only block access to a website by blocking access to the numeric Internet Protocol Address ("IP Address") of the website.

114. The blocking by numeric IP Address is specifically authorized and directed by the Act.

115. To effectively comply with the blocking requirement, most ISPs would be forced to create an "exception" in a "routing table" in order to "null route" or "mis-route" Internet traffic associated with the IP Address.

116. Blocking access to an IP Address will block access to all websites that use that IP Address, including websites that are wholly unrelated to any URLs listed the Adult Content Registry.

117. The sharing of IP Addresses among wholly unrelated websites is a very common practice on the Internet today.

118. According to recent research, over 85% of all Internet websites that have domain names ending in ".com," ".net" or ".org" share their IP Addresses with at least one other Internet website.

119. According to recent research, over 66% of all Internet websites that have domain names ending in ".com," ".net" or ".org" share their IP Addresses with at least fifty other Internet websites.

120. In some cases, hundreds, thousands and even hundreds of thousands of websites share a single IP Address.

121. In most cases, the websites that share their IP Address with dozens or hundreds of other websites have no affiliation or relationship with the other websites that share their IP Address.

122. Internet websites that carry hard core pornographic sexual content can share their IP Address with unrelated non-sexual websites.

123. IP Address 206.251.184.80 provides a good illustration of IP Address sharing. That IP Address is used by over 18,000 unrelated websites including a variety of hardcore sexually oriented websites, such as

[www.4dirtypics.com](http://www.4dirtypics.com)  
[www.a-1--sexmap.com](http://www.a-1--sexmap.com)  
[www.adamandeveshop.com](http://www.adamandeveshop.com)  
[www.addixgalleries.com](http://www.addixgalleries.com)

[www.adultlovecam.com](http://www.adultlovecam.com)  
[www.amateur-sex-sluts.com](http://www.amateur-sex-sluts.com)  
[www.babe-x.com](http://www.babe-x.com)  
[www.badboyfantasies.com](http://www.badboyfantasies.com)

as well as a diversity of websites that are wholly non-sexual, including

[www.abqmennonite.org](http://www.abqmennonite.org) (church in New Mexico)  
[www.acunafurniture.com](http://www.acunafurniture.com) (furniture store in Texas)  
[www.adirondackprinters.com](http://www.adirondackprinters.com) (printer repair in New York)  
[www.african-drums.com](http://www.african-drums.com) (online drum store)  
[www.africanhumanrightscenter.org](http://www.africanhumanrightscenter.org) (advocacy organization in Washington, DC)  
[www.alicebrentano.com](http://www.alicebrentano.com) (real estate agent in Kansas)  
[www.alphabetmoon.com](http://www.alphabetmoon.com) (children's accessories store in Texas)  
[www.amazinggraceministries.net](http://www.amazinggraceministries.net) (missionary organization in Massachusetts)  
[www.angusbookkeeping.com](http://www.angusbookkeeping.com) (accounting firm in California)  
[www.arkansasfoosball.com](http://www.arkansasfoosball.com) (foosball league in Arkansas)  
[www.attorneypaulgold.com](http://www.attorneypaulgold.com) (attorney in Kentucky)  
[www.ayersrockguide.com](http://www.ayersrockguide.com) (Japanese language guide to Australian site)  
[www.bagelsandbeyond.com](http://www.bagelsandbeyond.com) (bagel store in Massachusetts)  
[www.bellol.com](http://www.bellol.com) (clothing manufacturer in China).

124. If any one of the 18,000+ websites that use IP Address 206.251.184.80 is included on the Adult Content Registry, the actions of ISPs to comply with their blocking obligation would block access to all 18,000+ websites. Thus, a requirement to block access to, for example, "[www.amateur-sex-sluts.com](http://www.amateur-sex-sluts.com)" would result in the blocking of "[www.amazinggraceministries.net](http://www.amazinggraceministries.net)," "[www.bagelsandbeyond.com](http://www.bagelsandbeyond.com)" and thousands of other unrelated websites.

125. Blocking obligations imposed on most ISPs targeting any particular URL are very likely to lead to the blocking of access to wholly unrelated websites that share the IP Address of the targeted URL.

126. As an alternative to blocking by Internet Protocol Address, the Act permits ISPs to block by "domain name." If ISPs sought to comply with the Act by blocking by domain name, they would "spoil" or manipulate a data table used in the "domain name lookup" process.



127. Such an approach would still result in the blocking of access to lawful Internet content, because under such an approach the ISP would have to block access to all portions of a website, even if only one portion of a website was designated in the Adult Content Registry. For example, the Geocities Online Community has thousands of unrelated websites all hosted under the [www.geocities.com](http://www.geocities.com) domain name. Thus, if an ISP were required to block access to hardcore or adult oriented websites in the Geocities community (such as [www.geocities.com/realfreepix/index.html](http://www.geocities.com/realfreepix/index.html), [www.geocities.com/sylviakristel2/pictures.html](http://www.geocities.com/sylviakristel2/pictures.html) and [www.geocities.com/brnt524/index.html](http://www.geocities.com/brnt524/index.html)), the ISP would also block access to thousands of unrelated websites, including for example [www.geocities.com/ldsdemocrats/index.html](http://www.geocities.com/ldsdemocrats/index.html) (a political website aimed at Mormons) and [www.geocities.com/saltlakeseagullsafc/saltlakeseagulls.html](http://www.geocities.com/saltlakeseagullsafc/saltlakeseagulls.html) (a Salt Lake City sports club).

128. Although many ISPs could attempt to block access to a website by its IP Address or possibly by its domain name, some ISPs – for some or all of their customers – have no technical means by which they could attempt to block access to a website.

129. For many regional or national ISPs, any action taken to comply with blocking obligations under the Act will affect the Internet access of customers both in Utah and in other states around the country (and in some cases in other countries). In other words, content blocked as a result of the Act will be blocked far outside of Utah's borders.

130. Specifically, the blocking of websites challenged in this Complaint would have a direct and significant harmful affect on interstate and foreign commerce and

communications. In almost all (if not all) cases, the blocking provisions challenged in this Complaint interfere with the ability of Internet users located outside of Utah to access content also located outside of Utah. In most cases, the communications obstructed by the Act would have taken place (but for the Act) entirely outside of the borders of Utah.

131. Wholly innocent and completely lawful websites on the Internet would be blocked if ISPs comply with the Act by blocking access to websites designated in the Adult Content Registry.

**Mandated ISP Blocking of "Pornographic" Material as Determined by the ISP's Customers (Section 4, Utah Code § 76-10-1205)**

132. The effective blocking obligation imposed under this section will have all of the impacts described above with reference to the Adult Content Registry, except that instead of defendant SHURTLEFF designating websites to be blocked, Section 4 permits individual customers to designate websites to be blocked (so long as the customers "reasonably believed" the website to be "pornographic"). Allowing individual customers to impose blocking obligations on ISPs greatly exacerbates the constitutional problems raised by the Adult Content Registry provisions of the Act.

**Mandated ISP Blocking of Harmful-to-Minors Material (Section 7, Utah Code § 76-10-1231)**

133. The effective blocking obligation imposed under this section will have all of the impacts described above with reference to the Adult Content Registry, except that, instead of defendant SHURTLEFF designating websites to be blocked, under Section 7 the ISP will be required to block access to vast numbers of websites on the Internet.

Thus, it is unavoidable that a significant amount of constitutionally-protected non-harmful-to-minors content will also be blocked. Moreover, the actions of many ISPs to block access to harmful to minors content will result in blocking access for all of the customers of the ISP.

**Mandatory Labeling (Section 9, Utah Code § 76-10-1233)**

134. Section 9 of the Act effectively requires that Utah-located or connected websites and other Internet content publishers either to technically block access by minors to content that is harmful to minors, or to "label" material that is harmful to minors as being harmful to minors. The obligation to block access by minors suffers from all of the same problems discussed above with regard to Sections 3 and 5 of the Act. In addition, the obligation to "label" material as harmful to minors constitutes "compelled speech" in violation of the First Amendment.

**The Act's Burden on Interstate Commerce**

135. The Act impacts the speech of online speakers across the nation—not just in the State of Utah—because it is impossible for Internet users to determine the geographic location of persons who access their information. Internet users elsewhere have no way to determine whether information posted to the Web, discussion groups, or chat rooms will be accessed by persons residing in the State of Utah. The various websites on the Internet can be accessed by anyone in the world; therefore, there is no way for speakers to ensure that residents of Utah will not receive their communications. Thus, all users, even if they do not reside in Utah or intend to communicate with residents of Utah, must comply with the Act.

136. The Act unjustifiably burdens interstate commerce and regulates conduct that occurs wholly outside the State of Utah. The Act chills speakers outside of Utah and curtails speech that occurs wholly outside the borders of Utah, thereby causing irreparable harm. Like the nation's railways and highways, the Internet is by its nature an instrument of interstate commerce. Just as goods and services travel over state borders by train and truck, information flows across state (and national) borders on the Internet. Internet content providers that are located outside of Utah, such as The Sexual Health Network, as well as people participating in chat rooms, newsgroups or mail exploders, have no feasible way to determine whether their information will be accessed or downloaded by someone who is located in Utah. Just as a user of the Internet cannot identify the age of another user of the Internet, one also cannot identify where a particular user or speaker resides, or from where a particular user may be accessing or downloading information on the Internet. Due to the nature of the technology, a non-Utahan, even if he or she has no desire to reach anyone in Utah, will be forced to self-censor his or her speech on the Internet in order to comply with the Act and avoid the possibility that a minor from Utah will gain access to this information, thereby subjecting the speaker to prosecution in Utah. In addition, because more than one website is often on a server, blocking a single website will often block many more non-offending websites. As a regional or national ISP typically cannot restrict blocking to Utah users only, such non-offending websites will also be blocked as to users of that ISP in the rest of the United States. Therefore, the Act interferes significantly with the interstate flow of information and with interstate commerce.

137. Moreover, interstate and international computer communications networks—like the nation's railroads—constitute an area of the economy and society that particularly demands uniform rules and regulations. The states of New York, New Mexico, Arizona, Wisconsin, Vermont, Virginia, Pennsylvania, Michigan and South Carolina previously enacted laws similar to the Act, which were enjoined on Commerce Clause grounds because of the inconsistent obligations imposed on online speakers across the country.

138. Because the definition of "harmful to minors" in Utah Code § 76-10-1201(4) depends in part upon "prevailing standards in the adult community" in the State of Utah as a whole, the Act effectively imposes regulations on interstate speech that conflict with the community standards of other States and their local communities. If each state implements its own regulations, as Utah has done, regarding what information can be legally distributed via this new technology, interstate commerce will be greatly inhibited and disrupted as persons around the world try to discern what can and cannot be communicated in the many different jurisdictions connected to these networks.

#### **The Act's Impact on the Plaintiffs**

139. Plaintiffs interact with and use the Internet in a wide variety of ways, including as content providers, access providers and users. The Act burdens plaintiffs in all of these capacities. Plaintiffs who are users and content providers are subject to the Act. These plaintiffs fear prosecution under the Act for communicating, sending, displaying or distributing material that might be deemed by some to be "harmful to minors" under the Act. They also fear liability for material posted by others to their online discussion groups, chat rooms, mailing lists and websites. Plaintiffs have no way

to avoid prosecution under the Act and are left with two equally untenable alternatives: (i) risk prosecution under the Act, or (ii) attempt to engage in self-censorship and thereby deny adults and older minors access to constitutionally protected material.

#### **The King's English Bookshop**

140. Plaintiff The King's English Bookshop was founded in Salt Lake City in 1978. The King's English website, [kingsenglish.booksense.com](http://kingsenglish.booksense.com), provides information about books, including pictures of bookcovers and detailed descriptions of book contents provided by Booksense, a national service for independent booksellers. The website also includes the store's newsletter which offers book reviews, photos, information about upcoming events and other local items.

141. The King's English sells books covering a variety of topics, some of which contain sexual content. It carries, recommends and sells, for instance, such classics as D. H. Lawrence's Lady Chatterly's Lover and Gustave Flaubert's Madame Bovary; contemporary classics from Henry Miller's Tropic of Capricorn to Doris Lessing's The Golden Notebooks to Vladimir Nabokov's Lolita; more recent fiction such as Isabel Allende's The Stories of Eva Luna, Margaret Atwood's The Handmaid's Tale, Michael Ondaatje's The English Patient, Mark Spragg's The Fruit of Stone; and non-fiction, an example of which is Our Bodies Ourselves put out by the Boston Women's Collective and recently re-issued. These and other books that the King's English carries, when recommended on-line, could be described in ways that depict nudity and/or sexual conduct; an example is Margaret Atwood's most recent novel Oryx and Crake, which John Updike called "brilliant," and the Christian Science Monitor described as 'bewitching"; the cover features two nude female torsos joined as one. If the Act is not enjoined, the store will be inhibited from posting constitutionally protected material on its

website and may have to reconsider use of Booksense or any similar national web service. The King's English Bookshop fears prosecution under the Act if it does not self-censor.

142. Because of how the online Booksense system operates, it would be practically impossible for The King's English to review and "label" all of the content on its website.

#### **Sam Weller's Zion Bookstore**

143. Plaintiff Sam Weller's Zion Bookstore was established in Salt Lake City in 1929. The World Wide Web provides Sam Weller's Zion Bookstore with the opportunity to offer its books for sale over the Internet. In addition to selling books over the Internet, Sam Weller's also publishes a bi-monthly newsletter about books, book reviews and lists store events on its website.

144. Some of the books made available through [www.samwellers.com](http://www.samwellers.com) contain references to nudity and sexual conduct. If the Act is not enjoined, Sam Weller's would be forced to risk criminal prosecution for providing constitutionally protected speech on the Internet about books that it routinely sells from its store, or to self-censor its website to remove all references to nudity and sexual conduct. Sam Weller's is considering joining a national web service, such as Booksense, but is concerned as to whether it will subject the firm to prosecution under the Act. This would prevent, for example, individuals looking for information about sexual health or gay and lesbian issues from obtaining access to valuable resources available through the Internet.

145. Because of the volume and dynamic nature of the content on its website, it would be extremely burdensome if not impossible for Sam Weller's to review and "label" all of the content on its website.

#### **Nathan Florence**

146. Plaintiff Nathan Florence believes that the World Wide Web provides a unique and low-cost opportunity to exhibit his work to both local communities and to the world. Some of his art depicts nude figures in a tradition that is centuries old. For example, some of his paintings depict nude women in various positions.

147. Mr. Florence uses his website to display his art, and is worried that some of the depictions of nude figures, as well as other aspects of his art, might be considered in violation of provisions of the Act. Because he is uncertain what will be considered in violation of the Act, he would have to self-censor, shut down his website entirely, or risk criminal prosecution for providing constitutionally-protected artistic expression.

#### **W. Andrew McCullough**

148. Plaintiff Andrew McCullough is a candidate for Attorney General of Utah, and operates a campaign website at [www.andrewmccullough.org](http://www.andrewmccullough.org). This website contains no content that could be considered harmful to minors. The website is, however, hosted on a Web Server located at IP Address 207.150.192.12, along with more than 45,000 other unrelated websites, including sexually oriented websites such as [www.20sex.net](http://www.20sex.net), [www.100-free-porn-revealed.com](http://www.100-free-porn-revealed.com), [www.247porn.net](http://www.247porn.net), [www.adulthoodsex.com](http://www.adulthoodsex.com) and [www.adult-sexspot.com](http://www.adult-sexspot.com). If an ISP takes technical action to block access to these or other sexually oriented websites located at IP Address 207.150.192.12, it is very likely that access to [www.andrewmccullough.org](http://www.andrewmccullough.org) will also be blocked. Thus, McCullough fears that his website will be blocked as a result of actions by ISPs to comply with the Act.

**CSolutions**

149. Plaintiff Computer Solutions, Inc. is both an Internet service provider and a hosting company as defined in the Act. As such, all of the challenged provisions of the Act apply to or affect CSolutions. Complete compliance with Utah Code §§ 76-10-1204, 76-10-1205, 76-10-1206, 76-10-1231, and 76-10-1232 as enacted or amended by the Act may not be possible, and thus CSolutions reasonably fears prosecution under or application of any of those sections to CSolutions. If compliance with those sections is possible, it would be burdensome and costly, and would adversely harm the ability of CSolutions' customers to access constitutionally protected content on the Internet.

150. As a hosting company, the web hosting customers of CSolutions would be subject to Utah Code § 76-10-1233. That section harms CSolutions' ability to compete for and retain customers, and it harms the customers' constitutional rights to post content on the Internet.

**Mountain Wireless**

151. Plaintiff Mountain Wireless is both an Internet service provider and a hosting company as defined in the Act. As such, all of the challenged provisions of the Act apply to or affect Mountain Wireless. Complete compliance with Utah Code §§ 76-10-1204, 76-10-1205, 76-10-1206, 76-10-1231, and 76-10-1232 as enacted or amended by the Act may not be possible, and thus Mountain Wireless reasonably fears prosecution under or application of any of those sections to Mountain Wireless. If compliance with those sections is possible, it would be burdensome and costly, and would adversely harm the ability of Mountain Wireless' customers to access constitutionally protected content on the Internet.

152. As a hosting company, the web hosting customers of Mountain Wireless would be subject to Utah Code § 76-10-1233. That section harms Mountain Wireless' ability to compete for and retain customers, and it harms the customers' constitutional rights to post content on the Internet.

**The Sexual Health Network**

153. Plaintiff The Sexual Health Network's Web website (sexualhealth.com) includes a wide array of sex education materials for people with disabilities and chronic diseases. Some resources are written specifically for The Sexual Health Network, while other materials are adapted from a variety of sources. Topics covered include both general matters (such as information about the effects of aging on sexuality, or ideas to help increase women's sexual pleasure), to disability-specific issues (such as sexual positions that may enhance intercourse for individuals with particular disabilities, or advice on dealing with low sexual self-esteem that may accompany a disability).

154. The articles and other information available on sexualhealth.com necessarily involve the use of sexually explicit language and visual images. Frank, detailed explanations are given in order for the information that the website provides to be useful to its viewers.

155. Sexual Health Network publishes a monthly newsletter that is sent to nearly 5,000 subscribers.

156. The Sexual Health Network's website offered co-branded content, such as webcasts that are produced by Healthology (a health-related website), that are accessible by clicking on links or banners on Sexual Health Network's website.

157. The Sexual Health Network's website also provides links to other sexuality-related websites such as the Sinclair Intimacy Institute (producers of explicit educational videos designed to help couples improve their sex lives).

158. The Sexual Health Network fears that making the materials on the sexualhealth.com website available online could be alleged to constitute "distribution" of "harmful to minors" material and thus subject it to prosecution under the Act.

159. If the Act is not enjoined, the Sexual Health Network must choose between risking criminal prosecution or curtailing its speech by removing from its website any material that could be alleged to be "harmful to minors."

**Utah Progressive Network Education Fund, Inc.**

160. Plaintiff Utah Progressive Network Education Fund, Inc. ("UPNet") is a coalition of organizations and individuals committed to promoting social, racial, economic and environmental justice, and operates a website at [www.upnet.org](http://www.upnet.org). This website contains no content that could be considered "harmful to minors." The website is, however, hosted on a web server located at IP Address 65.121.176.20, along with more than 1,500 other unrelated websites, including sexually oriented websites such as [www.second-cumming.com](http://www.second-cumming.com) and [www.sensualawakenings.com](http://www.sensualawakenings.com). If an ISP takes technical action to block access to these or other sexually oriented websites located at IP Address 65.121.176.20, it is very likely that access to [www.upnet.org](http://www.upnet.org) will also be blocked. Thus, UPNet fears that its website will be blocked as a result of actions by ISPs to comply with the Act.

**American Booksellers Foundation for Free Expression**

161. Plaintiff ABFFE has hundreds of bookseller members who are located from coast to coast, as well as in the State of Utah, many of whom sell materials that

contain descriptions or depictions of nudity or sexual conduct, and which deal frankly with the subject of human sexuality. ABFFE's members are not "adult bookstores." Many member bookstores use the Internet and electronic communications to obtain information and excerpts of books from publishers. For example, member booksellers may review current popular titles such as Nymph by Francesa Lia Block, Pictures & Passion: A History of Homosexuality in the Visual Arts by James W. Saslow, American Pastoral by Philip Roth and The Joy of Sex, which include passages or images describing nudity and sexual conduct. Some member bookstores also have their own webpages that discuss the contents of books sold in stores.

162. ABFFE members' right to learn about, acquire and distribute material describing or depicting nudity and sexual conduct, and their patrons' right to purchase such materials, will be seriously infringed by the Act if it is not enjoined because ABFFE members and the publishers with whom they transact business will be forced to self-censor or risk prosecution under the Act.

**American Civil Liberties Union of Utah**

163. Plaintiff ACLU of Utah not only works to uphold the Bill of Rights, but also devotes considerable resources to public education about civil liberties. The ACLU of Utah maintains a website ([www.acluutah.org](http://www.acluutah.org)) that offers electronic copies of the affiliate's publications, reports, legal documents, press releases and other material related to its legal, legislative, educational and advocacy work. The website is updated at least weekly, and often daily. Some of the ACLU of Utah's online resources contain sexual subject matter. Examples include copies of ACLU of Utah and ACLU court briefs in cases involving arts censorship, obscenity, sex education, privacy rights and

discrimination against gays and lesbians. Additionally, the ACLU of Utah's website links to national ACLU's extensive online resources.

164. The ACLU of Utah does not moderate its computer communications systems because such editing or censorship would be antithetical to the organization's belief in freedom of speech. Furthermore, the ACLU of Utah considers minors to be an important audience for its online resources. If the Act is not enjoined, the ACLU of Utah fears that it would be compelled either to refrain from offering constitutionally protected civil liberties materials or to face potential criminal prosecution.

**Association of American Publishers, Inc.**

165. Plaintiff AAP sues on behalf of its members who are content providers and users of the Internet. Although their businesses are primarily based on print publishing, AAP's members are very actively involved in the Internet. AAP's members create electronic products to accompany and supplement their printed books and journals; create custom educational material on the Internet; communicate with authors and others, receive manuscripts, and edit, typeset, and design books electronically; transmit finished products to licensed end-user customers, communicate with bookstores and other wholesale and retail accounts; and promote authors and titles online.

166. Many of AAP's members have webpages and provide information to the world on the Internet. Some of the content provided by AAP's members contains nudity or sexual conduct. Many of the efforts to ban books in various communities have been directed at books published by AAP's members, and AAP fears that the Act will spawn similar efforts directed at AAP's online publishing. If the Act is not enjoined, AAP members will be forced either to risk criminal liability or to stop providing online access to constitutionally protected books and other related materials.

**The Comic Book Legal Defense Fund**

167. The Comic Book Legal Defense Fund ("CBLDF") represents over 1000 comic book authors, artists, retailers, distributors, publishers and readers located in Utah and the rest of the United States. Comics are a graphic-based art form that has rapidly adapted its content and commerce for the Internet. Today, the largest individual retailers of comic books in the United States are Internet-based, while hundreds of "web comics" artists are posting work every year. Some of their material involves frank sexual content or depictions of nudity. If the Act is not enjoined, CBLDF and its members are concerned that they will have either to risk criminal liability or self-censor constitutionally protected material.

**Freedom to Read Foundation, Inc.**

168. FTRF includes among its members librarians and public and non-public libraries that serve their patrons with access to and content on the Internet. Almost all libraries provide their patrons with facilities to access to the Internet for free or at a low cost. Most libraries also have their own websites and use the Internet for such things as posting catalogues of library materials, posting information about current events, sponsoring chat rooms, providing textual information or art and posting online versions of materials from their library collections. Patrons can, for example, access the website of certain libraries from anywhere in the country to peruse the libraries' catalogues, review an encyclopedia reference or check a definition in a dictionary.

169. Some of the materials provided or made available by libraries contain nudity or sexual conduct. For example, FTRF member libraries' online card catalogues include such works as Forever by Judy Blume, Women on Top by Nancy Friday,

Changing Bodies, Changing Lives by Ruth Bell, Our Bodies, Our Selves by the Boston Women's Health Collective and It's Perfectly Normal by Robie Harris.

170. If the Act is not enjoined, libraries will be inhibited from both posting and providing access to materials on the Internet that describe or depict nudity or sexual conduct. Adult library patrons and Internet users would thus be deprived of access to these constitutionally protected library materials. Given the global and unrestricted nature of the Internet and the past attempts by persons to bar literature and reference items from library collections, many of FTRF's members may choose not to post a substantial amount of expressive material at all—material that many adults might consider useful for themselves or their own children—rather than risk prosecution for posting material that might be illegal under the Act in Utah.

#### **Publishers Marketing Association**

171. Publishers Marketing Association ("PMA") was founded in California in 1983 to represent and serve book, audio and video independent publishers. It now has more than 3,900 publisher members in the United States and Canada, primarily publishers of non-fiction. Thirty of its members are located in Utah.

172. Plaintiff PMA sues on behalf of its members who are content providers and users of the Internet. Although their businesses are primarily based on publishing, many of PMA's members are very actively involved in the Internet. They communicate with authors and others, receive manuscripts, and edit, typeset, and design books electronically; transmit finished products to licensed end-user customers, communicate with bookstores and other wholesale and retail accounts; promote authors and titles; and market titles online.

173. Many of PMA's members have webpages and provide information to the world on the Internet. Some of the content provided by PMA's members contains descriptions or depictions of nudity or sexual conduct. If the Act is not enjoined, members of PMA will be forced either to risk criminal liability or to stop providing online access to constitutionally protected books and other related materials.

### **CAUSES OF ACTION**

#### **COUNT I**

##### **Violation of Adults' Rights Under the First and Fourteenth Amendments of the United States Constitution**

174. Plaintiffs repeat and re-allege paragraphs 1 – 173 as if set forth entirely herein.
175. The Act violates the First and Fourteenth Amendments to the United States Constitution on its face and as applied because it effectively bans and/or unduly burdens constitutionally protected speech by and between adults.
176. The Act violates the First and Fourteenth Amendments because it is not the least restrictive means of accomplishing any compelling governmental purpose.
177. The Act violates the First and Fourteenth Amendments because it is substantially overbroad.

#### **COUNT II**

##### **Violation of Minors' Rights Under the First and Fourteenth Amendments of the United States Constitution**

178. Plaintiffs repeat and re-allege paragraphs 1 – 173 as if set forth entirely herein.



179. The Act violates the First and Fourteenth Amendments to the United States Constitution because it interferes with the rights of minors to access and view material that to them is protected by the First Amendment.

180. The Act is unconstitutional because it prohibits the dissemination to all minors of any material that is deemed "harmful to minors" of any age, despite the fact that some of the material has value for older minors.

181. The Act violates the First and Fourteenth Amendment rights of minors because it is substantially overbroad.

**COUNT III**

**Prior Restraint**

182. Plaintiffs repeat and re-allege paragraphs 1 – 173 as if set forth entirely herein.

183. The Act operates as an unconstitutional prior restraint, and thereby deprive Plaintiffs and their members and customers of (a) access to constitutionally protected content, and (b) the ability to publish constitutionally protected content on the Internet, in violation of the First Amendment to the United States Constitution.

**COUNT IV**

**Inadequate Procedures**

184. Plaintiffs repeat and re-allege paragraphs 1 – 173 as if set forth entirely herein.

185. The Act affords ISPs, Internet content publishers, and Internet users, including Plaintiffs and their members and customers, inadequate procedural protection of their rights, in violation of the First and Fourteenth Amendments to the United States Constitution.

**COUNT V**

**Violation of the Right to Communicate and Access Information Anonymously Under the First and Fourteenth Amendments of the United States Constitution**

186. Plaintiffs repeat and re-allege paragraphs 1 – 173 as if set forth entirely herein.

187. The Act violates the First and Fourteenth Amendment right to communicate and access information anonymously, insofar as it effectively requires Internet users to identify themselves in order to gain access to constitutionally-protected speech.

**COUNT VI**

**Compelled Speech**

188. Plaintiffs repeat and re-allege paragraphs 1 – 173 as if set forth entirely herein.

189. Section 9 of the Act requires Utah-located or connected Internet content publishers, including Plaintiffs and their members and customers, to label their speech as "harmful to minors," in violation of the First and Fourteenth Amendments to the United States Constitution.

**COUNT VII**

**Violation of the Commerce Clause Of the United States Constitution**

190. Plaintiffs repeat and re-allege paragraphs 1 – 173 as if set forth entirely herein.

191. The Act violates the Commerce Clause because it regulates communications that take place wholly outside of the State of Utah.

192. The Act violates the Commerce Clause because it constitutes an unreasonable and undue burden on interstate and foreign commerce.

193. The Act violates the Commerce Clause because it subjects interstate use of the Internet to inconsistent regulations.

**COUNT VIII**

**Preemption Under 47 U.S.C. § 230(c)(1)**

194. Plaintiffs repeat and re-allege paragraphs 1 – 173 as if set forth entirely herein.

195. Portions of the Act violate 47 U.S.C. § 230(c)(1) and as such are preempted pursuant § 230(e)(3) of that statute.

**PRAYER FOR RELIEF**

**WHEREFORE**, plaintiffs respectfully request that the Court:

- A. Declare that sections 2 and 4 through 9 of H.B. 260 violate the First, Fifth and Fourteenth Amendments to and the Commerce Clause of the United States Constitution, and that section 2 of the Act violates 47 U.S.C. § 230(c)(1);
- B. Preliminarily and permanently enjoin Defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the injunction, from enforcing such provisions;
- C. Award Plaintiffs their reasonable costs and fees pursuant to 42 U.S.C. § 1988; and

- D. Grant Plaintiffs such other and further relief as the Court deems just and proper.

Respectfully submitted,

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Attorneys for Plaintiffs

Dated: June 9, 2005



Federal Communications Commission  
Washington, D.C. 20554

February 14, 2005  
Released: February 15, 2005

Mr. Steve Largent  
President

Dear Mr. Largent:

I am writing to you today to commend CTIA and its members, for addressing the important issues that arise with the delivery of content over mobile devices. Mobile content has been of increasing interest to both members of the media and the public in the past few months. As wireless technology advances, consumers are able to access an increasing amount and variety of information through their mobile connections. The development of new wireless technologies presents both benefits and risks to consumers, especially those consumers who are most vulnerable – children. As your members know, as mobile devices have become more ubiquitous, they are increasingly used for work, entertainment, and perhaps most importantly, personal safety. As a result of the development of new mobile data technologies and applications, as well as the growing use of wireless devices by children, the issue of access to adult content by minors on mobile devices has come to the forefront. I applaud the initiative you are taking to address this issue and ask that you consider the following recommendations.

With adult content available from a myriad of sources, now more than ever it is important for carriers, content providers, and parents 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. Therefore, I ask you to help educate parents about their options with regard to content access by minors. Let parents know that they can block access to pay-per-call voice services and access to the mobile Internet through their children's handsets; inform parents of the types of content that children will have access to through download services; and ensure that parents are aware of the different types of services to which their children will have access.

Second, I ask that you consider whether the availability of adult content via mobile devices warrants changes to CTIA's carrier code of conduct to promote industry self-regulation. Through responsible action on the part of wireless carriers and content providers this important social goal can be achieved without government intervention and without interference to the provision of content to adults.

Finally, I encourage you to examine the efforts that are being made by both government and industry in other countries to address the issue of access to adult content by minors. For example, the United Kingdom, Australia, and Israel have each recently confronted this subject, with differing results in each case. This issue is not confined to our borders and we should be mindful that other parts of the international telecommunications industry are facing similar circumstances.

By encouraging independent initiatives by your members and giving parents access to the tools needed to protect their children from inappropriate content you can encourage the continued growth of wireless services as an integral part of every American's daily life.

Sincerely,

John Muleta  
Chief, Wireless Telecom. Bureau  
Federal Communications Commission

### When Medium and Content Converge: The Issue of IPTV

Veronica Pastor  
Assistant General Counsel  
Intelsat

Ten years ago, the Chairman of the US House subcommittee on Telecommunications said that soon we would be able watch our phones, answer our PCs and download our televisions. This future is a lot closer than we think. A survey of telecoms professions attending the annual CeBit conference in Hannover revealed that a large number believe that DSL (Digital Subscriber Line) and IP (Internet Protocol) will be the predominant technologies for video transport in five years. In addition, they expect to see converged IP-based networks for voice, video and data by 2008. And what do you think these telecoms professionals saw as the biggest hurdle implementation of this convergence? Not high investment costs or technological challenges. The greatest single obstacle they perceived was government regulation.

Both the US and Europe are trying to design a regulatory framework for the newest convergence challenge: provision of broadcasting and semi-broadcasting services over the Internet.

#### The U.S. Regulatory Framework

- In the old days:
  - Pre-Computer Proceeding: distinction between common carrier and broadcaster
  - *Computer Cases* introduced distinction between "basic" service (telephony) and "enhanced" services: "basic": service offering transmission capacity for the delivery of information without net change in form or content and subject to Title II (common carrier) regulation; "enhanced": basic service over which a computer processing application that acts on the format, content code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information, and largely free from regulation.
  - Attempt at introducing "video dialtone" in 1992 – an idea whose time had not yet come.
- Telecommunications Act of 1996: distinction between "telecommunications services" – similar to "common carriers", with certain rights (access to unbundled elements of other networks, for example) and certain obligations (universal coverage, access for people with disabilities, access to emergency services). Both are subject to FCC jurisdiction, but

Congress thought best to leave them as unregulated as possible to encourage the development of the Internet.

- Thus the Internet has grown largely free from regulation, except where it intersects with regulated services. For example, the FCC believes in some regulation of Voice over IP services "we believe that any service provider that sends traffic to the PSTN should be subject to [...] compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network." *In the Matter of IP-Enabled Services, Notice of Proposed Rulemaking, released March 10, 2004.*
- IPTV introduces yet another challenge: the conversion of the unregulated Internet with a medium regulated for access and price (telecommunications services) and a medium regulated for access and content (broadcasting). There is also a question of state vs. Federal regulation. The Courts have recognized that Federal regulation is preeminent in cases involving information services, so FCC has exclusive jurisdiction of, for example, VOIP
- The FCC is considering whether the existing regulatory framework should be revisited. So far, IPTV has not been identified as a specific category requiring special regulation. The FCC is focusing on the following areas: How to categorize IP-based Services
  - Market dominance regulation vs public safety and consumer interest regulation: should the paramount interest be ensuring competition or public service obligations?
  - Consumer expectation and substitutability: should IPTV be regulated on the basis of whether consumers perceive it as an information service or a broadcast service
  - Use of the PSTN
  - Closed circuit (peer to peer) offering vs network service offering
  - Facilities layer vs Protocol Layer vs Application Layer

#### Regulatory Treatment

- FCC is required by the Act to forbear from applying regulation to a service unless (i) it is necessary to ensure that charges are just and reasonable, or not unjustly discriminatory, (ii) it is necessary to protect consumers, and (iii) forbearance is consistent with the public interest
- How should emergency service rules such as provision of 911, call-back, location information service apply to IP-based services such as IPTV – probably not, as these requirements are typically associated with providers of telephony, but what about providers of integrated wireless IPTV?
- How should rules on Disability Access apply? Should the rules that apply to telecommunications service providers and information service providers apply to IPTV?
- Carrier compensation – Once TV is delivered over telephone wires in an IP world, how should the carrier be compensated? Who will

- foot the bill? There has been a long and arduous fight over this issue in the VOIP world.
- o Universal service funding – should non-common carriers and non-facilities based providers be subject to universal service fund obligations?
  - o Wireless, Title II or Broadcasting regulation – How to regulate IPTV provided in real time and store and forward IPTV?

### **The European View**

- o Initially each European country had its own regulation for broadcasting and telecommunications
- o In 1989, the European Commission passed the *Television without Frontiers Directive* (Directive 89/552/EEC) to regulate broadcasting at a Europe-wide level : all broadcasters are regulated in at least one, but only one, Member State. Member States may not hinder broadcasts by broadcasters under the jurisdiction of another Member State.
- o On 1 June 2005, the Commission adopted *i2010 – A European information society for growth and jobs*, with a view to revamping the audiovisual regulatory framework and revising the scope of the TVWF Directive. Need for “an integrated approach to information society and audiovisual media policies in the EU as communication networks, media, content, services and devices are undergoing digital convergence.
- o Finding that increased economic and legal certainty brought about by clear new regulation will encourage new services and more content.

### The New Television Without Frontiers Consultation

- o Commenters favored the establishment of a **comprehensive framework** for any form of electronic delivery of audiovisual content over regulating all services similar to television similarly.
- o Distinction: **linear audiovisual services** (where the content service provider decides upon the moment in time when a specific program is offered and the composition of program schedules; i.e., broadcasting, streaming and near video on demand, regardless of platform) vs **non-linear audiovisual services** (on-demand services where users can choose the content they wish at any time)
- o **Two tiers of rules: (i) Basic tier** (protection of minors and human dignity and similar principles of general interest), applicable to all audiovisual content services, and **(ii) lighter and modernized broadcasting rules** for linear audiovisual services.
- o Excludes from regulation private mass communication and individual communication.
- o The Basic Tier:

- o Protection of minors and human dignity: No European standards of public decency permitting definition of “pornography” or “gratuitous violence”, so Member States will define these notions. Level of protection should be the same for linear and non-linear services, but means of implementation will vary according to service.
- o Identification of commercial content. All advertising should be clearly identifiable as such, prohibition against surreptitious advertising.
- o Restrictions on promotion of alcohol, tobacco and advertising targeted at minors for linear services
- o Right of reply
- o Identification/masthead to ensure access to identity of content provider to ensure people can exercise their rights
- o Territorial competence: EU Members and non-EU members
  - o Establishment: “where a significant part of the workforce involved in the pursuit of television broadcasting activity” and “editorial decisions”. Rejection of language of a program as criterion.
  - o Subsidiary criteria for broadcasters outside the EU: jurisdiction of they uplink from the EU, use satellite capacity appertaining to a EU member, or use a frequency granted by a Member State. For non-linear services, possibility of requiring registration in Member State of its choosing, otherwise, any and all Member States can exercise jurisdiction.
- o In England, Ofcom was created in 2003 as a single regulator for the whole sector (there were 5 before)
- o Ofcom’s mandate does not include regulation of the Internet -- but with IPTV and TVWF, how can it escape regulation by Ofcom?

Other countries have avoided the issue by decisive and early action: Korea: IPTV should not infringe on the areas of terrestrial broadcasters or cable TV operators, so under Korean IPTV rules, telecom operators will not be allowed to retransmit over-the-air programs nor to start 24-hour streaming services, only video clips on demand.

## A FEW USEFUL TELECOM DEFINITIONS

By Jonathan Spencer  
General Counsel  
Shenandoah Telecommunications Company

**802.11x:** a set of standards established by the IEEE (Institute of Electrical and Electronic Engineers) for wireless local area networks commonly referred to as Wi-Fi

**Access Charges:** amounts charged to Long Distance Carriers by Local Telephone Companies for connecting an end-user customer to the Long Distance Carriers network. The Long Distance Company is required to pay access charges to both the originating and terminating local telephone company. The access rate charged for Interstate calls and Intrastate calls can and usually are different. If a call is initiated or terminated as a VOIP call, some or all of the access charges are avoided.

**Bandwidth:** the capacity of a connection or network or a measure of the amount of data that can pass along a circuit at one time.

**Circuit Switched Network:** a network which creates upon demand a dedicated physical connection between any two points. Traditional telephone networks such as the PTSN use circuit switching.

**CLEC:** a competitive local exchange carrier is any company which offers local phone service other than the incumbent local telephone company.

**CO:** central office: Where the telephone company maintains its switching equipment. In traditional copper telephone networks, every home and PBX is connected to a central office by at least one dedicated copper circuit.

**Cramming** – An illegal practice in which customers are billed for additional telephone features they didn't order.

**Domain Name System (DNS):** A system by which one Internet host can find another. DNS translates words (Domain Names) into numbers that Internet computers can understand

**E911:** Enhanced 911 service. 911 service that includes the capability of the Emergency Response Center to automatically obtain the location of the caller. The FCC has mandated that all telecommunications carriers including VOIP providers that connect to the PTSN provide E911.

**Federal Excise Tax** A 3% tax imposed by the federal government on all telecommunications services including local, long distance and wireless bills. This tax was first imposed after the Spanish American War

**Federal Subscriber Line Charge** This charge implemented by the Federal Communications Commission (FCC) on consumers is intended to recover some of the costs associated with a customer's local telephone line to access the interstate long distance network.

**Frame Relay** a network interface protocol used primarily for the transmission of data. It is a high-speed switching technology. The basic units of information transferred are variable length frames, using only two bytes for header information. Due to the excessive and variable nature of delays inherent in a Frame Relay network, Frame Relay is generally considered to be unsuitable for voice and video applications

**Franchised Cable Operator:** A multi-channel video service provider that obtains a franchise from a local authority to use public rights of way to deliver its programming

**FTTC (Fiber to the Curb)** a fiber optic network that connects from the carrier network to the curb, and from there to the premises by copper wire or coaxial cable.

**FTTN (Fiber to the Neighborhood/Node)** a fiber optic network that connects from the carrier network to a central node within a particular block or neighborhood and then to the premises using copper wire or coaxial cable

**FTTP (Fiber to the Premises)** A fiber-optic network that connects directly from the carrier network to the user premises.

**Incumbent Local Exchange Company (ILEC):** the local telephone company which may be a former Bell Operating Company (Verizon, Bell South, Qwest or SBC), an Independent Telephone Company (Citizens, Century Telephone), a rural telephone company or a telephone cooperative. The ILEC is often subject to carrier of last resort obligations

**Information Service:** is defined by the Telecommunications Act of 1996 as the offering the capability to generate, acquire, share, transform, process, retrieve, transform, utilize or make available information via a telecommunications system. Information Services are exempt from the taxes and governmentally imposed surcharges such as universal service fees that Telecommunications Services must pay.

**Internet:** The global IP based network which is open to the public and to which many private IP networks are connected. The internet is a "best efforts" delivery network meaning that all traffic is given equal priority and treated equally.

**Internet Protocol (IP):** a networking protocol that provides communications across interconnected networks. First developed by the Defense Department's Advanced Projects Research Administration (DARPA) in the 1970's and is the most widely used protocol. Sometimes referred to as TCP/IP with TCP referring to Transmission Control Protocol.

**IP Networks:** A packet switched network that utilizes the IP protocol. IP networks can be private or open to the public like the Internet.

**IPTV:** The provision of television type programming over an IP network

**LAN :** Local Area Network. A data communications network that lies within a limited space (such as a building) to connect telephone lines, computers, modems, printers, etc.

**Leased Line:** A phone line dedicated for exclusive use from one location to another. A Leased Line is typically not connected to the PTSN

**Lifeline/Link-Up Program:** A Federal program designed to provide telephone service to the poor and elderly at a reduced cost to assure they can be reached in case of an emergency.

**Local Access And Transport Area (LATA):** Geographical boundaries within which local telephone companies may provide local telephone services (and some limited toll services).

**Local Number Portability Charge (LNP):** This fixed monthly charge allows local telephone companies to recover certain costs for providing "portability" to its customers.

**Multi-channel Video Service Provider:** Any provider of multiple channels of video or broadcast television usually for a fee. A multi-channel video service provider may be a cable TV provider, a satellite TV provider or a wireless cable TV provider; however, an ISP is not a MVSP.

**Network Access Point (NAP):** A centralized point where Internet traffic is exchanged or shared.

**Node:** The location where a customer's network is connected to the carrier's network

**Open Video Systems:** The Telecommunications Act of 1996 authorized telephone companies to build and operate a cable TV system provided that the local telephone company would allow third parties to lease and utilize a portion of the Open Video System to deliver their own content. Very few Open Video Systems have been built as a result of a court decision allowing local authorities to require the operators of Open Video Systems to obtain a Cable TV Franchise

**packet:-** A unit of data sent across a network. When a large block of data is to be sent over a network, it is broken up into several packets, sent, and the reassembled at the other end. A packet's format is based upon the protocol used.

**Packet Switched Networks:** any network that utilizes data packets to send information to a remote location. Because each individual packet travels over the network independently and is individually addressed, each packet may take a different route to its destination and does not require a dedicated path.

**Peering:** The exchange of traffic between two internet networks at no cost. However, under peering a network may only transfer traffic to the other network which has a final destination that network. This is in contrast to the telephone system where telephone companies pay to pass traffic (See Access Charges). Not all internet traffic is exchanged without cost, some networks require other (typically smaller ISPs and networks) to purchase a connection or "transit" services.

**PTSN:** The public telephone switched network, the worldwide voice telephone network.

**PBX:** Short for private branch exchange, a private telephone network used within an enterprise. Users of the PBX share a certain number of *outside lines* for making telephone calls external to the PBX. A variation on the PBX theme is the *centrex*, which is a PBX with all switching occurring at a local telephone office instead of at the company's premises.

**PON (Passive Optical Network):** a fiber-based network built without active electronics. A PON network uses optical splitters rather than active electronics, which reduces operating costs. Two types of PONs are B-PON and G-PON.

**Price Cap Regulation:** A method of rate regulation that regulates a telephone company's rates by imposing a price cap (which is adjusted for inflation). A carrier subject to Price Cap regulation can achieve greater profits by reducing costs. Most large local carriers are subject to Price Cap Regulation

**Private Cable Operator:** A provider of video services which is not required to obtain a local cable franchise. Most Private Cable Operators serve MultiDwelling Unit Communities (i.e. Apartment Buildings, Condominiums)

**QOS/COS – Quality of Service/ Class of Service –** A service offered by telecommunications carriers pursuant to which different types of traffic on a private IP network are given different priorities. QOS allows carriers to promise delivery of bandwidth intensive services such as video conferencing.

**Rate of Return Regulation:** The traditional means by which a regulators determined how much a local telephone company was permitted charge. Rate of Return carriers have their rates set at a level which guarantees a specific rate of return based on the carrier's eligible asset base. Unlike a company subject to price cap regulation, a rate of return carrier can petition for higher rates if its

costs increase, but also may be forced to lower rates if it achieves any cost savings. Most small and rural carriers are subject to Rate of Return Regulation

**Seven Layer OSI Model:** A model of how networks work developed by the International Standards Organization to help promote inter-operability between networks developed by different vendors. The model divides a network into the following 7 layers

Layer 7:	Applications	
Layer 6:	Presentation	Determines how a signal or data stream is "presented"
Layer 5:	Session	How two computers or network initiate, keep track and terminate individual "dialogs", sessions or conversations between two users or applications
Layer 4:	Transport	Controls how information is passed over a network TCP or Transmission Control Protocol is a Layer 4 protocol
Layer 3:	Network	Controls how data is moved between networks and computers IP or Internet Protocol is a Layer 3 protocol
Layer 2:	Data Link	Controls how the communication line is operated. Examples include Frame Relay and Point to Point Protocol (PPP)
Layer 1:	Physical	How the electrical or optical signals are physically transmitted, and example of a Layer 1 protocol is SONET

Not all protocols are limited to a single layer and many protocols such as MPLS operate on many layers at the same time. Similarly, TCP/IP refers to both the network and transport layer while computer operating systems such as Linux and Windows and browsers include the protocols for Layer 5 to 7.

**Subscriber Line Charge.** A governmentally authorized monthly fee paid by telephone customers. The money is used to compensate the local telephone company for part of the cost of maintenance and installation of the telephone wire, poles, and other facilities that link a customer's home to the telephone network. There can be both federal and state authorized subscriber line charges

**TCP/IP:** Transmission control protocol/internet protocol. TCP/IP is the transport layer and Internet layer, respectively, of the Internet suite of protocols. TCP corresponds to layer 4 of the OSI protocol stack: IP performs some of the functions of layer 3. It is a connectionless protocol used primarily to connect dissimilar networks to each other.

**Tariff:** A tariff is a published rate for a specific telecommunications service, equipment, or facility that constitutes a public contract between the user and the Telecommunications supplier (i.e., carrier); tariff services and rates are established by and for telecommunications common carriers in a formal process in which carriers submit filings for federal or state government regulatory review, public comments, possible amendment, and approval.

**Telecommunications Relay Center Fee:** This federally mandated fee helps pay for the relay center that transmits and translates calls for people who are deaf, hard-of-hearing or speech disabled.

**Transit Service:** Where one ISP or Internet network purchases the right to send traffic across ("transit") another ISP's network where such traffic has a final destination on a third network

**Universal Service Fund Surcharge:** Telephone companies are required by the FCC to collect and contribute to a federal universal service fund (USF). The USF helps to make phone service affordable and available to those with low incomes, those living in areas where the costs of providing telephone service is high, schools, libraries, and rural health care providers. USF surcharges may also be assessed at the state level.

**UNE:** Unbundled Network Elements (also known as UNE) are a requirement mandated by the Telecommunications Act of 1996. They are the parts of the network that the ILECs (local telephone companies) are required to offer on an unbundled basis. Together, these parts make up a loop that connects to a DSLAM (High Speed internet connection) or a voice switch (or both). The loop allows non-facilities-based telecommunications providers to deliver service without laying network infrastructure (copper/fiber).

**UNE-Platform:** a combination of Unbundled network elements (loop + port where the port involves switching which is bought per minute at a rate from the incumbent local exchange carrier) that allow end to end service delivery without any facilities..

**Telecommunications Service:** the transmission between or among two or more points specified by the user of information of the user's choosing without change in the form or content.

**Video over IP:** The transmission of a video signal over an IP network, Types of Video over IP applications include, webcasting, video downloads, video conferencing and IPTV.

**Virtual Private Network (VPN):** a service offering provided by telecommunications carriers which allows the users to simulate having a private network of dedicated circuits. VPN's are not limited to IP networks. VPNs are generally software defined networks which rely upon encryption to separate the VPN's traffic.

**VOIP (Voice over Internet Protocol):** the use of an IP network to send a real-time telephone quality voice signal . VOIP may be used as either all or part of the transmission path. If a VOIP telephone call is transmitted without using any portion of the PTSN, it is currently classified as an information service.

**Wi-Fi:** A wireless local area network which can be used to connect personal computers, laptops and printers to each other and to other networks such as the Internet.



**Wimax:** Similar to Wi-Fi but covers a larger area. Officially, Wimax is a wireless metropolitan area network that adheres to the IEEE 802.16 standard

**Video Choice Act of 2005 (Introduced in Senate)**

S 1349 IS

109th CONGRESS  
1st Session  
**S. 1349**

To promote deployment of competitive video services, eliminate redundant and unnecessary regulation, and further the development of next generation broadband networks.

**IN THE SENATE OF THE UNITED STATES**

**June 30, 2005**

Mr. SMITH (for himself and Mr. ROCKEFELLER) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

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**A BILL**

To promote deployment of competitive video services, eliminate redundant and unnecessary regulation, and further the development of next generation broadband networks.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the `Video Choice Act of 2005'.

**SEC. 2. FINDINGS.**

Congress finds the following:

- (1) Cable rates continue to rise substantially faster than the overall rate of inflation.
- (2) Wire-based competition in video services is limited to very few markets. According to the Federal Communications Commission, only 2 percent of all cable subscribers have the opportunity to choose between 2 or more wire-based video service providers.
- (3) It is only through wire-based video competition that price competition exists. The Government Accountability Office has confirmed that where wire-based competition exists, cable rates are 15 percent lower than in markets without competition.

(4) It is in the public interest to further wire-based competition in the video services market in order to provide greater consumer choice and lower prices for video services.

(5) To spur competition in the communications industry, Congress has decreased the regulatory burden on new entrants, thereby increasing entry into the market and creating competition.

(6) The United States continues to fall behind in broadband deployment rates. According to a recent study by the International Telecommunications Union, the United States is now ranked 16th in the world in broadband deployment.

(7) The deployment of advanced high capacity networks would greatly spur economic development in rural America.

(8) The deployment of advanced networks that can offer substantially higher capacity are critical to the long-term competitiveness of the United States.

### SEC. 3. AMENDMENT TO COMMUNICATIONS ACT.

Title VI of the Communication Act of 1934 (47 U.S.C. 521 et seq.) is amended by adding at the end the following:

#### ***PART VI--VIDEO CHOICE***

##### **SEC. 661. DEFINITION.**

In this part, the term 'competitive video services provider' means any provider of video programming, interactive on-demand services, other programming services, or any other video services who has any right, permission, or authority to access public rights-of-way independent of any cable franchise obtained pursuant to section 621 or pursuant to any other Federal, State, or local law.

##### **SEC. 662. REGULATORY FRAMEWORK.**

(a) Redundant Franchises Prohibited- Notwithstanding any other provision of this Act, no competitive video services provider may be required, whether pursuant to section 621 or to any other provision of Federal, State, or local law, to obtain a franchise in order to provide any video programming, interactive on-demand services, other programming services, or any other video services in any area where such provider has any right, permission, or authority to access public rights-of-way independent of any cable franchise obtained pursuant to section 621 or pursuant to any other Federal, State, or local law.

(b) Fees-

(1) IN GENERAL- Any competitive video services provider who provides a service that otherwise would qualify as a cable service provided over a cable system shall be subject to the payment of fees to a local

franchise authority based on the gross revenues of such provider that are attributable to the provision of such service within such provider's service area.

(2) CONSIDERATIONS- In determining the fees required by this subsection--

(A)(i) the rate at which fees are imposed shall not exceed the rate at which franchise fees are imposed on any cable operator providing cable service in the franchise area, as determined in accordance with section 622 and any related regulations; or

(ii) in any jurisdiction in which no cable operator provides service, the rate at which franchise fees are imposed shall not exceed the statewide average; and

(B) the only revenues that shall be considered are those attributable to services that would be considered in calculating franchise fees if such provider were deemed a cable operator for purposes of section 622 and any related regulations.

(3) BILLING- A competitive video services provider shall designate that portion of the bill of a subscriber attributable to the fee under paragraph (2) as a separate item on the bill.

(c) Terms of Service- A competitive video services provider shall--

(1) be subject to the retransmission consent provisions of section 325(b);

(2)(A) carry, within each local franchise area, any public, educational, or governmental use channels that are carried by cable operators within such franchise area pursuant to section 611; or

(B) provide, in any jurisdiction in which no cable operator provides service, reasonable public, educational and government access facilities pursuant to section 611;

(3) be subject to the must-carry provisions of section 614;

(4) carry noncommercial, educational channels as required by section 615;

(5) be considered a multichannel video programming distributor for purposes of section 628 and be entitled to the benefits and protection of that section;

(6) protect the personally identifiable information of its subscribers as required in section 631;

(7) comply with any consumer protection and customer service requirements promulgated by the Commission pursuant to section 632;

(8) not be subject to any other provisions of this title; and

(9) not deny services to any group of potential residential subscribers because of the income of the residents of the local area in which such group resides.

(d) Regulatory Treatment- Except to the extent expressly provided in this part, neither the Commission nor any State or political subdivision thereof may regulate the rates, charges, terms, conditions for, entry into, exit from, deployment of, provision of, or any other aspect of the services provided by a competitive video services provider.

`(e) State and Local Government Authority- Except as provided in subsection (a), nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to enact or enforce any consumer protection law.'.

109th CONGRESS  
1st Session  
**S. 1504**

**SEC. 4. REGULATION OF COMMON CARRIERS.**

Section 651(a)(3) of the Federal Communications Act (47 U.S.C. 571(a)(3)) is amended--

- (1) in subparagraph (A), by striking `or' after the semicolon;
- (2) in subparagraph (B), by striking the period and inserting `; or'; and
- (3) by adding at the end the following:  
 `(C) if such carrier is a competitive video services provider providing video programming pursuant to part VI of this title, such carrier shall not be subject to the requirements of this title but instead shall be subject only to the provisions of part VI of this title.'.

**SEC. 5. EXISTING FRANCHISE AGREEMENTS.**

Any franchise agreement entered into by a franchising authority and a competitive video service provider for the provision of video service prior to the date of enactment of this Act shall be exempt from the provisions of this Act for the term of such agreement.

To establish a market driven telecommunications marketplace, to eliminate government managed competition of existing communication service, and to provide parity between functionally equivalent services.

**IN THE SENATE OF THE UNITED STATES**

**July 27, 2005**

Mr. ENSIGN (for himself and Mr. MCCAIN) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

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**A BILL**

To establish a market driven telecommunications marketplace, to eliminate government managed competition of existing communication service, and to provide parity between functionally equivalent services.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

- (a) Short Title- This Act may be cited as the `Broadband Investment and Consumer Choice Act'.
- (b) Table of Contents- The table of contents for this Act is as follows:
  - Sec. 1. Short title; table of contents.
  - Sec. 2. Findings.
  - Sec. 3. General principle.
  - Sec. 4. Definitions.
  - Sec. 5. Consumer communications service.
  - Sec. 6. Federal quality standards.
  - Sec. 7. Consumer access to content and applications.
  - Sec. 8. Regulatory authority of the commission.
  - Sec. 9. Network interconnection and access requirements.
  - Sec. 10. Unbundled access to copper loops, physical collocation, and resale.
  - Sec. 11. Number portability.
  - Sec. 12. Special provisions for 2-percent carriers.
  - Sec. 13. Video services.
  - Sec. 14. Copyright limitations on exclusive rights video service providers.
  - Sec. 15. Municipally owned networks.

**SEC. 2. FINDINGS.**

Congress finds the following:

- (1) Since passage of the Telecommunications Act of 1996, there have been dramatic changes in the industry, technology, and marketplace requiring Congress to revisit the communications policy of the Nation.
- (2) Inter-modal competition is bringing consumers more choice in voice, data, and video service options than ever before.
- (3) A new policy framework is required to allow functionally equivalent services to compete fairly.
- (4) Silos of regulation based on historical regulatory classifications only invite arbitrage and result in government influenced market distortions.
- (5) Such market distortions coupled with lack of regulatory certainty is chilling investment and stalling deployment of broadband networks.
- (6) The United States is falling behind the world in broadband penetration and it must encourage investment to regain a leadership position in the world.
- (7) Communications networks are global in nature and the United States must eliminate barriers for domestic communications providers to compete in the global marketplace.
- (8) As the United States transitions to a market driven communications service sector, consumers should be protected with a safety net of access to affordable Basic Telephone Service.
- (9) A new communications framework should foster consumer value and choice by unleashing markets, in lieu of government-managed competition.
- (10) The 1's and 0's of the digital age are not constrained by State lines or national boundaries, therefore, a patch work quilt of State and local regulations will only stifle growth and impose undue costs and burdens on consumers.
- (11) In the event that market failure leads State or local governments to contemplate construction of their own communications services, the option to enter that market should first be provided to commercial providers under similar terms to ensure that such governments are not competing unnecessarily with private industry.
- (12) Robust competition coupled with rapid number portability will empower consumers to choose the best services at the best prices.

**SEC. 3. GENERAL PRINCIPLE.**

- (1) **APPLICABILITY OF THE COMMUNICATIONS ACT OF 1934-** Except as provided in this Act, any conduct, activity, service, or service provider shall on or after the date of enactment of this Act, be subject only to the requirements of this Act, if such conduct, activity, service, or service provider was, before the date of enactment of this Act, subject to--

(A) titles I, II, and VI or section 332 of the Communications Act of 1934 (47 U.S.C. 151 et seq.);

(B) any equivalent State common carrier law or regulation with respect to telecommunications, telecommunications services, or information services; or

(C) any State or local law, regulation, or order with respect to cable services or video services.

(2) **LIMITATION ON GOVERNMENT AUTHORITY-** Notwithstanding any other provision of Federal, State, or local law, and except as provided in this Act, no Federal, State, or local government shall have authority--

(A) to regulate the rates, terms, price, or quality of any communications service;

(B) to require any facilities-based communications service provider to provide third parties with access to its facilities; or

(C) to regulate the rates, terms, and conditions, if any, on which a facilities-based communications service provider chooses to afford third parties with access to its facilities.

(3) **EFFECT ON TITLES IV, V, VII OF THE COMMUNICATIONS ACT OF 1934-** Nothing in this Act shall be construed to affect title IV, V, or VII of the Communications Act of 1934 (47 U.S.C. 151 et seq.) and the provisions of such titles shall be applicable to any conduct, activity, service, or service provider subject to this Act.

(4) **AFFECT ON CERTAIN PROVISIONS OF TITLE II OF THE COMMUNICATIONS ACT OF 1934-**

(A) **IN GENERAL-** Nothing in this Act shall be construed to affect the authority of the Commission under sections 206, 207, 208, 209, 224, 225, 226, 227, 229, 230, 253, and 255 of the Communications Act of 1934.

(B) **AUTHORITY STILL VALID-** Except as provided otherwise in this Act, any conduct, activity, service, or service provider subject to this Act shall be subject to the authority and the requirements of the provisions of the Communications Act of 1934 described in subparagraph (A).

(5) **NO AFFECT ON STATE LAWS OF GENERAL APPLICABILITY-** Nothing in this Act is intended to affect State laws of general applicability to all businesses, except to the extent that such laws are inconsistent with this Act.

(6) **DIRECT-TO-HOME SATELLITE SERVICES-** No State or local government shall have the authority to regulate through franchise agreements or otherwise direct-to-home satellite services, including any activity, conduct, or matter concerning--

(A) rates;

(B) services;

(C) billing;

(D) equipment; and

(E) sales.

## (7) REGULATORY TREATMENT OF MOBILE SERVICES-

(A) FORBEARANCE- The Commission shall forbear from applying any regulation, provision, or requirement imposed by this Act or the Communications Act of 1934 to a mobile service or persons or classes of persons engaged in the provision of such service, to the extent such persons are engaged in the provision of such service, in all of the geographic markets served by such service, unless the Commission determines that enforcement of such regulation or provision is necessary--

- (i) because of the lack of competition among providers of such service; or
- (ii) for the protection of public health and safety.

## (B) PETITION FOR FORBEARANCE-

(i) IN GENERAL- Any provider or class of providers of a mobile service may submit a petition to the Commission requesting that the Commission exercise the authority granted under subparagraph (A) with respect to that provider or class of providers.

(ii) 1-YEAR REVIEW PERIOD- Not later than 1 year after the Commission receives a petition submitted under clause (i), such petition shall be deemed granted if the Commission does not deny the petition on either of the grounds described in subparagraph (A), unless such 1-year period is extended by the Commission.

(iii) EXTENSION OF REVIEW PERIOD- The Commission may extend the initial 1-year period under clause (ii) by an additional 90 days if the Commission finds that an extension is necessary to complete the determination required by that clause.

(iv) AUTHORITY OF COMMISSION- The Commission--  
(I) may grant or deny a petition in whole or in part; and

(II) shall explain its decision in writing.

## (8) REGULATORY TREATMENT OF SEAMLESS MOBILITY-

(A) IN GENERAL- In implementing the provisions of this Act or any other proceeding, the Commission shall not take any action to impede the development of seamless mobility.

(B) DEFINITION- For purposes of this paragraph, the term 'seamless mobility' means the ability of a consumer and connecting devices of consumer to move easily and smoothly between and among internet protocol enabled technology platforms, facilities, and networks.

(9) RULEMAKING- The Commission shall have authority to establish rules to implement the provisions of paragraphs (3) and (4) that are no greater or lesser than the requirements contained in the titles described in paragraph (3) and the sections described in paragraph (4).

**SEC. 4. DEFINITIONS.**

(a) In General- For purposes of this Act:

(1) BASIC TELEPHONE SERVICE; BTS- The term 'Basic Telephone Service' or 'BTS'--

(A) means a single-line flat rate voice communications service--

- (i) within a traditional local calling area;
- (ii) with access to 911;
- (iii) with touch tone dialing; and
- (iv) with access to long distance; and

(B) does not include any interexchange communications wireline service.

(2) BROADBAND COMMUNICATIONS SERVICE- The term 'broadband communications service' means a communications service enabling the transmission of communications at a capacity greater than 64 kilobits per second.

(3) COMMISSION- The term 'Commission' means the Federal Communications Commission.

(4) COMMUNICATIONS SERVICE- The term 'communications service'--

(A) means any service enabling an end user to transmit, receive, store, forward, retrieve, modify, or obtain voice, data, image, or video communications using any technology, including--

- (i) copper;
- (ii) coaxial cable;
- (iii) optical fiber;
- (iv) terrestrial fixed wireless;
- (v) terrestrial mobile wireless;
- (vi) satellite;
- (vii) power lines; or
- (viii) successor technologies; and

(B) does not include--

- (i) television or radio broadcasting; and
- (ii) any service that is not provided to the public or to a substantial portion of the public.

(5) CONSUMER- The term 'consumer'--

(A) means a consumer of goods or services whether for a fee, in exchange for an explicit benefit, or provided for free; and

(B) includes--

- (i) an end user of communications service;
- (ii) individuals;
- (iii) partnerships;
- (iv) associations;
- (v) joint-stock companies;
- (vi) trusts; and
- (vii) corporations.

(6) COPPER LOOPS- The term 'copper loops' means an entirely copper cable transmission facility used to provide circuit switched services, between a distribution frame (or its equivalent) in the central office of an incumbent local exchange carrier and the loop demarcation point at the premise of a consumer.

(7) ELIGIBLE TELECOMMUNICATIONS CARRIER; ETC- The term 'eligible telecommunications carrier' or 'ETC' means a telecommunications carrier that has been determined, under section 214(e) of the Communications Act of 1934 (47 U.S.C. 214(e)), to be eligible for Federal universal service support.

(8) FACILITIES-BASED PROVIDER- The term 'facilities-based provider' means a provider of a communications service to the extent that such provider makes available such communications service predominantly by means of its own network.

(9) FRANCHISE- The term 'franchise' has the meaning given to such term in section 602(9) of the Communications Act of 1934 (47 U.S.C. 522(9)).

(10) INCUMBENT LOCAL EXCHANGE CARRIER- The term 'Incumbent Local Exchange Carrier' has the meaning given to such term in section 251(h) of the Communications Act of 1934 (47 U.S.C. 251(h)).

(11) INTERCONNECTION- The term 'interconnection' means the physical linking of 2 networks whether directly or indirectly for the mutual exchange of non video traffic.

(12) NARROWBAND COMMUNICATIONS SERVICE- The term 'narrowband communications service' means a communications service enabling the transmission of communications at a capacity of not more than 64 kilobits per second.

(13) PUBLIC SWITCHED TELEPHONE NETWORK- The term 'public switched telephone network' means the collection of interconnected circuit switched telecommunications.

(14) SATELLITE CARRIER- The term 'satellite carrier' has the meaning given to such term in section 119(d)(6) of title 17, United States Code.

(15) TRANSITING SERVICE- The term 'transiting service' means a service provided by a facilities-based provider which facilitates the indirect interconnection between 2 other facilities-based providers on the circuit switched network.

(16) 2-PERCENT CARRIER- The term '2-percent carrier' means an incumbent local exchange provider which serves in aggregate less than 2 percent of the access lines of the Nation on the date of enactment this Act.

(17) VIDEO SERVICE- The term 'video service' means--

- (A) video programming;
- (B) interactive on demand services; and
- (C) other programming services.

(18) VIDEO SERVICE PROVIDER- The term 'video service provider'--

- (A) means a provider of video service that utilizes a public right-of-way in the provision of such service; and

(B) does not include--

- (i) a satellite carrier;
- (ii) any person providing video programming using radio communication;
- (iii) any other provider of video service that does not use a public right-of-way in the provision of its service; or
- (iv) any person providing video service by means of a commercial mobile service, unless such person has substantially replaced a video service provider described in subparagraph (A) by occupying a position in the video service market comparable to that occupied by such provider.

(b) Common Terminology- Except as otherwise provided in subsection (a), terms used in this Act shall have the same meaning given to such terms under sections 3, 332(d), and 602 of the Communications Act of 1934 (47 U.S.C. 153, 332(d), and 522).

## SEC. 5. CONSUMER COMMUNICATIONS SERVICE.

(a) Basic Telephone Service Safety Net- Each telecommunications carrier that is deemed to be an incumbent local exchange carrier on the date of enactment of this Act and any ETC shall offer BTS to business and residential customers throughout the service territory of such incumbent local exchange carrier, as such service territory was defined on the date of enactment of this Act.

(b) Rate Cap-

(1) IN GENERAL- Until January 1, 2010, BTS rates charged by an incumbent local exchange carrier shall be capped at current basic local residential or business rates.

(2) EXCEPTION- The cap under paragraph (1) does not include additional fees and charges that may be imposed to cover expenses related to--

- (A) subscriber line and universal service charges; and
- (B) other similar taxes and fees.

(3) ANNUAL ADJUSTMENT- After January 1, 2010, BTS rate caps may be adjusted annually by the incumbent local exchange carrier by an amount not to exceed any adjustment in the Consumer Price Index.

(c) Expansion of BTS- An incumbent local exchange carrier or an ETC may expand or modify the services it provides in its BTS offering, if such expansion or modification results in a BTS offering that is equal or more favorable to consumers.

(d) BTS Technology-

(1) IN GENERAL- An incumbent local exchange carrier or an ETC may determine the technology it uses to meet its BTS obligations under this section, if such technology does not alter the rates, terms, and conditions for a BTS offering required under subsection (b).

(2) EQUAL ACCESS NOT REQUIRED- Notwithstanding any other provision of this Act or any other provision of law, a BTS offering may

- not require equal access to long distance, if the incumbent local exchange carrier or an ETC is offering BTS through a communications technology that does not support equal access as of the date of enactment of this Act.
- (e) Termination of Bts- If a consumer purchases any service, capability, or function in addition to a BTS offering, the resulting offering shall not--
- (1) be deemed to be a BTS offering; and
  - (2) be subject to the requirements of subsection (a).
- (f) Carrier of Last Resort Obligations- Any carrier of last resort obligation under the Communications Act of 1934 (47 U.S.C. 151 et seq.) or any equivalent State law, regulation, or order shall be satisfied, subject to the exceptions provided in such section, by the ubiquitous availability of BTS to all consumers in a service territory.

## SEC. 6. FEDERAL QUALITY STANDARDS.

- (a) Quality Standards- The Commission, taking into consideration that different technologies can potentially be used to provide BTS service and that such technologies may have different performance characteristics than a public switched telephone network, shall establish Federal quality standards for BTS service relating to--
- (1) reasonable uptime;
  - (2) installation intervals;
  - (3) repair intervals; and
  - (4) suitable voice quality.
- (b) Additional Standards- The Commission shall establish reasonable maximum intervals for the performance of different classes of incumbent local exchange carriers.
- (c) Enforcement-
- (1) IN GENERAL- Notwithstanding any other provision of this Act, a State commission shall have the authority to enforce the Federal quality standards established under subsections (a) and (b).
  - (2) LIMITATION-
    - (A) IN GENERAL- The regulatory power granted to a State commission under this subsection shall apply only to the enforcement of the Federal standards under subsections (a) and (b).
    - (B) PENALTIES- Any penalties assessed by a State commission for violations of the standards established under subsections (a) and (b) shall be limited to those provided for in paragraph (4).
  - (3) LIMITATION ON CLASS ACTIONS- No class action alleging a violation of the standards under subsection (a) and (b) shall be maintained under this subsection by an individual or any private party in Federal or State court.
  - (4) PENALTIES-
    - (A) IN GENERAL- Notwithstanding any other provision of this Act, any ETC or incumbent local exchange carrier that violates the standards established under subsections (a) and (b) shall be subject

- to a civil penalty not to exceed \$50 per household for the first violation.
- (B) SUBSEQUENT VIOLATIONS- Subsequent violations by any ETC or incumbent local exchange carrier of the standards established under subsections (a) and (b) shall increase at intervals of \$50 per violation per household up to a maximum of \$500.
- (C) ANNUAL ADJUSTMENT- The amount of penalties provided under this section shall be adjusted annually by an amount equal to any adjustment in the Consumer Price Index.
- (D) PENALTY TO BE PAID TO CONSUMERS-

- (i) IN GENERAL- All penalties collected under authority of this section shall be paid to consumers that are directly affected by the failure to comply with the standards established under subsections (a) and (b).
- (ii) EXCLUSIVE REMEDY- The penalties established under authority of this section shall be the exclusive remedy for failure to comply with the standards established under subsections (a) and (b).

- (d) Commission to Act if State Commission Will Not Act- If a State commission fails to carry out its enforcement responsibilities under subsection (c), the Commission shall--
- (1) issue an order preempting the jurisdiction of the State commission; and
  - (2) assume exclusive enforcement authority.
- (e) Lifeline Assistance- Nothing in this section shall affect the collection, distribution, or administration of the Lifeline Assistance Program provided for by the Commission under regulations set forth in section 69.117 of title 47, Code of Federal Regulations, and other related sections of such title.

## SEC. 7. CONSUMER ACCESS TO CONTENT AND APPLICATIONS.

- (a) Access-
- (1) IN GENERAL- A consumer may not be denied access to any content provided over facilities used to provide broadband communications service and a broadband service provider shall not willfully and knowingly block access to such content by a subscriber, unless--
    - (A) such content is determined to be illegal;
    - (B) such denial is expressly authorized by Federal or State law; or
    - (C) such access is inconsistent with the terms of the service plan of such consumer including applicable bandwidth capacity or quality of service constraints.
  - (2) CUSTOMIZED CONTENT- A broadband communications service provider may offer to a consumer a customized plan developed through such service providers network or commercial arrangements with providers of content, applications, and other service components to differentiate--
    - (A) access to content;

- (B) the availability of applications; and
- (C) the character of service components available.
- (3) NON-CUSTOMIZED CONTENT- Nothing in subsection (a) shall adversely affect the performance of non-customized consumer access to content, services, and applications offered by the competitors of a broadband service provider.
- (b) Enforcement of Access Violations-
  - (1) IN GENERAL- The Commission may take such enforcement action as it may prescribe by rule, if the Commission determines that a broadband communications service provider intentionally restricted access to any content described in subsection (a)(1).
  - (2) EXCEPTION- A broadband communications service provider may not be in violation of subsection (a), if such service provider does not interrupt or block access to any content described in subsection (a)(1) when--
    - (A) performing network--
      - (i) optimization or management;
      - (ii) security; or
      - (iii) prioritization;
    - (B) performing other measures to ensure network security and integrity; or
    - (C) attempting to prevent unlawful conduct.
- (c) Parental Controls- Nothing in this section shall be construed to prohibit--
  - (1) any communications service provider from offering a service that allows a consumer to block display of programs with a common rating; and
  - (2) a provider of mobile services from offering or providing access only to a family friendly service to a subscriber.
- (d) Connectivity of Devices- Except as provided in this section, a broadband service provider shall not prevent any person from utilizing equipment and devices in connection with lawful content or applications.
- (e) Access to VoIP Applications- Nothing in subsection (a) shall permit a broadband service provider to prevent a customer from using voice over Internet Protocol applications offered by a competitor.

## SEC. 8. REGULATORY AUTHORITY OF THE COMMISSION.

- (a) Federal Policy- The Commission shall, with respect to communication service providers, develop rules and regulations regarding--
  - (1) automatic dialing, telephone solicitation, slamming, cramming, E911, obscene and harassing telephone calls;
  - (2) billing disputes;
  - (3) the use, sale, and distribution of consumer proprietary network information; and
  - (4) access for persons with disabilities, including--
    - (A) the hearing impaired; and
    - (B) the speech impaired.

- (b) Commission Rules-
  - (1) IN GENERAL- In developing the rules required under subsection (a), the Commission shall take into account the technical limitations of the technology used by communications service providers.
  - (2) TIMING- Not later than 120 days after the date of enactment of this Act, the Commission shall establish the rules required under subsection (a), and until such rules become effective, the requirements of Federal law, including all prior Commission rules and orders in effect on the date of enactment of this Act relating to the matters described in subsection (a) shall--
    - (A) remain in effect; and
    - (B) be applicable to the matters described in subsection (a).
- (c) Enforcement-
  - (1) STATE COMMISSION AUTHORITY- Notwithstanding any other provisions of this Act, a State commission shall have authority to enforce the rules established by the Commission pursuant to this section.
  - (2) LOCAL POINT OF CONTACT- Each State commission shall designate a local point of contact, which residents of that State may contact to alert the State of any potential violations of the rules and regulations set forth under subsection (a).
  - (3) LIMITATION ON CLASS ACTIONS- No class action alleging a violation of the rules and regulations set forth under subsection (a) shall be maintained under this subsection by an individual or any private party in Federal or State court.
  - (4) PARENS PATRIAE AUTHORITY- In any case in which a State commission has reason to believe that an act or practice violates the rules and regulations set forth under subsection (a), the State commission may bring a civil action on behalf of the residents of that State in a district court of the United States of appropriate jurisdiction, or any other court of competent jurisdiction, to--
    - (A) enjoin the act or practice;
    - (B) obtain--
      - (i) damages in the sum of actual damages, restitution, or other compensation on behalf of affected residents of the State; and
      - (ii) punitive damages, if the violation is willful or intentional; or
    - (C) obtain such other legal and equitable relief as the court may consider to be appropriate.
  - (5) VENUE; SERVICE OF PROCESS-
    - (A) VENUE- Any action brought under this subsection may be brought in the district court of the United States that meets applicable requirements relating to venue under section 1931 of title 28, United States Code.



(B) SERVICE OR PROCESS- In an action brought under this subsection, process may be served in any district in which the defendant--

- (i) is an inhabitant; or
- (ii) may be found.

(d) Limitation of State Authority- Notwithstanding the provisions of this section, States and State commissions shall have no authority to impose different or additional interconnection or intercarrier compensation requirements on communication service providers.

(e) Commission to Act if State Commission Will Not Act- If a State commission fails to carry out its enforcement responsibilities under subsection (c), the Commission shall--

- (1) issue an order preempting the jurisdiction of the State commission; and
- (2) assume exclusive enforcement authority.

## SEC. 9. NETWORK INTERCONNECTION AND ACCESS REQUIREMENTS.

(a) Interconnection Arrangements-

(1) IN GENERAL- Facilities-based providers shall establish commercial arrangements regarding the ability of such facilities-based providers to interconnect with other facilities-based providers.

(2) SCOPE OF ARRANGEMENTS- The commercial arrangements described in paragraph (1) shall establish the rates, terms, and conditions on which facilities-based providers shall interconnect with other facilities-based providers.

(3) EXEMPTION FROM REGULATION- Except as provided in subsections (b) and (c), the commercial arrangements described in paragraph (1) may not be subject to regulation by the Commission or by the States or State commissions.

(b) Commission Intervention With Narrowband Communication Service Providers-

(1) IN GENERAL- Not later than 6 months after the date of enactment of this Act, the Commission shall develop a regulatory framework governing interconnection between facilities-based providers and narrowband communication service providers.

(2) SCOPE OF REGULATORY FRAMEWORK- The regulatory framework described in paragraph (1) shall apply only in connection with the termination or origination of traffic on narrowband communication service providers facilities.

(3) UNIFORM RATE STRUCTURE- The regulatory framework described in paragraph (1)--

- (A) shall establish a uniform rate structure governing interconnection between facilities-based providers and narrowband communication service providers;

(B) shall apply only in the event narrowband communication service providers cannot agree on the rates, terms, and conditions of interconnection between facilities-based providers and such narrowband communication service providers; and

(C) may not require the Commission to use any particular rate-making methodology in establishing the uniform rate structure required by this paragraph.

(4) NO STATE AUTHORITY- No State or State commission may establish rates, terms, or conditions governing interconnection between facilities-based providers and narrowband communication service providers regardless of the jurisdictional nature of the underlying traffic involved.

(5) CONTENTS OF FRAMEWORK- The regulatory framework described in paragraph (1)--

(A) shall establish reasonable and equitable points of interconnection;

(B) shall facilitate narrowband communication service providers efforts to innovate and introduce new services and packages of services to consumers;

(C) shall eliminate arbitrage opportunities;

(D) shall eliminate intercarrier disputes over the rates, terms, and conditions of direct interconnection; and

(E) may not unduly burden electronic commerce.

(c) Transiting Service-

(1) IN GENERAL- Transiting service providers shall establish commercial arrangements with respect to transiting services.

(2) SCOPE OF ARRANGEMENTS- The commercial arrangements described in paragraph (1) shall establish the rates, terms, and conditions for transiting service.

(3) EXEMPTION FROM REGULATION- Except as provided in paragraphs (4) and (5), the commercial arrangements described in paragraphs (1) and (2) may not be subject to regulation by the Commission or by the States or State commissions.

(4) COMMISSION INTERVENTION FOR TRANSITING SERVICE-

(A) ESTABLISHMENT OF REGULATORY FRAMEWORK- Not later than 6 months after the date of enactment of this Act, the Commission shall develop a regulatory framework governing transiting service.

(B) APPLICABILITY OF REGULATORY FRAMEWORK- The regulatory framework developed under subparagraph (A) shall apply only in the event agreement cannot be reached on the rates, terms, and conditions for transiting service pursuant to paragraphs (1) and (2).

(5) SCOPE OF REGULATORY FRAMEWORK- The regulatory framework described in paragraph (4) shall establish the rates, terms, and

conditions on which facilities-based providers shall provide transiting service.

(6) NO COMPENSATION OBLIGATION- Transiting service providers shall have no obligation to compensate any party to an indirect interconnection of narrowband communications service providers for the delivery of any transited traffic.

(d) Sunset of Regulatory Framework- The regulatory frameworks established under subsections (b) and (c) shall terminate on the day occurring 5 years after the date of enactment of this Act.

(e) Notice of Changes- A facilities-based provider of communications service shall provide reasonable public notice of--

- (1) changes in the information necessary for the transmission and routing of communications service using such facilities-based provider of communications service facilities or networks; and
- (2) any other changes that would affect the interoperability of such facilities and networks.

(f) Identification of Traffic- Any party seeking to use a facilities-based provider of communications service network to route their traffic through another facilities-based provider of communications service shall, to the extent technically feasible and in a manner consistent with applicable industry standards, identify--

- (1) such traffic; and
- (2) the origin of such traffic.

(g) Equal Access- Nothing in this Act shall require any communications service provider, or any other person, that was not required on the date of enactment of this Act to provide equal access to common carriers for the provision of telephone toll services to provide such equal access.

## **SEC. 10. UNBUNDLED ACCESS TO COPPER LOOPS, PHYSICAL COLLOCATION, AND RESALE.**

(a) Incumbent Local Exchange Carrier Obligations-

(1) UNBUNDLED ACCESS-

(A) IN GENERAL- An incumbent local exchange carrier shall provide unbundled access to copper local loops on commercially reasonable rates, terms, and conditions.

(B) COMMISSION TO RESOLVE DISPUTES- The Commission shall resolve any disputes regarding unbundled access to copper loops as described in subparagraph (A).

(C) EXEMPTION- Except as provided in subparagraph (A), no facilities-based provider of communications service shall have any obligation to provide unbundled access to any of its facilities, equipment, or support systems, either individually or in combination.

(2) COLLOCATION-

(A) IN GENERAL- An incumbent local exchange carrier shall provide physical collocation at the central office of such carrier for access to unbundled copper loops.

(B) VIRTUAL COLLOCATION- If the physical collocation described in subparagraph (A) is not practical for technical reasons or due to space limitations, virtual collocation for access to unbundled copper loops shall be required.

(3) RESALE-

(A) IN GENERAL- An incumbent local exchange carrier shall provide resale of any local narrowband communications service that is subject to regulation under this Act.

(B) RESALE RATE- The resale rate applicable to subparagraph (A) shall--

- (i) be established by the Commission; and
- (ii) equal the retail rate for such services less the costs actually avoided.

(b) Sunset- The obligations established under subsection (a) shall terminate on January 1, 2011.

(c) Report- Not later than January 1, 2009, the Commission shall submit to Congress a detailed report, with recommendations, on whether the obligations established under subsection (a) are in the public interest.

## **SEC. 11. NUMBER PORTABILITY.**

(a) In General- All communications service providers that use numbers or the successor system assigned by the North American Numbering Plan, or any such successor entity, shall provide number portability to consumers.

(b) 5-DAY RULE- The Commission shall develop rules and regulations requiring that numbers be ported in no more than 5 business days.

(c) Rulemaking Proceeding- The Commission may commence a rulemaking proceeding if the Commission finds that excessive early cancellation fees charged by communications service providers are hindering the ability of consumers to change providers.

## **SEC. 12. SPECIAL PROVISIONS FOR 2-PERCENT CARRIERS.**

(a) Opt In/Opt Out-

(1) IN GENERAL- Any 2-percent carrier may elect to continue to be subject to Federal and State statutory and regulatory requirements as such requirements existed on the date of enactment of this Act.

(2) STUDY AREA BASIS- The election under paragraph (1) may be made only on a study area basis.

(b) Rural Exemption- If a communications service provider that is also a rural telephone company, as that term is defined in section 3 of the Communications Act of 1934 (47 U.S.C. 153), elects under subsection (a) to continue to be subject to the regulatory requirements in existence on the date of enactment of this Act,

such communications service provider shall retain its rural exemption pursuant to section 251(f) of the Communications Act of 1934 (47 U.S.C. 251(f)).

(c) NECA Tariffs Unaffected- Nothing in this section precludes or affects any tariff filed by the National Exchange Carrier Association, and any such tariff may continue to include--

- (1) all tariffed services in effect on the date of enactment of this Act; and
- (2) any new service or modifications to existing service typically covered by such tariffs.

(d) Negotiation Authority of NECA- For the purpose of conducting and concluding commercial negotiations regarding interconnection arrangements, the National Exchange Carrier Association is authorized to be the negotiating agent for any 2-percent carrier wishing to use the National Exchange Carrier Association for such purpose.

**SEC. 13. VIDEO SERVICES.**

(a) Video Service Providers- A video service provider may not be required--

- (1) to obtain a State or local video franchise;
- (2) to build out its video distribution system in any particular manner; or
- (3) to provide leased or common carrier access to its video distribution facilities and equipment to any other video service provider.

(b) State and Local Government Authority to Regulate-

(1) REASONABLE FEE-

(A) COMPENSATING LOCAL GOVERNMENTS-

- (i) IN GENERAL- A State or local government may require a video service provider to pay a reasonable video service fee on an annual basis to the units of local government in which the video service provider provides video service for the purpose of compensating such local government for the costs that it incurs in managing the public rights-of-way used by such provider.
- (ii) AMOUNT OF FEE- The video service fee imposed under clause (i) shall not exceed 5 percent of gross revenues.

(B) DEFINITION- For purposes of this paragraph, the term `gross revenues'-

(i) means all consideration of any kind or nature received by a video service provider from its subscribers for the provision of video service within a municipality, including-

- (I) cash;
  - (II) credits;
  - (III) property; and
  - (IV) in-kind contributions (services or goods); and
- (ii) does not include--

- (I) revenue not actually received, even if billed, including bad debt;
- (II) revenue received by any affiliate or any other person in exchange for supplying goods or services used by a video service provider to provide video service;
- (III) refunds, rebates, or discounts provided to--

- (aa) subscribers;
- (bb) leased access providers;
- (cc) advertisers; or
- (dd) the municipality;

(IV) revenue from services not classified as video service, including--

- (aa) revenue received from telecommunications services;
- (bb) revenue received from information services;
- (cc) revenue received in connection with advertising;
- (dd) revenue received in connection with home shopping services; or
- (ee) any other revenue attributed by a video service provider to non-video service in accordance with any applicable rules, regulations, standards, or orders;

- (V) revenue paid by subscribers to home shopping programmers directly from the sale of merchandise through any home shopping channel offered as part of the video service;
- (VI) the sale of video service for resale in which the purchaser of such service is required to collect a 5 percent fee from the customer of such purchaser;
- (VII) any tax of general applicability--

- (aa) imposed upon a video service provider or upon subscribers by a Federal, State, city, or any other governmental entity; and
- (bb) required to be collected by a video service provider and remitted to the taxing entity, including--
- (AA) sales or use taxes;

- (BB) gross receipts taxes;
- (CC) excise taxes;
- (DD) utility users taxes;
- (EE) public service taxes;
- (FF) communication taxes; and
- (GG) the 5 percent fee described in subclause (VI);

(VIII) the provision of video service to public institutions, public schools, or governmental entities at no charge;  
 (IX) any foregone revenue from the provision of free or reduced-cost video service by a video service provider to any person, including--

- (aa) the municipality;
- (bb) other public institutions; and
- (cc) other institutions;

(X) sales of capital assets or sales of surplus equipment;  
 (XI) reimbursement by programmers of marketing costs incurred by a video service provider for the introduction or promotion of programming;  
 (XII) directory or Internet advertising revenue, including revenue from--

- (aa) yellow page sales;
- (bb) white page sales;
- (cc) banner advertisement; and
- (dd) electronic publishing; and

(XIII) copyright fees paid to the United States Copyright Office.

(2) RIGHTS-OF-WAY DISPUTES TO BE RESOLVED BY THE COMMISSION OR FEDERAL COURTS- Any dispute regarding the application or amount of fees charged under paragraph (1) shall, upon

request of a local unit of government or affected video service provider, be resolved--

- (A) by the Commission; or
- (B) by filing a claim in the district court of the United States that meets applicable requirements relating to venue under section 1931 of title 28, United States Code.

(3) STATE ADJUSTMENT OF FEES AND TAXES-

(A) IN GENERAL- A video service provider may petition the Commission for a reduction of the fee paid by such provider under this subsection, if a State adjusts the fees and taxes paid by communications service providers or their customers for the purpose of--

- (i) providing fairness;
- (ii) equality of treatment; or
- (iii) simplification of the fees and taxes of such providers relative to each other or to other commercial and industrial tax payers in general within such State.

(B) COMMISSION ACTION ON PETITION- The Commission shall act on any petition described in subparagraph (A) not later than 60 days after its receipt.

(C) GRANT OF PETITION- The Commission shall grant a petition described in subparagraph (A) if and to the extent it determines that the fees paid by a video service provider should be reduced in order to achieve the purposes of fairness, equality of treatment, or simplification described in subparagraph (A).

(4) FEE APPEARANCE ON SUBSCRIBER'S BILL- A video service provider may designate that portion of a subscriber's bill attributable to a video service fee as a separate item on the subscriber's bill.

(c) Applicability of Title VI of the Communications Act; Cable Act Provisions-

(1) OBLIGATIONS AND DUTIES- Any video service provider shall--

- (A) not be subject to any provision of title VI of the Communications Act of 1934 (47 U.S.C. 521 et seq.), except as otherwise provided in this paragraph;
- (B) be subject to the retransmission consent obligations of section 325(b) of the Communications Act of 1934 (47 U.S.C. 325(b));
- (C) carry and determine the appropriate channel positioning and grouping of, within each local franchise area, not more than 4 public, educational, or governmental use channels as required under section 611 of such Act (47 U.S.C. 531);
- (D) carry the signals of local commercial television stations as required under section 614 of such Act (47 U.S.C. 534);
- (E) carry the signals of local noncommercial educational television stations as required under section 615 of such Act (47 U.S.C. 535);
- (F) be subject to the regulation of carriage agreements under section 616 of such Act (47 U.S.C. 536);

- (G) be subject to the requirements regarding obscene or indecent programming under section 624(d)(2) of such Act (47 U.S.C. 544(d)(2));
  - (H) be entitled to the benefits and protections under section 624(f)(1) of such Act (47 U.S.C. 544(f)(1)) regarding the content of video service;
  - (I) be subject to the emergency information requirements under section 624(g) of such Act (47 U.S.C. 544(g));
  - (J) be subject to the consumer electronics equipment capability requirements under section 624A of such Act (47 U.S.C. 545);
  - (K) be entitled to the benefits and protections under section 628 of such Act (47 U.S.C. 548);
  - (L) be subject to the requirements under section 629 of such Act (47 U.S.C. 549);
  - (M) protect the personally identifiable information of its subscribers in the same manner as is required of cable operators with respect to subscribers to cable services under section 631 of such Act (47 U.S.C. 551);
  - (N) be entitled to the benefits and protections under section 633 of such Act (47 U.S.C. 553);
  - (O) be subject to the equal employment provisions as required under subsections (a) through (h) of section 634 of such Act (47 U.S.C. 554);
  - (P) be subject to criminal or civil liability under section 638 of such Act (47 U.S.C. 558);
  - (Q) be subject to the penalties prescribed for the transmission of obscene programming under section 639 of such Act (47 U.S.C. 559); and
  - (R) be required to comply with the scrambling requirements under section 640 of such Act (47 U.S.C. 560).
- (2) DETERMINATIONS OF LOCAL SIGNALS- For purposes of complying with subparagraphs (C) and (D) of paragraph (1), a video service provider shall treat as local stations with respect to a customer located within the jurisdiction of any franchising authority the same stations that are treated as local television stations for a cable system located within such jurisdiction.
- (3) IMPLEMENTATION-
- (A) REGULATIONS REQUIRED- Not later than 120 days after the date of enactment of this Act, the Commission shall prescribe regulations to implement the requirements of paragraph (1) that are no greater or lesser than the obligations required by the specifically referenced provisions of the Communications Act of 1934 (47 U.S.C. 151 et seq.).
  - (B) EFFECTIVE DATE OF REGULATIONS- The regulations required under subparagraph (A) shall take effect 6 months after the date of enactment of this Act.

(4) EXISTING FRANCHISES-

(A) IN GENERAL- Any provision in any franchise granted by a franchising authority that is inconsistent with the provisions of this Act shall be deemed to be preempted and superseded.

(B) TREATMENT AS A VIDEO SERVICE PROVIDER- A cable operator operating under the authority of any franchise described in subparagraph (A) prior to the date of enactment of this Act shall be treated as a video service provider under this Act.

(5) CABLE CHANNELS FOR PUBLIC, EDUCATIONAL, AND GOVERNMENTAL USE-

The governmental entity that was the franchising authority for a State or a political subdivision of a State on the date of enactment of this Act, shall for that State or political subdivision determine which public, educational, or governmental entities shall be authorized to designate the channels required under paragraph (1)(C).

(6) CONSUMER PROTECTION AND CUSTOMER SERVICE-

(A) REGULATIONS REQUIRED- Not later than 120 days after the date of enactment of this Act, the Commission shall establish regulations with respect to customer service and consumer protection requirements of the video service provider.

(B) EFFECTIVE DATE OF REGULATIONS- The regulations required under subparagraph (A) shall take effect 6 months after the date of enactment of this Act.

(7) STATE COMMISSION AUTHORITY-

(A) IN GENERAL- Notwithstanding any other provision of this Act, a State commission shall have the authority to enforce the requirements of paragraph (6)(A).

(B) LOCAL POINT OF CONTACT- Each State commission shall designate a local point of contact, which residents of such geographic area may contact to alert such State commission of any potential violations of the requirements and obligations established under paragraph (6)(A).

(C) LIMITATION ON CLASS ACTIONS- No class action alleging a violation of the obligations set forth in the regulations established by the Commission under paragraph (6)(A) shall be maintained under this subsection by an individual or any private party in Federal or State court.

(D) PARENS PATRIAE AUTHORITY- In any case in which a State commission has reason to believe that an act or practice violates the obligations set forth in the regulations established by the Commission under paragraph (6)(A), the State commission may bring a civil action on behalf of the residents within its jurisdiction in a district court of the United States of appropriate jurisdiction, or any other court of competent jurisdiction, to--

- (i) enjoin the act or practice;
- (ii) obtain--

- (I) damages in the sum of actual damages, restitution, or other compensation on behalf of affected residents of the State; and
  - (II) punitive damages, if the violation is willful or intentional; or
  - (iii) obtain such other legal and equitable relief as the court may consider to be appropriate.
- (E) VENUE; SERVICE OF PROCESS-
- (i) VENUE- Any action brought under this paragraph may be brought in the district court of the United States that meets applicable requirements relating to venue under section 1931 of title 28, United States Code.
  - (ii) SERVICE OR PROCESS- In an action brought under this paragraph, process may be served in any district in which the defendant--
    - (I) is an inhabitant; or
    - (II) may be found.
- (F) LIMITATION- A State commission that is authorized to enforce the requirements of paragraph (6) may not be authorized to impose additional obligations beyond those established by the Commission in paragraph (6)(A).
- (d) Commission to Act if State Commission Will Not Act- If a State commission fails to carry out its enforcement responsibilities under subsection (c)(7), the Commission shall--
- (1) issue an order preempting the jurisdiction of the State commission; and
  - (2) assume exclusive enforcement authority.
- (e) Ability to Manage Public Rights-of-Way-
- (1) IN GENERAL- Except as provided in this section, nothing in this Act shall affect the authority of a State or local government to manage the public right-of-way in a manner that is--
    - (A) non-discriminatory;
    - (B) competitively neutral; and
    - (C) consistent with applicable State law.
  - (2) CONSTRUCTION PERMITS-
    - (A) IN GENERAL- In managing the public rights-of-way a State or local government may require the issuance of a construction permit, without cost, to a video service provider that is locating facilities in such public right-of-way.
    - (B) RESPONSE WORK OR REPAIR- If there is an emergency necessitating response work or repair in the public right-of-way, a video service provider may begin such work or repair without prior approval from a State or local government, if such provider notifies the State or local government as promptly as possible after beginning such work or repair.
  - (3) TIMELY ACTION REQUIRED- In managing the public rights-of-way a State or local government that is required to issue permits or

licenses for such use shall be required to act upon any such request for use in a timely manner.

(4) NEW ROADS- Nothing in this section shall effect the ability of a State or local government to impose reasonable limits on access to public rights-of-way associated with newly constructed roads.

(f) Conforming Amendments to the Communications Act of 1934-

(1) POLE ATTACHMENTS- Section 224 of the Communications Act of 1934 (47 U.S.C. 224) is amended--

(A) in subsection (a)(1), by striking 'local exchange carrier' and

inserting 'telecommunications carrier';

(B) by striking subsections (a)(5) and (d)(3);

(C) in subsection (d)(3), in the first sentence by striking all after 'cable television system' through the period at the end and inserting 'and facilities of other video service providers, regardless of the nature of the services provided.'; and

(D) by adding at the end the following:

'(j) Wireless Service Facility Exemption- Nothing in this section applies to a wireless service facility, including to towers of a provider of mobile services.'

(2) CARRIAGE OF LOCAL COMMERCIAL TELEVISION SIGNALS- Section 614(b)(4) of the Communications Act of 1934 (47 U.S.C.

534(b)(4)) is amended to read as follows:

'(4) SIGNAL QUALITY-

'(A) NON-DEGRADATION- The signals of local commercial television stations that a cable operator carries shall be carried without material degradation.

'(B) CARRIAGE STANDARDS- The Commission shall adopt carriage standards to ensure that, to the extent technically feasible, the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of broadcast local commercial television signal when using the same transmission technology.'

(3) CARRIAGE OF NONCOMMERCIAL EDUCATIONAL TELEVISION- Section 615(g)(2) of the Communications Act of 1934 (47 U.S.C. 535(g)(2)) is amended to read as follows--

'(2) BANDWIDTH AND TECHNICAL QUALITY- A cable operator shall-

'(A) provide each qualified local non-commercial television station whose signal is carried in accordance with this section with bandwidth and technical capacity equivalent to that provided to commercial television stations carried on the cable system when using the same transmission technology; and

'(B) carry the signal of each qualified local non-commercial television station without material degradation.'

(4) DEVELOPMENT OF COMPETITION AND DIVERSITY IN VIDEO PROGRAMMING DISTRIBUTION- Section 628 of the Communications Act of 1934 (47 U.S.C. 548) is amended to read as follows:

**SEC. 628. DEVELOPMENT OF COMPETITION AND DIVERSITY IN VIDEO PROGRAMMING DISTRIBUTION.**

(a) Purpose- The purpose of this section is--

(1) to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market;

(2) to increase the availability of MVPD programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming; and

(3) to spur the development of communications technologies.

(b) Prohibition- It shall be unlawful for an MVPD, an MVPD programming vendor in which an MVPD has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any MVPD from providing MVPD programming or satellite broadcast programming to subscribers or consumers.

(c) Regulations Required-

(1) PROCEEDING REQUIRED- Not later than 180 days after the date of enactment of the Broadband Investment and Consumer Choice Act, the Commission shall prescribe regulations to specify particular conduct that is prohibited by subsection (b), in order to promote--

(A) the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market; and

(B) the continuing development of communications technologies.

(2) MINIMUM CONTENTS OF REGULATION- The regulations required under paragraph (1) shall--

(A) establish effective safeguards to prevent an MVPD which has an attributable interest in an MVPD programming vendor or a satellite broadcast programming vendor from unduly or improperly influencing the decision of such vendor to sell, or the prices, terms, and conditions of sale of, MVPD programming or satellite broadcast programming to any unaffiliated MVPD;

(B) prohibit discrimination by an MVPD programming vendor in which an MVPD has an attributable interest or by a satellite broadcast programming vendor in the prices, terms, and conditions of sale or delivery of MVPD programming or satellite broadcast programming among or between cable systems, cable operators, or other MVPDs, or their agents or buying groups, except that an MVPD programming vendor in which an MVPD has an

attributable interest or such a satellite broadcast programming vendor shall not be prohibited from--

(i) imposing reasonable requirements for--

(I) creditworthiness;

(II) offering of service; and

(III) financial stability and standards regarding character and technical quality;

(ii) establishing different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of MVPD programming or satellite broadcast programming;

(iii) establishing different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor; or

(iv) entering into an exclusive contract that is permitted under subparagraph (D);

(C) prohibit practices, understandings, arrangements, and activities, including exclusive contracts for MVPD programming or satellite broadcast programming between an MVPD and an MVPD programming vendor or satellite broadcast programming vendor, that prevent an MVPD from obtaining such programming from any MVPD programming vendor in which an MVPD has an attributable interest or any satellite broadcast programming vendor in which an MVPD has an attributable interest for distribution to persons in areas not served by an MVPD as of the date of enactment of the Broadband Investment and Consumer Choice Act; and

(D) with respect to distribution to persons in areas served by an MVPD, prohibit exclusive contracts for MVPD programming or satellite broadcast programming between an MVPD and an MVPD programming vendor in which an MVPD has an attributable interest or a satellite broadcast programming vendor in which an MVPD has an attributable interest, unless the Commission determines (in accordance with paragraph (4)) that such contract is in the public interest.

(3) LIMITATIONS-

(A) GEOGRAPHIC LIMITATIONS- Nothing in this section shall require any person who is engaged in the national or regional distribution of video programming to make such programming available in any geographic area beyond which such programming has been authorized or licensed for distribution.

(B) APPLICABILITY TO SATELLITE RETRANSMISSIONS- Nothing in this section shall apply--





`(g) Reports- The Commission shall, beginning not later than 18 months after promulgation of the regulations required by subsection (c), annually report to Congress on the status of competition in the market for the delivery of video programming.

`(h) Exemptions for Prior Contracts-

`(1) IN GENERAL- Nothing in this section shall affect--

`(A) any contract that grants exclusive distribution rights to any person with respect to satellite cable programming and that was entered into on or before June 1, 1990; or

`(B) any contract that grants exclusive distribution rights to any person with respect to MVPD programming that is not satellite cable programming and that was entered into on or before July 1, 2003, except that the provisions of subsection (c)(2)(C) shall apply for distribution to persons in areas not served by an MVPD.

`(2) LIMITATION ON RENEWALS-

`(A) SATELLITE CABLE PROGRAMMING CONTRACTS- A contract pertaining to satellite cable programming or satellite broadcast programming that was entered into on or before June 1, 1990, but that is renewed or extended after the date of enactment of the Broadband Investment and Consumer Choice Act shall not be exempt under paragraph (1).

`(B) MVPD PROGRAMMING CONTRACTS- A contract pertaining to MVPD programming that is not satellite cable programming that was entered into on or before July 1, 2003, but that is renewed or extended after the date of enactment of the Broadband Investment and Consumer Choice Act shall not be exempt under paragraph (1).

`(i) Definitions- As used in this section:

`(1) MVPD- The term 'MVPD' means multichannel video programming distributor.

`(2) MVPD PROGRAMMING- The term 'MVPD programming' includes the following:

`(A) DIRECT RECEIPT- Video programming primarily intended for the direct receipt by MVPDs for their retransmission to MVPD subscribers (including any ancillary data transmission).

`(B) ADDITIONAL PROGRAMMING-

`(i) IN GENERAL- Additional types of programming content that the Commission determines in a rulemaking proceeding to be completed not later than 120 days from the date of enactment of the Broadband Investment and Consumer Choice Act, as of the time of such rulemaking, of a type that is--

`(I) primarily intended for the direct receipt by MVPDs for their retransmission to MVPD subscribers, regardless of whether such programming content is--

`(aa) digital or analog;

`(bb) compressed or uncompressed;

`(cc) encrypted or unencrypted; or

`(dd) provided on a serial, pay-per-view, or on demand basis; and

`(II) without regard to the end user device used to access such programming or the mode of delivery of such programming content to MVPDs.

`(ii) CONSIDERATIONS- In making the determination under clause (i), the Commission shall consider the effect of technologies and services that combine different forms of content so that certain content or programming is not included within the meaning of MVPD programming solely because it is integrated with other content that is of a type that is primarily intended for the direct receipt by MVPDs for their retransmission to MVPD subscribers.

`(iii) MODIFICATION OF PROGRAMMING DEFINED AS MVPD PROGRAMMING- At any time after 3 years following the conclusion of the rulemaking proceeding required under clause (ii), any interested MVPD or MVPD programming vendor may petition the Commission to modify the types of additional programming content included by the Commission within the definition of MVPD programming in light of--

`(I) the purpose of this section;

`(II) market conditions at the time of such petition; and

`(III) the factors to be considered by the Commission under clause (ii).

`(3) MVPD PROGRAMMING VENDOR- The term 'MVPD programming vendor'--

`(A) means a person engaged in the production, creation, or wholesale distribution for sale of MVPD programming; and

`(B) does not include a satellite broadcast programming vendor.

`(4) SATELLITE BROADCAST PROGRAMMING- The term 'satellite broadcast programming' means broadcast video programming when--

`(A) such programming is retransmitted by satellite; and

`(B) the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster.

`(5) SATELLITE BROADCAST PROGRAMMING VENDOR- The term 'satellite broadcast programming vendor' means a fixed service satellite

carrier that provides service pursuant to section 119 of title 17, United States Code, with respect to satellite broadcast programming.

`(6) SATELLITE CABLE PROGRAMMING- The term `satellite cable programming' has the same meaning as in section 705, except that such term does not include satellite broadcast programming.

`(7) SATELLITE CABLE PROGRAMMING VENDOR- The term `satellite cable programming vendor'--

`(A) means a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming; and

`(B) does not include a satellite broadcast programming vendor.

`(j) Common Carriers-

`(1) IN GENERAL- Any provision that applies to an MVPD under this section shall apply to a common carrier or its affiliate that provides video programming by any means directly to subscribers.

`(2) ATTRIBUTABLE INTEREST- Any provision that applies to an MVPD programming vendor in which an MVPD has an attributable interest shall apply to any MVPD programming vendor in which such common carrier has an attributable interest.

`(3) LIMITATION- For the purposes of this subsection, 2 or fewer common officers or directors shall not by itself establish an attributable interest by a common carrier in an MVPD programming vendor (or its parent company).'

(5) REGULATIONS REQUIRED- Not later than 180 days after the date of enactment of this Act, the Commission shall prescribe such regulations as may be necessary to implement the amendments made by this section.

(g) Rulemaking on Section 629- Not later than January 1, 2008, the Commission shall conduct a proceeding to determine the appropriateness of the requirements under subsection (c)(1)(L) taking into account changes and advancements in technology.

#### **SEC. 14. COPYRIGHT LIMITATIONS ON EXCLUSIVE RIGHTS VIDEO SERVICE PROVIDERS.**

Section 111 of title 17, United States Code, shall for purposes of this Act be deemed to extend to any secondary transmission, as that term is defined in section 111, made by a video service provider.

#### **SEC. 15. MUNICIPALLY OWNED NETWORKS.**

(a) Protection Against Undue Government Competition With Private Sector- Any State or local government seeking to provide communications service shall--

(1) provide conspicuous notice of the proposed scope of the communications service to be provided, including--

- (A) cost;
- (B) services to be provided;
- (C) coverage area;

(D) terms; and

(E) architecture; and

(2) give a detailed accounting of all proposed accommodations that such government owned communications service would enjoy, including--

(A) any free or below cost rights-of-way;

(B) any beneficial or preferential tax treatment;

(C) bonds, grants, or other source of funding unavailable to non-governmental entities; and

(D) land, space in buildings, or other considerations.

(b) Open Bids Must Be Made Available for Non-Governmental Entities- Not later than 90 days after posting of the notice required under subsection (a)(1), a non-governmental entity shall have the option of participating in an open bidding process conducted by a neutral third party to provide such communications service on the same terms, conditions, financing, rights-of- way, land, space, and accommodations as secured by the State or local government.

(c) Preference for Non-Governmental Entities- In the event of identical bids under subsection (b), the neutral third party conducting the bidding process shall give preference to a non-governmental entity.

(d) Open Access to Non-Governmental Entities- If a State or local government wins the bid under subsection (b), a non-governmental entity shall have the ability to place facilities in the same conduit, trenches, and locations as the State or local government for concurrent or future use under the same conditions secured by the State or local government.

(e) Grandfather Clause- A State or local government providing communications service as of the date of enactment of this Act shall be exempt from this section, unless such State or local government--

(1) substantially enters into new lines of business; or

(2) substantially expands its communications service beyond its current service area, as such service area existed upon the date of enactment of this Act.

END