

**Content on the Fly: *The Growing Need for Regulation of Video
Content Delivered Via Cellular Telephony***

Jacob Chapman
Managing Editor | Berkeley Business Law Journal
Boalt Hall School of Law, Class of 2007
University of California, Berkeley
Tel. 510.333.3742
Email. jake_ucb@yahoo.com

I. INTRODUCTION

Technological advancements in the last twenty years have substantially altered the ways in which people work, communicate, and are entertained. Many of these advancements have occurred in areas generally thought to fall under the regulatory purview of the Federal Communications Commission (FCC). These advancements have included the personal computer, the internet, digital cable, direct broadcast satellites (DBS), and cellular phones. Of all these increasingly available and inexpensive technologies, perhaps the most ubiquitous is the cellular phone.¹ Thus far, the FCC has struggled to apply its public interest mandate to the ever shifting sands of technological development with varying degrees of success.² Cellular phone regulation however has proven relatively simple and free from first amendment challenges as it has mostly included simple interconnectivity regulation, and the monitoring of the cell phone's impact on competition. The era of straightforward cellular regulation may soon be coming to an end as the cellular industry continues its transition to broadband speeds, and richer content.

Over the course of 2005 and continuing through 2006 the major cellular operators have begun upgrading their systems to new third generation (3G) technology.³ This technology allows for connection speeds far exceeding the older second generation networks. These speeds have permitted the development of new video services such as

¹ Kim, Ryan. "The world's a cell-phone stage: The device is upending social rules and creating a new culture." San Francisco Chronicle, 02/27/06 pg C-1

² *U.S. v. Playboy Entertainment Group*, 529 U.S. 803 (2003); *Reno v. ACLU*, 521 U.S. 844 (1997); *FCC v. Pacifica*, 438 U.S. 726 (1978).

³ http://www.betanews.com/article/T-Mobile_Plans_for_Growth_3G_in_2006/1134755975 (Last visited 4/29/06). This article discusses the upcoming launch of T-Mobile's 3G service

Cingular Wireless's *CV* service, or Verizon's *V-Cast*. The scheduled advanced wireless services (AWS) auction on June 29, 2006 is likely to only speed the development of these new faster networks.⁴

A transition to 3G cellular service will mean that cellular phones will have ceased being mere communication devices and will have taken on many of the characteristics of the richer content technologies like cable, the internet, and DBS. The sheer pervasiveness of cellular phones - they appear in restaurants, on public streets, in movie theatres, and in every other imaginable locale - means that there will almost certainly be a call to Congress and the FCC to regulate the content of the video delivered. What form is FCC regulation of 3G cellular content likely to take? What rationales are likely to be advanced for these regulations? Firstly, to answer these questions, it is necessary to look at what form content regulation has taken in other technological contexts, and at the rationales offered to support those regulations. Secondly, it is necessary to speculate as to the shape that 3G technologies are likely to take so that they can be properly analogized to established regulated technologies. The scope of this paper does not include a discussion of whether the rationales for content regulation are logical or a discussion about the Constitutional validity of content regulation. An analysis of the Constitutional validity of each of the possible regulatory approaches is, at a minimum, owed its own paper. Rather, this paper focuses on a proposed regulatory regime for 3G cellular content.

II. CURRENT REGULATION

A. Broadcast Encouraged Content

⁴ *Id.*

The FCC was the successor regulatory body to the Federal Radio Commission. As the name implies the Federal Radio Commission was formed in 1927 to regulate the radio spectrum.⁵ The FCC replaced the Federal Radio Commission in 1934 and was given a mandate to regulate not only the radio spectrum, but also telephony. As other non-radio uses developed for the electromagnetic spectrum, the territory of the FCC was gradually expanded to cover those uses. The advent of the television occasioned just such an expansion, and the regulation of television was subsumed under the FCC's authority to regulate radio as a different medium of broadcast. Therefore, the early foundational cases regarding the regulation of broadcast content were in the context of radio broadcasts, but have been equally extended to video broadcasts.

One of the earliest attempts at content regulation of broadcast by the FCC was the fairness doctrine.⁶ The fairness doctrine was made up of two parts. First, the doctrine stated that if a broadcaster attacked a person or group while discussing a controversial issue, that broadcaster had to inform the target group within one week, and had to allow them to respond. Second, the fairness doctrine stated that whenever a broadcaster made a political editorial, that broadcaster had to notify opposing political candidates, and had to allow them the opportunity to retort.⁷ The broadcaster was required to allow the proponents of those viewpoints time to express their ideas, and had to do so free of charge if the proponents of the differing views could not afford to pay for their

⁵ Benjamin, Stuart M; Lichtman, Douglas G; Shelanski, Howard A. *Telecommunications Law and Policy*. Carolina Academic Press, Durham, NC. 2001. pg 16.

⁶ *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 369-371 (1969).

⁷ *Id.*

broadcast.⁸ The original justification behind the fairness doctrine was the FCC’s mandate under 47 U.S.C. §303 to act as “public convenience, interest, and necessity requires.” The Supreme Court determined that Congress’ use of the phrase public interest “imposed a duty on broadcasters to discuss both sides of controversial issues.”⁹

In *Red Lion*, the Supreme Court addressed a first amendment challenge to the fairness doctrine. A broadcaster had accused the author of a book of working for a communist newspaper, of defending Alger Hiss, and of attacking J. Edgar Hoover. The author requested an opportunity to respond under the fairness doctrine and was denied. The author then brought suit to force the broadcasters to give him access. The Supreme Court in *Red Lion* established two principles which have continued to substantially impact telecommunications regulation. First, the Court held that “differences in the characteristics of new media justify differences in the First Amendment standards applied to them.”¹⁰ Second, the court established the scarcity rationale for allowing some content-based regulation of broadcast.¹¹

The scarcity rationale posits that because there are more speakers who desire to use radio spectrum than can use it, and because the government must license some of those people to have rights to the spectrum, the government may require licensees to allow access to other people in the hopes of encouraging more diverse speech.¹² Therefore, it is the government’s interest in creating a better informed public despite the limits of scarce radio spectrum which permits the abridgement of some of the First Amendment rights of broadcasters. As the Court in *Red Lion* stated, “It is the right of the viewers and listeners,

⁸ *Id.*

⁹ *Id.* at 380.

¹⁰ *Id.* at 386

¹¹ *Id.*

¹² *Id.* at 390

not the right of the broadcasters which is paramount.”¹³ Following this rationale to its conclusion, the Court held that the fairness doctrine was consistent with the First Amendment.¹⁴

In 1987 the FCC re-evaluated the fairness doctrine and chose to eliminate it.¹⁵ The FCC determined that the fairness doctrine actually undermined the quality of information in the broadcast media, because broadcasters simply ceased covering controversial issues, and ceased taking opinionated stances.¹⁶ Thus, the purpose of the fairness doctrine was no longer being met and the doctrine had become merely a hindrance to free speech. The FCC also determined that technological changes including the introduction of cable and satellite television had rendered the scarcity rationale obsolete.¹⁷ The FCC’s decision to eliminate the fairness doctrine was reviewed in *Syracuse Peace Counsel v. FCC*.¹⁸ The court in *Syracuse* upheld the FCC’s decision, but specifically declined to rule on the continuing validity of the scarcity rationale, or on the First Amendment issues. Rather, the court simply found that the doctrine was no longer accomplishing its objective. More recently, the Supreme Court and the FCC have continued their reliance on the scarcity rationale, and on the principles established in *Red Lion*.

While the fairness doctrine is no longer in place, a similar doctrine still remains.¹⁹ This doctrine states that whenever a broadcaster sells time to a political candidate, the broadcaster must sell similarly valuable time at the same rate to opposing political

¹³ *Id.*

¹⁴ *Id.* at 401

¹⁵ *In Re Complaint of Syracuse Peace Council*, 2 FCC Red. 5043 (1987).

¹⁶ *Id.* at P 59

¹⁷ *Id.* at PP 64,65

¹⁸ *Syracuse Peace Counsel v. FCC*, 867 F.2d 654 (D.C. cir. 1989).

¹⁹ 47 USC §315.

candidates. This requirement excludes broadcast exposure of a candidate as the result of bona fide news reporting.

Another form of content regulation that encourages specific content in broadcast are the children's educational programming guidelines. In 1990, Congress passed the Children's Television Act (CTA) to encourage broadcasters as part of their public interest obligation to produce and air children's educational programming.²⁰ In formulating the specific rules for implementing the CTA, the FCC created four criteria that must be met for something to be defined as children's programming; (1) the programming must have serving the educational and informational needs of children as a significant purpose, (2) the programming must be regularly scheduled, (3) the programming must be at least thirty minutes long, and (4) the programming must air between 7:00 am and 10:00 pm.²¹ In order for a broadcaster to meet their public interest obligations, they must air a minimum of three hours of material that meets the above criteria.²² If a broadcaster airs three hours of core children's programming, then they get a check next to the children's educational programming box on their license renewal application. If a broadcaster does not air three hours of programming, they will be referred to the commission for further investigation.²³ This processing guideline operates as a strong incentive for broadcasters to comply with the CTA.

Congress had several reasons for passing the CTA. First, Congress believes that children's educational programming has the potential to provide educational and social

²⁰ *Policies and Rules Concerning Children's Television Programming*, 11 FCC Rcd. 10660 (1996).

²¹ *Id.* at P 4.

²² *Id.* at P 5

²³ *Id.* at P 6

benefits to the children who watch it.²⁴ Second, Congress believes that lower income children are likely to benefit from children's educational programming disproportionately to upper income children.²⁵ Lastly, Congress believes that market pressures prevent the socially optimal amount of children's programming from being aired. (TB 266-267). Thus, because broadcast is uniquely accessible to lower income families, and because children's educational programming has positive social effects which the market doesn't account for, Congress chose to impose the CTA on broadcasters as part of their public interest obligations.

The market pressures preventing the socially optimal amount of children's programming from being aired are intimately tied to the advertiser-paid nature of free broadcast.²⁶ As a general rule, the larger the viewing audience, the more money an advertiser is willing to pay for a given amount of time. Adults aged 18-49 account for 122.2 million potential viewers, whereas children only account for 59.5 million.²⁷ Moreover, children's educational programming must be targeted at small subsets of the young audience, as a program designed for 7 year old children is not likely to appeal to or educate 12 year old children.²⁸ This slicing up of the audience makes the airing of children's programs less profitable for broadcasters. Additionally, children, particularly the youngest, don't have independent purchasing power. Advertisers recognize this and factor this consideration into the amount they are willing to pay for ads during children's educational programming.²⁹

²⁴ *Id.* at P 9-12

²⁵ *Id.*

²⁶ *Id.* at P 29-30

²⁷ *Id.* at P 31

²⁸ *Id.*

²⁹ *Id.* at P 33

When looking at whether political or children's educational content should be promoted through regulation on 3G cellular technology, it will be necessary to keep in mind the particular nature of broadcast. This nature includes its universality, its public interest obligations, its exclusively advertiser supported content, its unique educational ability, and its scarcity.

B. Broadcast Discouraged Content

Discouraged content in broadcast falls into two not totally distinct categories. These categories are indecent material, and material which may fall short of indecency, but which parents may not want their children being exposed to, including violent content. According to the FCC, indecent content is content that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities."³⁰ This content as well as profane speech is tightly regulated by the FCC in the context of broadcast.

The broadcast of indecent material is limited by section 16(a) of the 1992 Telecommunications Act.³¹ The D.C. Circuit in *Action* held that 16(a) could limit indecent broadcasts to the hours between 10:00 pm and 6:00 am.³² The court in *Action* analyzed the constitutionality of the restriction and determined that the government had a compelling interest in limiting indecency, and that the time channeling provision was narrowly tailored to achieve that goal.³³

³⁰ <http://www.fcc.gov/cgb/consumerfacts/obscene.html> (Last visited 04/29/06).

³¹ *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995).

³² *Id.* at 669-670

³³ *Id.*

In *Action*, the court determined that the compelling government interest was two fold. First, the government has a compelling interest in protecting children from being exposed to indecency by anyone other than their parents.³⁴ Second, the government has a compelling interest in assisting parents to control their children's access to indecent material.³⁵ The court opined that the broadcast medium was particularly suited to the time channeling restriction, because of the pervasiveness of the medium. By pervasive, the court meant both that broadcast signals enter the home whether or not an individual chooses to receive them, and that there are so many means of receiving broadcast signals within the typical American home that it is very difficult for a parent to control their children's access to it with any consistency.³⁶ The court noted that many children have their own television, and that many children have headphones for their radio.³⁷ By restricting indecent broadcasts to times when parents are likely to be home and able to directly supervise their children, and to times when younger children are likely not to be part of the viewing audience, the time channeling restrictions are able to address both of the compelling interests of the government.

Congress has also acted to support parental control over their children's access to material which while not necessarily indecent may have content that their parents would prefer them not to be exposed to, particularly violent content.³⁸ The 1996 Telecommunications act §551 known as Parental Choice in Television Programming, stated that unless broadcasters adopted 'voluntary rules for rating video programming

³⁴ *Id.* at 660-661

³⁵ *Id.*

³⁶ *Id.* at 659-660

³⁷ *Id.* at 661

³⁸ Benjamin, Stuart M; Lichtman, Douglas G; Shelanski, Howard A. *Telecommunications Law and Policy*. Carolina Academic Press, Durham, NC. 2001. pg 240.

that contains sexual, violent, or other indecent material’, and unless broadcasters broadcast that rating information along with the television program, the FCC will be empowered to appoint an advisory committee to establish a ratings regime, and will then impose that regime through regulations.³⁹ In addition to these requirements, §551 also imposed on T.V. manufacturers a requirement that they place a ‘v-chip’ into every television set over 13” that they produce.⁴⁰ This chip, susceptible to parental control, has the ability to read the broadcasted ratings, and to block out programs which do not meet the pre-approved limits set by parents.

The rationale offered to support the threatened regulation in §551 is probably very similar to the rationale offered to support the time channeling of indecent material. §551 applies to indecent material as well as violent content, and directly provides parents with a means to filter the content available to their children, whether or not they are home to personally supervise what their children are viewing. §551 is also interesting because it is an example of regulation achieved without official regulation. Had the FCC acted to impose regulations, it is not clear if they would have been found to be constitutional.⁴¹ In the context of 3G cellular technology, it is possible that Congress would employ a similar tactic to avoid the constitutional challenges.

In considering the possible regulation of indecent content over 3G networks, we should consider the rationales offered to regulate that content over broadcast. These rationales included the pervasiveness of the broadcast signal, the parental interest in controlling the content available to their children, and the government’s interest in limiting children’s exposure to indecent or violent content.

³⁹ *Id.* at 241

⁴⁰ *Id.*

⁴¹ *Id.*

C. Cable Encouraged Content

Congress and the FCC have acted to promote diverse content on cable.⁴² Under 47 U.S.C. §531(b), local cable franchising authorities may require that a cable company provide channel capacity for public, educational, or governmental use.⁴³ This requirement is known as the PEG provision. The PEG provision was challenged in *Time Warner v. FCC*, but the court determined that it was content neutral.⁴⁴ According to the court, the PEG requirement applied to all cable operators equally, and did not punish or reward any cable operators based on content.⁴⁵ The finding of content neutrality was critical in the upholding of the PEG regulations, because the courts have determined that cable does not merely receive the same cursory first amendment protection that broadcast receives, but receives first amendment protections more akin to the printed media.⁴⁶ As the court in *TBS* observed, the scarcity rationale which applies in broadcast regulation does not apply to the cable context.⁴⁷ The cable platform has the ability to carry many more channels than does the broadcast platform, and unlike broadcast where the government was in the business of handing out licenses for spectrum, cable companies transmit content along a physical line that they control.

The rationale for imposing the PEG requirement on cable companies is likely related to the goal of exposing the public to diverse viewpoints, and of increasing the

⁴² *Time Warner v. FCC*, 93 F.3d 963 (D.C. Cir. 1996).

⁴³ *Id.*

⁴⁴ *Id.* at 971

⁴⁵ *Id.*

⁴⁶ *Turner Broadcasting System v. FCC*, 512 U.S. 637 (1994).

⁴⁷ *Id.*

amount of educational programming on T.V.. When discussing the must-carry cable provisions which require cable companies to carry local broadcast stations, the court in *Turner* noted that “the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”⁴⁸ Thus, the PEG requirements ensure that a portion of the cable medium is available for these diverse and potentially antagonistic sources. Moreover, the PEG provisions allow for local programming which has always been one of the policy goals of the FCC.⁴⁹

D. Cable Discouraged Content

Congress has made several attempts to limit the availability of indecent content over cable lines.⁵⁰ §§ 504 & 505 of the Telecommunications Act of 1996 both sought to limit access to cable channels which are primarily dedicated to showing “sexually explicit adult programming, or other programming that is indecent.”⁵¹ §505 required the operators of these channels to either ensure that the channels would be completely blocked at the point of receipt, and would not allow signal bleed, or to time channel their indecent programming.⁵² Prior to the legislation, the channels were already blocking people from receiving the signals who were not ordering the program, but the scrambling was not complete.⁵³ The court in *Playboy* found §505 to be overly restrictive in large part because

⁴⁸ *Id.* at 653-654.

⁴⁹ 2002 Biennial Regulatory Review of the Commissions Broadcast Ownership Rules. P 73

⁵⁰ *U.S. v. Playboy Entertainment Group*, 529 U.S. 803 (2000).

⁵¹ *Id.* at 811.

⁵² *Id.* at 806.

⁵³ *Id.*

there was little evidence that signal bleed was a substantial problem.⁵⁴ Therefore, the *Playboy* court struck down §505.⁵⁵

§504 of the Telecommunications Act of 1996 addressed the signal bleed issue in a less restrictive manner. §504 required providers of sexually explicit content to install a blocking device on the cable box of anyone who actively requested the ability to block the sexually explicit channels.⁵⁶ This blocking device does not suffer from the same potential problems as the standard signal scrambling technique. The *Playboy* court found this lesser restriction on speech to be acceptable.⁵⁷

The rationale for limiting indecency on cable is almost identical to the rationale for limiting indecency over broadcast.⁵⁸ The court in *Denver* found that cable television is at least as accessible to children as broadcast television, that cable television is as pervasive as broadcast television, and that the same difficulties in preventing children from being exposed to indecent material are present.⁵⁹ While the same rationales might be used to justify regulation of indecency in broadcast and cable, those justifications provide for less regulation in the cable context. This difference appears to be based on the scarcity rationale, and the *Red Lion* court's statement that different technologies should be subject to different treatment.

The rationales offered to support regulation of cable content are very similar to the rationales offered to support regulation of broadcast content. The differences in the allowable scope of the regulation can be largely attributed to the differences in the

⁵⁴ *Id.* at 818.

⁵⁵ *Id.* at 827.

⁵⁶ *Id.* at 823.

⁵⁷ *Id.* at 827.

⁵⁸ *Denver Area Educational Telecommunications Consortium Inc. v. FCC*, 518 U.S. 744,745 (1996).

⁵⁹ *Id.*

technologies. Thus when analyzing how 3G might be regulated, it is not only the various rationales for regulation which must be considered, but it is also the form that 3G technology is likely to take that must be considered.

E. Satellite Encouraged Content

Congress has also imposed regulations on the content provided by DBS. Section 25 of the 1992 Cable Act as codified by 47 U.S.C. §335(b)(1) provides that DBS operators are required to reserve a minimum of 4% of their channel capacity exclusively for non-commercial programming of an educational or informational nature. In addition to this requirement, DBS providers are not allowed to exercise editorial discretion over that 4% of their channel capacity.

In *Time Warner*, §335(b)(1) was challenged as being a restriction on First Amendment speech. The court in *Time Warner* determined that DBS is similar to broadcasting, and that it should be subjected to the same lesser scrutiny as outlined by the decision in *Red Lion*.⁶⁰ In determining that DBS is like broadcast, the court in *Time Warner* considered that there are a limited number of satellite positions available for DBS service, and that the demand for DBS licenses far exceeds the available supply.⁶¹ Having determined that regulation of DBS receives lighter scrutiny, the court in *Time Warner* reviewed the government's rationale for §335(b)(1). The court found that the rationale behind §335(b)(1) was to encourage diversity of information sources, and that "assuring that the public has access to a multiplicity of informational sources is a governmental

⁶⁰ *Time Warner Entertainment v. FCC*, 93 F.3d 975 (D.C. Cir. 1996).

⁶¹ *Id.*

purpose of the highest order, for it promotes values central to the First Amendment.”⁶²

The *Time Warner* court held that where DBS regulation is subject to a lower level of scrutiny, and that where the government has a strong rationale for its regulation, §335(b)(1) is constitutional.⁶³

The *Time Warner* court’s decision has potential far-reaching effects if Congress were to try to discourage or eliminate indecent content delivered via DBS. A reading of *Time Warner* in conjunction with *Act III* or *Pacifica* seems to indicate that the time channeling provisions, if enforced on DBS, would meet constitutional muster. However, it is possible that other differences would lead to a different constitutional conclusion. These differences include the fact that DBS is not delivered into the home uninvited, rather a satellite dish must be installed, and a service must be subscribed to. Another key difference is that satellite subscription service may allow for the blocking of individual channels which air indecent content. These distinctions might mean that indecency regulation of DBS would look more like the regulation of cable under *Playboy*.

F. Internet Discouraged Content

The internet as one of the newest methods of mass communication and public discourse has not escaped Congress’ attempt to restrict the availability of indecent content.⁶⁴ As part of the Telecommunications Act of 1996, Congress passed the Communications Decency Act (CDA).⁶⁵ The CDA led to the adoption of two statutory

⁶² *Id.* at 976.

⁶³ *Id.* at 977.

⁶⁴ *Reno v. ACLU*, 521 U.S. 844 (1997).

⁶⁵ *Id.* at 857,858.

provisions, 47 U.S.C. §§223(a), 223(d). The provisions prohibited the knowing transmission or displaying of obscene or indecent content to people under 18 years of age.⁶⁶ The regulations also banned displaying such content in a manner that was available to persons under 18 years of age.⁶⁷

The constitutionality of Sections 223(a) and 223(d) was challenged in *ACLU v. Reno*. In *ACLU*, the government asserted the usual rationale for indecency regulation, that children will have access to it, and that the medium is pervasive.⁶⁸ The Supreme Court rejected this rationale for several reasons. First, the Court opined that in *Pacifica* indecency regulation of broadcast was partially justified by the fact that a warning at the beginning of a broadcast would not protect against the unintentional exposure of children just tuning in whereas, on the internet indecent content is often preceded by a warning and is not encountered accidentally.⁶⁹ Second, the Court determined that the internet is not as invasive as broadcast is.⁷⁰ Internet content does not appear on a person's computer without being actively sought.⁷¹ Moreover, there are various parental filters available which may serve to limit the access of children at the source. Third, the Court held that the internet is not scarce.⁷² The Court found that the low cost easily available ability to communicate on the internet had been adopted by over 40 million people and projected that by 1999 more than 200 million people would be using the internet.⁷³ Fourth, the Court stated that the CDA was too vague.⁷⁴ This vagueness would not have permitted

⁶⁶ *Id.* at 859,860

⁶⁷ *Id.*

⁶⁸ *Id.* at 864-870.

⁶⁹ *Id.* at 867.

⁷⁰ *Id.* at 869.

⁷¹ *Id.*

⁷² *Id.* at 870

⁷³ *Id.*

⁷⁴ *Id.* at 871.

parents to intentionally expose their children to indecent content online including some content which many would judge valuable such as safe sex education. The vagueness of the CDA would have led to a suppression of the speech of adults, and as the Court explained in *Denver*, “the government may not reduce the adult population . . . to . . . only what is fit for children.”⁷⁵ Upon making these findings, the Supreme Court struck down sections 223(a) and 223(d).

The unique technological aspects of the internet, its lack of scarcity, its susceptibility to parental filters, and the way in which content is delivered has led to an environment of very little content based regulation. When looking at possible regulation of 3G cellular technology, it will be important to carefully compare the similarities of that technology to the internet to determine if content regulation would be plausible.

III. THE 3G CELL PHONE

A. Current Business Models

There are currently three models for the provision of video services over wireless networks that may emerge as the dominant business model for 3G services. The first of these models allows users to download and view as much video content as they want for a monthly subscription fee. Both Verizon and Cingular have adopted this model for their initial roll out of 3G services. Cingular offers about 10 “channels” of content for this basic subscription fee, and offers HBO and HBO Family for an

⁷⁵ *Id.* at 875.

additional premium subscription fee. The channels aren't channels in the traditional sense meaning that there is a time sensitive continuing broadcast, but rather each channel is a unique content provider, all of their content being available for individual download whenever the user desires. Cingular's programming currently offers local weather, news, sports, entertainment, music, and children's content. Verizon's V-cast service provides users with the option to both download the video content to their phone and watch it locally, or to stream the content directly from Verizon. Neither of the other two business models are currently being applied to 3G services, but could easily become the preferred method of supporting 3G.

The first alternative business model is to mimic i-Tunes. Under this model, 3G providers would provide the same content, but would charge a small fee for every download instead of a monthly subscription fee. Currently, Cingular adopts this approach for their music video content only. However, if a Cingular customer does not subscribe to the monthly video service and chooses to download video, that customer pays by the amount of data transmitted which currently costs approximately \$10.00 per minute of video content. While both Cingular and Verizon launched 3G with a subscription service, the popularity of the i-Tunes' ala carte model makes it possible that 3G services will eventually be delivered in the same fashion.

The second alternative model would be to provide advertiser supported video content for free to the user. This model, more like broadcast television, hasn't really been tested in the downloadable video context. However, Disney has announced plans to begin providing downloadable versions of some of its content for free online. These shows will be available the day after they are broadcast. Disney has developed

a technology which will not allow users to fast forward through or skip the commercials that it is going to imbed in these shows.⁷⁶ If this model proves successful for Disney, it is possible that the 3G video content providers will also consider an advertiser supported format.

B. Where Does 3G Fit Along the Broadcast, DBS, Cable, and Internet Spectrum?

As the Court in *Red Lion* stated “differences in the characteristics of new media justify differences in the First Amendment standards applied to them.”⁷⁷ While the various characteristics of 3G probably place it closer to broadcast in the spectrum of First Amendment protection than to cable, other characteristics would probably limit the allowable scope of regulation.

To the extent that the scarcity rationale is still used to justify regulation of content and the imposition of public interest obligations, 3G services would probably be found to be scarce. There are several ways to look at scarcity. First, 3G services could be found to be scarce because there are fewer licenses for advanced wireless service (AWS) than there are people willing to provide those services. There are currently only 3 major players in the cell phone market, and one of them is eagerly awaiting the forthcoming AWS auction without which it will not be able to provide the 3G services that its competitors are providing.⁷⁸ This definition of scarcity is the one employed by the

⁷⁶ <http://abcnews.go.com/Business/Entertainment/story?id=1825619&page=1> (Last viewed 04/29/06).

⁷⁷ *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 387 (1969).

⁷⁸ http://www.betanews.com/article/TMobile_Plans_for_Growth_3G_in_2006/1134755975 (Last viewed 04/29/06).

Supreme Court in *Red Lion* to broadcast and in *Time Warner* to DBS. Thus, it is likely to be the definition of scarcity applied to 3G content providers. The other possible definition of scarcity is channel scarcity. Broadcast, for instance, can be considered scarce because there are a tightly limited number of speakers that can transmit over the spectrum. DBS, on the other hand, has the potential for providing hundreds of channels and therefore has much less channel scarcity. If this were the definition of scarcity used, 3G would probably not be scarce because the storage capacity for unique video content is almost limitless. However, the *Time Warner* court's holding that DBS is scarce would probably control 3G.

An alternative justification for imposing public interest obligations on 3G providers was suggested by a dissenting opinion for the denial of rehearing to *Time Warner* in the context of DBS.⁷⁹ The judge suggested that an implicit cost of the spectrum licenses to the bidders for DBS could be the public interest obligations. Similarly, courts may hold that public interest obligations should be included as an additional implicit cost to the bids for AWS spectrum. If the scarcity rationale is eventually rejected by the courts, this licensing rationale may take its place with very little disruption to the actual obligations placed on users of the spectrum.

While 3G service may be found to be as scarce as broadcast, it would not likely be thought to be as pervasive as broadcast. The Court in *Pacifica* and *Act III* found that broadcast was pervasive because its signal invaded the home whether or not anybody wanted it in the home. Therefore, this signal could in some way be considered a nuisance. 3G signal, on the other hand, is not sent to an individual phone unbidden. The pervasive aspect of broadcast, it was determined, made it difficult for parents to filter the content

⁷⁹ *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723 (D.C. Cir. 1997).

that their children were being exposed to because any headset radio or small personal T.V. could receive the free and potentially indecent broadcast signals. A subscription 3G system is more like cable where only if the parent is willing to subscribe are their children potentially exposed to the content. However, 3G systems are likely to become pervasive in another sense. While not necessarily pervasive in the home, many millions of Americans, including children, carry cell phones. As 3G penetrates the market more deeply, consumers will be confronted not merely with annoying people talking on their cell phones in inappropriate locations, but with people watching indecent content in public. The watching of indecent content in public is already becoming an issue with automobile DVD players.⁸⁰ Thus, while 3G is less pervasive than broadcast, it is substantially more pervasive than cable or DBS. 3G is even somewhat more pervasive than the internet, because while many people have wireless access and can view indecent content at will over the internet, a substantially greater number of people have cell phones.

The way in which 3G content would be delivered is more similar to pay per view cable or the internet than it is to broadcast. Because 3G content would be delivered on a per show basis instead of on a per channel basis, the consumer is likely to know with a great deal of specificity the level of violence, profanity, or sexuality that he is about to view. As the Court in *ACLU* found in the context of the internet, indecent 3G content would not likely pop-up without the consumer looking for it.⁸¹ Moreover, the court in *ACT III* worried that warnings preceding a broadcast would be ineffective for those

⁸⁰ Kirby, David. "When the Car Beside You Is an XXX Theatre." New York Times, 10/27/04, Technology section.

⁸¹ *Reno v. ACLU*, 521 U.S. 854 (1997).

people just tuning in.⁸² With a per show business model, 3G consumers would never be tuning in to the middle of a program. A warning could therefore always precede the content. These factors would make it much easier for a parent to censor their children's viewing of 3G material at the point of receipt than broadcast, basic cable, or DBS make possible. Just as they do for the internet, concerned parents could employ a content filter for 3G to prevent their children from having download access to material that they don't want their children to view. This technological capability likely renders content regulation at the source unconstitutional.

3G technology is likely to be subject to the stringent public interest obligations of broadcasters, yet is unlikely to be subject to content regulation at the source. The next section will look at what regulations of 3G might look like.

IV REGULATION OF 3G

A. Indecency Regulation

3G, while probably subject to public interest requirements and some indecency regulation, would not likely be subject to the time channeling provisions that broadcast television is subject to. Broadcasters are in large part subject to the time channeling provisions because no effective warning technique has been established.⁸³ 3G technologies, however, would permit effective screening of programs by the recipient without affecting the choices of other adults. The Court in *Denver* held that in the context

⁸² *Action For Children's Television v. FCC*, 53 F.3d 660 (D.C. Cir. 1995).

⁸³ *Reno v. ACLU*, 521 U.S. 867 (1997).

of cable, adults should not have their options limited to G rated content. Similarly, the courts would be unlikely to uphold any regulation which required 3G providers to censor indecent content at the source.

One argument in favor of time channeling regulations for 3G relates to the potential pervasiveness of indecent video content in public. Children when at school or even when under their parent's supervision may be exposed to indecent content downloaded onto the phone of a person on the street. Similar instances involving "drive-by-porn" have been occurring with greater frequency as more people install DVD players in their cars.⁸⁴ By limiting the availability of this content to times when young children are likely to be asleep, time channeling provides a uniquely effective method to control the content available to children. As argued above, time channeling would likely not meet constitutional muster. Moreover, laws punishing the public viewing of indecent material can attack this walk-by-porn problem much more narrowly without substantially impeding the availability of indecent material for adults. Therefore, rather than regulating indecent content at the source like it does for broadcast, and like it attempted for the internet, Congress should instead penalize the inappropriate public dissemination of indecent content. Just like it would be illegal to project pornography onto the side of one's house, it should be illegal to watch indecent material via a 3G phone in a public park.⁸⁵

Congress and the FCC might also consider imposing regulations on 3G similar to the ones upheld in *Playboy*. 3G is scarce under the *Red Lion* definition and is therefore probably subject to even greater regulation than cable. The regulations upheld in *Playboy*

⁸⁴ Kirby, David. "When the Car Beside You Is an XXX Theatre." New York Times, 10/27/04, Technology section.

⁸⁵ *Id.*

requiring that cable providers block indecent content upon request would ensure that parents would have a means of filtering their children's video exposure without having to eliminate it all together. Such a regulation is particularly important as cell phones are being marketed to younger and younger audiences.⁸⁶ Additionally, many parents will want their children to carry a cell phone for emergencies, and some will want their children to have access to the educational video content. The *Playboy* regulation would let children access the content geared towards them without being able to access indecent content, and without obstructing the access of adults.

The Cingular 3G video service already has a parental control function. This function, however, has limited usefulness where a rating system hasn't been developed.

B. Ratings Regulation

The lack of meaningful ratings on 3G content makes it difficult for anyone to know exactly what kind of content they are downloading, and makes the parental control function that Cingular provides much less valuable. For this reason, Congress should consider adopting a technique similar to section 551 of the Telecommunications Act of 1996, which effectively brow beat the broadcasters into adopting a voluntary ratings system. The same technique, if employed against the 3G providers, may not be quite as effective. When Congress passed section 551, the broadcasters were aware that *Red Lion* was still good law, and that a Constitutional challenge to section 551 might not be successful. There is no precedent stating the level of scrutiny applicable to regulation of

⁸⁶ <http://www.mobiledia.com/news/27261.html> (last visited 04/29/06); This is an advertisement for the Firefly phone which enables parents to program a limited quantity of numbers for their children to call including mom, dad, and emergency numbers.

3G, and the 3G providers might be more willing to challenge the government instead of self-regulating. Despite the lack of strong precedent, two additional factors would probably cause the 3G providers to self-regulate.

First, the 3G providers currently grant access to the Disney channel, Sesame Street, HBO Family, and the Cartoon Network. This strong commitment to children's programming indicates that they have an interest in marketing 3G to children. Because parents have an interest in filtering the video that their children have access to, parents may be unwilling to purchase 3G phones for children if the parental control function isn't made more effective. Thus, there is a market-based incentive for the 3G providers to voluntarily adopt a ratings system.

Second, one of the reasons that extensive regulation of the content of 3G at the source would probably not be permitted is because the technology makes parental control at the point of receipt potentially easy. This potential is only realized if there is a ratings system. Therefore, a refusal to rate the programming by the 3G providers would make time channeling provisions or other harsher regulations more likely to survive a constitutional challenge.

If the 3G providers did not self-regulate, Congress could probably impose ratings regulations on them. 3G technology as both scarce and pervasive falls under the logic of *Pacifica* and *Act III*. The compelling governmental interest in supporting a parent's oversight would probably be sufficient to justify the minor intrusion on speech that a ratings system would impose. A ratings system does not criminalize content, nor does it impede the ability of an adult from accessing that content. Therefore, voluntary or not, a ratings regime is likely to emerge in the 3G context.

C. Public and Governmental Access Regulation

The PEG provisions imposed on cable providers, and the 4% noncommercial educational programming floor imposed on DBS providers could similarly be applied to 3G providers. The PEG provisions were justified as being content neutral by the court in *Time Warner*. Thus, where the government had a compelling interest in encouraging diverse speakers, the PEG provisions were allowed. The similar requirement imposed on DBS was justified because DBS, like broadcast, was scarce and subject to the public interest obligation. Additionally, the court in *Time Warner* was willing to permit PEG requirements where those requirements wouldn't be overly burdensome on the cable provider. The court specifically approved of the provisions if they didn't take a disproportionate amount of the channel capacity from the cable provider.⁸⁷ In the 3G context, the idea of channel capacity is almost non-existent. The "channels" provided by a 3G operator are just indexing tools. The amount of content that a 3G provider can offer is limited only by its electronic storage capacity. Moreover, one can imagine a system evolving in which the 3G operator doesn't even provide the storage, but merely serves as the index and the link to off-site content storage which is paid for by the content producers. In such a system, the costs of adding additional content are infinitesimal. The money paid by consumers for the content would be split between the 3G operator and the content producer.

The potential costs of adding PEG content is so low and the potential social benefit is so high that Congress should require 3G operators to open their systems to certain

⁸⁷ *Time Warner Entertainment Co. v. FCC*, 93 F.3d 973 (D.C. Cir. 1996).

content. This content could include public service announcements, safe sex education, educational programming, emergency preparedness information, and local government announcements. The fact that 3G operators are already providing access to local weather and sport information means that such targeted content could likely be provided without much additional investment. Furthermore, this content would not only promote diversity amongst speakers, but would also address the FCC's interest in fostering localism.

D. Political Speech Regulation

Congress should impose a regulation similar to 47 U.S.C §315 on 3G operators. Just as section 315 can be justified by the public interest obligation of broadcasters, so too could a similar regulation affecting 3G operators be justified. It is likely that only 3 3G operators will arise. It would likely be against the public good if these operators all decided to only offer the content of one particular political party. Moreover, because the costs of adding additional content to 3G networks will be so low, forcing 3G operators to allow all bona fide Federal candidates several minutes worth of content will not infringe upon the speech of the 3G operators. Unlike in the newspaper context where the printing of one story means that another story will likely not be printed, 3G operators will not lose any ability to further their own speech if required to link to and index opposing political candidates.⁸⁸ Furthermore, the ability of consumers in the increasingly fast paced modern world to assimilate important political messages is tightly constrained. Creating a means for these people to access diverse opposing political messages in a quick, portable format is an important social benefit, and if challenged in court would likely be found to

⁸⁸ *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 256,257 (1974).

represent a compelling government interest. Since the interest is compelling and the cost to the 3G operators is so low, the courts would likely uphold the regulation.

During the 2004 presidential election, i-Tunes made various candidate speeches available online for free. 3G operators who have been granted the right to use the valuable AWS spectrum should similarly support the democratic process.

E. Children's Educational Programming

Congress should not yet act to impose children's educational programming requirements on 3G operators. The CTA, which imposes a children's educational programming requirement on broadcasters, is justified because that programming provides a valuable public benefit, and because market failures prevent the socially optimal amount of children's programming from being aired. Thus, the broadcaster's public interest obligation compels them to fill that programming void. However, in the 3G context, no market failure exists. As long as the CTA is in effect and children's programming is being made for broadcast or other mediums, that programming can be inexpensively offered through 3G. The low cost of adding additional content to the 3G index means that even shows with a low potential for profit can be offered. The large proportion of children's programming relative to other programming offered by Cingular video and by Verizon V-cast is empirical evidence that in the 3G context the market failure does not exist.

While congress should not impose separate children's educational programming regulations on 3G operators, it should continue to impose those obligations on

broadcasters to ensure that the programming is produced. Moreover, if it is later determined that the 3G operators are not providing a sufficient supply of children's educational programming, the public interest obligations probably provide a sufficient rationale for Congress to adopt children's programming guidelines for 3G.

CONCLUSION

The emergence of 3G technology poses a unique challenge to regulators as characteristics of 3G are similar to many other technologies both new and old. Regulators should look back at the prior technologies when developing the proper means to regulate 3G. This regulation must address indecency, a ratings system, government and local access, children's programming, and political access. The regulatory approach as suggested by this paper would serve to support parental choice without limiting the availability of content for adults. Moreover, the suggested regulatory approach would leave 3G free to develop into the powerful tool that it has the potential to become.