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Kristen S. Burns

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LEGISLATIVE UPDATES

Protecting the Child: The V-chip Provision of the Telecommunications Act of 1996

INTRODUCTION

In the United States today the average child, according to a Congressional finding, spends 25 hours a week in front of the television.¹ The average child sees 8,000 murders and 100,000 acts of violence on television by the time he or she completes elementary school.² Congress further found that some children will watch as much as eleven hours of television a day.³ In the past few years concern over the amount of violence children are being exposed to has grown; as has the concern over the effect this exposure will have on children as they mature.

On February 8, 1996, Congress and the President responded to this concern with the passing of the Telecommunications Act of 1996.⁴ This bill deregulates the cable television and telephone industry but also contains § 551, "Parental Choice in Television Programming."⁵ This provision -- often called the V-chip provision -- proscribes two main events. The first event is that all video programming broadcast in the United States must be rated based on the amount of sex, violence, or other indecent material contained within the program. This rating must be transmitted in such a way as to allow parents to block those programs they deem inappropriate for their children.⁶ The second event is that all televisions over a certain size (thirteen inches) manufactured or sold in the United States must contain a computer chip capable of blocking programs based on their rating.⁷

As a form of forced governmental censorship the V-chip has attracted a lot of controversy. This article will examine the V-chip provision and the controversy that surrounds it. Section I of this article will examine the background of the V-chip and how the V-chip works. Section II will look at the legislation itself, and section III examines the V-chip's constitutional issues and the future of the V-chip.

1. The Telecommunications Act of 1996, § 551(a)(3), 110 Stat. 56, 139, (1996).

2. *Id.* at § 551(a)(5).

3. *Id.* at § 551(a)(3).

4. The Telecommunications Act of 1996, 110 Stat. 56 (1996).

5. *Id.* at § 551.

6. *Id.* at § 551(b).

7. *Id.* at § 551(c).

I. BACKGROUND

A. History

The history of the V-chip begins in 1990 with the passing of the Television Decoder Circuitry Act of 1990.⁸ This law required that all television manufactures install decoders to read the part of the broadcast spectrum that would carry closed captioning information, with the idea that this same technology could eventually be used to send viewers ratings based on the sexually explicit or violent content of television programs.⁹

Several years later Tim Collings, an electrical engineer at Simon Fraser University in Vancouver, Canada, created a computer chip that would make the sending and decoding of such ratings possible.¹⁰ Collings manufactured the world's first working V-chip because of his own concern over what his children were watching on television.¹¹ He hoped to enable parents to gain control of what their family sees.¹² The "V" in V-chip, according to Collings, stands for viewer-control, not violence.¹³ Due to his persistence, Canada's largest cable company, Shaw Communications Inc., began testing his V-chip in early 1995.¹⁴ Although this early test yielded some complaints, Shaw received an overall approval rating of 80% by the families that took part in the test.¹⁵

While Canada was quietly testing the V-chip, it was fast becoming a political hot topic in the United States. The political fight for the V-chip began in earnest during the 1995 State of the Union address, when President Clinton challenged Congress to pass a V-chip law that would enable parents to take control of what their children are watching on television.¹⁶ Before the provision was voted on, several GOP leaders joined with the four major television networks to declare the V-chip provision unconstitutional and harmful to advertising revenue.¹⁷ However, as public pressure for the V-chip rose many prominent GOP leaders began to back

8. Edward Markey, *How the V-Chip Came to Pass: A Paradoxical History*, ROLL CALL ASSOCIATES, Mar. 11, 1996.

9. *Id.*

10. Douglas Todd, *V as in Values, V as in V-Chip*, WINDSOR STAR, July 6, 1996, at E2.

11. Douglas Todd, *The Evangelical Faith That Drives the V-chip Inventor*, VANCOUVER SUN, June 22, 1996, at D28.

12. *Id.*

13. *Id.*

14. Patricia Chisholm, *Disarming the Tube: The V-chip Holds the Promise of TV Peace*, MACLEAN'S, Mar. 25, 1996, at 56.

15. *Id.*

16. Jim Moran, *President Clinton Endorses V-chip in State of the Union Address*, GOV'T PRESS RELEASE, Jan. 24, 1996.

17. Dennis Wharton, *V-chip on a Roll Puts Industry in a Pickle*, VARIETY, July 17, 1995, at 21.

away from the fray. These included then Senate Majority Leader Bob Dole who abruptly canceled his plans to testify against the V-chip.¹⁸

After the Telecommunications Act of 1996 was signed into law, the Democrats hailed the V-chip provision as a major victory. President Clinton made the V-chip a central issue in his reelection campaign.¹⁹ Vice-president Al Gore proudly announced at the Democratic National Convention that the current administration had passed the V-chip law to give parents a new tool to keep violent and explicit programming out of their homes and away from their kids.²⁰ During the first televised debate between Senator Bob Dole and President Bill Clinton, Clinton mentioned the V-chip in his opening statements to show how the country was better today than it was four years ago.²¹ In an election that had both parties claiming family values as a major part of their agenda the Democrats were able to point to the V-chip as something concrete that they had done to enhance family values.

B. Mechanics Behind the V-chip

The process of blocking out inappropriate programs is actually a collaboration of several technologies. The first technology is the actual chip, which is a small circuit similar to the closed captioned circuit.²² This circuit is built into televisions giving them the ability to "read" information that arrives on the vertical blanking interval (VBI).²³ The VBI is the black bar that can be seen when the vertical hold on the set is out of sync.²⁴ Television broadcasters will encode a program's rating into the VBI at the point of transmission.²⁵ The V-chip in the television will translate these codes and block programs based on instructions parents program into the chip by remote.²⁶ Parents will also be given an access number to allow them to turn the chip on and off to protect against tampering by children.²⁷

18. *Id.*

19. *Media Issues Rate for Democrats*, TELEVISION DIG., Sept. 2, 1996.

20. Marc Silver & Thom Geier, *Ready for Prime Time?*, U.S. NEWS AND WORLD REP., Sept. 9, 1996.

21. *First Presidential Debate Between William Clinton And Robert Dole*, 1996 WL 565446 (Oct. 6, 1996).

22. See Chris O'Malley, *Blueprint for a Revolution*, POPULAR SCIENCE, July 1, 1996, at 69.

23. *Id.*

24. *Id.*

25. Bill Keveney, *The V-Chip: Who, What, When, and Where*, ST. LOUIS POST DISPATCH, April 24, 1996, at 1E.

26. Abraham T. McLaughlin, *V-Chip Promises Limits That Are Easy to Set: HOW IT WORKS*, CHRISTIAN SCIENCE MONITOR, May 17, 1996, at 11.

27. *Id.*

When a show is blocked, the screen displays the V-chip menu in place of the program so that people know that the chip is doing its job and the television is simply not broken.²⁸ One pitfall of the system is that the VBI sends information every one and a half seconds.²⁹ Therefore it may take the chip up to one second to block a prohibited show.³⁰ This leads to the possibility that a child might be able to catch snippets of restricted shows by surfing between two channels with a remote.³¹

C. Rating the Programs

The Telecommunications Act (the "Act") gives the broadcast industry one year to come up with its own rating system.³² If the industry can not do so, the FCC can establish an advisory board to set up a model rating system.³³ The Act specifies that the rating is a voluntary procedure, and does not force stations to use the model rating system. Instead, Congress and the FCC hope that public pressure will force the industry to comply.³⁴

The broadcast industry is still undecided as to what form the ratings will take. Some speculate the ratings might mimic the film industry ratings of G, PG, PG-13, R, and NC-17.³⁵ However, the rating system will probably be more complicated than that. The system will probably allow parents to program different levels of ratings for violence, language, and sexually explicit material.³⁶ This would allow greater freedom of choice for parents who might want to protect their child from violence and bad language but do not mind their child seeing partial nudity.

American broadcast industry leaders stress the wish to provide American parents with as many choices as possible.³⁷ However, implementing a rating system is a problem with enormous proportions. There are as many as 600,000 hours of programming to be rated annually, compared to 1,200 films.³⁸ Some shows will have to be rated only moments before they are aired.³⁹ The number of shows to be rated and the speed required in some instances will inevitably require networks to self-rate programs. Films are rated by an independent rating

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. Telecommunications Act at § 551(e).

33. *Id.* at § 551(b)(2).

34. Christopher Stern, *Broadcasters Plotting V-chip Legal Strategy*, BROADCASTING & CABLE, Feb. 12, 1996, at 23

35. O'Malley, *supra* note 20.

36. *Id.*

37. *Presidential Roundtable Discussion Regarding Television Violence*, FED. NEWS SERVICE, Mar. 1, 1996.

38. James C. Goodale, *To V or Not to V*, 215 N.Y.L.J. 66 (1996).

39. *Id.*

committee.⁴⁰ As a result of self rating, a host of inconsistent results are probable if a strict rating guide line isn't developed.

Some parents and special interest groups express concern that the broadcast industry is not the best organization to rate television shows.⁴¹ Evidence shows that the industry is out of touch with how the average American feels about televised sex and violence and its effect on viewers. For instance, a recent U.S. News and World Report poll found that over two-thirds of the public thought that television shows have a negative impact on the country and believe television contributes to social problems like violence, divorce, teen pregnancy, and a decline in family values.⁴² A similar poll of Hollywood leaders found that consistently 30% to 40% fewer Hollywood people believed that violent or sexual programs affect the American public, especially children and teens.⁴³ This great disparity could result in ratings that fail to block out programs parents do not want their children to see.

II. THE LEGISLATION

Section 551 of the Telecommunications Act of 1996 (the "V-chip provision") appears to be drafted with litigation in mind. The standard for regulating broadcast speech is a strict scrutiny review, meaning that the state must have a compelling interest in regulating the speech and the regulation must be narrowly tailored to effectuate the compelling interest.⁴⁴ The subsections of § 551 appear to be carefully worded to establish a compelling state interest. The subsections also appear to be drafted to be narrowly tailored, but not unduly burdensome, and still be an effective means to meet the state's interest.

In sub-section (a) of § 551, the Act outlines the state's compelling interest by enumerating a series of findings. Congress found that: television exposes children to extraordinary amounts of violence; television is a pervasive influence on children; harm can result from this influence; and empowering parents by allowing them to control what their child sees helps the government reduce the harmful effects of television.⁴⁵

The Supreme Court has previously held that protecting children from indecent speech is a compelling state interest.⁴⁶ However, subsection (a) attempts to broaden the compelling state interest to include protecting children from exposure to violence, something the Supreme Court has never held. The Supreme Court

40. *Id.*

41. Jim Impoco et al., *TV's Frisky Family Values in Prime Time*, U.S. NEWS & WORLD REPORT, Apr. 15, 1996, at 58.

42. *Id.*

43. *Id.*

44. *See, infra*, section III for a discussion of the strict scrutiny standard.

45. Telecommunications Act at §551(a).

46. *Sable Communications v. FCC*, 492 U.S. 115, 126. (1989).

traditionally has given deference to Congressional findings.⁴⁷ Therefore, the inclusion of the findings in the body of the law probably increases the likelihood that the Supreme Court will also find that protecting children from broadcast violence is a compelling state interest.

The remaining subsections in §551, attempt to narrowly tailor the Act so that it will both protect children and not be unduly burdensome on the exercise of speech. In essence, Congress is attempting to balance two competing interests. The first interest is protecting children. Congress achieves this goal by proscribing that all programs broadcast in the United States must transmit a signal based on the program's sexual, violent, or indecent subject matter.⁴⁸ They also require that all televisions shipped within the United States must contain technology capable of blocking programs based on the above mentioned signal.⁴⁹ Together these two provisions ensure that eventually the technology for blocking inappropriate television shows will be present in every American household. The presence of this technology will then assist American parents in regulating what their child sees, thereby reducing the amount of violent or indecent material the child sees and protecting the child.

The one flaw in attempting to protect children from indecent and violent material through the V-chip technology is that it will protect some, but not all, children. Children whose parents already take an interest in what they watch will be the most protected by the V-chip.⁵⁰ Those parents will be able to use the V-chip to exercise control over what their child views. However, other children, whose parents do not take an interest in what their children see on television, may not be protected.⁵¹ These parents may never bother to use the V-chip, thus leaving the child vulnerable to exposure to indecent and violent programs. These children, whose parents do not care, are probably in the most need of protection. Unfortunately the V-chip provision offers them the least amount of protection against violent and indecent broadcasts.

The second interest is ensuring that the regulations are not unduly burdensome on the broadcast industry's exercise of free speech. This goal is effectuated in several ways. First, the Act gives the broadcast industry one year to develop a voluntary rating system before the government steps in.⁵² This allows the industry the opportunity to avoid all government involvement. Second, if the government does become involved in the creation of a ratings system, the Act provides that the FCC must establish an advisory committee that will set up guidelines and

47. See *Fullilove v. Klutznick*, 448 U.S. 448, 451 (1980).

48. Telecommunications Act at § 551(b).

49. *Id.* at § 551(c).

50. Paul Simone, *The V-chip is No Solution for TV Violence*, THE WASHINGTON TIMES, Aug. 4, 1995, at A19.

51. *Id.*

52. Telecommunications Act at § 551(e).

procedures for rating shows.⁵³ This advisory committee must be composed of a cross section of people and groups including: parents, television broadcasters, cable operators, television producers, and other public interest groups.⁵⁴ This insures that the broadcast industry will not be under the control of the federal government if they are unable to establish a voluntary rating system. Third, the FCC must implement new technology as it becomes available that would be less restrictive than the technology provided for in the Act.⁵⁵ Presumably this means technology that does not require ratings. These provisions attempt to lessen the burden broadcasters felt when the Act was passed. Although presumably included to stave off litigation, the provisions may insure that the Act will withstand a constitutional challenge if the broadcasters decide to file suit. However, these concessions do not necessarily compensate for the essence of the V-chip provision, a mandated censorship that has the potential to economically hurt the broadcast business.

III. CONSTITUTIONAL ANALYSIS

Because the V-chip provision is a regulation of televised speech it creates serious First Amendment concerns. Congress, foreseeing constitutional problems, created a special court comprised of three judges. This court is to determine the constitutionality of the Act so that the matter could be immediately appealed to the Supreme Court.⁵⁶ No broadcast company has yet chosen to file suit. However, the Supreme Court has mentioned the V-chip in dicta.⁵⁷ Based on this dicta and previous Supreme Court rulings it is likely that the court will uphold the V-chip provision.

The First Amendment of the Constitution says, in part, Congress shall make no law abridging the freedom of speech,⁵⁸ but the Supreme Court has never interpreted that clause to prohibit the regulation of all speech.⁵⁹ The Court also does not hold that all speech necessarily receives the same amount of protection.⁶⁰ What the Supreme Court has said was that of all forms of communication, broadcasting is

53. *Id.* at § 551(b)(2).

54. *Id.* at § 551(b)(2)(A).

55. *Id.* at § 551(d)(4).

56. Telecommunications Act § 551.

57. *See Denver Area Educational Telecommunications Consortium v. FCC*, 116 S. Ct. 2374 (1996).

58. U.S. CONST. AMEND. I.

59. *See Gitlow v. New York*, 268 U.S. 652 (1925) (finding speech that presents a clear and present danger is entitled to no protection); *Chaplinski v. New Hampshire*, 315 U.S. 568 (1942) (holding that a prohibition of fighting words was constitutionally valid); *Roth v. United States*, 354 U.S. 476 (1957) (finding obscene speech is entitled to no protection).

60. *FCC v. Pacifica*, 438 U.S. 726, 748 (1978).

granted the most limited First Amendment protection.⁶¹ This is because of the uniquely pervasive presence that broadcasting has in the lives of Americans, and because broadcasting is uniquely accessible to children.⁶²

The first case dealing with this issue, *Pacifica v. FCC*, concerned a radio broadcast of George Carlin's "Filthy Words" monologue, which the FCC and the Supreme Court deemed indecent, but not obscene.⁶³ The *Pacifica* Court held that indecent material, while protected by the Constitution, could be regulated.⁶⁴ Any regulation of indecent speech would have to pass strict scrutiny review, the level of review mandated for constitutionally protected speech.⁶⁵ This means that any regulation must serve a compelling state interest and be narrowly tailored to meet the state interest.⁶⁶ A narrowly tailored regulation may not be over or underinclusive.⁶⁷

Pacifica aided the understanding of how to regulate indecent speech in two ways. First, *Pacifica* held that protecting children from indecent material is a compelling governmental interest.⁶⁸ Second, indecent material could be regulated by airing the speech only during those times of the day when children would be less likely to be in the audience.⁶⁹ It was not appropriate to broadcast a monologue filled with profanity at two o'clock in the afternoon. However, *Pacifica* was not the last word on the subject.

The duty of verbalizing the correct way to regulate indecent speech fell on the United States Court of Appeals for the District of Columbia. In a series of cases entitled *Action for Children's Television v. FCC (ACT)*, the court struggled with the FCC to determine a constitutionally valid regulation on indecent speech that would effectively protect children while not being either over or underinclusive. The court of appeals in *ACT I* considered the FCC's order prohibiting broadcast of indecent material when there was a reasonable risk that children would be in the audience.⁷⁰ The FCC had suggested that after midnight might be an appropriate time to broadcast indecent material.⁷¹ The Court found the FCC's midnight advice was too vague and not adequately considered and therefore did not uphold it.⁷² The FCC subsequently issued a twenty-four hour ban on the broadcast of indecent

61. *Id.*

62. *Id.* at 748-749.

63. *Pacifica*, 438 U.S. 726.

64. *Id.*

65. *Id.*

66. *Sable*, 492 U.S. at 122.

67. *Id.*

68. *Pacifica*, 438 U.S. at 749-750.

69. *Id.*

70. *Action for Children's Television v. FCC*, 852 F.2d 1332, 1341-1342, (D.C. Cir. 1988) (hereinafter "ACT I").

71. *Id.*

72. *Id.*

material.⁷³ In *ACT II* the court struck down the twenty-four hour ban, holding that there should be some reasonable period of time when indecent material could be broadcast.⁷⁴ The FCC then attempted to channel indecent materials to certain time periods when children would be less likely to be in the audience.⁷⁵ Although the court invalidated the first channeling proposal in *ACT III*, in *ACT IV* the court settled on a ban of indecent material from 6:00 a.m. to 10:00 p.m.⁷⁶ The D.C. court held that the six o'clock to ten o'clock time period was a good compromise that would still allow indecent material to be shown but would insure that a small number of young people were in the audience.⁷⁷ However, channeling still seemed both over and underinclusive.

The V-chip provision is perhaps what the courts were waiting for. If implemented correctly it would potentially allow broadcasters to broadcast indecent material at any time of the day and would insure almost no children in the audience. The Supreme Court has suggested, in dicta, that it would support the V-chip.⁷⁸ Recently, in *Denver Area Educational Telecommunications Consortium v. FCC (DAETC)*, the Supreme Court examined the constitutionality of the Cable Television Consumer Protection and Competition Act of 1992.⁷⁹ In *DAETC* the Court found the proposed regulation of indecent material unconstitutional because the provision was not the least restrictive means available to effectuate the goal.⁸⁰ Although the Court did not decide the validity of the V-chip, the Court did hint that the V-chip provision in the Telecommunications Act might be the least restrictive means available.⁸¹

However, the provisions run into another problem because they regulate violence as well as indecent material. The Supreme Court has never singled out violent shows as being less deserving of constitutional protection, as it has indecent material. In fact, in *Winters v. New York*, the Supreme Court specifically held that magazines, newspapers and other written material that were devoted to publicizing stories about crime and violence were protected by the First Amendment.⁸² However, the government has made a compelling argument in the

73. *Action for Children's Television v. FCC*, 932 F.2d 1504, 1509, (D.C. Cir. 1988), *cert. denied*, 503 U.S. 913 (1992) (hereinafter "ACT II").

74. *Id.*

75. *Action for Children's Television v. FCC*, 11 F.3d 170 (D.C. Cir. 1993), *rehearing en banc granted, judgment vacated*, 15 F.3d 186 (D.C. Cir. 1994) (hereinafter "ACT III").

76. *Action for Children's Television v. FCC*, 58 F.3d 654, 669-670 (D.C. Cir. 1994), *cert. denied*, 116 S. Ct. 701 (1996) (hereinafter "ACT IV").

77. *Id.*

78. *See Denver Area Educational Telecommunications Consortium v. FCC*, 116 S. Ct. 2374 (1996).

79. *Id.*

80. *Id.*

81. *Id.* at 2378.

82. *Winters v. New York*, 333 U.S. 507 (1948).

Telecommunications Act that violent material, like indecent material, is harmful to children. Although the Supreme Court did grant violent material protection in *Winters*, *Winters* concerned print media, a media that has traditionally been granted more protection than broadcast media.⁸³ The Supreme Court will probably find that violence, while protected under the First Amendment, can still be regulated even under strict scrutiny review.

CONCLUSION

An attack of the V-chip provision will probably fail. Although the V-chip must clear the strict scrutiny hurdle, precedent seems to indicate that the V-chip will have no problem doing so. The Supreme Court has already established that protecting children from indecent material is a compelling state interest, and it seems likely that the Court will hold the same for violent material.

Although a compelling state interest exists, the government must establish that the V-chip is a narrowly tailored way to protect children. The broadcasting industry might say that the V-chip is not narrowly tailored because it is too restrictive and it will hurt revenue. Advertisers, they will argue, will not want to advertise on a show with a high rating because that show may be blocked. However, that argument is unconvincing. A high V-chip rating may actually compel certain segments of the population to watch a show, thereby increasing the potential commercial market. In fact, a recent survey by a New York based advertising agency found three times the respondents said they would be more likely to watch a show after learning of a high V-chip rating⁸⁴

Another segment that might attempt to argue that the V-chip provision is not narrowly tailored is children's special interest groups. They might assert the provision is underinclusive because it does not protect all children. The only children that will benefit from the V-chip would be those children whose parents already take an interest in what the child watches. Those children whose parents do not care will no longer be protected. This is an unconvincing argument. By putting control in parents' hands the government is holding the parents accountable for what their child watches. Such parental control can only help children by making parents more responsible. As such, the Supreme Court is likely to uphold the V-chip provision as a constitutional exercise of Congress' power to regulate speech, that is neither over nor underinclusive.

Kristen S. Burns

83. See *Pacifica*, 438 U.S. at 748.

84. *V-Chip Finds Favor*, THE JOURNAL RECORD, Aug., 14, 1996.