# De Facto Censorship: Adult Content Video Scrambling and the First Amendment

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When Alexander Hamilton wrote the Federalist Papers, he anticipated a time would come when the legislature would overstep its bounds.[1] And just as he predicted, the courts would be in place to rectify the situation when legislation ran contrary to the Constitution. Congress has implicated this very situation by enacting section 505 of the Telecommunications Act of 1996,[2] which is intended to protect children but may do so at the expense of First Amendment freedoms.

The lower courts, acting in their intermediary capacity, have reviewed this legislation and found it contrary to the rights embodied in the Constitution. Now the Supreme Court, the ultimate intermediary, will determine the final outcome of this contentious debate. The Supreme Court heard oral arguments for *United States v. Playboy Entertainment Group, Inc.*,[3] in November 1999 and is expected to issue an opinion by summer 2000.[4]

Congress enacted section 505 to deal with a phenomenon on cable television known as signal bleed, which occurs when portions of the audio or video of a particular channel can be viewed although a subscriber has not requested that particular channel.[5] Signal bleed is particularly problematic when subscribers receive programming from adult channels despite scrambling by the cable operator, in homes where such content is unexpected. By enacting restrictive legislation, Congress sought to protect children from accidentally viewing indecent programming, ensuring that they would not be exposed to such signal bleed from adult channels.[6]

Although the government's intent to protect children is laudable, section 505 is overbroad because it interferes with adults' recognized First Amendment right to watch indecent programming. As Alexander Hamilton predicted, when the Constitution and a piece of legislation are at odds, the Constitution must prevail. In this situation, the First Amendment must trump section 505.[7]

This note explores the constitutionality of section 505's restrictions on adult programming and its effect on the cable services industry. Part I of this note explains the procedural background and legislative history of section 505, particularly why Congress deemed it necessary to regulate this problem and the practical implications of the regulation. Part II explores the progression of the

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1 *See* Alexander Hamilton, The Federalist No. 78.

> It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the later within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded as the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

*Id.*

2 Telecommunications Act of 1996 § 505, Pub. L. No. 104-104, 110 Stat. 56, 136 (codified at 47 U.S.C. § 561 (1994 & Supp. III 1997)).

3 United States v. Playboy Entertainment Group, Inc., 30 F. Supp. 2d 702 (D. Del. 1998).

4 *See* Joan Biskupic, *Justices Hear Arguments on Cable Smut Restrictions*, Wash. Post, Dec. 1, 1999, at A4.

5 *See* Playboy Entertainment Group, Inc. v. United States, 945 F. Supp. 772, 776 (D. Del. 1996) (discussing section 505 and its attempt to eliminate signal bleed). The district court's opinion noted the "extensive and complex testimony" that it heard "regarding cable technology and the mechanisms available to comply with 505." *Id.*

6 Telecommunications Act of 1996 § 505, Pub. L. No. 104-104, 110 Stat. at 136 (codified at 47 U.S.C. § 561 (1994 & Supp. III 1997); *see also* 141 Cong. Rec. S8166–69 (statements of Sens. Feinstein and Lott).

7 *See* U.S. Const. amend. I (providing in part that "Congress shall make no law . . . abridging the freedom of speech").

*Playboy Entertainment Group, Inc.* ("*Playboy*") case in the district court, from the denial of a preliminary injunction allowing section 505 to go into effect, to the declaratory judgment preventing its enforcement. Part III illustrates the prior law relevant to this case; specifically, how regulations of speech are examined as content-based regulations, time/place/manner regulations or obscenity regulations. Part IV analyzes the issues the Supreme Court will grapple with when it determines the outcome of *Playboy*. Finally, this note suggests how the Court should resolve the issues raised in the case.

## I. THE CREATION OF SECTION 505

### A. Why the Need for Section 505?

To understand the constitutional challenge at issue, an exploration of the technical aspects of signal bleed is necessary. A multisystem operator ("MSO") is a cable provider that packages available cable channels for distribution to subscribers.[8] Generally, MSOs offer different packages of a variety of channels, including blocks of basic packages and premium channels for which subscribers pay an additional fee.[9] Additionally, MSOs generally offer programming on a "pay-per-view" basis, in which a subscriber places an order for a specific program or period of time.[10] Among these premium and pay-per-view channels, the MSO may offer the Playboy Channel and other adult programming channels.[11]

MSOs receive the signals for these channels from a variety of sources, amplify the signals and then retransmit them over coaxial cable into the homes of cable subscribers.[12] Although premium channels are transmitted from the cable head-end to the homes of all cable subscribers,[13] MSOs "scramble" the signal as it is transmitted into homes where subscribers have not requested the channels so that they do not receive a discernable signal.[14]

Section 505 addresses the problem that arises when the signal does not fully scramble and the nonsubscribers can see or hear portions of the programming on these channels.[15] This problem, the "partial reception of images and/or sounds on a scrambled channel," is known as "signal bleed."[16] The severity and pervasiveness of signal bleed varies by place and time as weather, equipment or human error contribute to the problem.[17]

### B. Congress Takes Action

Congress decided to intervene and regulate adult programming signal bleed by enacting section 505 of the Telecommunications Act of 1996.[18] This statute requires MSOs to fully scramble sexually explicit adult programming or other indecent programming that is transmitted on channels "primarily dedicated to sexually oriented programming."[19] The amendment's goal is to "protect children by prohibiting sexually explicit programming to those individuals who have not specifically requested such programming."[20]

Senators Diane Feinstein and Trent Lott proposed the legislation on June 12, 1995.[21] Senator Lott stated that it was needed because "cable systems across the country are sending uninvited, sexually explicit and pornographic programming into the homes."[22] He referenced studies proving that young people were "acting out the behavior they are seeing in this type of programming,"[23] although no actual studies were produced at the

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8 *See* Playboy Entertainment Group, Inc. v. United States, 945 F. Supp. 772, 776 (D. Del. 1996).

9 *See id.*

10 *See Playboy Entertainment Group,* 30 F. Supp. 2d at 706. When an order for a pay-per-view program is received, the MSO unscrambles the signal for the viewing period and then rescrambles the signal by remotely accessing a converter box in the subscriber's home. *See id.*

11 *See id.*

12 *See* Playboy Entertainment Group, Inc. v. United States, 918 F. Supp. 813, 817 (D. Del. 1996).

13 *See Playboy Entertainment Group,* 945 F. Supp. at 777.

14 *See* 47 U.S.C. § 560 (1994 & Supp. III 1997) (defining scrambling as rearranging the contents of a signal "so that the programming cannot be viewed or heard in an understandable manner"); *see also* 47 C.F.R. § 227(e) (1998).

15 *See Playboy Entertainment Group,* 945 F. Supp. at 777.

16 *Playboy Entertainment Group,* 945 F. Supp. at 776.

17 *See id.* at 778.

18 *See* Telecommunications Act of 1996 § 505, 47 U.S.C. § 561 (1994 & Supp. III 1997).

19 *Id.* at § 505, 47 U.S.C. § 561(a).

20 United States v. Playboy Entertainment Group, Inc., 30 F. Supp. 2d 702, 710 (D. Del. 1998) (quoting 141 CONG. REC. S8166–69, S8167 (daily ed. June 12, 1995) (statement of Sen. Feinstein)).

21 *See generally* 141 CONG. REC. S8166–69 (statements of Sens. Feinstein and Lott).

22 *Id.* at S8169 (statement of Sen. Lott).

23 *Id.*

hearing.[24] Senator Lott also suggested that the rape of a six-year-old child by an eight-year-old and a ten-year-old was the result of these children being exposed to adult programming.[25] Little evidence was presented on the Senate floor; although the regulation was referred to as "a very simple amendment," there was no discussion of its First Amendment implications.[26] Thus, proposed Amendment 1269 to the Communications Decency Act ("CDA") ultimately became section 505 of the Telecommunications Act of 1996.[27]

Congress perceived a need to further protect the nation's children in section 505, although another section of the Telecommunications Act of 1996 already offers a solution to signal bleed.[28] Section 504 requires MSOs to fully scramble or block the audio and video signals received by a cable subscriber upon the cable subscriber's request.[29] Because this service must be provided free of charge, a family that wants to avoid signal bleed has only to ask.[30] Nevertheless, Congress concluded that families do not fully understand the signal bleed problem and that the government must take the initiative to protect the nation's children.[31]

In effect, section 505 requires MSOs to take costly measures[32] to block the signals for all subscribers regardless of the subscriber's lack of concern about signal bleed.[33] Although this statute passed with no floor debate in Congress,[34] it has proved to be a controversial topic in the courts.

### C. Practical Impact of Section 505

The statute in question requires MSOs to fully scramble for nonsubscribers any adult programming networks.[35] However, the varieties of cable technology currently in use for most systems makes complete scrambling either impossible or highly inefficient.[36]

The majority of MSOs use "RF" or "baseband" technology to scramble the signal of pay-per-view channels that cable subscribers do not wish to receive.[37] However, this type of scrambling, without modification, is generally capable of making indiscernable only the video portion of the signal.[38] Other popular options include positive trapping, in which the entire signal is scrambled from the cable head-end and subscribers to the channel must use a device installed at the home to unscramble the signal,[39] or negative trapping, in which the signal is transmitted clearly but a negative trap is installed in the homes of nonsubscribers to block the signal.[40] Additionally, MSOs that provide pay-per-view service may utilize a system of addressable converters, which the MSO can remotely access to send a signal that scrambles and unscrambles the signal upon demand.[41]

Signal bleed occurs in a variety of situations, depending on the scrambling technology used. In systems that use RF or baseband technology, signal bleed will occur because those technologies may not be capable of scrambling the audio sig-

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24 *See id.*

25 *See id.*

26 *See id.*

27 *See Playboy Entertainment Group,* 30 F. Supp. 2d at 709.

28 *See* Telecommunications Act of 1996 § 504, 47 U.S.C. § 560(a) (stating, "Upon request by a cable service subscriber, a cable operator shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that a subscriber does not receive it").

29 *See id.*

30 *See id.*

31 *See Playboy Entertainment Group,* 30 F. Supp. 2d at 710.

32 *See id.* at 711 (stating that section 505 gives all MSOs the "option of upgrading its technology from analog to digital transmission, of time-channeling, or of distributing channel-mapping capable converters, lockboxes, or positive or negative traps to all their customers").

33 *See id.* at 712 (stating that less than one-half of one percent of all cable subscribers requested lockboxes as per § 504).

34 *See id.* at 710.

35 *See* Telecommunications Act of 1996 § 505, 47 U.S.C. § 561.

36 *See* Playboy Entertainment Group, Inc. v. United States, 945 F. Supp. 772, 778 (D. Del. 1996).

37 *See Playboy Entertainment Group,* 30 F. Supp. 2d at 707.

38 *See id.*

39 *See id.* Subscribers to cable systems that utilize a positive trap are given a device that is "attached to a cable-ready TV or to the set-top converter box to filter out the jamming signal." *Id.*

40 *See id.* The decision to use either positive or negative trapping "will depend on whether the majority of subscribers to the overall cable service also wish to subscribe to a particular premium service." *Playboy Entertainment Group,* 945 F. Supp. at 778.

41 *See Playboy Entertainment Group,* 945 F. Supp. at 778. Although utilizing addressable converters would eradicate the problem of signal bleed, the cost of instituting this remedy would be prohibitively high; addressable converters cost approximately $115 per television set. *See id.*

nal.[42] Signal bleed may also occur when subscribers use cable-ready television sets, which, unlike older sets, do not contain a feature called channel-mapping that prevents signal bleed.[43]

The pervasiveness of signal bleed from adult channels is an issue about which the parties are in dispute.[44] In the government's argument against a preliminary injunction, it presented statistical evidence showing the homes that potentially could be exposed to signal bleed,[45] along with "anecdotal evidence of parents discovering that their children have been exposed to sights and sounds from sexually explicit programming."[46] The statistics presented by the government illustrated that of the approximate sixty-two million cable subscribing households in the United States, roughly forty million of these households "have the potential for a 'bleed' problem."[47] However, the government's statistics are overly broad, as they include those cable subscribers who could "potentially" be exposed to signal bleed, not those who actually have been exposed to signal bleed, nor how much of the signal bleed stems from adult programming.[48] During *Playboy's* declaratory judgment phase, the court asked the government to present further evidence of the problem, but it failed to present any new evidence.[49]

Section 505 forces MSOs to comply with the regulation regardless of the existence or the extent of the problem.[50] Current technology however, provides MSOs with few viable alternatives to facilitate compliance with the statute.[51] First, an MSO may provide every subscriber of its service with a channel lockbox programmed to completely block any signal from the specified adult channel.[52] Although section 504 already requires all MSOs to provide lockboxes to any cable subscriber upon request,[53] it may be infeasible to require that MSOs do so for all subscribers due to the high cost of each box.[54]

A second alternative for MSOs is double-scrambling.[55] One form of double-scrambling uses RF or baseband technology in addition to a positive trap.[56] Although this option is less costly than distributing a lockbox to all cable subscribers, it would still cost MSOs 50 percent of their revenues from adult programming channels.[57] During trial, neither side presented evidence of any MSO that chose to comply with the regulation by using double scrambling.[58]

MSOs could also avoid signal bleed by upgrading their networks from analog to digital.[59] However, digital cable service currently reaches only two million American consumers.[60] Converting entire analog cable systems to digital at this time would cost in the billions of dollars, making this the least feasible option.[61]

Notably, section 505 does provide MSOs with an alternative until they comply with the statute; it states that MSOs "shall limit the access of children to [adult programming] . . . by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it."[62] The

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42 *See Playboy Entertainment Group*, 30 F. Supp. 2d at 708.

43 *See Playboy Entertainment Group*, 945 F. Supp. at 778. "[W]hen a consumer with a cable-ready TV tunes to a scrambled premium channel to which the consumer does not subscribe, the consumer receives the jammed signal which under some circumstances includes a video picture or portions of a video picture[,]" a phenomenon called random lock-up. *See id.*

44 *See Playboy Entertainment Group*, 30 F. Supp. 2d at 708.

45 *See id.* (referring to the government's evidence that, of the 62 million homes in the United States that receive cable television, approximately 40 million subscribers do not have blocking devices for signal bleed, so these 40 million homes have the potential to receive signal bleed).

46 Playboy Entertainment Group, Inc. v. United States, 945 F. Supp. at 778.

47 *Id.* at 779.

48 *See id.* at 778–79.

49 *See* United States v. Playboy Entertainment Group, Inc., 30 F. Supp. 2d at 708–09 (noting that the government did not present any "survey-type evidence on the magnitude of the 'problem' ").

50 *See* Telecommunications Act of 1996 § 505, 47 U.S.C. § 561 (1994 & Supp. III 1997).

51 *See Playboy Entertainment Group*, 30 F. Supp. 2d at 706; *see also Playboy Entertainment Group*, 945 F. Supp. at 780.

52 *See Playboy Entertainment Group*, 945 F. Supp. at 779.

53 *See* Telecommunications Act of 1996 § 504, 47 U.S.C. § 560 (1994 & Supp. III 1997).

54 *See Playboy Entertainment Group*, 30 F. Supp. 2d at 711. This has become a contentious issue among the parties in this suit. *See, e.g.*, Appellant's Brief at *33, United States v. Playboy Entertainment Group, Inc., No. 98-1682 [hereinafter Supreme Court Appellant's Brief]; Oral Arguments at *44–45, United States v. Playboy Entertainment Group, Inc., No. 98-1682 (Nov. 30, 1999) [hereinafter Supreme Court Oral Argument].

55 *See Playboy Entertainment Group*, 30 F. Supp. 2d at 711.

56 *See id.*

57 *See id.*

58 *See id.*

59 *See id.* Bleed also does not occur when MSOs transmit the cable signal in digital form. *See Playboy Entertainment Group*, 945 F. Supp. at 778.

60 *See id.*

61 *See Playboy Entertainment Group*, 30 F. Supp. 2d at 711.

62 Telecommunications Act of 1996 § 505, 47 U.S.C. § 561(b).

Federal Communications Commission later determined that the prohibited hours extend from six a.m. to ten p.m.[63] The creation of this eight-hour safe harbor period, called time-channeling, is relatively simple and has been the most popular method of compliance among MSOs.[64]

However, this restriction of adult programming has caused difficulties for Playboy and other providers of adult programming.[65] The obvious problem with time-channeling is that while it does not affect nonsubscribers, it prohibits subscribers from viewing adult programs during the safe harbor hours.[66] This alternative also places a tremendous financial burden on adult programmers.[67] Although the extent of the financial burden will not be a crucial factor in determining whether the statute passes First Amendment scrutiny, these alternatives demonstrate the extent of the burden that this regulation imposes on the cable industry's First Amendment opportunities.[68]

## II. PLAYBOY'S CHALLENGE

Playboy initially applied for a temporary restraining order ("TRO") to prevent the implementation of section 505.[69] Section 505 had forced Playboy, as the provider of numerous adult programming channels, to relegate all of its programming from regular programming hours to the "safe harbor" hours.[70] Playboy argued that this restriction on broadcast of its programming was a violation of the First Amendment.[71] The United States District Court for the District of Delaware granted the TRO, holding that Playboy demonstrated a "likelihood of success on the merits, irreparable harm if relief is denied, that the government will not be irreparably harmed if relief is granted and that granting relief will not adversely affect the public interest."[72] The district court stated that the "implementation of section 505 will have a 'chilling effect' on the adult-oriented cable television industry."[73] Furthermore, the court found that section 505 was not the least restrictive means by which the government could achieve its goal of restricting children's access to adult programming because it would cause irreparable harm to Playboy.[74]

The court of appeals overturned the TRO and held that the statute would survive a challenge on its merits.[75] In making its decision, the court stated that section 505 was a "carefully tailored, and constitutional solution" to the problem asserted by the government.[76] It also recognized that section 505 was not a complete ban on adult programming and that the statute did not restrict consenting adults from viewing the adult programming.[77]

The most substantial factor in the court's determination was the court's interpretation of *FCC v. Pacifica Foundation*.[78] In relying on that decision, the court held that time-channeling was a viable alternative for adult programming channels because it was upheld by the Supreme Court as a valid option in *Pacifica*.[79] However, the Supreme

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63 *See In re* Implementation of Section 505 of the Telecommunications Act of 1996: Scrambling of Sexually Explicit Adult Video Service Programming, *Order and Notice of Proposed Rulemaking*, 11 FCC Rcd. 5386, 5387, para. 6 (1996).

64 *See* Playboy Entertainment Group, 30 F. Supp. 2d at 711 (according to one survey, 69 percent of MSOs have resorted to time-channeling in order to comply with section 505).

65 *See id.* at 718 (explaining the significant burden that time-channeling imposes, the court stated that "time-channeling amounts to the removal of all sexually explicit programming . . . during two-thirds of the broadcast day" and "[s]ince 30–50 percent of all adult programming is viewed in households prior to 10 p.m. . . . [section] 505 restricts a significant amount of protected speech").

66 *See id.* at 711.

67 *See id.* (noting that the elimination of viewing before 10 p.m. results in a potential loss of 15 percent of revenue through 2007).

68 *See id.* at 712.

69 *See* Playboy Entertainment Group, Inc. v. United States, 918 F. Supp. 813 (D. Del. 1996).

70 *See* Appellee's Brief at *2, United States v. Playboy Entertainment Group, Inc., No. 98-1682 (filed Sept. 24, 1999) [hereinafter Supreme Court Appellee's Brief].

71 *See id.* at *1; U.S. CONST. amend. 1.

72 *Playboy Entertainment Group*, 918 F. Supp. at 822–23.

73 *Id.* at 821.

74 *See id.*

75 *See* Playboy Entertainment Group, Inc. v. United States, 945 F. Supp. 772, 792 (D. Del. 1996).

76 *See id.* at 787.

77 *See id.* at 789 (noting, "It is important to our reasoning that § 505 does not seek to ban sexually explicit programming, nor does it prohibit consenting adults from viewing erotic material on premium cable networks if they so desire").

78 *See* FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (upholding the FCC's regulation of a broadcast radio monologue that contained patently offensive sexual and excretory language; the Court stated that although the language was not obscene language that would normally receive minimal First Amendment protection if any, this language nonetheless was "not entitled to absolute constitutional protection under all circumstances").

79 *See Playboy Entertainment Group*, 945 F. Supp. at 789 (stating that since "the Supreme Court endorsed a time-channeling solution in very similar circumstances in *Pacifica*,

Court's subsequent examination of content-based restrictions since *Pacifica* raises the question of whether *Pacifica* would be upheld in the context of adult-oriented cable programming.[80] The Court has noted that there are fundamental technological differences between cable television and broadcast television (specifically, the cable industry does not contend with the limited number of frequencies allocated to broadcast television); therefore, the Court has concluded that this significant difference requires a more lenient First Amendment analysis for broadcast television.[81] Following this comparison, it would appear that the *Pacifica* analysis would not sustain a similar regulation imposed on the cable industry. Nonetheless, the United States Supreme Court affirmed the lower court's denial of a TRO without issuing an opinion.[82]

Following these proceedings, section 505 became effective. The enforcement of the statute opened the door for Playboy to renew its proceedings.[83] On December 28, 1998, the United States District Court for the District of Delaware granted Playboy a declaratory judgment against the enforcement of the statute.[84] The court held that although the government proved it had a compelling interest, the statute was nonetheless unconstitutional because it was not the least restrictive means by which to accomplish the goals sought.[85] Particularly, the court stated that effective enforcement of section 504 was a less restrictive alternative for dealing with the problem of signal bleed.[86]

The Supreme Court recently granted certiorari to reconsider the constitutionality of section 505 and heard oral arguments on November 30, 1999.[87]

## III. FINDING THE APPROPRIATE FIRST AMENDMENT ANALYSIS

Although the First Amendment initially may have been intended to protect only political debate,[88] scholars have realized that "even if one could distinguish between illegitimate and legitimate speech, it may still be necessary to protect all speech in order to afford real protection for legitimate speech."[89] Yet, the First Amendment is not interpreted as an absolute right.[90] It has been said that "[t]he First Amendment is not the guardian of unregulated talkativeness."[91] Thus, in order to implement the appropriate level of protection, one must first determine the type of speech at issue.[92]

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we believe that time-channeling also survives constitutional scrutiny here"). *But see* Amicus Brief of the National Cable Television Association at *8, United States v. Playboy Entertainment Group, Inc., No. 98-1682 (filed Sept. 24, 1999) (asserting the less than strict scrutiny advanced in *Pacifica* was the result of the scarce spectrum available in broadcast; whereas the less than strict scrutiny should not apply to cable regulation because the cable programming is "less pervasive" than broadcast).

80 *Cf.* Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 637 (1994) (stating "the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation . . . does not apply in the context of cable regulation").

81 *See id.* at 637–38.

82 *See* Playboy Entertainment Group, Inc. v. United States, 520 U.S. 1141 (1997); *see also* United States v. Playboy Entertainment Group Inc., 30 F. Supp. 2d 702, 705 (D. Del. 1998) (referring to the court's affirmation of the denial of a temporary restraining order). It is likely that although it recognized the importance of the case, the court did not issue an opinion because Playboy would have further grounds for challenging the regulation after it was enforced against the company. At that point, Playboy would be able to challenge the substance of section 505.

83 *See Playboy Entertainment Group*, 30 F. Supp. 2d at 705.

84 *See id.* at 719.

85 *See id.* at 717–18.

86 *See id.* at 718 (in determining whether section 504 was a less restrictive alternative to section 505, the court explained that it must examine "the relative burden of one solution versus another." The court found that because section 504 provides for "voluntary blocking, . . . neither Playboy nor its subscribers will suffer any First Amendment ill-effects . . . [and f]or that reason, [section] 504 is not restrictive of anyone's First Amendment rights and is clearly 'less restrictive' ").

87 *See* United States v. Playboy Entertainment Group, Inc., 119 S. Ct. 2365 (1999) (noting probable jurisdiction); Paige Albiniak, *Bunny Gets High Court's Ear; Playboy Argues Before Supreme Court*, BROADCASTING & CABLE, Dec. 6, 1999, at 22 (reporting that following the oral arguments, some "observers" on both sides predicted that the Court would rule for Playboy).

88 *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.6, at 941 n.12 (4th ed. 1991) (stating that "it has been argued that protection should only be afforded to explicitly political speech, and not to scientific, literary or obscene speech").

89 *Id.* at § 16.6, 941.

90 *See id.* at § 16.7, 942 (stating that "[a]n absolute right, by definition, is not subject to balancing").

91 *Id.* at § 16.6, 939–40 (quoting A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT no. 26 (1948)).

92 *See id.* at § 16.7, 943 (comparing Justice Black's absolutist approach to the First Amendment with Justice Harlan's balancing approach; also noting that "Harlan's balancing approach is not inconsistent with the language of the first amendment. It is not 'speech' that is being absolutely pro-

### A. Levels of First Amendment Protection

To safeguard the various types of speech entitled to varying degrees of First Amendment protection, the Supreme Court has developed different levels of scrutiny. When a regulation is subject to First Amendment analysis, it is first generally categorized as a content-based regulation,[93] an obscenity regulation,[94] or a time, place and manner regulation.[95]

Content-based regulations receive strict scrutiny because they purport to directly regulate the substance of the message.[96] The Court has determined that there are two requirements that the government must meet in order to validate a content-based regulation. First, the government must have a compelling interest to protect, and second, the regulation must be the least restrictive means available to protect this interest.[97]

At the opposite end of the spectrum is the analysis applied to the regulation of obscene speech. The Court has held that the regulation of obscene speech will receive less than intermediate scrutiny because obscene speech has a low social value and the government has a legitimate interest in protecting society from such speech.[98] In the Playboy case, both parties stipulated that the speech at issue is indecent rather than obscene.[99] Therefore, the regulation at issue will be subject to a higher level of scrutiny than one restricting obscene speech.

Time, place and manner regulations, which receive intermediate scrutiny, lie between content-based and obscenity regulations.[100] When the government seeks to restrict speech by regulating the particular time, place or manner in which it is presented, the regulation must be "designed to serve a substantial government interest and . . . not unreasonably limit alternative avenues of communication."[101] Generally, regulations aimed at the secondary effects of the speech are deemed content-neutral regulations.[102] Under this "secondary effects" doctrine, the Court has upheld local zoning ordinances that regulate the location of adult theaters.[103] The Court reasoned that a city could regulate adult theaters if the regulation is aimed at preventing deterioration of the surrounding neighborhoods rather than suppressing speech.[104] A crucial element of this doctrine is that the regulated speech must be left with alternative avenues of dissemination.[105]

### B. Section 505 is a Content-Based Restriction That Must be Subjected to Strict Scrutiny.

Section 505 explicitly regulates the content of video service channels that are primarily dedi-

tected from restriction but only 'free speech' ").

93 *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992) (describing content-based regulations as presumptively invalid regulations that prohibit speech "solely on the basis of the subjects the speech address").

94 *See* Miller v. California, 413 U.S. 15, 24 (1973) (stating that the Court's definition of obscenity has developed into a three-part test: "(a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the state law; and (3) whether the work taken as a whole, lacks serious literary, artistic, political or scientific value").

95 *See* Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986) (upholding a zoning ordinance as a valid time, place and manner regulation of adult theaters since the regulation did not "unreasonably limit alternative avenues of communication").

96 *See* United States v. Playboy Entertainment Group, Inc., 30 F. Supp. 2d 702, 715 (D. Del. 1998) (stating that "Congress's targeting of signal bleed of solely sexually explicit programming is a content-based restriction").

97 *See id.*

98 *See* Miller v. California, 413 U.S. 15, 18–23 (1973); *cf.* Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 131 (1989) (upholding a regulation banning "obscene" dial-a-porn telephone messages but invalidating that portion of the regulation banning all dial-a-porn telephone messages since indecent (but not obscene) sexual expression is entitled to First Amendment protection).

99 *See* Playboy Entertainment Group, Inc. v. United States, 918 F. Supp. 813, 819 (D. Del. 1996) (referring to the fact that Playboy employs full time attorneys who view all of the Playboy programming to assure that the programming is not obscene programming and that it does not violate any community standards).

100 *See Renton*, 475 U.S. at 50 (upholding an adult zoning regulation prohibiting adult theaters in certain neighborhoods after finding that the regulation served the substantial government interest of preventing the harmful "secondary effects" caused by the presence of such theaters and that the city government allowed for "reasonable alternative avenues of communication").

101 *Id.* at 47.

102 *See id.* at 47–48.

103 *See id.* at 49; Young v. American Mini Theatres, Inc., 427 U.S. 50, 71–73 (1976) (upholding a zoning regulation of adult theaters because its purpose was to reduce the deleterious secondary effects that these theaters had on the neighborhoods and not to restrict the offensive speech).

104 *See Renton*, 475 U.S. at 48–49.

105 *See id.* at 50.

cated to adult programming.[106] The government has created a content-based restriction by singling out the signal bleed from adult programming channels[107]—signal bleed from other channels is not restricted.[108] Thus, section 505 employs content-based discrimination "in the strong sense of suppressing a certain form of expression that the Government dislikes or otherwise wishes to exclude on account of its effects."[109] There should be no justification for anything less than strict scrutiny to be applied in analyzing this issue.

The government argued that section 505 is aimed at the deleterious secondary effects of signal bleed rather than at the effects of adult programming, thus necessitating a content-neutral analysis.[110] This argument may stand if the statute regulated signal bleed from *all* adult programming (including that adult content occasionally appearing on other premium channels).[111] Instead, the argument fails because the government has chosen to regulate only premium channels devoted entirely to adult content.[112] If the government is concerned about the effects of signal bleed from all adult programming, then any channel showing sexually explicit programming should be required to comply with section 505.[113] Because this is not the case, the government's argument will most likely fail. The Court therefore will treat the provision as restraining content, thus invoking strict scrutiny.

### 1. *Applying Strict Scrutiny to Section 505: Establishing Compelling Interests*

When the Court applies strict scrutiny, the government will first have to establish that the regulation is intended to protect compelling interests.[114] The government contends that the following interests are compelling:

> (1) the Government's interest in the well-being of the nation's youth—the need to protect children from exposure to patently offensive sex-related material; 2) the Government's interest in supporting parental claims of authority in their own household—the need to protect parents' rights to inculcate morals and beliefs on their children; and 3) the Government's interest in ensuring the individual's right to be left alone in the privacy of his or her home—the need to protect households from unwanted sexual communications.[115]

Following Supreme Court precedent, the lower courts agreed that these are indeed, compelling interests for the government to promote.[116] Although these interests may be compelling, however, there is little evidence to show that signal bleed threatens these interests.[117] Given the mini-

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106 *See* Telecommunications Act of 1996 § 505, 47 U.S.C. § 561 (1994 & Supp. III 1997).

107 *See* United States v. Playboy Entertainment Group, Inc., 30 F. Supp. 2d 702, 715 (D. Del. 1998).

108 *See id.* at 714–15 (stating that "[s]ignal bleed from the Disney Channel, for example, does not come within the purview of the statute"); Amicus Brief of the Media Institute at *4, United States v. Playboy Entertainment Group, Inc., No. 98-1682 (filed Sept. 24, 1999) (referring to the fact that although Home Box Office shows programming similar to the Playboy Channel, it is not regulated by section 505).

109 Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727, 802 (1996) (holding, in part, that a regulation allowing cable operators to prohibit patently offensive and indecent programming violates the First Amendment). *See also* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (stating, "Content-based regulations are presumptively invalid").

110 *See Playboy Entertainment Group,* 30 F. Supp. 2d at 714.

111 *See* Telecommunications Act of 1996 § 505, 47 U.S.C. § 561 (regulating only adult programming that is shown on channels "primarily dedicated to adult programming").

112 *See* Playboy Entertainment Group, Inc. v. United States, 945 F. Supp. 772, 785 (D. Del. 1996) (noting that "[e]ven though § 505 is aimed at the content-neutral objective of preventing signal bleed, the section applies only when signal bleed occurs during the transmission of 'sexually explicit adult programming or other programming that is indecent' " (quoting § 505, codified at 47 U.S.C. § 561 (1994 & Supp. III 1997))).

113 *See* David L. Hudson, Jr., *The Secondary Effects Doctrine: "The Evisceration of First Amendment Freedoms,"* 37 WASHBURN L.J. 55, 59 (1997) (stating that "[t]he secondary effects doctrine has become a favorite tool for government officials who seek to disguise content-based regulations").

114 *See* United States v. Playboy Entertainment Group, Inc., 30 F. Supp. 2d 702, 715 (D. Del. 1998) (describing the procedure the court states that the government bears the burden of establishing that "its interests are compelling and that the means chosen 'are carefully tailored to achieve those ends' ").

115 *Id.*

116 *See, e.g., id.* at 715–18; *Playboy Entertainment Group,* 945 F. Supp. at 785–86.

117 *See* Amicus Brief for Sexuality Scholars, Researchers and Therapists at *15, United States v. Playboy Entertainment Group, Inc., No. 98-1682 (filed Sept. 24, 1999) [hereinafter Sexuality Scholars Brief] (asserting that the government has not established its burden of proving a compelling interest in protecting children from signal bleed exists since it did not present sufficient evidence of harm); *but see* 16A Am. Jur. 2d Constitutional Law § 171 (1998) (stating, "There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds") Furthermore, if evidence of certain facts is required for a legislature to properly pass a statute, "it is presumed that such evidence was actually and properly before the legislative body." *Id.*

mal evidence, it is argued that the government has not met its burden of proving that signal bleed from sexually explicit programming is harmful to children.[118]

In 1996, the district court stated that the results of a study conducted by the government's expert witness were "anecdotal and possibly misleading."[119] Playboy's expert witnesses testified that "there is no empirical evidence of psychological harm to minors from exposure to sexually explicit videos, no less to signal bleed,"[120] and the government's witness did not refute that testimony.[121]

Again in 1998, the district court stated that the government had presented "no clinical evidence linking child viewing of pornography to psychological harms."[122] Despite these findings, the district court held that the government had met its burden because only "some evidence of harm short of definitive scientific proof must be presented."[123] Arguably, the court relied on "dubious and inadequate evidence" to find that the government had established a compelling interest.[124]

It is clear that the Supreme Court recognizes the importance of protecting children from indecent material.[125] However, no case has yet asked the Court whether signal bleed of indecent material is a potential harm to children. The Court has not "even contemplated the claim that fleeting sounds or images from indecent signal bleed could be harmful to youth."[126] Rather, the government's argument is based on an analogy between the effect of television violence on children and the effect of pornography on children.[127] While the government's evidence is far from conclusive, it is likely that the Court will accept the minimal evidence based on its precedent of protecting children from indecent material.[128]

### 2. *Finding the Least Restrictive Means*

The crux of this issue lies within the second prong of the Court's analysis: whether this regulation is the least restrictive means available to meet the government's asserted interest.[129] The government asserts that this regulation is the only viable means by which it can satisfy its compelling interests.[130] However, there are several alternatives that can satisfy the government's interest in protecting children from indecent programming.

#### a. *Section 504*

First, section 504 is a viable and a less restrictive alternative. Under section 504, any cable subscriber is entitled to request a lockbox, in which any programming (whether or not it is sexually explicit) could be completely blocked, free of charge.[131] The United States District Court for the District of Delaware noted that the "basic difference between section 504 and section 505 is in determining who takes the initiative to remediate the signal bleed problem."[132] While section 505 requires the MSOs to take the initiative and fully scramble the adult programming channels, section 504 enables parents to have the adult pro-

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118 *See* Sexuality Scholars Brief, *supra* note 117, at *15.

119 Playboy Entertainment Group, Inc. v. United States, 918 F. Supp. 772, 813 (D. Del. 1996).

120 Sexuality Scholars Brief, *supra* note 117, at *3.

121 *See id.*

122 United States v. Playboy Entertainment Group, Inc., 30 F. Supp. 2d 702, 716 (D. Del. 1998).

123 *Id.*

124 *See* Sexuality Scholars Brief, *supra* note 117, at *6–7.

125 *See* United States v. Playboy Entertainment Group, Inc., 30 F. Supp. 2d 702, 715–16 (D. Del. 1998) (referring to Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (holding that a school's disciplinary actions taken as a result of a student's speech using indecent speech did not violate of the First Amendment); Action for Children's Television v. FCC, 58 F.3d. 654 (D.C. Cir. 1995) (remanding the case to redesign the FCC regulation that prohibited indecent programming from being shown between 6 a.m. and midnight; the court ruled that the regulation was unconstitutional after applying strict scrutiny—it was not the least restrictive means to achieve the government's interest); Ginsburg v. New York, 390 U.S. 629 (1968) (upholding a New York statute that prohibited the sale of obscene materials to minors after finding that the statute bore a rational relation to the government's interest in protecting minors from obscene materials); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (remanding a challenge to the Georgia laws that regulated adult theaters and the obscene material that is shown therein)).

126 Sexuality Scholars Brief, *supra* note 117, at *8.

127 *See Playboy Entertainment Group*, 30 F. Supp. 2d at 716.

128 *See supra* note 125, discussing the Court's precedent.

129 *See Playboy Entertainment Group*, 30 F. Supp. 2d at 717 (assuming that the government's interest may be compelling, the court next must determine "whether § 505 is narrowly tailored to serve that end and whether it is the least restrictive alternative").

130 *See id.*; *see also* Reno v. ACLU, 521 U.S. 844, 875 (1997) (stating that a governmental interest in protecting children "does not justify an unnecessarily broad suppression of speech addressed to adults;" additionally, that "the government may not 'reduc[e] the adult population . . . to . . . only what is fit for children' " (citing Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727, 802 (1996))).

131 *See* Telecommunications Act of 1996 § 504, 47 U.S.C. § 560 (1994 & Supp. III 1997).

132 *Playboy Entertainment Group*, 30 F. Supp. 2d at 717.

gramming channels fully scrambled upon their request.[133]

In order to determine which provision is less restrictive, it is important to look at the practical implications of the provision. Section 505 has compelled the majority of MSOs to comply by initiating time-channeling of the adult programming channels.[134] Thus, section 505 has diminished "Playboy's opportunities to convey, and the opportunity of Playboy's viewers to receive, protected speech."[135] Alternatively, section 504 is significantly less restrictive of First Amendment rights because it amounts to voluntary blocking; no cable subscriber will be prohibited from viewing their choice of programming.[136]

In addition to being a less restrictive alternative to the challenged regulation, section 504 must also be as effective as the challenged regulation.[137] The district court found that section 504 was an effective alternative if cable subscribers were given adequate notice of its availability.[138] The court encouraged Playboy, through its contractual obligations with the MSOs, to ensure that MSOs give adequate notice.[139] In opposition to the court's "enhanced version of section 504," the government argued that it has an obligation to protect all children from signal bleed, including those children whose parents, through "inertia, indifference, or distraction," have not taken the initiative to block it.[140] When the Supreme Court raised this issue at oral arguments, counsel for Playboy responded by asserting that effective notice, through video announcements and written notice, would be an adequate way to notify the parents.[141] It was also stated that if the parents did not respond to such notice, the lack of response would serve as further evidence that the parents were not concerned about the potential of a signal bleed problem.[142]

The effectiveness of section 504 is inherently tied to its economic feasibility. The district court in its findings of fact appeared to accept the government's findings that if only three to six percent of cable subscribers requested lockboxes, the cost of such distribution would exceed the "break-even" point, defined as "the point at which the cost of distributing lockboxes would exhaust all of a cable system's adult channel revenues."[143] The court also appeared to accept the theory that such an economic impact would cause the cable operators to cease carrying the adult channels.[144] In contrast, Playboy presented information asserting that the government has "vastly overestimate[d] compliance costs" and the break-even point is when eighty percent of cable subscribers request lockboxes.[145] While the court acknowledged the government's statistics in its findings of fact, it did not address the issue in its conclusions of law.[146] While the Court will undoubtedly question the economic feasibility of section 504 (and it does not appear that the Court is satisfied with the district court's treatment of this issue),[147] the question it must ultimately address is whether section 504 is less restrictive of our First Amendment rights than section 505, not whether it is more intrusive into the MSOs' wallets.

b. *The V-Chip*

While the awareness of section 504 would help to prevent signal bleed in homes where it is unwanted, there are still other alternatives to blocking signal bleed. As technology advances, more parental control devices become available; for example, the v-chip.[148] The v-chip, in conjunction with a rating system, can be used to block specific

133 *See* Telecommunications Act of 1996 § 505, 47 U.S.C. § 561 (1994 & Supp. III 1997); Telecommunications Act of 1996 § 504, 47 U.S.C. § 560.

134 *See Playboy Entertainment Group*, 30 F. Supp. 2d at 717.

135 *Id.* at 718.

136 *See id.* (explaining that any cable subscriber who requests a blocking device will be provided one free of charge, while all Playboy subscribers will be able to receive the programming 24 hours a day).

137 *See id.* (applying this analysis and noting that the less restrictive alternative must also be a "viable alternative").

138 *See id.* at 719.

139 *See id.* at 720.

140 *See* Supreme Court Appellant's Brief, *supra* note 54, at *33.

141 *See* Supreme Court Oral Arguments, *supra* note 54, at *44–45.

142 *See id.*

143 United States v. Playboy Entertainment Group, Inc., 30 F. Supp. 2d 702, 713 (D. Del. 1998) (examining the evidence, the court found that that the "distribution of boxes is not feasible for a cable system" and thus "[e]conomic theory would suggest that profit-maximizing cable operators would cease carriage of adult channels").

144 *See id.*

145 *See* Supreme Court Appellee's Brief, *supra* note 70, at *47.

146 *See Playboy Entertainment Group*, 30 F. Supp. 2d at 713–20.

147 *See* Supreme Court Oral Arguments, *supra* note 54, at *52–54.

148 *See* Amy Fitzgerald Ryan, *Don't Touch That V-Chip: A*

programs that parents do not want their children to see.[149] The v-chip is a device implanted into televisions that reads the rating information encoded on the television programs and blocks the programs based on the ratings specified by the parent.[150] On March 12, 1998, the FCC adopted an order implementing a voluntary rating system and requirements for technical television equipment that would enable the v-chip to be a viable alternative for parents.[151] The rules implemented by the FCC required half of all television models thirty-three centimeters and larger to be equipped with the v-chip by July 1, 1999, and all such models to contain the v-chip by January 1, 2000.[152] At the time of the implementation of the v-chip regulation, the FCC addressed the potential First Amendment issues that could arise because the v-chip was potentially a speech regulation.[153] Upon review, the FCC stated that the regulation "prudently provided an alternative to a government-created, government-policed scheme for judging the content of video programming: the establishment of a private, voluntary ratings system by video programming distributors."[154]

c. *Safe-Harbor Hours*

The government is likely to argue that regardless of the preceding discussion, section 505 is constitutional because it allows for adult programming to be shown during the safe harbor hours.[155] Although use of safe harbor hours was validated by the Court in *FCC v. Pacifica Foundation*,[156] crucial differences between *Pacifica* and the present case may make safe-harbor hours inapplicable.

First, the narrow holding in *Pacifica* applied only to one specific broadcast.[157] The Court considered the FCC's ability to regulate one performance after that performance had been broadcast over radio.[158] The Court "emphatically declined to authorize the FCC 'to edit proposed in advance and to excise material considered inappropriate for the airwaves' broadcasts."[159] Because the Court has rejected prior restraint as a method for regulating indecent speech, *Pacifica* cannot be used to automatically validate safe harbor hours on cable television.

Second, *Pacifica* reviewed a broadcast that was disseminated on public radio; the fact that the regulation in question refers to cable television changes the scope of the inquiry drastically. One relevant issue is that, at the time of *Pacifica*, the objected broadcast was a "dramatic departure from traditional program content."[160] In contrast, the adult programming that is regulated by section 505 has regularly been available on cable television.[161] Furthermore, unlike radio broadcasts, which were deemed pervasive in *Pacifica*, cable television is not available to everyone.[162] Cable tele-

*Constitutional Defense of the Television Program Rating Provisions of the Telecommunications Act of 1996*, 87 GEO. L.J. 823, 825 (1999) (defining the v-chip as a "device that allows viewers to block the display of programs that carry a common rating").

149 *See Commission Finds Industry Video Programming Rating System Acceptable, Adopts Technical Requirements to Enable Blocking of Video Programming* (Rpt. No. GN 98-3), FCC News, Mar. 12, 1998 [hereinafter *Rating System Release*]

150 *See Viewing Television Responsibly: The V-Chip* (visited Jan. 22, 2000) <www.fcc.gov/vchip>. *But see* Supreme Court Appellant's Brief, *supra* note 54, at *36 n.25 (stating that Playboy had conceded that the v-chip did not address the problem of signal bleed "because the imperfect scrambling that creates the problem of signal bleed distorts or obliterates the program classification (ratings) codes that the v-chip must interpret in order to block the programming); *cf.* Supreme Court Appellee's Brief, *supra* note 70, at *42 n.59 (agreeing that Playboy acknowledged that the v-chip was not designed to prevent signal bleed but disagreeing that the v-chip does not work to block signal bleed because since the trial, the FCC has adopted rules that enable parents to block unrated programming through the v-chip).

151 *See Viewing Television Responsibly: The V-Chip,* (visited Jan, 22, 2000) <www.fcc.gov/vchip> (explaining that the rating system applies to all television programming except news, sports, and certain premium movies; children's shows are rated TV-Y, TV-Y7, and TV-Y7-FV; general programming is rated TV-G, TV-PG, TV-14, and TV-MA).

152 *See Rating System Release, supra* note 149.

153 *See In re* Implementation of Section 551 of the Telecommunications Act of 1996: Video Programming Ratings, *Report and Order,* 13 FCC Rcd. 8232, 8247 (1998) (separate statement of Comm. Harold W. Furchtgott-Roth)

154 *Id.*

155 *See* United States v. Playboy Entertainment Group, Inc., 30 F. Supp. 2d 702, 717 (D. Del. 1998); *see also* Becker v. FCC, 95 F.3d 75, 84 (D.C. Cir. 1996) (referring to the safe harbor hours as "broadcast Siberia").

156 438 U.S. 726 (1978).

157 *See Pacifica,* 438 U.S. at 742 (holding that the decision only applied to the "specific factual context").

158 *See id.*

159 Supreme Court Appellee's Brief, *supra* note 70, at *22–23.

160 *Id.* at *23 (citing FINAL REPORT, THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY 282 (1986)).

161 *See* Supreme Court Appellee's Brief, *supra* note 70, at *23.

162 *See* United States v. Playboy Entertainment Group, Inc., 30 F. Supp. 2d 702, 706 (D. Del. 1998) (referring to the subscription prices for various cable television packages); *but see* Reno, 521 U.S. at 854 (stating, "Unlike communications received by radio or television, 'the receipt of information on the Internet requires a series of affirmative steps more delib-

vision is subscription programming that also offers numerous options for blocking unwanted programming.[163] Thus, the safe harbor hours that were used in *Pacifica* are no longer needed because there are other ways to prevent children from seeing or hearing the adult programming.[164]

### C. Section 505 May Fail Due to Vagueness

One final issue that the Court will undoubtedly address is whether section 505 can survive a constitutional challenge of vagueness. The District Court for the District of Delaware did not address this issue in its opinion in 1998.[165] However, in its review of the preliminary injunction, the court ruled that section 505 clearly survived Playboy's vagueness claim based on the Court's decision in *Denver Area Educational Telecommunications Consortium.*[166] However, there is a strong possibility that the Court will find section 505 to be vague. The Court is likely to focus on *Reno v. ACLU,* where it invalidated portions of the Communications Decency Act due to vagueness.[167] In that decision, the Court noted that the statute was a content-based regulation and that the criminal punishment for violation was severe.[168] While section 505 does not impose a severe criminal penalty, it is a content-based regulation.[169]

Although section 505 initially did not define "indecency," the enacted regulation defined indecent sexually explicit adult programming as "any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable or other multichannel video programming distribution medium."[170] Therefore, pursuant to section 505, the FCC will determine what is indecent at a national level rather than through an individual community's standard.[171] In *Reno,* the Court specifically noted that such standards must be "judged by contemporary community standards" rather than by a "national floor for socially redeeming value."[172] Therefore, the question of who will determine the indecency of the programming is sure to raise issues for the Court.

## IV. CONCLUSION: SECTION 505 IS AN UNCONSTITUTIONAL CENSORSHIP OF SPEECH

As the Supreme Court reviews Playboy's challenge to these restrictive government regulations, it is likely to address both the First Amendment issue, under a strict scrutiny standard, and the vagueness doctrine. When the Court applies strict scrutiny, it is likely to find that the government has proven a compelling interest, but that section 505 is not the least restrictive means available to protect that interest. Given the many available options for preventing children's exposure to indecent programming, it is difficult to say that section 505 is the least restrictive alternative. To be certain, there is no replacement for parental supervision. However, where parental supervision is not possible, parents still have various available safeguards. Concerned parents who do not have time to regulate every program their children watch can utilize the v-chip or request a free lockbox from their cable operator.

This government regulation is aimed at protecting children; there are various other ways to accomplish this goal. Unfortunately, the government chose the means that is most restrictive of adults' rights. Section 505 places a tremendous burden on the financial capability of adult pro-

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erate and directed than merely turning a dial. A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended.' "). While the Court groups all television and radio together in the previous sentence, cable television is not as readily accessible as public radio. Furthermore, adult programming channels are generally not placed in the same vicinity of children's channels, thus making it harder and more unlikely for children to access these channels.

163 *See supra* part IV.B (discussing the alternatives to time-channeling).

164 *See id.*

165 *See Playboy Entertainment Group,* 30 F. Supp. 2d 702.

166 *See* Playboy Entertainment Group, Inc. v. United States, 945 F. Supp. 772, 791 (D. Del. 1996) (citing Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727 (1996)) (referring to the Court's flat rejection of the plaintiff's argument in *Denver Consortium* that the challenged regulations were unconstitutionally vague since "the use of accepted terms imbued the statute with meaning").

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

168 *See id.* at 871–72.

169 *See id.* at 872 (stating that a vague, content-based regulation poses "special First Amendment concerns because of its obvious chilling effect on the free speech").

170 Telecommunications Act of 1996 § 505, 47 U.S.C. § 561 (1994 & Supp. III 1997); *see also* 47 C.F.R. § 76.227 (1998).

171 *See Reno,* 521 U.S. at 862–64.

172 *Id.* at 873.

gramming channels, and more importantly, it places a substantial burden on free speech.

There is no doubt that much attention will directed at the Court as it decides yet another First Amendment case. While First Amendment jurisprudence has been relatively unclear, the Court has a chance to clarify its position on content-based regulations. First, the Court should determine whether the government's undocumented evidence is sufficient to establish a compelling interest; the government's evidence on this point was minimal at best. Second, the Court should also make it clear that the "least restrictive" means must be used if the government wants to achieve its compelling interest. Because there are multiple viable alternatives, the government has not used the least restrictive means of regulation through section 505. It is undoubtedly clear that on November 30, 1999, at oral arguments before the Supreme Court, the government appealed to the Court's conscience to protect our children from a societal ill. However, the Court can best protect our children by preserving the integrity of the First Amendment.