ARTICLES

HUNG UP ON THE PAY-PER-CALL INDUSTRY?: CURRENT FEDERAL LEGISLATIVE AND REGULATORY DEVELOPMENTS

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Introduction

All Americans, regardless of where they live and what they do for a living, are affected daily by the new products and services available as a result of the rapid pace of technological change.[1] Nowhere is this change more dramatic than in the delivery of information services via America's high tech telecommunications "highway system."[2]

Pay-per-call services make electronic information products

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[1] JOHN NAISBITT & PATRICIA ABURDENE, MEGATRENDS 2000, at 23 (1990).

> Telecommunications — and computers — will continue to drive change, just as manufacturing did during the industrial period. We are laying the foundations for an international information highway system. In telecommunications we are moving to a single worldwide information network, just as economically we are becoming one global marketplace.

Id.

[2] *Id.* at 23. *See also* H.R. Rep. No. 430, 102d Cong., 1st Sess. (1992) [hereinafter House Report]; S. Rep. No. 190, 102d Cong., 1st Sess. (1991) [hereinafter Senate Report].

available to a mass market through a medium that is accessible and understandable to nearly everyone in America — the telephone.[3] Establishing a 900 number is just another way of publishing and selling information. Pay-per-call service brings the Information Age into virtually every U.S. home — not just those homes with personal computer systems, or those that subscribe to sophisticated and often costly electronic information services, but to every home that has a telephone. The service is a fast and convenient way for businesses and consumers to access information and entertainment, whenever they wish, without the inconvenience of leaving the home or office.

This article explores recent Federal legislative and regulatory developments relating specifically to the 900 pay-per-call services industry (also known as audiotext or 900 services). Part I of this article provides an overview of the pay-per-call industry's evolution and significant growth since the late-1980s. Part II analyzes, from a First Amendment perspective, the current body of law relating to dial-a-porn services. Part III of this article discusses the current regulatory framework promulgated by the Federal Communications Commission (FCC) as applied to indecent pay-per-call services, as well as the FCC's most recent regulations addressing consumer protection issues for pay-per-call services. Part IV analyzes the newly enacted Telephone Disclosure and Dispute Resolution Act (Federal 900 law) recently passed by the U.S. Congress and signed into law by President Bush on October 28, 1992.[4] The Federal 900 law is intended to establish a set of uniform consumer protection laws and regulations for the pay-per-call industry. Part V discusses the continuing need for the establishment of uniform consumer protection laws and regulations to foster the consumer confidence necessary for the continued growth of the pay-per-call industry. Finally, this article concludes that the new Federal 900 law most likely will achieve this objective while at the same time preserving the regulatory framework developed over nearly a decade to serve

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[3] According to the Federal Communication Commission's (FCC) most recent available data, 93.3 % of all U.S. households have telephone service. House Report, *supra* note 2, at 4.

[4] Telephone Disclosure and Dispute Resolution Act, Pub. L. No. 102-556, 106 Stat. 4181 (1992) [hereinafter Federal 900 law].

the compelling interest of protecting minors from indecent pay-per-call services.

I. 900 Pay-Per-Call Services

A. *How Pay-Per-Call Works: The Basics*

The concept of pay-per-call telephone service is not entirely new to consumers. Telephone companies have always charged for their service. However, today's pay-per-call service is different from "plain old telephone service" (POTS) because a third-party vendor, the information provider (IP), is renumerated for its services through a billing and collection agreement with the appropriate carrier — the local exchange carrier (e.g., Illinois Bell or Chesapeake & Potomac Telephone Company) or the interexchange carrier (e.g., AT&T, MCI or US Sprint).[5]

Pay-per-call services fall into three broad categories. The first includes services in which billing and transport are provided by an interexchange carrier that can provide inter-LATA (local access transport area) transport.[6] The second category is based on services where billing and transport are provided exclusively by a local exchange carrier that can only provide essentially local intra-LATA transport.[7] The third type consists of services offered through a seven-digit telephone number (i.e., using the 976 prefix), or through a ten-digit number which resembles a long distance number, usually using the special access code "900."[8] Services using the 976 prefix are offered by local exchange carriers. Local exchange carriers are restricted from providing inter-LATA, as opposed to intra-LATA, service; therefore, 976 services are also restricted by specific geographic boundaries.[9]

On the other hand, 900 services are generally provided as a long distance service offered by an interexchange carrier and are widely accessible from most parts of the country.[10] Because 976 service is only offered on an intra-LATA basis by the local exchange carrier, such services are regulated by each state's public

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5 INFOTEXT PUBLISHING, INC., THE 1992 TELEMEDIA ALMANAC 5-12 (1992) [hereinafter 1992 TELEMEDIA ALMANAC].

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 1992 TELEMEDIA ALMANAC, *supra* note 5, at 5-12.

utility commission (PUC), which regulates state local exchange carriers.[11] 900 services, however, are regulated by the FCC to the extent they are interstate, inter-LATA offerings.[12] The focus of this article is on 900 number pay-per-call services.[13]

The pay-per-call market consists of five primary participants, including the information provider (IP), the service bureau, the local exchange carrier, the long distance carrier (interexchange carrier) and the customer who utilizes the program or service (end user).[14] The sponsor of a particular pay-per-call program or service is either the IP or service bureau.[15] The IP develops the actual program content of the 900 service. The IP also researches, designs, and markets pay-per-call programs and services.[16] Some IPs purchase and utilize their own telecommunications and computer equipment and facilities to deliver their services to the end users; other IPs contract with service bureaus.[17]

Service bureaus provide the necessary facilities, computer software and interactive telecommunications equipment to operate a pay-per-call program, obtain 900 numbers from carriers and provide an array of other business-related services to the IP.[18] Known in the industry as "space and equipment brokers," service bureaus are independent companies which offer voice storage and access to telephone service.[19] The service bureau may also provide the IP with creative 900 application development, programming expertise, recording facilities and services, call traffic reporting, media placement and marketing advice.[20] The local exchange carriers and interexchange carriers provide the transport of the pay-per-call service over telephone lines, as

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11 *Id.*

12 *Id.*

13 For a thorough discussion of the evolution of various pay-per-call services, such as 976 and 900, *see generally* 1992 TELEMEDIA ALMANAC, *supra* note 5, at 5-12.

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 1992 TELEMEDIA ALMANAC, *supra* note 5, at 5-12.

19 *Id.* at 8; *see also* INFOTEXT MAG., Aug. 1992. InfoText Magazine is the leading trade publication of the interactive telephone industry, which includes 900 pay-per-call services. The August, 1992 issue of InfoText provides an indepth review of service bureaus in the United States (on file with authors).

20 INFOTEXT MAG., Aug., 1992.

well as billing and collection services.[21]

Once the call is placed to the pay-per-call service, Automatic Number Identification (ANI) permits the telephone network to identify exactly where the call originated.[22] Through ANI information, the telephone network has the personal data it needs to bill the caller for the pay-per-call service. Typically, the IP contracts with a interexchange carrier, such as AT&T, MCI or US Sprint, to provide a particular information service.[23] In addition, the local telephone company makes its phone lines available for use by the IP and processes the provider's billing and collections.[24] Through intensive marketing, the pay-per-call provider advertises its particular information service. Ultimately, the person utilizing the pay-per-call service, the end user, is billed directly for the service on his or her local telephone bill.[25]

Once payment for the pay-per-call service is received, charges for the use of the local telephone company lines, switching facilities and other long distance network charges are deducted.[26] The remaining balance of payments received is paid to the IP and, if utilized by the IP, the service bureau.[27] The rates charged by local and some interexchange carriers are typically regulated by state public service commissions; thus, providing limits as to how much these companies can charge for the use of their lines and facilities.[28] However, charges made to the customer by the IP are not regulated, which allows the pay-per-call provider to receive any amount remaining after deducting the costs of the local and long distance carriers as well as those of the service bureau.[29]

B. *The Growth of an Information Age Industry*

AT&T introduced the first 900 number service in 1980.[30] The first service, "Dial-It 900," was rudimentary and passive. A

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21 *Id.*
22 House Report, *supra* note 2, at 2.
23 *Id.*
24 *Id.*
25 *Id.*
26 House Report, *supra* note 2, at 2-3.
27 *Id.* at 3.
28 *Id.*
29 *Id.*
30 *Id.*

caller dialing this first 900 service could only listen to a pre-recorded message.[31]

The pay-per-call market evolved in the 1980's into two forms — local exchange 976 services and AT&T's national 900 services.[32] These services were later offered by other interexchange carriers, such as MCI and Sprint.[33] In 1989, a third form of service emerged — ten-digit 900 number service offered on an intra-LATA, local exchange basis.[34]

In 1989, AT&T, MCI, Sprint, and Telesphere Communications (a smaller interexchange carrier)[35] introduced interactive national 900 service.[36] The move in 1989 from a purely passive system to 900 service offering interactive features was the turning point in the relatively young pay-per-call industry. According to Strategic TeleMedia, an interactive telemedia research and consulting firm based in New York, retail revenues for 900 pay-per-call services amounted to approximately $60 million in 1988 (the year preceding introduction of interactive 900 service), $445 million in 1989, $880 million in 1990 and in 1991 pay-per-call revenues jumped to approximately $975 million due to more than 274 million calls placed to such services.[37] In all, it is estimated that there are over 14,000 pay-per-call programs offered by approximately 5,000 pay-per-call service providers.[38] In contrast, there were merely 233 such pay-per-call programs available in 1988.[39]

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31 *Id.*

32 1992 TELEMEDIA ALMANAC, *supra* note 5.

33 *Id.*

34 *Id.*

35 Telesphere introduced the first interactive 900 service in 1987. Telesphere was able to achieve a competitive advantage over the larger interexchange carriers such as AT&T, MCI and Sprint by offering interactive 900 service. After only four years, Telesphere became a leader in 900 services. However, as a result of several significant business, financial, legal and regulatory setbacks, Telesphere filed for Chapter 11 bankruptcy protection just one day after discontinuing its 900 network. *Id.* at 235-41.

36 *Id.* at 5-12.

37 STRATEGIC TELEMEDIA, 800 & 900 REVIEW 3 (Sept. 1992). This data represents gross retail interexchange carrier billings as opposed to actual collected funds. *Id.*; 1992 TELEMEDIA ALMANAC, *supra* note 5, at 34.

38 Senate Report, *supra* note 2, at 2.

39 House Report, *supra* note 2, at 3 (citing *Comments of the Staff of the Bureaus of Economics and Consumer Protection of the Federal Trade Commission to the FCC* (July 2, 1991) (CC Docket No. 91-65)).

Once viewed as a purely entrepreneurial business operated by a handful of providers of pornographic adult sex lines and scam artists, by the decade's end, the pay-per-call industry finally matured. Starting in 1989, major corporations, such as American Express, Carnation, Coca-Cola, Gannett News, RCA, and United Way, began implementing interactive 900 services.[40]

The pay-per-call industry grew rapidly from 1988-1991 and became such an attractive business opportunity for several reasons. First, it is relatively easy for businesses and individual entrepreneurs to enter the pay-per-call industry. The start up costs and capital investment required to operate a 900 service are much lower than other information services.[41] Second, the pay-per-call industry offers significant profit potential combined with relatively low overhead. For example, in 1991, an estimated 55 percent of all revenues went to the providers of pay-per-call services, after deducting costs paid to interexchange carriers (34 percent) and service bureaus (11 percent).[42] Finally, the rapid growth of the pay-per-call industry is just one of several Information Age byproducts of the divestiture of AT&T.[43]

C. *Pay-Per-Call Services Today*

The potential profitability of pay-per-call services has resulted in the development and marketing of a myriad of services offering callers live or recorded messages that provide everything from stock quotes, product information, and news headlines, to soap opera updates, horoscopes, and up-to-the-minute weather forecasts for any city in the World.[44] The two most common types of pay-per-call offerings are "passive" and "interactive" services.[45] Passive services allow a caller to simply listen to a

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40 1992 TELEMEDIA ALMANAC, *supra* note 5, at 9.

41 Senate Report, *supra* note 2, at 2, (citing ATTORNEYS GENERAL WORKING GROUP, THE 900 REPORT, FINDINGS AND PRELIMINARY RECOMMENDATIONS, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL (NAAG) (Mar. 1991)) [hereinafter NAAG Report]. The Working Group consisted of Attorneys General from the States of Florida, Kansas, Missouri, New York, Pennsylvania, Tennessee, Texas, Washington, and Wisconsin. *Id.*

42 1992 TELEMEDIA ALMANAC, *supra* note 5, at 34. These figures are based on data supplied by Strategic TeleMedia.

43 Senate Report, *supra* note 2, at 2 (citing NAAG Report, *supra* note 41).

44 *Expanding The Uses of '900' Services*, N.Y. TIMES, Aug. 10, 1991, at 34.

45 House Report, *supra* note 2, at 3.

prerecorded or live message.[46] Interactive pay-per-call services, on the other hand, transfer the caller to a live operator or direct the caller via a voice processor to make choices by pressing the key pad of a touch-tone telephone.[47]

With respect to content, there are two primary categories of pay-per-call services — entertainment and information services.[48] Entertainment-related pay-per-call services include: personals and datelines, as well as sports, contests, promotions and sweepstakes lines.[49] Among entertainment services, personals and dateline pay-per-call services account for approximately 26 percent of the market; sports lines for 10 percent; games for 6 percent. Less than 3 percent of the industry market share is occupied by adult-oriented, dial-a-porn services.[50] Indeed, the industry has seen a dramatic shift away from adult-oriented entertainment services.[51] This is reflected in the recent bankruptcy filing of the nation's largest adult-services pay-per-call provider, Telesphere Communications, Inc.[52] Increasingly, the pay-per-call industry is offering business-to-business and business-to-consumer services.[53]

Information-related pay-per-call services include product information and support lines, stock market quotes, weather information, as well as public opinion polling.[54] Furthermore,

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46 *Id.*

47 *Id.*

48 Laurent Belsie, *Pay-Per-Call Services Ringing Up Lots of Flak*, CHRISTIAN SCI. MONITOR, Oct. 30, 1991, at 9; Richard D. Hylton, *For 900 Numbers, the Racy Gives Way to the Respectable*, N.Y. TIMES, Mar. 1, 1992, at 8.

49 Hylton, *supra* note 48.

50 1992 TELEMEDIA ALMANAC, *supra* note 5, at 34. Dial-a-porn services, as a percentage of market share, reached their peak in 1990 with approximately 4 percent of the pay-per-call market. In 1992, industry analysts predicted the dial-a-porn business would decline to only a 1.3 percent market share, and less than 1 percent of the overall market in 1993. Tim Deady, *Telephone Sex Lines Face a Less Than Fetching Future*, L.A. BUS. J., Dec. 9, 1991, at 30.

51 CHRISTIAN SCI. MONITOR, *supra* note 48, at 9.

52 *Id.*

53 *Id.*

54 Karen Padley, *More Companies Are Embracing '900' Phone Service*, INVESTOR'S DAILY, Oct. 9, 1991, at 10. Information-related pay-per-call services are considered second-generation services, providing everything from one-on-one legal (Tele-Lawyer), medical and pharmaceutical (Health Information Network & Pharma/Call), insurance (Bestline) and parenting advice (National Parenting Center) from trained professionals, to technical assistance for such products as computer software (Microsoft's User Helpline). *Id.* The array of pay-per-call information

technological advances have vastly improved the capabilities of pay-per-call service offerings.[55] Major Fortune 500 corporations are increasingly turning to pay-per-call services to compliment or replace toll free 800 services, for marketing, merchandising, consumer research, polling, and other customer services.[56] Currently on the horizon for pay-per-call are interactive facsimile services, in which callers access large computer databases via the touchtone telephone in order to receive requested information upon demand directly to their office or home fax machine.[57] Today, 900 numbers are used by the three major broadcast net-

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services includes: USA Living Trust (an information line to help individuals with estate planning), Dow Jones & Co. (current news on the top 250 U.S. companies), NBC Television (used a 900 number as a polling device during the 1980 Reagan-Carter debates. The NBC debate number generated 500,000 calls on the night of the final debate), Johnson & Johnson (used a 900 number to provide information to consumers during the Tylenol scare), Public Broadcasting System (PBS raised thousands of dollars in 1990 with a pay-per-call service advertised during the airing of its special on the Civil War), Consumer Reports (provides the value of a specific year and model of used car to consumers), Pratt & Whitney Company (provides engineers on line to offer technical support and advice to consumers), and, the March of Dimes, American Red Cross and other major charities use 900 numbers for fundraising. Information Industries Ass'n maintains an unpublished list of selected pay-per-call services.

The use of 900 number technology for public service and health information is also on the rise. The National Condom Information Hotline, provides callers with information on the importance and correct use of condoms, as well as educational information regarding AIDS and other sexually transmitted diseases. *National Condom Hotline Returns; Parents Encouraged to Call and Take Notice*, PR NEWSWIRE, Aug. 28, 1991 (Financial News Section).

Callers who dial 1-900-740-POPE can listen to a message from the Holy Father at $1.95 per minute. Richard D. Hylton, *For 900 Numbers, the Racy Gives Way to the Respectable*, N.Y. TIMES, Mar. 1, 1992, at 8. The Vatican's 900 number serves as an "electronic collection plate." *Id.* "Once known for its sleazy, boiler-room operations pushing 'dial-a-porn' lines and credit card frauds, the pay-per-call . . . industry is quickly moving into the marketing mainstream." *Id.*

Several large U.S. corporations have turned to pay-per-call technology as a direct marketing tool, among them American Express, AT&T, Calgon, Carol Wright, Coors Light, Gannett, Kodak, Newsweek, Soap Opera Update Magazine, Tropicana, and Windex. Brad McGill, *High-Tech Meets Old-Time Response Analysis*, DIRECT MARKETING NEWS, Oct. 28, 1991, at 53. AT&T received more than 3.5 million calls when it offered its Calling Card customers a chance to win $10,000 by calling a 900 number to learn more about how the card works. *Id.* For the most recent examples of innovative pay-per-call services, *see generally* 1992 TELEMEDIA ALMANAC, *supra* note 5, and INFOTEXT MAG., Dec. 1992.

55 House Report, *supra* note 2, at 3.

56 *Id.*

57 *Interactive FAX Services Promise to Revolutionize Business and Personal Information Retrieval*, PR NEWSWIRE, Nov. 12, 1991 (wire service). This development promises

works, Fox Television, and CNN to register viewer opinion on a range of issues.[58] Cable television networks, like MTV, and cable operators use 900 services to enhance revenues, indeed sometimes finding that pay-per-call programs are more profitable then selling commercial time on their cable systems.[59] While the pay-per-call industry of the late-1980s has certainly prospered and matured, the industry, nevertheless, has been forced to face a number of challenges from both within and outside the industry.

D. *An Industry in Transition*

In 1989, the 900 industry exploded. In 1992, however, the industry came to terms with the hard lessons and the realities of the previous three years. Indeed, Strategic TeleMedia reported:

> Most telemedia industry players will remember 1992 as the year that 900 services crashed and burned under the strain of the economy, regulatory and legislative restraints, rampant fraud and uncollectibles, and overall 900 exchange image problems. The result is a more mature but drastically slimmed down 900 industry. The long term effect of this watershed year will be a shift in the perception of 900 from a billing mechanism for entertainment-oriented pay-per-call services to the view that 900 is just another network option (along with 800, 700 and POTS [plain old telephone service]) to be considered when planning promotional campaigns or the delivery of information services.[60]

National 900 retail billings for 1992 were projected to be 40 percent less than in 1991 — $550 million, compared to $975 million for the previous year.[61] Despite the sharp decline in 1992 revenues,

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to revolutionize a variety of financial, marketing, and information retrieval services. *Id. See also* 1992 TELEMEDIA ALMANAC, *supra* note 5, at 125-49, 201-05.

58 1992 TELEMEDIA ALMANAC, *supra* note 5, at 12.

59 *Id.*

60 STRATEGIC TELEMEDIA, 800 & 900 REVIEW, at 1-2 (Sept. 1992).

61 *Id.* at 3. In its 1992 forecast, Strategic TeleMedia notes the 1991 national 900 retail billings figure of $975 million does not reflect totally what was actually collected on a net basis. Uncollectibles and other disputed charges were as high as 50 percent in 1991, particularly in the category of entertainment pay-per-call services. Therefore, the 1991 revenue estimate is likely inflated, especially when compared with the more conservative 1992 revenue projections. As uncollectibles decline in the pay-per-call industry, revenue projections will become more accurate to reflect actual net collected revenues, as opposed to revenues which were billed, but which were not necessarily collected. *Id.*

national 900 service revenues are projected to grow by 7 percent in 1993; by 10 percent in 1994, and by 12 percent in 1995, to approximately $752 million.[62] This projected growth rate is far from the "golden year" growth rates of ninety-nine percent in 1990 and twenty percent in 1991.[63] In addition to the economic recession and the costs of fraud and uncollectibles, there is one underlying cause of the downturn experienced by the 900 industry in 1992 — the industry's so-called "bad actors".

E. *Focusing on the Industry's Bad Actors*

While the industry has indeed grown rapidly in recent years to offer a variety of value-added and legitimate pay-per-call services to individual consumers and businesses, the industry has been increasingly scrutinized by the United States Congress, the Federal Communications Commission (FCC), the Federal Trade Commission (FTC), state legislatures, state attorneys general, state public utility commissions, consumer groups and the national media.[64] In its report on H.R. 3490, the Telephone Disclosure and Dispute Resolution Act,[65] the House Energy and Commerce Committee outlined the problem succinctly:

> The growth of non-deceptive uses of pay-per-call technology has been beneficial to consumers. Legitimate users of this technology offer consumers a new method of purchasing goods and services that is both convenient and instantaneous. However, because of its low barriers to entry and ability to piggyback on the telephone industry's billing system, the pay-per-call industry has also attracted the attention of unscrupulous marketers.[66]

Because of the ease of entry and attractiveness of pay-per-call as an information services product, the industry unfortunately attracted a few overzealous and unethical entrepreneurial IPs who saw an opportunity to "hit" the pay-per-call market with 900 programs of questionable value and "run" away with very high profits. Even though the industry's bad actors constituted a small minority of the

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62 *Id.*

63 *Id.*

64 *See, e.g.*, Senate Report, *supra* note 2, at 3-8; Mike Mills, *House OKs Bill That Would Put Preamble on 900-Number Calls*, CONG. Q., Feb. 29, 1992, at 463.

65 H.R. 3490, 102d Cong., 1st Sess. (1991).

66 House Report, *supra* note 2, at 4.

industry's players in the late 1980s and early 1990s, they badly hurt the image of the pay-per-call industry as a whole, eroding consumer and business confidence in 900 technology as a valuable information resource, and causing the legitimate industry players as well as policymakers to undertake efforts to remove the bad actors from the industry. The projected decline in 1992 revenues reflects the outcome of this industry shake out, due to the combined efforts of regulators and key players within the industry itself.

The increased use of pay-per-call services has resulted in many consumer complaints.[67] Since early 1988, the FCC has received over 2,000 complaints related directly to pay-per-call services; FTC complaints of telemarketing fraud have grown at the rate of 20 percent each year since 1987, when the agency received approximately 3,100 complaints.[68]

After the U.S. House of Representatives passed the Telephone Disclosure and Dispute Resolution Act[69] in late February, 1992, the Chairman of the House Energy and Commerce Telecommunications Subcommittee, Edward J. Markey (D-MA) remarked, "Legitimate [pay-per-call] services are penalized by the actions of a few. We can punish the hucksters while allowing the legitimate business people to move forward."[70] Indeed, the bad actors of the pay-per-call services industry represent a very small percentage of the total market in a dynamic industry which offers consumers and businesses a host of legitimate and useful information services.[71]

It is the bad actors which have been the focus of the most intense congressional and agency scrutiny. Pay-per-call fraud includes deceptive price advertisements, in which television and print advertisements do not fully disclose the price of the call or the actual per minute rate of the call. Often, if the price is fully disclosed, it appears in very small print or at the end of a commercial when it is rushed or barely audible to the consumer.[72] Some consumers complain that a service's introductory information or preamble is often

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67 Senate Report, *supra* note 2, at 3.

68 *Id.* at 3, 8.

69 H.R. 3490, 102d Cong., 1st Sess. (1991).

70 Mills, *supra* note 64, at 463.

71 For example, the dial-a-porn segment of the industry is on the decline and is expected to occupy less than one percent of overall market share by 1993. CHRISTIAN SCI. MONITOR, *supra* note 48, at 9.

72 House Report, *supra* note 2, at 4.

unnecessarily long and contains useless information in an effort to drive up the per minute length, and total cost, of the call.[73] In some cases, callers are told to call a toll free 800 number, only to be instructed to call a 900 number, without being told that there will be a charge for calling the 900 number.[74] Some deceptive pay-per-call providers specifically target audiences that are unable to understand the costs involved, or are vulnerable to the provider's claims, such as children, the undereducated, certain ethnic groups who may not speak nor understand English very well, as well as the unemployed, desperately seeking work.[75] For example, a Wisconsin pay-per-call service promising to help callers find union jobs paying $17 per hour merely told callers how to fill out a job application.[76] A woman in South Carolina called a 900 service advertising a VISA card, only to receive a pamphlet telling her how to apply for a credit card; she never received the VISA card, but she did receive a charge of $40 for the 900 call on her monthly telephone bill.[77]

Seldom do pay-per-call services identify themselves with information sufficient to allow a consumer to complain about poor service or to question the amount charged for the 900 call.[78] Pay-per-call providers which operate sweepstakes, games, and contests are a common source of consumer complaints. Sometimes the promise of a "prize" or free vacation is used to lure callers into making a 900 call merely to listen to a lengthy and, therefore, expensive sales pitch.[79] The prize is often costume jewelry or a coupon for a discount on the purchase of overpriced merchandise sold by the service provider.[80]

In the past, some unscrupulous pay-per-call providers targeted the lucrative childrens' market, luring young children to call 900 numbers by promising conversations with the Easter Bunny as well as with popular children's cartoon, television, or movie characters.[81] In one celebrated example, a television Santa Claus urged children viewing the program to hold the telephone receiver up to the televi-

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73 *Id.* at 5.
74 Senate Report, *supra* note 2, at 3.
75 House Report, *supra* note 2, at 4.
76 CHRISTIAN SCI. MONITOR, *supra* note 48, at 9.
77 *Id.*
78 House Report, *supra* note 2, at 4.
79 *Id.* at 5.
80 *Id.*
81 *Id.*

sion, which emitted the dial tones necessary to automatically connect the child to a pay-per-call service.[82] These are extreme examples of abusive and fraudulent consumer practices; they are the exception rather than rule.

Recently in New York City, a 900 number scam artist was arrested for tricking pager subscribers into returning calls to New York numbers that turned out to be expensive pay-per-call services.[83] Given today's sophisticated telephone-related technology, those who wish to engage in fraudulent pay-per-call practices are limited only by the extent of their level of creative ingenuity.

The intense Federal legislative and regulatory focus on the pay-per-call industry began in the early 1980s when Congress and the FCC directed their attention to prohibiting obscene telephone services and to severely curtailing the offering of indecent pay-per-call services. The early industry bad actors were viewed as the providers of certain adult programming, including what some judged to be pornographic services and sexually oriented chat lines, collectively referred to as "dial-a-porn" services.[84]

II. Dial-A-Porn Services: A Legal History

A. *The 1983 Amendment*

The current law applicable to the dial-a-porn[85] segment of the pay-per-call industry is the result of nearly a decade of exchange between Congress, the FCC and the courts. From the inception of dial-a-porn services in 1983, Congress has sought to regulate the industry in order to restrict the access of minors to pornographic messages.[86] Shortly after the first dial-a-porn services became available, Congress amended the Communications Act of 1934 by adding to section 223, subsection (b), which pro-

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82 *Id.*

83 Paul M. Eng, ed., *The Pager-Scam Rumor That Refuses to Die*, BUS. WK., Feb. 24, 1992, at 90E.

84 1992 TELEMEDIA ALMANAC, *supra* note 5, at 8.

85 Dial-a-porn encompasses two types of telephone service: live and pre-recorded. For pre-recorded services, the caller pays the fee on his monthly telephone bill. Live services generally require payment with a national credit card. Ellen L. Nagel, Note, *First Amendment Constraints on the Regulation of Telephone Pornography*, 55 U. CIN. L. REV. 237 n.5 (1986) [hereinafter Nagel] (citing 49 Fed. Reg. 24,996 & 24,998 (1984)).

86 Cindy L. Petersen, Note, *The Congressional Response to the Supreme Court's Treatment of Dial-a-Porn*, 78 GEO. L.J. 2025, 2026 (1990) [hereinafter Petersen].

hibits the making of, by means of telephone, any "obscene or indecent communications to any person under eighteen years of age or to any other person without that person's consent."[87] However, in section 223(b)(1)(B), Congress provided that restricting access to the prohibited communication to persons eighteen or older would constitute a defense to a prosecution under section 223(b)(1)(A).[88] Congress delegated to the FCC the task of determining the manner in which such restrictions were to be implemented.[89]

Pursuant to the grant of authority by Congress, the FCC promulgated regulations permitting access to dial-a-porn messages only between 9:00 p.m. and 8:00 a.m. or upon the use of a credit card for payment prior to the transmission of the message.[90] The time-channeling provision set forth in subsec-

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87 FCC Authorization Act of 1983, Pub. L. No. 98-214, 97 Stat. 1467-68 (codified as amended at 47 U.S.C. § 223 (1990 & West Supp. 1991)). The 1983 amendment provided in pertinent part:

> (b)(1) Whoever knowingly—
> (A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person under eighteen years of age or to any other person without that person's consent, regardless of whether the maker of such communication placed the call; or (B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined not more than $50,000 or imprisoned not more than six months, or both.
> (2) It is a defense to a prosecution under this subsection that the defendant restricted access to the prohibited communication to persons eighteen years of age or older in accordance with procedures which the Commission shall prescribe by regulation . . . (c) The Federal Communications Commission shall issue regulations pursuant to section 223(b)(2) of the Communications Act of 1934 (as added by subsection (a) of this section) not later than one hundred and eighty days after the date of the enactment of this Act.

88 *Id.*

89 *Id.* It appears from the legislative history that Congress provided little guidance to the Commission as to how such defenses were to be formulated. Indeed, § 8 of the House Report, entitled "Clarification and Administration of Section 223" does not discuss defenses. H.R. Rep. No. 356, 98th Cong., 1st Sess. 19-20, *reprinted in*, 1983 U.S.C.C.A.N. 98 Stat. 2219, 2235-36. No Senate report was submitted with the legislation.

90 49 Fed. Reg. 24,996 & 25,003 (1984). The regulations provided in pertinent part:

> It is a defense to prosecution under Section 223(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 223(b) (1983), that the

tion (a) was intended to regulate pre-recorded pay-per-call services, while subsection (b) applied to live telephone services providing sexually explicit conversation, which require payment by charge or credit card.[91]

B. Carlin I: *The Second Circuit's Review of Time Channeling*

Carlin Communications, a dial-a-porn provider, challenged these regulations, contending that the time-channeling regulation violated the First Amendment requirement that a restriction on protected speech be the least restrictive alternative for protecting a compelling government interest.[92] The United States Court of Appeals for the Second Circuit agreed, holding that the FCC failed to adequately demonstrate that the regulatory scheme was sufficiently tailored to its purpose and that such purpose could not be met by less restrictive means.[93] The court initially noted that section 223(b) applies only to speech deemed by its content to be obscene or indecent.[94] Thus, because of the content based provision, the Carlin court recognized the FCC regulation as implicating a fundamental First Amendment right. The court, therefore, subjected the regulation to the most "exacting scrutiny."[95]

In its analysis, the court assumed that protecting minors from "salacious matter" was a compelling government interest.[96] The determinative issue was whether the regulations were nar-

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defendant has taken either of the following steps to restrict access to communications prohibited thereunder:

(a) Operating only between the hours of 9:00 p.m. and 8:00 a.m. Eastern Time or

(b) Requiring payment by credit card before transmission of the message(s).

91 Thus, subsection (b) cannot be relied on as a defense by a provider of pay-per-call services because a caller does not pay prior to the transmission of the message. Carlin Communications Inc. v. FCC, 749 F.2d 113, 117 (2d Cir. 1984) [hereinafter *Carlin I*]. *See also* Nagel, *supra* note 85, at 241.

92 Carlin also attacked the regulation as impermissibly overbroad, arbitrary and capricious and in conflict with common carrier tariffs. These contentions were rejected by the court. *Id.* at 117.

93 *Id.* at 121.

94 *Id.* at 120-21. The FCC argued that the regulation was merely a content neutral time, place, or manner restriction that should be subject to a rational basis standard of review. *Id.*

95 *Id.*

96 *Id.*

rowly drawn to further this interest.[97] In a detailed review of the record the court found that the regulation denied access to adults between certain hours, but not to minors who can easily call dial-a-porn during remaining hours.[98] Moreover, the FCC rulemaking record does not demonstrate that time channeling is the least restrictive method for protecting minors from dial-a-porn. The court noted that the FCC expressly rejected certain alternatives without explanation as to why they might not be both more effective in limiting the pay-per-call audience and less restrictive of adults' freedom to hear "what they want when they want to hear it."[99] The court, therefore, found that the regulation was both over inclusive and under inclusive and held that the time-channeling regulation was not the appropriate means to achieving the compelling interest of protecting minors from indecent material.[100]

C. Carlin II: *The Second Circuit Invalidates Access Codes*[101]

After the United States Court of Appeals for the Second Circuit struck down the time-channeling regulations in *Carlin I*, the FCC alternatively adopted a regulation requiring dial-a-porn providers either to send messages only to adults who first obtain an access or identification code from the provider, or to require payment by credit card before access is permitted.[102] Again Carlin Communications challenged the FCC regulations. In this instance, however, petitioners limited their challenge to the

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97 *Carlin Communications, Inc.*, 749 F.2d at 121 (citing Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637 (1980); Buckley v. Valeo, 424 U.S. 1, 25 (1976). Moreover, the court noted that the government bears the burden of demonstrating that the compelling state interest could not be served by restrictions that are less intrusive on protected forms of expression. *Id.* (citing Schad v. Borough of Mount Ephraim, 452 U.S. 61, 74 (1981)).

98 *Id.*

99 *Id.* at 122.

100 *Id.*

101 Carlin Communications, Inc. v. FCC, 787 F.2d 846 (2d Cir. 1986) [hereinafter *Carlin II*].

102 Following the decision in *Carlin I*, the FCC invited comment on a new approach to providing a defense to enforcement of prohibitions against dial-a-porn service. 50 Fed. Reg. 10,510 (1985). In this Notice of Proposed Rulemaking, the Commission proposed to amend its rules to provide a defense to enforcement of prohibitions against dial-a-porn services. Specifically the notice invited comment on screening and blocking devices and services, as well as identification codes and scrambling. *Id. See also Carlin II*, 787 F.2d at 849-50.

regulations as applied in New York to services operating under the NYT Mass Announcement Service. (NYT MAS).[103] NYT MAS was a one-way distribution system in which it was technically unfeasible to provide the two-way access between the information provider and the caller necessary for the use of access codes.[104] Yet again the United States Court of Appeals for the Second Circuit agreed with the petitioner, Carlin Communications.

In *Carlin Communications, Inc. v. FCC,*[105] (*Carlin II*), the court held that access codes[106] and credit card payment did not provide the least restrictive means for complying with the congressional mandate of section 223(b)(2).[107] In support of this, the court closely reviewed the FCC record, observing that the Commission had failed to adequately consider the feasibility of shifting the cost of customer premises blocking equipment to providers of services and/or the telephone companies that derive income from the calls.[108] Thus, the court of appeals again remanded to the Commission, this time for the specific purpose of exploring more fully cost shifting of customer premises blocking equipment as a less restrictive alternative to access codes or credit card payment.[109]

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103 787 F.2d at 848.

104 *Id.* The FCC regulations in question presuppose the technical feasibility of the two-way transmission for the use of the access code. *Id.* Thus, the court noted that the FCC regulation would put Carlin out of business in New York. *Id.*

105 787 F.2d 846 (2d Cir. 1986).

106 The court found the access code requirement particularly troubling because this system required access to a two-way trunk line, a service not available from the New York Telephone one-way MAS network. *Id.* at 855. The New York telephone system does not permit the caller to communicate the access code to the telephone company or service provider. *Id.*

107 *Id.* at 856. In its discussion, the court reiterated its finding that the regulation, because it was content based, would be subject to close scrutiny. Thus, the issue before the court was whether the regulation "precisely furthers [the] compelling governmental interest [of] protecting minors from salacious matter." *Id.* at 855.

108 *Id.* at 855. In its consideration of blocking as an alternative, the Commission took note of several devices as both technologically and economically feasible. *Id.* at 854 (citing 50 Fed. Reg. 42,706 (1985)). Nevertheless, the Commission rejected this alternative noting that "requiring telephone subscribers to purchase these devices misallocates the burden of implementing a restriction on access to 'dial-a-porn' service by minors." *Id.*

109 *Id.* at 856. The court expressly noted that its remand on the basis of the Commission's failure to consider shifting the cost of customer premises equipment obvi-

In response to the *Carlin II* court's concern for the unfeasibility of access codes in New York, the Commission added scrambling as an available defense to those already set forth in the pre-*Carlin II* regulations.[110] Moreover, the Commission noted that since the court's earlier decision, the New York Telephone system had been upgraded such that access codes were now feasible in that area.[111] Thus, the Commission reestablished access codes as a defense to prosecution in areas served by New York Telephone.[112]

D. Carlin III

In *Carlin Communications v. FCC (Carlin III)*, the United States Court of Appeals for the Second Circuit finally rejected Carlin's challenge, holding that the record supported the FCC's conclusion that a regulatory scheme incorporating access codes, scrambling, and credit card payment was a feasible and effective way to serve the compelling interest of protecting minors from obscene speech.[113]

Having upheld the validity of the three defenses outlined in

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ated the need to decide the constitutionality of the access code plan. *Id.* n.7. However, the court expressed concern that the written application and identification procedure necessary to obtain an access code may have a potentially chilling effect upon adult access to service. *Id.* (citing Talley v. California, 362 U.S. 60, 64-65 (1960); NAACP v. Alabama, 357 U.S. 449, 466 (1958)).

110 Carlin Communications, Inc. v. FCC, 837 F.2d 546, 556 (2d Cir. 1988) [hereinafter *Carlin III*]. In establishing scrambling as an alternative defense, the Commission reversed its decision issued in the Second Report and Order. *Id.* (citing 50 Fed. Reg. 42,704 (1985)). Initially concerned that descramblers had to be installed at the customer's premises, the Commission was concerned that this would impose a burden on customers and prevent adults from obtaining access to messages from phones not in their place of residence. *Id.* However, with the advent of a portable battery-operated descrambling device requiring no installation, the Commission reevaluated its earlier finding. *Id.* Furthermore, the Commission noted that descrambler devices cost approximately $15, considerably less expensive than equipment necessary for customer premises blocking. *Id.* at 554-55.

111 *Id.* at 554 (citing 2 FCC Rcd at 2720 para. 39).

112 *Id.*

113 *Id.* at 555 (citing Ginsberg v. New York, 390 U.S. 629, 639 (1968)). In addition, the court rejected Carlin's contention that the written application requirement for obtaining an access code would impermissibly chill the First Amendment rights of adults wishing to receive sexual messages over the telephone. *Id.* at 557. The theory advanced by Carlin in support of this assertion was that many adults would not exercise their first amendment rights because they fear that the government would discover their identities by using its subpoena power to obtain the message provider's records. *Id.*

the regulations, the court addressed Carlin's challenge to the constitutionality of the underlying statute.[114] The court upheld the constitutionality of section 223(b), finding that the term "indecent" as provided in the statute was to be given the meaning ascribed to obscenity as set forth by the United States Supreme Court in *Miller v. California*.[115] Thus, the court of appeals avoided the problem of a ban on protected speech by defining the term indecent as synonymous with obscene, a category of expression not protected by the First Amendment.[116]

E. *The "Helms" Amendment*

After the *Carlin III* decision, Congress in 1988 amended 47 U.S.C. section 223(b), thus prohibiting the making by telephone of "any obscene or indecent communication for commercial purposes to any person."[117] The new version of section 223(b) obviated the need for any regulations to protect minors from sexually explicit material because access was now prohibited to both minors and adults alike.[118] Several rationales were advanced ex-

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114 *Id.* at 557-58 (citing 47 U.S.C. § 223(b) (Supp. I 1983)).

115 *Id.* at 560 (citing Miller v. California, 413 U.S. 15 (1973)). The court supported this finding with a review of the legislative history, emphasizing that the intent of Congress in the enforcement of this section was that it be consistent with the Supreme Court's rulings on obscenity. *Id.* (citing H.R. Rep. No. 356, 98th Cong., 1st Sess. 19, *reprinted in*, 1983 U.S.C.C.A.N. 98 Stat. 2219, 2235).

116 For a more comprehensive discussion of FCC indecency policy *see* John Crigler & William J. Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U. L. REV. 329 (1989).

117 These amendments to section 223 were incorporated in section 6101 of The Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, § 6101, 102 Stat. 424 (codified as amended at 47 U.S.C. § 223(b) (West Supp. 1991)).

118 The 1988 or "Helms" Amendment provided:

> PART B - PROHIBITION OF DIAL-A-PORN
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> Sec. 6101. Amendment to the Communications Act of 1934 is amended —
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> (1) in paragraph (1)(A), by striking out "under eighteen years of age or to any other person without that person's consent';
> (2) by striking out paragraph (2);
> (3) in paragraph (4), by striking out "paragraphs (1) and (3)' and inserting in lieu thereof "paragraphs (1) and (2)"; and by
> (4) redesignating paragraphs (3), (4), and (5) as paragraphs (2), (3), and (4), respectively.

The pertinent portion of section 223, thus, read:

> (b)(1) Whoever knowingly—
> (A) in the District of Columbia or in interstate or foreign communica-

plaining Congress' complete ban on the transmission of sexually explicit telephone messages in the Amendment.[119] First, Congress was concerned that *Carlin III* would have the effect of creating inconsistency between the Second Circuit and the other circuits as to the constitutionality of the 1983 amendment and FCC regulations.[120] Thus, the new Helms Amendment would create uniformity in the regulation of the dial-a-porn industry.[121] Second, Congress may have passed the amendment, knowing that it was over-restrictive thus inviting judicial review to more clearly define the constitutional limits for regulating indecent, as opposed to obscene, dial-a-porn services.[122] Third, Congress may have imposed a total ban on sexually explicit telephone messages to satisfy public concern, essentially making a political statement without regard to any constitutional constraint on regulation of indecent speech.[123]

F. Sable Communications v. FCC: *The Supreme Court Rejects Congress' Attempt to Ban Indecent Pay-Per-Call Services*

Not surprisingly, the highly restrictive provisions of the 1988 Amendment were challenged by pay-per-call service providers. In *Sable Communications v. FCC*,[124] the United States Supreme Court reemphasized the legal significance of the distinction between obscene speech and indecent speech for the purpose of assessing the restrictive section 223(b) provision. The Court in *Sable Communications*, upheld the prohibition of obscene telephone messages as constitutional.[125] In support of this holding, the Court simply noted that the "protection of the First Amend-

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tions, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or

(B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined not more than $50,000 or imprisoned not more than six months, or both.

119 Peterson, *supra* note 86, at 2038-39.

120 *Id.* at 2038.

121 *Id.*

122 *Id.* at 2039.

123 *Id.*

124 492 U.S. 115 (1989).

125 *Id.* at 124.

ment does not extend to obscene speech."[126] The Court also rejected Sable's argument that the legislation created an impermissible national standard of obscenity.[127] The Court recognized, however, that to the extent Sable's audience is comprised of different communities with different notions of obscenity, Sable would bear the burden of complying with the prohibition on obscene messages as defined by each community.[128]

In contrast, Sable's challenge to the restrictions on indecent speech met with greater success.[129] Justice White, writing for a unanimous court, agreed that while Government has a legitimate interest in protecting children from exposure to indecent dial-a-porn messages, the new version of section 223(b) was not sufficiently narrowly drawn and thus violated the First Amendment.[130] Indeed, the Court vituperated Congress' efforts, characterizing the indecency provision of the statute as yet another case of " 'burn[ing] up the house to roast the pig.' "[131]Thus, the Supreme Court held that the statute's effect of denying adult access to indecent but not obscene telephone messages far exceeds that which is necessary to limit the access of

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126 *Id.* (citing Paris Adult Theater I v. Slaton, 413 U.S. 49, 69 (1973)).

127 *Id.* The Petitioner, Sable Communications, argued that because dial-a-porn messages are transmitted simultaneously from the same source into several communities, the provider would be placed in a "double bind": To the extent technical limitations required that the same message be transmitted to all the communities, the provider would be compelled to tailor all messages to comply with the " 'contemporary community standards' " of the least tolerant community. *Id.* (quoting Miller v. California, 413 U.S. 15 (1973)).

128 *Id.* at 125-26. The Court first noted that the contemporary community standards articulated in *Miller* have been held applicable to federal legislation. United States v. 12,200-ft. Reels of Film, 413 U.S. 123 (1973). Moreover, the Court saw this situation as indistinguishable from federal statutes prohibiting the mailing of obscene materials:

> [T]he fact that 'distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional, because of the failure of application of uniform [national] standards of obscenity.

Sable Communications, 492 U.S. at 125 (quoting Hamling v. United States, 418 U.S. 87 (1974)).

129 *Id.* at 126.

130 *Id.*

131 *Id.* at 131 (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)).

minors to such messages.[132]

III. The FCC's Current Regulatory Approach

A. *The 1989 Amendment to 47 U.S.C. § 223*

In the wake of the United States Supreme Court's decision in *Sable Communications*, Congress again amended 47 U.S.C. section 223, this time looking to emerging technology in order to strike a balance between First Amendment interests and the state's interest in protecting minors from indecent material.[133] As upheld by the Supreme Court in *Sable*, Congress imposed a total ban on "any obscene communication for commercial purposes to any person . . . ."[134] However, with respect to indecent communica-

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[132] *Id.* at 131.

[133] These amendments were included in section 521 of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-166, § 521, 103 Stat. 1159, 1192-93 (codified at 47 U.S.C. § 223 (West Supp. 1991). The amendment to § 223(b) provided for the "restoration and correction of dial-a-porn sanctions" as follows:

> (b)(1) Whoever knowingly—
> (A) within the United States, by means of telephone, makes (directly or by recording device) any obscene communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or
> (B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined in accordance with title 18, or imprisoned not more than two years, or both.
> (2) Whoever knowingly—
> (A) within the United States, by means of telephone, makes (directly or by recording device) any indecent communication for commercial purposes which is available to any person under 18 years of age or to any other person without that person's consent, regardless of whether the maker of such communication placed the call; or
> (B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined not more than $50,000 or imprisoned not more than six months, or both.
> (3) It is a defense to prosecution under paragraph (2) of this subsection that the defendant restrict access to the prohibited communication to person 18 years of age or older in accordance with subsection (c) of this section and with such procedures as the Commission may prescribe by regulation.

[134] *Id.* § 223(b)(1)(A). The FCC recently issued two notices of apparent liability for violation of 47 U.S.C. § 223(b) by information providers. *In re* Telecompute Corp., Notice of Apparent Liability, FCC 92-419, No. ENF-92-04 (Sept. 17, 1992); *In re* Fourth Media, Notice of Apparent Liability, FCC 92-352, No. ENF-92-01 (Aug. 17, 1992). In each case, the FCC concluded that tape recorded adult-oriented

tion, Congress resolved again to prohibit the making of indecent live or prerecorded messages available to a minor.[135] This time, however, Congress afforded one specific statutory defense to prosecution and delegated the formulation of other defenses to the FCC.[136]

Congress spelled out one defense in section 223(c)(1) which requires common carriers to initially block access to dial-a-porn services unless the subscriber requests access to such services in writing.[137] Thus, under this provision, the customer must affirmatively request access to service before it will be made available.[138] This type of restriction has been termed "reverse blocking," as distinct from "blocking," which implies initial free access to pay-per-call services that may be curtailed by a request that access be discontinued.[139]

B. *The FCC Indecency Regulations: Upheld by the Second Circuit*

The second category of defense defined as procedures to be formulated by Commission regulation has been the subject of much discussion in the national media and of debate by policymakers as well as the telecommunications industry.[140] Relying on the grant of authority from Congress set forth in section 223(b)(3), the FCC promulgated regulations to complement the reverse blocking requirement specifically indicated in section

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messages were provided over the telephone network without any restrictions that would prevent access by children or nonconsenting adults. *Id.*

135 *Id.* § 223(b)(2)(A).

136 *Id.* § 223(b)(3).

137 *Id.* Section (c)(1) provides:

> A common carrier within the District of Columbia or within any State, or in interstate or foreign commerce, shall not, to the extent technically feasible, provide access to a communication specified in subsection (b) of this section from the telephone of any subscriber *who has not previously requested in writing the carrier to provide access to such communication* if the carrier collects from subscribers an identifiable charge for such communication that the carrier remits, in whole or in part, to the provider of such communication.

Id. (emphasis added).

138 *Id.*

139 *See* Petersen, *supra* note 86, at 2045-46.

140 *See* Edmund Andrews, *FCC Takes Steps to Combat Abuses on '900' Numbers*, N.Y. TIMES, Mar. 15, 1991, at A1, D4; Mike Mills, *FCC Proposes Clampdown on 900-Number Services*, CONG. Q., Mar. 16, 1991, at 664-66; Cindy Skrycki, *FCC Rules Restrict 900-Number Calls*, WASH. POST, Sept. 27, 1991, at G1.

223(C)(1).[141] In its Report and Order Concerning Indecent Communications by Telephone (FCC Indecency Rules), the Commission promulgated detailed criteria in order to establish a defense to prosecution for the provision of indecent communications to a minor in violation of section 223(b)(2).[142] To implement the reverse blocking provision in section 223(c)(1), the Commission required notice by the service provider to the common carrier of any indecent communication, presumably to allow

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141 *In re* Policies & Rules Concerning Interstate 900 Telecommunications Services, Report & Order, 6 FCC Rcd. 6166 (1991) (to be codified at 47 C.F.R. §§ 64.318(c)(2) & 64.709-64.716) [hereinafter FCC 900 Rules]; *In re* Regulations Concerning Indecent Communication by Telephone, Report & Order, 5 FCC Rcd. 4926 (1990) (codified at 47 C.F.R. § 64.201) [hereinafter FCC Indecency Rules].

142 FCC Indecency Rules, *supra* note 141, at 4934. As finally promulgated in 47 C.F.R. § 64.201, the regulations provide:

> (a) It is a defense to prosecution for the provision of indecent communications under section 223(b)(2) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. 223(b)(2), that the defendant has taken the action set forth in paragraph (a)(1) of this section and, in addition, has complied with the following: Taken one of the actions set forth in paragraphs (a)(2), (3), or (4) of this section to restrict access to prohibited communications to persons eighteen years of age or older, and has additionally complied with paragraph (a)(5) of this section, where applicable:
>
> (1) Has notified the common carrier identified in section 223(c)(1) of the Act, in writing, that he or she is providing the kind of service described in section 223(b)(2) of the Act.
>
> (2) Requires payment by credit card before transmission of the message; or
>
> (3) Requires an authorized access or identification code before transmission of the message, . . .
>
> (4) Scrambles the message using any technique that renders the audio unintelligible and incomprehensible to the calling party unless that party uses a descrambler; and
>
> (5) Where the defendant is a message sponsor subscriber to mass announcement services tariffed at this Commission and such defendant prior to the transmission of the message has requested in writing to the carrier providing the public announcement service that calls to this message service be subject to billing notification as an adult telephone message service.
>
> (b) A common carrier within the District of Columbia or within any State, or in interstate or foreign commerce, shall not, to the extent technically feasible, provide access to a communication described in section 223(b) of the Act from the telephone of any subscriber who has not previously requested in writing the carrier to provide access to such communication if the carrier collects from subscribers an identifiable charge for such communication that the carrier remits, in whole or in part, to the provider of such communication.

the carrier to determine what numbers should be subject to reverse blocking.[143]

In addition to this threshold requirement, the service provider must require payment by credit card,[144] or the use of an authorized access code before transmission,[145] or must scramble the message rendering it unintelligible to a calling party unless that party uses a descrambler.[146] Furthermore, as a prerequisite to invoking one of these defenses, the service provider must have requested in writing to the carrier that its message service be subject to billing notification as an adult telephone message service.[147] Thus, it appears that the FCC requires compliance with the above requirements in addition to the statutory mandate of reverse blocking.

At least one commentator has argued that this "blocking plus" regulatory framework will not be upheld by the courts because it is "overly burdensome and not sufficiently narrow to be considered the "least restrictive" means of regulating indecent "dial-a-porn."[148] However, the United States Court of Appeals for the Second Circuit reached a different conclusion, upholding at least the statute as sufficiently narrowly tailored to serve the compelling government interest of protecting minors from the "damaging psychological effects" of dial-a-porn.[149] The court did not address the legality of the statute as implemented by the more restrictive regulations.

C. *FCC Regulations Addressing Broader Consumer Protection for Pay-Per-Call Services*

In addition to the regulations dealing specifically with inde-

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[143] *See* FCC Indecency Rules, *supra* note 141, at 4934, app. B, § 64.201(1)(a) (codified at 47 C.F.R. § 64.201(a)(1)). The regulation imposing the reverse blocking requirement on the common carrier is set forth in 47 C.F.R. § 64.201(b).

[144] 47 C.F.R. § 64.201(a)(2) (1991).

[145] 47 C.F.R. § 64.201(a)(3) (1991).

[146] 47 C.F.R. § 64.201(a)(4) (1991).

[147] 47 C.F.R. § 64.201(a)(5) (1991).

[148] Petersen, *supra* note 86, at 2049.

[149] Dial Information Services v. Thornburgh, 938 F.2d 1535, 1542-43 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 9661 (1992). The circuit court reversed the district court's preliminary injunction by rejecting the trial court's holding that the statute and regulations were not the least restrictive means for furthering a government interest and that the term indecent as used in the statute was void for vagueness. *Id.* at 1537.

cent messages, the FCC promulgated regulations aimed at protecting consumers from unscrupulous information providers that misrepresent the cost or other material terms of receiving a message.[150] Although the consumer protection provisions set forth here may be viewed as more appropriately placed under the jurisdiction of the Federal Trade Commission,[151] the FCC promulgated regulations presumably because many of these provisions involve requirements applicable to the common carriers that play an integral role in providing pay-per-call service.[152]

The first of these regulations, set forth in section 64.711 requires that messages begin with a clearly understandable preamble, stating the cost of the call,[153] the name of the information provider, a description of the information product or service[154], and at what specific point billing will commence[155]. Furthermore, the preamble associated with a pay-per-call service aimed at minors must direct the caller to hang up unless he or she has parental permission.[156] Finally, frequent callers may be provided the means to bypass the preamble for subsequent calls, except within thirty days after the effective date of a price increase in the pay-per-call service.[157]

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150 FCC 900 Rules, *supra* note 141 (to be codified at 47 C.F.R. §§ 64.318(c)(2), 64.709-64.716). Since the FCC's 900 rules became effective in December, 1992, several interested parties, including AT&T, MCI and the National Association of Attorneys General (NAAG) have filed with the FCC petitions for reconsideration seeking clarification of the rules.

151 The Federal Trade Commission has jurisdiction over cases involving unfair or deceptive trade practices under sections 5 and 13(b) of the Federal Trade Commission Act (codified at 15 U.S.C. § 45 (1973 & Supp. 1992)). The FTC has recently brought several enforcement actions in cases involving television advertising for pay-per-call services. *See In re* Teleline, Inc., No. C-3337 (July 24, 1991) (LEXIS, FATR library, FTC File); *In re* Audio Communications, Inc., No. C-3338 (July 24, 1991) (LEXIS, FATR library, FTC file). *See also* Statement of the Federal Trade Commission Before the Commerce, Consumer and Monetary Affairs Subcommittee, Committee on Government Operations, U.S. House of Representatives, No. 0009681, slip copy, (July 12, 1990) *available in* LEXIS, FATR library, FTC file (asserting the FTC's jurisdiction over fraudulent telemarketing services with respect to civil enforcement).

152 FCC 900 Rules, *supra* note 141, at 6183. Section 64.710 provides that common carriers may provide interstate transmission only under the terms and conditions required by the substantive provisions of sections 64.711-64.716.

153 *Id.* § 64.711(a).

154 *Id.* § 64.711(b).

155 *Id.* § 64.711(c).

156 *Id.* § 64.711(d).

157 47 C.F.R. § 64.711(e) (1991).

Other provisions of the FCC 900 regulations require that local exchange carriers offer an option to block all interstate 900 service where technically feasible.[158] In addition, a common carrier may not disconnect a telephone subscriber's basic service as a result of failure to pay interstate pay-per-call service charges.[159] Also prohibited are collect calls from a pay-per-call service provider to the consumer unless the party called has taken affirmative action indicating acceptance of the charges for the collect pay-per-call service.[160] Finally, section 64.716 of the regulations prohibits transmission services for any pay-per-call service which employ broadcast advertising to generate the audible tones necessary to call a pay-per-call service.[161]

The FCC responded rather quickly to the call for Federal regulation of the emerging pay-per-call industry. It wasn't until late 1992, however, that the United States Congress was able to pass final legislation to guide the industry. This important legislation begins the final and most critical chapter in the development of a comprehensive legal and regulatory framework for the pay-per-call industry.

IV. The Telephone Disclosure and Dispute Resolution Act[162]

A. *Legislative History*

Largely in response to complaints from consumers,[163] both the United States Senate and the House of Representatives held hearings and passed similar pieces of legislation designed to prevent fraud by companies offering pay-per-call services via 900 telephone numbers.[164] On October 29, 1991, the U.S. Senate passed by voice vote S. 1579, the "900 Services Consumer Protection Act of 1991."[165] The companion House bill, H.R. 3490,

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158 *Id.* § 64.713.
159 *Id.* § 64.714.
160 *Id.* § 64.715.
161 *Id.* § 64.716.
162 Pub. L. No. 102-556, 106 Stat. 4181 (1992) [hereinafter Federal 900 Law].
163 *See* Senate Report, *supra* note 2, at 3.
164 S. 1579, 102d Cong., 1st Sess. (1991); H.R. 3490, 102d Cong., 1st Sess. (1991).
165 S. 1579, 102d Cong., 1st Sess. (1991). *See also Voice Vote OK Given 900-Number Bill*, CONG. Q., Nov. 9, 1991, at 3278. Senator John McCain (R-Ariz.) introduced S. 471, the 900 Services Consumer Protection Act of 1991. Senate Report, *supra* note 2, at 8. On April 25, 1991, Senator Daniel Inouye (D-Haw.) introduced S. 1166,

the "Telephone Disclosure and Dispute Resolution Act," passed the House of Representatives on February 25, 1992, by a vote of 381-31.[166]

After the House passed H.R. 3490, it inserted the language of its bill into S. 1579, the Senate-passed bill.[167] Minor differences between the two bills were resolved in an informal, staff level conference before the final legislation was passed by unanimous consent as H.R. 6191 by both the House and Senate in early October, 1992, just days before the 102nd Congress adjourned.[168] While the Bush Administration did not threaten to veto the legislation, it opposed the legislation arguing that pay-per-call legislation is unnecessary since Federal agencies, such as the FCC, have already taken many of the same steps through regulations.[169] The Telephone Disclosure and Dispute Resolution Act (Federal 900 law) was signed into law by President Bush on October 28, 1992.[170]

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the Telephone Consumer Assistance Act. *Id.* The intent of each Senate bill was to establish a regulatory framework and provide for oversight of the pay-per-call industry. *Id.* Following Senate hearings on both bills, Senators Inouye and McCain merged their two bills into one and introduced the current bill, S. 1579. *Id.* The Senate Committee on Commerce, Science and Transportation ordered S. 1579, the 900 Services Consumer Protection Act of 1991, reported favorably without objection to the full Senate, subject to technical amendment. *Id.*

166 H.R. 3490, 102d Cong., 1st Sess. (1991). *See also* Mills, *supra* note 64, at 463. The Subcommittee on Telecommunications and Finance of the House Energy and Commerce Committee held hearings on H.R. 328, a bill similar to the current H.R. 3490, on February 26, 1991. House Report, *supra* note 2, at 7. In addition, on May 9, 1991, the Energy and Commerce Committee's Subcommittee on Transportation and Hazardous Materials held a legislative hearing on draft legislation addressing consumer fraud abuses in the telemarketing and pay-per-call industries. *Id.* at 8. The Telecommunications Subcommittee ordered reported a Committee Print, later introduced as H.R. 2330, on May 8, 1991. *Id.* On August 1, 1991, the Transportation Subcommittee ordered reported H.R. 2330, as a result of its previous hearings. *Id.* Finally, on October 8, 1991, the full House Energy and Commerce Committee met in open session and ordered reported the current H.R. 3490, a "clean" bill amalgamating H.R. 2330 and H.R. 2829. *Id.*

167 *See* Mills, *supra* note 64, at 463.

168 H.R. 6191, 102d Cong., 2nd Sess. (1992). Telephone interview with Antoinette D. Cook, Majority Chief Counsel, Subcommittee on Communications, Committee on Commerce, Science and Transportation, United States Senate (Oct. 7, 1992).

169 Mills, *supra* note 64, at 463. *See also* FCC 900 Rules, *supra* note 141.

170 Telephone interview with White House Clerk's Office (Oct. 28, 1992). *See also* BRP PUBLICATIONS, INC., TELECOMMUNICATIONS REPS. 32 (Nov. 2, 1992).

B. *Legislative Findings*

In broad terms, the intent of the new Federal 900 law is to: (1) establish uniform standards for the pay-per-call industry at the Federal level; (2) ensure that consumers who call 900 services receive adequate information before they decide to utilize a pay-per-call service; and (3) give the FCC, the FTC, and the States the authority necessary to protect the pay-per-call consumer.[171] The new Federal 900 law specifically recognizes the interstate nature of the pay-per-call industry, and it is, therefore, especially concerned with the need to provide uniform nationwide consumer protection standards in order to avoid the development of a cumbersome and complicated patchwork of individual State regulations governing the pay-per-call industry.[172]

The Federal 900 law requires both the FCC and the FTC to conduct rulemakings and promulgate regulations governing preambles, advertisements, collect call-backs, 800 numbers, and billing dispute procedures.[173] The law requires both agencies to promulgate their rules by late July of 1993.[174]

The law as enacted consists of four titles: Title I addresses the required FCC rulemaking, including the regulation of common carriers offering pay-per-call services and billing and collection practices. Title II outlines the required FTC rulemakings regarding advertising preambles and actions by states. Title III sets forth the requirements for the FTC rulemaking pertaining to the correction of billing errors with respect to telephone-billed purchases. Title IV outlines miscellaneous provisions governing non-pay-per-call issues.[175]

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171 Federal 900 Law, *supra* note 162, § 1(b); S. 1579, 102d Cong., 1st Sess. §§ 2, 3 (1991); Senate Report, *supra* note 2, at 8, 11-12.

172 Federal 900 Law, *supra* note 162, § 1(b)(3) & (4)(1992). "The lack of nationally uniform regulatory guidelines has led to confusion for callers, subscribers, industry participants, and regulatory agencies as to the rights of callers and the oversight responsibilities of regulatory authorities. . . ." *Id.* § 1(b)(4); S. 1579, *supra* note 164, § 2; Senate Report, *supra* note 2, at 11. "The Committee believes that greater uniformity in State regulation would foster greater protection for consumers while allowing the industry to evolve. Accordingly, the States are encouraged to adopt the uniform standards and practices proposed in this legislation." Senate Report, *supra* note 2, at 11.

173 Federal 900 Law, *supra* note 162, § 101 (to be codified at 47 U.S.C. § 228(c)) & §§ 201 & 301 (1992).

174 *Id.*

175 Federal 900 Law, *supra* note 162. The Congress added Title IV to the Act just

C. *Title I — Common Carrier Obligations, Consumer Rights, and the FCC Rulemaking*

Title I of the law amends the Communications Act of 1934 by adding a new section 228 governing the regulation of common carriers offering pay-per-call services.[176] For purposes of this new section, the term "pay-per-call service" is defined as any service in which a person provides:

> (A)(i) audio information or audio entertainment produced or packaged by such person; (ii) access to simultaneous voice conversation services; or (iii) any service, including the provision of a product, the charges for which are assessed on the basis of completion of the call;
> (B) for which the caller pays a per-call or per-time-interval charge that is greater than, or in addition to, the charge for transmission of the call; and
> (C) which is assessed through use of a 900 telephone number or other prefix or area code [as] designated by the [FCC]. . . .[177]

The definition specifically does not include: (1) directory services provided by common carriers or local exchange carriers or their affiliate; (2) tariffed services; or (3) services for which customers are charged only after entering into a presubscription agreement or "comparable arrangement."[178] The congressional definition of pay-per-call services varies from the one adopted by the FCC 900 Rules in December, 1991.[179]

The new law requires the FCC to promulgate regulations within 270 days after the date of enactment of the new section 228 of the

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prior to its final passage. Title IV addresses non-pay-per-call issues, including the interception of cellular telephone transmissions. *Id.*

176 Federal 900 Law, *supra* note 162, § 101 (1992) (to be codified at 47 U.S.C. § 228).

177 *Id.* § 101 (to be codified at 47 U.S.C. § 228(i)).

178 *Id.*

179 FCC 900 Rules, *supra* note 141 (codified at 47 C.F.R. § 64.709). The FCC 900 Rules include the following definition of "pay-per-call" services:

> [T]elecommunications services which permit simultaneous calling by a large number of callers to a single telephone number and for which the calling party is assessed, by virtue of completing the call, a charge that is not dependent on the existence of a presubscription relationship and for which the caller pays a per-call or per-time-interval charge that is greater than, or in addition to, the charge for transmission of the call.

Id.

Communications Act of 1934.[180] It further directs the FCC to establish several specific rules governing the conduct and obligations of common carriers — both interexchange carriers and local exchange carriers.

First, the FCC's final rules must ensure that common carriers, either by contract or tariff, require information providers (IPs) to comply with the Federal 900 law.[181] Second, the FCC must require that common carriers provide, upon request, to Federal and State agencies as well as other interested persons specific information, including: (1) the telephone numbers for each pay-per-call service it carries; (2) a description of the type of each service, including the total cost or cost per minute of the service (and any other fees); (3) the IP's name, business address and telephone number; and (4) any other information the FCC requires.[182] The FCC must also require that a common carrier terminate the IP's service if the carrier "knows or reasonably should know" that the pay-per-call service is not provided in compliance with the regulations promulgated by the FTC as required by Titles II and III of the law.[183] In essence, the new 900 law places a burden upon common carriers to police IPs and ensure compliance with the FTC regulations to be promulgated. This new requirement will place a significant legal burden upon common carriers and will undoubtedly lead to even greater scrutiny by the carriers when deciding whether or not to accept pay-per-call programs and services placed by IPs.[184]

The new FCC regulations required by the Federal 900 law also must prohibit a common carrier from disconnecting or interrupting a telephone subscriber's basic local and long distance telephone service due to the subscriber's nonpayment of pay-per-call charges.[185] This requirement is similar to the current FCC 900 rules.[186] In addition, the FCC rules must require local exchange carriers to offer, where technically feasible, blocking to all or certain specific prefixes

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180 Federal 900 Law, *supra* note 162, § 101 (1992) (to be codified at 47 U.S.C. § 228(b)).

181 *Id.* (to be codified at 47 U.S.C. § 228(c)).

182 *Id.*

183 *Id.*

184 *See* Edwin N. Lavergne & Jay S. Newman, *Federal Agencies Move Swiftly to Implement New Pay-Per-Call Law*, 6 INFOTEXT MAG. 20 (Jan. 1993).

185 Federal 900 Law, *supra* note 162, § 101 (1992) (to be codified at 47 U.S.C. § 228(c)(3)).

186 47 C.F.R. § 64.714 (1991).

or area codes used by pay-per-call services.[187] Blocking must be offered at no charge to all telephone subscribers for 60 days after the FCC rules become effective, and to any new subscriber for a 60 day period after their new telephone number is placed in service.[188] After this one-time free blocking service is offered, local exchange carriers will be allowed to charge a reasonable fee for blocking.[189] Finally, in addition to the blocking requirements outlined above, local exchange carriers will be required by the FCC rules to offer subscribers, where technically and economically feasible, the option of presubscribing to or blocking only specific pay-per-call services for a one-time "reasonable" charge.[190]

The law also requires the FCC to promulgate rules governing the use of 800 telephone numbers.[191] The FCC is required to prohibit the use of any 800 telephone number, or numbers "advertised or widely understood to be toll free" in a manner which results in the calling party being charged for completing the call or being connected to a pay-per-call service.[192] For example, a person who calls an 800 number, or some other number generally viewed as free, cannot be automatically connected to a 900 or pay-per-call service via a call to the toll free number. The FCC rules will not apply when the caller has a "preexisting agreement" to be charged for the service, or if the caller provides a "credit or charge number during the call" to the information provider.[193] This requirement is problematic since the law does not define what constitutes a "preexisting agreement." For example, an individual could presubscribe to a pay-per-call service by entering into an agreement with the IP prior to using the service. This individual could access the pay-per-call service by calling a toll free 800 number. It is unclear what would constitute an "agreement" — whether the caller would have to request a presubscription arrangement in writing or whether this could be accomplished over the telephone. Finally, the FCC is re-

187 *Id.* (to be codified at 47 U.S.C. § 228(c)(4)). The current FCC 900 rules already contain a similar blocking requirement. 47 C.F.R. § 64.713 (1991).

188 Federal 900 Law, *supra* note 162, § 101 (1992) (to be codified at 47 U.S.C. § 228(c)(4)).

189 *Id.*

190 *Id.*

191 *Id.* (to be codified at 47 U.S.C. § 228(c)(6)).

192 *Id.*

193 Federal 900 Law, *supra* note 162, § 101 (1992) (to be codified at 47 U.S.C. § 228(c)(6)).

quired to strictly prohibit the practice of calling a 800 number only to be automatically called back collect by the provider of pay-per-call services.[194] Precisely how the FCC and the FTC formulate rules governing 800 and other toll free services will have a dramatic impact upon the future use and development of innovative 800 services.

Under the new law, Congress has directed the FCC to establish rules governing common carrier billing and collection for pay-per-call services.[195] Under the required FCC rules, any local exchange carrier that offers billing and collection services to an IP must ensure that a caller is not billed for: (1) pay-per-call services that the local exchange carrier "knows or reasonably should know" violates the 900 law, or (2) under other circumstances that the FCC finds abusive.[196] Common carriers must also establish a local or toll free telephone number to allow subscribers to get information and have their questions answered concerning pay-per-call services, including the name and address of any pay-per-call services offered through the common carrier by an IP.[197] In addition, within 60 days from the effective date of the FCC's new regulations, the common carrier, either directly or through the local exchange carrier, must provide telephone subscribers with a disclosure statement outlining the rights and responsibilities of the subscriber with respect to the use and payment for pay-per-call services.[198] Finally, the FCC rules will require that pay-per-call charges be segregated on the subscriber's telephone bill from regular local and long distance charges, and must specify the date, time, and duration of the call, as well as the type of service called and the charge for the call.[199] The FCC is also required to develop procedures consistent with Titles II and III of the 900 law to ensure that common carriers and "other parties providing billing and collection services" for pay-per-call services provide refunds to subscribers that have been billed for services deemed to have violated the 900 law or other Federal laws.[200]

While the new law and resulting FCC regulations will place a

194 *Id.*
195 *Id.* (to be codified at 47 U.S.C. § 228 (d)).
196 *Id.*
197 *Id.*
198 Federal 900 Law, *supra* note 162, § 101 (1992) (to be codified at 47 U.S.C. § 228 (d)).
199 *Id.*
200 *Id.* (to be codified at 47 U.S.C. § 228(f)(1)).

number of new regulatory burdens upon common carriers, the law specifically limits common carrier liability. Common carriers will face civil or criminal liability under the new law only if the carrier "knew or reasonably should have known" that a particular pay-per-call service was provided in violation of the 900 or other Federal law.[201] And, subject to a "good faith" test, a common carrier cannot be sued for terminating a pay-per-call service in order to comply with the 900 law.[202]

The 900 law does not preempt Federal, State, and local election, consumer protection, or gambling laws.[203] Furthermore, states are free to enact "additional and complimentary oversight" so long as these rules govern intrastate services and do not significantly impede the enforcement of Federal law.[204] The new 900 law will also not affect the current dial-a-porn law and regulations previously enacted by Congress and the FCC.[205] In addition, the law directs the FCC within one year from October 28, 1992, to submit to Congress recommendations concerning the extension of the new FCC rules to persons that provide, for a per-call charge, electronic data services that are not traditional pay-per-call services.[206] Finally, with the respect to the FCC's rules, the 900 law does not prevent any State from adopting additional laws and regulations, "so long as [they] govern intrastate services and do not significantly impede the enforcement of this section [of the 900 law] or other Federal statutes."[207]

D. *Title II — The FTC Rulemaking Regulating Unfair and Deceptive Pay-Per-Call Practices*

The FTC is the Federal agency primarily responsible for overseeing advertising practices. Until the new Federal 900 law

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201 *Id.* (to be codified at 47 U.S.C. § 228(e)). However, the FCC is not prevented from imposing its own sanctions or penalties on a common carrier for a violation under this section. *Id.*

202 *Id.*

203 Federal 900 Law, *supra* note 162, § 101 (1992) (to be codified at 47 U.S.C. § 228(g)).

204 *Id.*

205 *Id.* (to be codified at 47 U.S.C. § 228(h)). *See* 47 U.S.C. § 233 & FCC Indecency Rules, *supra* note 141.

206 Federal 900 Law, *supra* note 162, § 101 (1992) (to be codified at 47 U.S.C. § 228(f)(3)).

207 *Id.* (to be codified at 47 U.S.C. § 228(g)(4)).

was enacted, the FTC acted on a case-by-case basis against pay-per-call programs that it considered deceptive or misleading.[208] Title II of the new 900 law requires the FTC to promulgate specific rules to prohibit unfair and deceptive pay-per-call advertisements.[209] These new rules apply to IPs that advertise pay-per-call services. Like the FCC, the FTC has 270 days from the October 28, 1992 enactment of the 900 law in which to complete its rulemaking.[210]

The FTC rules must require that the person offering advertised pay-per-call services "clearly and conspicuously" disclose the cost to use the telephone number, including the total cost or the cost per minute, and any other fees.[211] The 900 law does not define the term "clearly and conspicuously." For any service advertisement which offers a prize, award, service, or product at no cost or at a reduced cost, the FTC rules must require that the IP "clearly and conspicuously" disclose the odds of being able to win or receive the service or product.[212] Unless the IP offers a "bona fide educational service," the FTC will prohibit all advertisements directed at children under twelve years of age.[213] It is not clear from the new law just how the FTC will define what constitutes a "bona fide educational service." All pay-per-call advertising directed primarily to those individuals under the age of 18 must "clearly and conspicuously" state that the caller must have parental or legal guardian consent prior to using the service.[214]

Other FTC advertising requirements must include a prohibition against the use of advertising which emits an electronic beep tone to automatically dial a pay-per-call service.[215] This requirement is aimed primarily at children. In addition, pay-per-call advertisements appearing in the print media and on television must "clearly and conspicuously" disclose the cost of the call (total

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208 *See, e.g.*, FTC v. United States TransWorld Courier Services, Civil Action No. 1:90-CV-1635-RHH, 1991 U.S. Dist. LEXIS 5225 (N.D. Ga. Apr. 3, 1991); FTC v. United States Sales, No.91-C-3893, 1992 WL 104819 (N.D. Ill. May 6, 1992).

209 Federal 900 Law, *supra* note 162, § 201.

210 *Id.*

211 *Id.*

212 *Id.*

213 *Id.*

214 Federal 900 Law, *supra* note 162, § 201.

215 *Id.*

cost or cost per minute) whenever the 900 number appears.[216] In television advertisements, the cost disclosure must be displayed on the screen for the same duration as the 900 number.[217] These same disclosure requirements apply to any telephonic solicitations for pay-per-call services.[218] Finally, the new FTC 900 rules must prohibit the advertising of any 800 number, or any other telephone number widely understood to be free, from which callers are automatically connected to an access number for a pay-per-call service.[219]

The 900 law also requires the FTC to develop rules which establish certain service standards applicable to IPs.[220] Each pay-per-call service provider will be required to include an introductory disclosure message (preamble) that: (1) describes the service; (2) specifies the total cost or cost per minute, and other fees of the call; (3) informs the caller that charges begin at the end of the preamble; (4) informs the caller that parental consent is required for children; and (5) states that the service is not authorized, endorsed or approved by any Federal agency, if the program provides information on any Federal program.[221]

Additionally, the FTC must require that IPs allow the caller to hang up after the preamble without incurring a charge.[222] Similar to the FTC's advertising requirements, IPs will not be permitted to direct pay-per-call services to children under the age of 12, unless it is a "bona fide educational service."[223] The IP will be required to stop charging the caller immediately upon disconnection of the call.[224] Also, the IP must temporarily disable any bypass mechanism which allows frequent callers to avoid listening to the required preamble after the institution of any price increase.[225] The FTC is required to prohibit IPs from providing pay-per-call services through any 800 number or other

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216 *Id.*
217 *Id.*
218 *Id.*
219 Federal 900 Law, *supra* note 162, § 201.
220 *Id.*
221 *Id.*
222 *Id.*
223 *Id.*
224 Federal 900 Law, *supra* note 162, § 201.
225 *Id.*

number advertised or widely understood to be toll free.[226]

With respect to billing statements, the FTC must require that IPs ensure that such statements separately display pay-per-call charges, and list the type of service, the date, time, and duration of the call, as well as the cost of the call.[227] Under the law, IPs will be liable for refunds to consumers for pay-per-call services that have been found to violate the 900 law or the FTC's new rules.[228]

The FTC's rules applicable to IPs may include certain exemptions.[229] The FTC may exempt from its rules calls by frequent callers or regular subscribers using a bypass mechanism and pay-per-call services provided at nominal charges.[230] The 900 law does not define the term "nominal charges." This definition will be delineated in the FTC's new rules. Currently, the FCC 900 rules exempt from FCC preamble requirements those services with a flat-rate charge of $2.00 or less.[231] It is uncertain whether or not the FTC will define "nominal charges" to be a figure which is greater than the current FCC standard.

Congress has also directed the FTC to consider requiring pay-per-call services to automatically disconnect a call after one full cycle of the program.[232] The FTC must also require IPs to include a beep tone or other signal during live interactive group programs to alert callers to the passage of time.[233] The transgression of FTC rules prescribed by Title II of the Federal 900 law will be treated as a violation of unfair or deceptive acts or practices under section 5 of the Federal Trade Commission Act.[234]

Finally, section 202 of the Federal 900 law provides that state officials will be permitted to bring a civil action under the 900 law against IPs in the appropriate U.S. District Court. States may seek an injunction against further practices, obtain damages on behalf of their residents, or obtain other relief that the court

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226 *Id.*
227 *Id.*
228 *Id.*
229 Federal 900 Law, *supra* note 162, § 201.
230 *Id.*
231 47 C.F.R. § 64.711(a) (1991).
232 Federal 900 Law, *supra* note 162, § 201.
233 *Id.*
234 *Id.* (citing 15 U.S.C. § 45 (1988)).

deems appropriate.[235]

E. *Title III — The FTC's Billing and Collection Rules*

The third title of the new 900 law directs the FTC to undertake a rulemaking to establish procedures for the correction of billing errors relating to telephone-billed purchases.[236]The FTC must adopt rules substantially similar to those found in the Truth in Lending and Fair Credit Billing Acts.[237] For purposes of this title, the 900 law defines "telephone billed purchase" as "any purchase that is completed solely as a consequence of the completion of the call or a subsequent dialing, touch tone entry, or comparable action of the caller."[238] The term does not include: (1) a purchase made pursuant to a preexisting agreement; or (2) local or interexchange telephone service.[239] Among other things, the 900 law directs the FTC to consider the procedures that subscribers must follow in order to correct alleged billing errors, as well as the method by which common carriers and third party billing entities must respond to such requests.[240] The FTC must also consider (1) limitations on collection action; (2) the regulation of credit reports on billing disputes; and (3) notification to the purchaser of a credit to their account.[241]

Conclusion

Since Congressional enactment and subsequent approval by the Second Circuit of the reverse blocking provision applicable to indecent pay-per-call services,[242] as well as the promulgation of the three-tiered FCC regulations,[243] it appears that the First Amendment dimensions of pay-per-call regulation have been resolved. Providers of indecent pay-per-call services will be subject both to reverse blocking and the credit card/access code/scrambling restrictions. The new Federal 900 law will in no way affect

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235 Federal 900 Law, *supra* note 162, § 202.
236 *Id.* § 301.
237 *Id.* § 301(a)(2); 15 U.S.C. §§ 1601 (1988).
238 Federal 900 Law, *supra* note 162, § 304(1).
239 *Id.*
240 *Id.*
241 *Id.*
242 47 U.S.C. § 223 (Supp. 1991); Dial Information Services v. Thornburgh, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 9661 (1992).
243 47 C.F.R. § 64.201 (1991).

the dial-a-porn legal framework fashioned over the last decade by Congress, the FCC and the courts.[244]

The new 900 law and the resulting FCC and FTC rules, in concert with the FCC's enforcement of the indecency provisions of section 223, will provide the much needed legal and regulatory framework to protect consumers of pay-per-call services from the industry's bad actors while ensuring the pay-per-call industry, as a whole, continued opportunities for growth and innovation.

The Federal 900 law and the new regulations required to be enacted under the law will complete the development of a Federal legal and regulatory framework to guide the future of the pay-per-call industry. However, the precise language of the 900 rules promulgated by the FCC and the FTC, as well as how the new rules and the 900 law will be applied and interpreted will impact significantly the industry's future. Several critical issues remain to be decided by both the FCC and the FTC. First, the FTC's definition of "bona fide educational services" must be crafted carefully as it applies to pay-per-call services offered to children under 12. Second, the potential exists for the development of inconsistent preamble requirements between the FTC and the FCC. The FCC already has promulgated such requirements.[245] The new 900 law also directs the FTC to develop its own preamble requirements.[246] Given the FTC's important new role in the regulation and oversight of the pay-per-call industry, it is vital that the FCC and the FTC coordinate their respective rulemakings in order to avoid unintended duplication and confusion in the new 900 rules. Finally, the Title III billing and collection procedures developed by the FTC must be crafted carefully to ensure that they achieve their intended purpose — to protect both consumers and providers of pay-per-call services — without becoming overly burdensome to implement and administer.[247]

The most important impact of the new Federal 900 legal and regulatory scheme will be its effect on State initiatives to regulate the industry. The Congress is correct in its finding that uniform-

244 Federal 900 Law, *supra* note 162, § 101 (1992) (to be codified at 47 U.S.C. § 228(h)).
245 47 C.F.R. § 64.711 (1991).
246 Federal 900 Law, *supra* note 162, § 201.
247 *Id.* § 301.

ity of Federal and State law is the most effective way of balancing the competing interests of consumer protection and industry growth. Indeed, while pay-per-call providers and consumers await the outcome of the FCC and FTC rulemakings, several states are already moving to pass laws which go well beyond the existing Federal laws to regulate the pay-per-call industry. For example, currently, the states of Alaska and South Carolina have proposed legislation and regulations that would drastically curtail public access to pay-per-call services,[248] and California enacted a sweeping pay-per-call law which goes into effect on January 1, 1993.[249] A rising tide of state legislation will result in a patchwork of inconsistent standards that will halt the continued growth and development of innovative and value-added pay-per-call services. Finally, the new Federal 900 law will hopefully achieve the objective of imposing the uniformity necessary for continued growth of the industry, while at the same time preserving the law that has evolved over nearly a decade to advance the compelling interest of protecting minors from the small segment of the industry that provides indecent adult pay-per-call services.

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248 Jay S. Newman, *The Whip Comes Down*, 5 INFOTEXT MAG. 16 (May 1992).
249 Cal. Assem. Bill No. 2746 (1992).