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IMPLICATIONS OF A BOND REQUIREMENT FOR 900-NUMBER DIAL-A-PORN PROVIDERS: EXPLORING THE NEED FOR TIGHTER RESTRICTIONS ON OBSCENITY AND INDECENCY

In Alaska recently, a twelve-year-old boy, baby-sitting two three-year-old infants, made one repulsive dial-a-porn call. After hearing that one message, he walked up the stairs and began re-creating what he had heard. The victims were those same three-year-old babies. . . . As long as the pornographers have access to the public phone lines, our children will continue to fall prey to this garbage.¹

INTRODUCTION

Dial-a-porns are telephone services that offer sexually explicit pre-recorded and live messages to anyone with access to a telephone.² A dial-a-porn provider operates as an "information access service," defined as "any telecommunications service which permits individuals to access a telephone number, and for which the caller is assessed, by virtue of placing or completing the call, a charge that is greater than, or in addition to, the charge for the transmission of the call."³ These services "include[], but [are] not limited to, telephone numbers with the prefix 900 or 976."⁴

Since they became available in 1983, dial-a-porns have generated a great deal of controversy and have been blamed for a number of instances of sexual violence and abuse.⁵ As a result, Congress enacted legislation to protect minors by placing a number of restrictions on dial-a-porns.⁶

Current FCC regulations strictly govern the time, place and manner in which dial-a-porn services may operate.⁷ Though the issue is far from

1. 135 CONG. REC. S15793 (statement of Sen. Helms).

2. Leah Murphy, Comment, *The Second Circuit and Dial-A-Porn: An Unsuccessful Balance Between Restricting Minors' Access and Protecting Adults' Rights*, 55 BROOK. L. REV. 685, 686 (1989). See also 135 CONG. REC. S15793 (statement of Sen. Helms) (citing incidences of live dial-a-porn services).

3. CAL. BUS. & PROF. CODE § 17539.5 (a)(6) (West 1987 & Supp. 1994).

4. *Id.*

5. See generally Cindy L. Peterson, Note, *The Congressional Response to the Supreme Court's Treatment of Dial-A-Porn*, 78 GEO. L.J. 2025 (1990). The author recounts additional examples taken from a letter read to the House of Representatives by Representative William E. Dannemeyer, among them the story of a twelve-year-old who, after spending two and one-half hours on a sex line, compelled a four-year old girl to orally copulate him, and that of a thirteen-year-old boy who, within forty-eight hours after calling a dial-a-porn service, had intercourse with a younger girl because it "sounded like fun." *Id.* at 2025.

6. Murphy, *supra* note 2, at 689. See *infra* Section III discussing congressional modification of the Communications Act of 1934 and related case history.

7. See *infra* Section III, which discusses these regulations in detail.

settled, the regulations seek to serve the government's interest in protecting minors without placing unconstitutional restrictions on the provider's right to freedom of speech.⁸

When compared to California's licensing requirements for telephonic sellers,⁹ those imposed on 900-number services are significantly less burdensome. While a telephonic seller soliciting purchases of items as innocuous as news magazines must, in addition to other licensing requirements, post a \$100,000 bond for the protection of the consumer,¹⁰ a dial-a-porn provider offering verbally graphic and arguably destructive sexual material need only pay a \$50 annual fee for each 900-number registered.¹¹ The cost of entering the 900-number business, then, is comparatively low for companies that do not initially solicit consumers.

Since those interested in operating a dial-a-porn service need only make a small investment to cover registration, providers of such services have little incentive to take responsibility for their actions. While they certainly wish to stay in business, dial-a-porns often find themselves walking a thin line between attracting more customers and staying within current regulations.¹² From a practical standpoint, a dial-a-porn seller's liability depends on the state's being able to locate the seller. A "boilerroom"¹³ operation can escape potential liability stemming from incidents like that described above by staying one step ahead of law enforcement.

In light of this relatively new "product" on the market and the comparatively moderate licensing guidelines, this Comment asks whether the state may impose additional licensing requirements on dial-a-porn services without overstepping constitutional bounds. Specifically, the Comment addresses whether requiring issuance of a bond before a 900-number dial-a-porn

8. Peterson, *supra* note 5, at 2026.

9. "Telephonic seller" is defined as "a person who, on his or her own behalf or through salespersons or through the use of an automatic dialing-announcing device, . . . causes a telephone solicitation to occur." The definition includes companies or individuals selling or renting most goods and services, but in every case, the seller initially contacts the consumer (in contrast to dial-a-porn and other 900-number services, with which advertisements are used to induce the consumer to place a call). CAL. BUS. & PROF. CODE § 17511.1 (West 1987 & Supp. 1994).

10. CAL. BUS. & PROF. CODE § 17511-17511.12 (West 1987 & Supp. 1994) provides for the posting of a bond in addition to other requirements, such as disclosure of all phone numbers to be used, names and addresses of employees and business locations, disclosure of scripts (if used for sales), and consent to authorize the Attorney General to receive lawful process in any civil action.

11. 900-number services must provide to the Consumer Section of the Department of Justice each 900-number being used, name and address of provider, written copies of audio text, copies of all advertisements, names of carrier services used, and must pay "an annual registration fee of fifty dollars (\$50) for each 900-number used." CAL. BUS. & PROF. CODE § 17539.55 (West 1987 & Supp. 1994).

12. *See infra* Section II, discussing in depth the development of obscenity law as it applies to telephone solicitations and advertisements.

13. "Boilerroom" refers to a phone bank set up in a discrete location, one which can quickly be moved in the event it is detected. The name is meant to reflect both the location of the sparsely-furnished room and the intensity level within.

provider can lawfully operate constitutes an impermissible infringement on free speech. In addition, this Comment discusses whether such a requirement is justified by the state's interest in holding dial-a-porn providers accountable for the consequences of allowing minors access to these services.

Section I of this Comment examines the history of dial-a-porn services and the problems they have created. Section II explains the development of standards of indecency and obscenity in the courts. Section III presents the FCC's regulatory responses to dial-a-porn's introduction and gives an overview of current laws and regulations. Section IV analyzes arguments for and against the bond requirement with emphasis on First Amendment issues. The conclusion advocates imposition of a bond requirement for dial-a-porn providers.

I. BACKGROUND

A. *Dial-A-Porn*

In 1983, *High Society Live!* magazine advertised the first dial-a-porn service, Dial-It, which offered a pre-recorded message depicting actual and simulated sexual behavior.¹⁴ The service became extremely popular, receiving as many as 500,000 calls per day.¹⁵ Before long, the service was generating \$35,000 daily for the phone company and \$10,000 daily for *High Society*.¹⁶ The phone calls included sexual content "ranging from the mildly suggestive to even the most shocking such as sadomasochism, rape, and bestiality."¹⁷ Since then, dial-a-porn has offered not only pre-recorded messages, but live operators as well, who offer advice or act out fantasies for the caller.¹⁸ The dial-a-porn industry as a whole generated an estimated \$2 billion in 1989.¹⁹

B. *The Dangers*

Unfortunately, dial-a-porn services are easily accessible to minors in much of the country.²⁰ Though not all minors are inclined to "act out" what they hear over the phone lines, the pornographic message can be extremely addictive, causing minors to repeatedly call the numbers and accumulate enormous telephone bills.²¹ In addition, the abusive content of

14. Thomas J. Lo, *The Supreme Court's Recent Stand on Dial-A-Porn Regulations: "Honey, I Shrank the First Amendment!"*, 19 W. ST. U. L. REV. 431, 432 (1992).

15. *Id.*

16. *Id.*

17. *Id.* at 433.

18. 135 CONG. REC. S15793 (statement of Sen. Helms).

19. *Id.*

20. Peterson, *supra* note 5, at 2025.

21. *Id.*

many message services “tend[s] to condition . . . children to associate sexual arousal with the abuse and degradation of women and with violence and pain.”²²

Dial-a-porn calls are for minors very real experiences which become “vivid memories which the mind continually replay[s] again and again.”²³ The causal relationship between dial-a-porn and sexual dysfunction and abuse among minors has been thoroughly studied and documented. The Attorney General’s Commission on Pornography researched the effects of pornography and obscenity on sexual violence and attitudes towards sex and women.²⁴ The Commission found “a causal relationship between exposure to sexually explicit materials and sexual aggression, including the commission of unlawful sexual acts.”²⁵ They concluded that even non-violent sexual material was “likely to increase the extent to which those exposed will view rape or other forms of sexual violence as less serious.”²⁶

Other studies support these findings. One recent study conducted on college students indicated that exposure to R-rated nudity and violence produced an unconscious acceptance of sexual deviance.²⁷ Exposure to pornographic material at any age has been shown to increase the probability that the “fantasies” will be acted out in real life.²⁸

As a result of these studies, Senator Mitch McConnell introduced the Pornography Victim’s Compensation Act (PVCA)²⁹ in 1989. Essentially, the PVCA makes commercial pornographic industries liable for the damages resulting from a sexual offense caused by the aggressor’s use of pornographic material.³⁰ The PVCA creates a cause of action which specifically addresses this issue, since prevailing tort law has not established any possible cause

22. *Id.* at 2025-26 (quoting *Telephone Decency Act of 1987: Hearings on H.R. 1786 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 215 (1987) (statement of Mr. Brent Ward, U.S. Atty, Dep’t of Justice)). For a discussion of plans to restrict access by minors, see Section III of this Comment.

23. Peterson, *supra* note 5, at 2025 n.5 (quoting *Telephone Decency Act of 1987: Hearings on H.R. 1786 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 215 (1987) (statement of Mr. Brent Ward, U.S. Atty, Dep’t of Justice)).

24. 135 CONG. REC. S7281, 7282 (statement of Sen. McConnell).

25. *Id.*

26. Robert D. Potter, Jr., Note, *Constitutional Law—The Regulation of Telephone Pornography Sable Communications, Inc. v. Federal Communications Commission*, 24 WAKE FOREST L. REV. 433, 455 (1989) (quoting *Attorney General’s Commission on Pornography, U.S. Department of Justice, Final Report* 323, 332 (1986)).

27. *Id.* at 457.

28. *Id.* at 456 (quoting J. McManus, *Introduction to the Final Report of the Attorney General’s Commission on Pornography* xxxi (1986) (testimony by Dr. Cline delivered to the Commission in Houston)).

29. 135 CONG. REC. S7281 (statement of Sen. McConnell).

30. Sheila J. Winkelman, *Making a Woman’s Safety More Important than Peep Shows: A Review of the Pornography Victim’s Compensation Act*, 44 WASH. U. J. URB. & CONTEMP. L. 237, 248-49 (1993).

of action other than negligence.³¹ The bill has resulted in vigorous debates as to its workability, and additional studies are still being conducted.³² The primary concern is with imposing additional regulations on the dial-a-porn industry. The interest that has developed in the reasoning behind the PVCA suggests that current laws and regulations may be inadequate to meet the concerns of victims of sex crimes and their advocates.

As the following sections will explain, dial-a-porns are already heavily regulated, and the industry will vehemently oppose further restrictions. An understanding of the implications of a bond requirement for dial-a-porns requires an understanding of how the courts and the FCC have responded thus far to the 900-number services. Therefore, before the arguments for and against a bond requirement can be discussed, an overview of obscenity and indecency as well as past cases and the FCC's regulation of common carriers is warranted.

II. OBSCENITY AND INDECENCY

The courts are hesitant to restrict the content of speech, the individual's right to receive communications, or the provider's ability to express protected speech. Any restrictions placed on free speech are subject to "strict scrutiny," and must be narrowly drawn to serve the government's "compelling interest" in limiting speech without infringing on First Amendment rights.³³ In enacting such restrictions, the courts have distinguished two classes of speech—obscene speech and indecent speech.

A. *Obscene Speech*

In *Chaplinsky v. New Hampshire*,³⁴ the Court listed obscenity as a class of speech which is not subject to the "strict scrutiny" test, and can be regulated in the broader interest of society.³⁵ The *Chaplinsky* court stated as follows:

There are certain well-defined . . . classes of speech, the prevention and punishment of which have never thought to raise any Constitutional problem. These include the lewd and obscene. . . . It has been well

31. "The PVCA allows a victim to bring a civil action against a commercial industry involved in pornography when: (1) the individual is a victim of a sexual assault; (2) the material was obscene or constitutes child pornography; (3) the material was a substantial cause of the offense; and (4) the defendant should have reasonably foreseen that the material would create an 'unreasonable risk' of such a crime." *Id.* at 249.

32. *Id.* at 250.

33. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (holding that the government may regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest).

34. 315 U.S. 568 (1942).

35. *Id.* at 571-72.

observed that such utterances . . . are of such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.³⁶

In *Roth v. United States*,³⁷ the Court went on to define obscenity as anything which “the average person, applying contemporary community standards” would find “appeals to prurient interests” when taken as whole.³⁸ Prurient interests were those supporting “a shameful or morbid interest in nudity, sex, or excretion, . . . go[ing] substantially beyond customary . . . description or representation of such matters.”³⁹

In *Miller v. California*,⁴⁰ the Court incorporated the “prurient interest” standard into a three-part test to determine whether material is obscene:

(a) whether “the average person, applying contemporary community standards,” would find that the work, taken as a whole, appeals to prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁴¹

If the speech in question satisfies each part of the test, it will constitute obscene speech, and will not receive First Amendment protection. Obscene dial-a-porn may therefore be subject to complete governmental regulation even *absent* any compelling state interest, as the “strict scrutiny” standard is inapplicable.⁴²

B. Indecent Speech

Indecent speech, however, is given some constitutional protection, and the government needs to have a compelling interest before it can regulate specific instances of indecent speech.⁴³ Indecent speech does not rise to the level of obscenity in that it does not appeal to prurient interests, but “merely refers to nonconformance with accepted standards of morality.”⁴⁴

In *FCC v. Pacifica Foundation*,⁴⁵ the Court stated that whether speech is indecent depends not only on the content of the speech, but on the context

36. *Id.* (footnotes omitted).

37. 354 U.S. 476 (1957).

38. *Id.* at 489.

39. *Id.* at 487 n.20.

40. 413 U.S. 15 (1973).

41. *Id.* at 24 (citations omitted).

42. Peterson, *supra* note 5, at 2028.

43. See generally *FCC v. Pacifica*, 438 U.S. 726 (1978).

44. *Id.* at 740.

45. 438 U.S. 726 (1978).

in which it is expressed.⁴⁶ In *Pacifica*, the Court found that an afternoon radio broadcast of George Carlin's "Filthy Words" monologue was indecent because it was broadcast at a time of the day "when there [was] a reasonable risk that children [were] in the audience."⁴⁷ The Court stated that the concept of indecency is "intimately connected with the exposure of children" to offensive language, and that protecting children from such exposure constituted a compelling interest which justified regulation.⁴⁸ However, such speech would receive constitutional protection if it were broadcast at a time when there was little chance of minors being in the audience.⁴⁹

III. REGULATION OF DIAL-A-PORN

Obscene or indecent telephone communications were originally prohibited by 47 U.S.C. § 223 of the Communications Act of 1934.⁵⁰ Immediately after dial-a-porn emerged in 1983, the statute was amended to permit indecent communications to adults but not to minors.⁵¹ In addition, the amendment required the FCC to devise regulations which included methods by which dial-a-porn services could effectively restrict access by minors.⁵²

The FCC made a number of regulatory attempts to restrict access to minors by modifying Section 223. The first, in 1984, was "time-channeling," limiting the transmission to specific hours of the day (9 p.m. to 8 a.m.) when the odds of the transmission being intercepted by minors were the lowest.⁵³ Time-channeling was accompanied by the requirement that callers pay by credit card.⁵⁴

Carlin Communications, a dial-a-porn provider, challenged this regulation in *Carlin Communications, Inc. v. FCC (Carlin I)*,⁵⁵ claiming that the time-channeling requirement was overbroad, and not narrowly tailored to meet the government's compelling interest in protecting minors.⁵⁶ The court held that time-channeling was indeed overbroad since it restricted

46. *Id.* at 747-48.

47. *Id.* at 732.

48. *Id.*

49. *Id.* at 746.

50. Suzanne D. Rubens, Note, *First Amendment—Disconnecting Dial-A-Porn: Section 223 (b)'s Two Pronged Challenge to First Amendment Rights*, 80 J. CRIM. L. & CRIMINOLOGY 968, 975 (1990).

51. *Id.*

52. *Id.*

53. *See infra* note 80.

54. *Id.*

55. 749 F.2d 113 (2d Cir. 1984).

56. *Id.* at 117. Carlin did not challenge the credit card requirement, which was standard procedure for live dial-a-porn calls. *Id.*

adults' right of access during certain times of the day.⁵⁷ The FCC had, according to the court, overlooked other less restrictive measures which could have been taken, such as "exchange blocking," which would block access at the customer's premises unless the customer affirmatively requested the dial-a-porn service.⁵⁸

In 1985, the FCC released a second set of regulations in Section 223 which required the use of access codes by adult users.⁵⁹ Once again, the FCC did not consider exchange blocking, since it required the installation of additional equipment by common carriers.⁶⁰ Carlin again challenged the regulation, and the court agreed with them, concluding that it was not the least restrictive regulatory scheme available.⁶¹ The court felt that the FCC still had failed to consider exchange blocking sufficiently.⁶²

The FCC released its third set of regulations in 1987. These regulations reestablished access codes and added scrambler devices⁶³ as alternative means by which dial-a-porn services could operate. Dial-a-porn services utilizing one of these options could avoid liability in the event a minor heard the transmission.⁶⁴ These regulations finally withstood an attack by Carlin.⁶⁵ The court considered the affirmative act of requesting an access code to be a minimal burden on the customer, and accepted the FCC's argument that exchange-blocking devices were ineffective since "they are easily disabled by unplugging, or by reprogramming by the minor."⁶⁶ The regulation requiring access codes, credit card payments, and scramblers to block minor's access to dial-a-porn was found to be the least restrictive means possible.⁶⁷

In 1988, the same year that *Carlin III* was decided, Congress amended Section 223 (b) to completely prohibit all obscene and indecent interstate

57. *Id.* at 121.

58. *Id.* at 122. It is important to note that *Carlin I* held that a credit card restriction for live dial-a-porn was a sufficient regulatory measure since the service would have live operators to take the credit card numbers. *Id.* at 118-19. The challenges in the *Carlin* cases to follow centered around regulation of recorded dial-a-porn regulations. *Carlin Communications, Inc. v. FCC (Carlin II)*, 787 F.2d 847 (2d Cir. 1986); *Carlin Communications, Inc. v. FCC (Carlin III)*, 837 F.2d 546 (1988), *cert. denied* 488 U.S. 924 (1988). See *infra* discussion accompanying notes 59 through 81.

59. Rubens, *supra* note 50, at 976.

60. *Id.*

61. *Id.* (citing *Carlin Communications, Inc. v. FCC (Carlin II)*, 787 F.2d 846, 855-56 (2d Cir. 1986)).

62. *Id.* at 856.

63. Murphy, *supra* note 2, at 692. Scramblers are devices used to make the communication unintelligible without the use of a decoder. *Id.* at 692 n.21.

64. See *infra* note 80.

65. *Carlin Communications, Inc. v. FCC (Carlin III)*, 837 F.2d 546, 557 (1988).

66. *Id.* at 554.

67. *Id.* at 557.

telephone communications.⁶⁸ The ban on dial-a-porn in this instance was total, prohibiting both minors and adults from using the service.⁶⁹

In *Sable Communications of California v. FCC*,⁷⁰ Sable Communications, an affiliate of Carlin Communications, challenged the prohibition.⁷¹ The government argued that “enterprising youngsters could and would evade the rules and gain access to” the service.⁷² The government relied on *Pacifica*, which upheld a 24-hour ban on the broadcast of obscene material and strict regulation of indecent material.⁷³ Sable contended that a blanket prohibition was unconstitutional, creating a “national standard of obscenity” and circumventing the obscenity test articulated in *Miller*.⁷⁴

The Supreme Court upheld the ruling of the appellate court, allowing the regulation to stand as it applied to obscene communications, but forbidding a blanket prohibition of indecent dial-a-porn.⁷⁵ The Court noted that the effectiveness of the regulations as upheld under *Carlin III* had yet to be tested, rendering the prohibition premature.⁷⁶ The Court found the regulation of indecent dial-a-porn too broad, in effect a case of “burn[ing] up the house to roast the pig.”⁷⁷

A. Current Law

After *Sable* reestablished the adult’s right to indecent communication, the law regulating indecent dial-a-porn under *Carlin III* was adopted with the addition of a “reverse-blocking” subsection in 1989.⁷⁸ Reverse-blocking provides that the carrier affirmatively block the customer’s access to dial-a-

68. Rubens, *supra* note 50, at 977.

69. *Id.*

70. 492 U.S. 115 (1989).

71. *Id.*

72. *Id.* at 128.

73. *Id.* at 127.

74. *Id.* at 124.

75. *Sable Communications*, 492 U.S. at 131.

76. *Id.* at 130.

77. *Id.* at 131 (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1952)).

78. Lo, *supra* note 14, at 445. Section 223 (b)(1) provides that any person who knowingly “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 . . . permits any telephone facility under such person’s control to be used [for this purpose] shall be fined in accordance with title 18, United States Code, or imprisoned not more than two years, or both.” 47 U.S.C. § 223(b)(1) (1993). Section 223 (b)(2) provides that whoever knowingly “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 . . . permits any telephone facility under such person’s control to be used [for this purpose] shall be fined not more than \$50,000 or imprisoned not more than six months, or both.” 47 U.S.C. § 223(b)(2) (1993).

porn lines unless the customer requests in writing that the block be removed.⁷⁹ Current law, then, allows indecent dial-a-porn provided that the service accept credit card payment only, use a system of identification codes, or scramble the message.⁸⁰ Reverse blocking must be used in conjunction with one of the preceding FCC requirements.⁸¹

The law governing dial-a-porn has evolved to a point where both the FCC and the service providers seem at least temporarily content—the regulations adequately protect minors without infringing on the First Amendment rights of adults or providers. In fact, arguments have been raised that current law cannot get any more restrictive without infringing on the rights of such services and their legitimate customers.⁸² For example, an adult is required to make a written request that their phone be unblocked for use of the service.⁸³ Given the nature of dial-a-porn, few people are comfortable giving their identity to the phone company. In *Fabulous Associates, Inc. v. Pennsylvania Public Utility Commission*,⁸⁴ the court found that even the use of access codes, when they require the person to identify him/herself, imposes an undue burden on the rights of “some” adults due to the sufficiently embarrassing nature of identification.⁸⁵ Any additional regulations on dial-a-porn in the form of user access requirements may therefore not survive constitutional scrutiny.

However, if the FCC determines that the potential abuse of dial-a-porn justifies further regulation, such as a bond requirement, concerns over the First Amendment rights of providers will undoubtedly resurface. Though current regulations governing dial-a-porn are not considered unduly burdensome on the service provider or the consumer, each additional requirement, regardless of its form, “represents another hurdle in the way of First Amendment freedoms.”⁸⁶ The following section analyzes arguments for and against the imposition of additional regulations for dial-a-porn.

79. *Id.* Section 223(c)(1) states, in pertinent part, that “a common carrier within the District of Columbia or within any State . . . 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.” 47 U.S.C. § 223(c)(1) (1993).

80. 47 C.F.R. § 64.201(a) provides as a “defense to prosecution for the provision of indecent communications under section 223(b)(2) of the Communications Act . . . that the defendant has . . . [both] notified the common carrier . . . in writing, that he or she is providing [a “dial-a-porn” service, and either] . . . [r]equires payment by credit card before transmission of the message, . . . [r]equires an authorized access or identification code before transmission of the message, . . . [or] [s]crambles the message using any technique that renders the audio unintelligible and incomprehensible to the calling party unless that party uses a descrambler.” 47 C.F.R. § 64.201(a) (1991).

81. *Lo, supra* note 14, at 450. *See also supra* note 79.

82. *Id.* at 451.

83. *See supra* note 79.

84. 896 F.2d 780 (3d Cir. 1990).

85. *Id.* at 786.

86. *Lo, supra* note 14, at 448.

IV. EVALUATING THE NEED FOR ADDITIONAL REGULATIONS

A. *Protecting Minors versus Adult Access*

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.”⁸⁷ Freedom of speech includes not only the right to speak or print, but the right to distribute, receive, read, inquire, and teach.⁸⁸ The First Amendment also protects the individual’s right to privacy in his associations and affairs.⁸⁹ Though this right is not expressly included in the First Amendment, courts have concluded that “its existence is necessary in making the express guarantees fully meaningful.”⁹⁰

Though obscene dial-a-porn receives no constitutional protection, the governmental interest in protecting “the well-being of minors” became the primary justification for congressional regulation of *indecent* dial-a-porn.⁹¹ The Supreme Court has long recognized protection of minors as a compelling reason for the government’s imposition of such regulations. In *Ginsburg v. New York*,⁹² the Court recognized the parental right to raise children and parents’ rights to “laws designed to aid discharge of that responsibility.”⁹³ These laws included those which insured that minors were “safeguarded from abuses” which could allegedly prevent their growing to become responsible citizens.⁹⁴

Regulations, however, must be by the least restrictive means possible—though indecent material is inappropriate for minors, dial-a-porns providers have a First Amendment right to provide services, and adults have a First Amendment right to access.⁹⁵ Regulation of dial-a-porn, then, must restrict access to minors while insuring that constitutionally protected dial-a-porn remains available.⁹⁶

B. *Arguments Against the Bond Requirement*

A system of “prior restraint” is defined as “any scheme which gives public officials the power to deny use of a forum in advance of its actual expression.”⁹⁷ The imposition of a restraint on a publication before it is

87. U.S. CONST. amend. I.

88. See *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (discussing the scope of the First Amendment).

89. *Id.* at 483.

90. *Id.*

91. *FCC v. Pacifica Foundation*, 438 U.S. 726, 732 (1978).

92. 390 U.S. 629 (1968).

93. *Id.* at 639.

94. *Id.* at 640 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 165 (1943)).

95. *Sable Communications*, 492 U.S. at 131.

96. *Id.*

97. BLACK’S LAW DICTIONARY 1194 (6th ed. 1991).

published is “presumptively unconstitutional.”⁹⁸ Prior restraints on speech and publication are among “the most serious and the least tolerable infringement[s] on First Amendment Rights.”⁹⁹ The state would carry a heavy burden of showing justification for a further restraint, especially considering the fact that indecent speech is protected.¹⁰⁰ Service providers may argue that a bond requirement represents another unnecessary “hurdle” discriminating against would-be providers with severe financial constraints.

In an article entitled “A Legislative Framework for Reducing Fraud in the Credit Repair Industry,” discussing the effectiveness of a bond requirement in reducing fraud in the credit repair industry,¹⁰¹ author James Nehf suggested that there are a number of other problems with imposing a bond requirement for the protection of consumers.¹⁰² Each of these criticisms is applicable to 900-number services in general, and dial-a-porn providers in particular.

First, “while a . . . bond may sufficiently cover the damages of a handful of defrauded consumers, it hardly suffices if a CRO [credit repair organization] engages in widespread fraud and then disappears without a trace.”¹⁰³ As mentioned earlier in this Comment, dial-a-porn businesses operating unlawfully, whether by circumventing access-to-minor requirements or including obscene services which fall outside the ambit of the First Amendment, are often notorious for being unavailable at the first sign of potential liability.¹⁰⁴ Therefore, while a bond could at least provide some relief, it effectively caps liability if the dial-a-porn service is unavailable in a contemplated civil action.

98. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558 (1975).

99. *Id.* at 559.

100. *See New York Times Co. v. U.S.*, 403 U.S. 713 (1971). Note also that obscene speech is excepted from the rule against prior restraints. The rule only applies to speech which is originally protected by the First Amendment. *Roth v. U.S.*, 354 U.S. 476, 481-85 (1957). Obscene speech has already been judicially determined to be outside the protection offered by the First Amendment. *Id.* *See supra* Section II discussing the development of the standard as it applies to dial-a-porn services.

101. The credit repair industry is relatively new, having arisen in response to the need to “repair” credit ratings that have been negatively affected because of accidental recordings or deletions in a consumer’s file. James P. Nehf, *A Legislative Framework for Reducing Fraud in the Credit Repair Industry*, 70 N.C. L. REV. 781, 781 (1992). Since so many businesses and individuals have turned to the use of credit in recent years, huge computer databases have been created to manage and track a consumer’s credit file. *Id.* Businesses rely on the credit ratings recorded in these files when deciding whether to extend to consumers any additional credit. *Id.* Because an incorrect entry or deletion can “render a consumer unable to obtain credit,” and larger databases increase the probability of error, credit repair, which is often costly and time-consuming, became a growth industry. *Id.* Note: in this author’s experience investigating and assisting in filing civil actions against fraudulent credit repair agencies, the need for consumer protection became clear. Consumers in need of credit repair are often in situations where they are willing to pay advance fees in order to secure such a service as quickly as possible. Fraudulent credit repair companies prey on the financial instability of the consumer, collecting the advance fee without any intention of providing the service.

102. *Id.* at 810

103. *Id.*

104. *See supra* note 14 and accompanying text.

Second, Nehf notes that “adverse publicity surrounding the [CRO] industry in recent years has made it difficult, if not impossible, to obtain bonds from licensed sureties.”¹⁰⁵ The dial-a-porn industry has also gained widespread public attention in recent years since the service has become more pervasive and cases such as *Carlin I*, *Carlin II*, *Carlin III* and *Sable* established guidelines for the industry. Studies linking sexual deviance to pornographic material¹⁰⁶ have undoubtedly led to widespread public disapproval of dial-a-porn services. Purportedly legitimate providers may find it difficult to locate a surety willing to undertake what could not only be a potential risk, but a public relations disaster.¹⁰⁷

Third, Nehf criticizes the statutes imposing bond requirements on CROs, noting that “the statutes do not set forth a method for determining how the bond . . . will be distributed among competing claimants if the judgments exceed the principal amount in the fund.”¹⁰⁸ Assume that a bond requirement is imposed on dial-a-porn providers, and two or more victims are able to establish that the acts of the defendant in a preceding criminal case involving sexual misconduct were proximately caused by the victim’s obsession with a given dial-a-porn service.¹⁰⁹ While the bond could be used to compensate the plaintiffs, a state statute which outlines how the bond is allocated invites additional problems. If the statutes differ in this respect between states, dial-a-porn providers will choose to operate in the states with the most lenient statutes, subjecting residents of those states to disproportionate risk.¹¹⁰

Dial-a-porns providers are already subject to extensive regulation. The preceding arguments lend support to the position that legitimate services will take regarding any further restriction—that a bond requirement is not only an unnecessary and constitutionally impermissible “hurdle” interfering with First Amendment freedoms, but an entirely ineffective requirement as well.

C. Arguments in Favor of the Bond Requirement

The California Legislature’s rationale for the imposition of a bond requirement for telephonic sellers included development of “numerous problems for purchasers . . . which are inimical to good business practices.”¹¹¹ The legislature recognized that telephonic sales have “a significant impact upon the economy and well-being of this state”¹¹² and sought to

105. Nehf, *supra* note 101, at 810.

106. See *supra* Section I (B) (discussing the dangers of dial-a-porn).

107. Nehf, *supra* note 101, at 810.

108. *Id.* at 811.

109. This hypothetical assumes that the dial-a-porn provider is unavailable.

110. Nehf, *supra* note 101, at 811. In general, dial-a-porns advertise principally through local newspapers and television.

111. CAL. BUS. & PROF. CODE § 17511 (a) (West 1987 & Supp. 1994).

112. *Id.*

“safeguard the public against . . . financial hardship” by insuring some recovery for defrauded consumers.¹¹³ The same reasoning applies to imposing a bond requirement on dial-a-porns—a bond requirement guarantees that consumers are protected against financial hardship,¹¹⁴ and is therefore particularly important where the business is likely to disappear at the first sign of trouble. If critics suspect that the bond is insufficient to compensate more than a “handful of . . . consumers,”¹¹⁵ increasing the amount of the bond is an effective solution.¹¹⁶

In addition, since the PVCA has yet to be enacted and there is currently no bond requirement for dial-a-porns, victims have no adequate legal recourse. Because the cost of entry is minimal,¹¹⁷ abusive providers are far more likely to enter this highly profitable business. A bond requirement, while it would not entirely prevent dial-a-porn providers who fail to meet current indecency standards from entering the industry, will at least make entry more difficult. Concerns over difficulty obtaining bonds due to adverse publicity in the industry (undoubtedly an expected risk in such a business venture) may be valid in this respect, but are outweighed by the need to filter out of the marketplace those providers who are less likely to comply with current FCC guidelines.

Critics may still argue that any additional requirement for entry into the 900-number dial-a-porn business unconstitutionally infringes upon the providers' First Amendment rights. However, *obscene* speech is not protected by the First Amendment, and there cannot be a prior restraint on speech which does not fall under its protection.¹¹⁸ First Amendment arguments are therefore moot. Dial-a-porn providers who stay within mandated guidelines for indecency and take appropriate safeguards so that access to minors is restricted are, under current law, shielded from liability. A bond requirement is neither an additional *access* restriction nor an infringement on the adult's rights to privacy.

CONCLUSION

Since its introduction eleven years ago, dial-a-porn has been linked to an increase in sexual violence and sexually deviant thought. While the FCC's restrictions have significantly reduced the probability that these services will

113. CAL. BUS. & PROF. CODE § 17511 (b)(2) (West 1987 & Supp. 1994).

114. Because lawsuits are brought on behalf of the state, damages for each violation are paid to the state. California Business and Professions Code § 17511 et seq. is constructed in such a way as to allow that only the \$100,000 bond be used to compensate victims.

115. Nehf, *supra* note 101, at 810.

116. In fact, the bond requirement for telephonic sellers in California was increased from \$50,000 to \$100,000 effective January 1, 1994 to address this concern. See CAL. BUS. & PROF. CODE § 17511.1-17511.12 (West 1987 & Supp. 1994).

117. See *supra* discussion accompanying note 10.

118. See *supra* discussion accompanying note 42.

be accessed by minors, incidents like that reported in this Comment continue to occur. Legal recourse against the service provider is seldom, if ever, successful.

A bond requirement, while it may not totally compensate victims of sexual abuse or misconduct resulting from a minor's exposure to dial-a-porns acting unlawfully, will at least provide *some* relief. While deterring fraudulent and abusive providers from entering the marketplace is one purpose of the bond requirement, its primary purpose would be to compensate victims. Determining how the bond is to be allocated to victims is a minimal concern when weighed against the prospect of victims receiving nothing at all. As long as the amount of the bond is reasonable, imposition of a bond requirement on dial-a-porn providers should withstand constitutional scrutiny. Any argument opposing the bond requirement is outweighed by the societal need to protect minors and afford some protection for consumers.

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