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NATIONAL TELECOMMUNICATIONS MOOT COURT COMPETITION 2009

RULES

On Friday, February 6, and Saturday, February 7, 2009, the Fifteenth Annual National Telecommunications Moot Court Competition will be hosted by the Moot Court Association of The Catholic University of America, Columbus School of Law (CUA), the Institute for Communications Law Studies, and the Federal Communications Bar Association (FCBA). The National Telecommunications Moot Court Competition attempts to encourage law students with a particular interest in the field of telecommunications law to strengthen their appellate advocacy skills. The rules governing the Competition are set forth below.

I. ORGANIZATION OF COMPETITION & RESPONSIBILITIES OF MANAGEMENT AND PARTICIPANTS

A. GENERAL

1. The Steering Committee of the National Telecommunications Competition (Competition), which is comprised of certain members of the Moot Court Board of CUA, including the Vice Chancellor of the Competition (Vice Chancellor), the Director of the Institute for Communications Law Studies, and members of the FCBA, including the Co-Chairs of the Competition (hereinafter the Committee), will apply and enforce these rules with due consideration for the teams and the competition. The Vice Chancellor shall be responsible for the management of the competition. Any and all questions concerning the Competition shall be brought to the attention of the Vice Chancellor as soon as practicable.

2. Each team wishing to participate in the Competition shall submit a registration form containing the contact information for the team and school, together with an administrative fee of **$325.00.**

3. In order to foster diverse competition, schools will be permitted to register a second team. No school may register more than two (2) teams to compete in the competition. An official law school moot court association team is given preference for selection to the competition if space is limited. In the event that

more than one (1) affiliated moot court association team seeks to register, the individual moot court association must determine which team is given preference. The additional team will be placed in the pool of nonaffiliated moot court association teams from that school. In the event that a school seeks to register more than one (1) non-affiliated moot court association team, preference will be given to the team that returns their completed application first to The Catholic University of America, Columbus School of Law Moot Court Association.

4. Each team shall designate one representative to whom information and briefs may be sent and with whom questions and concerns may be discussed.

5. All competitors are bound by their law school honor codes with respect to their conduct under the Rules of this Competition. If a law school does not have its own honor code, it must abide by CUA's honor code.

II. DISTRIBUTION OF THE RECORD AND RULES

At least one copy of the Record and these Rules will be distributed to the representative designated by each team.

III. THE COMPETITION

A. ROUNDS

1. *PRELIMINARY ROUND*

The Competition will be held on two (2) consecutive days. During the preliminary round held on Friday, February 6, 2009, each team will argue on-brief only. There will be additional preliminary rounds held on Saturday morning, February 7, 2009, during which each team will argue on-brief and off-brief. Two members of each team must argue in each round (See Format of the Oral Arguments, *infra* page 7).

2. *SEMI-FINAL AND FINAL ROUND(S)*

The top four (4) teams after the preliminary rounds will advance to the semi-final rounds. Scoring for the semi-final rounds is solely on the basis of the semi-final round oral argument performances of the teams participating in that round. To the extent possible, the four (4) teams advancing to the semi-final round will argue on-brief. If this is not possible, side designations will be determined by coin toss. **The winners of each of the two semi-final round moots shall advance to the final round.** The winner of the final round will be determined by the judges of the final round, solely on the basis of the final round oral argument performances of the teams participating in the final round.

B. TEAMS

Each team shall consist of **two (2) or three (3) student members**. Team members must be students enrolled in a full or part-time program in the law school that they represent. **Only candidates for a Juris Doctor may participate in this Competition**. All team members may contribute to the writing of the brief and may present oral argument, but only two team members may argue in any single round. No substitution of team members will be permitted after the team has submitted its brief, except upon written consent of the Committee.

C. SIDE DESIGNATION

The Vice Chancellor randomly will assign a side designation to each team, as well as a team number. Teams will be notified via electronic mail, of their side designations by **5:30 p.m. EST, Friday, December 5, 2008.** Teams must submit a brief for the side designated to them by the Vice Chancellor.

D. BRIEFS

1. *SUBMISSION AND DELIVERY OF BRIEFS*

(a) Each team must submit five (5) hard copies of its written brief, including one (1) "measuring brief," as defined in Rule D.2.(l) to the CUA Moot Court suite by **5:30 p.m. EST, on Friday, January 16, 2009**. Each team must also submit an electronic copy to the Vice Chancellor by 5:30 p.m. EST on January 16, 2009. **Only those briefs received at CUA Moot Court Suite by 5:30 p.m. EST, on January 16, 2009, will be considered timely.** Copies of the above-referenced briefs must be sent via overnight delivery service or certified mail.

(b) In addition to service to the CUA Moot Court Suite, each team also shall serve one (1) copy of its brief, either electronically in Microsoft Word or PDF format or by mail in hard copy format, so that it is received by *each* of the other competing teams by **5:30 p.m. EST on Friday, January 16, 2009.** If a team selects delivery by paper mail, to ensure timely delivery, overnight delivery service or certified mail must be used. Please note that all records or receipts of delivery of service on the competing teams, whether electronic or other, should be retained by the competitors as proof of delivery.

(c) To ensure fairness to all teams, hand-delivery of briefs is not permitted. Briefs that are hand-delivered will not be accepted.

2. *FORMAT OF BRIEFS*

(a) The electronic copies of the briefs must be submitted in either (1) Microsoft Word 2000 format (or more recent version of Microsoft Word), or (2) Portable Document Format (PDF) readable by Adobe Reader. If PDF is used, the brief

must be text-searchable using a standard PDF reader word search function (i.e., briefs scanned into PDF as graphics files are not acceptable).

(b) Briefs will be in the format required under the Federal Rules of Appellate Procedure ("FRAP") and the Local Rules of the United States Court of Appeals for the District of Columbia Circuit, except as otherwise stated herein.

(c) Briefs will contain the following sections in the following order: (1) cover page; (2) table of contents; (3) table of authorities;[1] (4) jurisdictional statement; (5) issues presented; (6) statement of the case; (7) statement of the facts; (8) summary of the argument; (9) argument; and (10) conclusion. Notwithstanding FRAP 28(b), Appellees are required to include all of the foregoing sections in their briefs.

(d) The relevant text of all statutes and constitutional provisions may be placed in an appendix instead of the body of the brief. It is not necessary to attach the Record to the brief.

(e) The Certificate required by Circuit Rule 28(a)(1), the glossary required by Circuit Rule 28(a)(3) and the reference to oral argument required by Circuit Rule 28(a)(7) should **not** be included in any brief.

(f) The typeface used to produce the brief shall be at least 12 points. Serif types are preferred, although headings and captions may use sans-serif type. Monospaced fonts such as courier are disfavored, but if used, they may not exceed ten (10) characters per inch ("CPI"). Competitors should measure a ten (10)-character length of their typeface with a ruler to ensure compliance. Note that Courier 10-point type may not result in ten (10) CPI on every word processing system. Characters must produce a clear black image on white paper.

(g) Briefs must have one-inch margins on all sides and the text must be double-spaced.

(h) Footnotes must be single-spaced and use characters the same point size as the text.

(i) Briefs must be stapled or otherwise bound along the left margin in a volume having pages not exceeding 8 1/2 by 11 inches.

(j) Briefs must have a heavy or hard cover surface. The cover on Appellant's brief shall be blue. The cover on Appellee's brief shall be red.

[1] Pursuant to Circuit Rule 28(a)(2), teams must place an asterisk in the left-hand margin of the table of authorities besides the authorities on which the brief principally relies. The table of authorities also must include a notation at the bottom of the first page stating: "Authorities upon which Appellant/Appellee chiefly relies are marked with asterisks."

(k) **No brief shall exceed forty (40) pages, including footnotes and citations.** The only material excluded from the page limit shall be the following: cover page, table of contents, table of citations, certificate of service, certificate of typeface and volume, appendix containing relevant statutory and constitutional provisions, and the certificate required by Rule D(3) of these Competition Rules.

(l) **Citations will be complete and in the format prescribed by the most recent edition of *The Bluebook: A Uniform System of Citation*.** The typeface and abbreviation conventions will be in accordance with Rules 2.1 and 2.2 of *The Bluebook.* Underscoring may be used to indicate the use of italics, in accordance with *The Bluebook* Rule P.1.

(m) **One hard copy of the brief (the "measuring brief") must bear the typewritten names of all team members, their signatures, and the names of their school on the front cover page and nowhere else**. No other copies shall bear the names or signatures of the team members or their schools. Instead, each team shall mark each of the remaining copies of their brief with the team number assigned to them by the Vice Chancellor. This team number shall be placed in the upper right hand corner of each brief submitted to the CUA Moot Court suite and to the competitors.

By signing the measuring brief, each team certifies that the brief has been prepared in accordance with these Rules, and that it represents the work product of the team members only.

3. ***BRIEF CERTIFICATES***

(a) In addition to the briefs, each team shall submit a certificate containing the following information:

i) a statement that the work product contained in all copies of the team's brief is in fact the work product of the members of the team;
ii) a statement that the team has complied fully with its law school honor code or the honor code of CUA; and
iii) an acknowledgment that the team has complied with all Rules of the Competition.

4. ***SCORING OF BRIEFS***

(a) Brief scores shall constitute fifty percent (50%) of each team's final score for each preliminary round, but will not count in the semi-final and final rounds.

(b) Briefs will be scored by a panel of judges. Briefs will be evaluated anonymously and graded on a scale of one (1) to one hundred (100) points, in accordance with the resources made available to the brief judges and in accordance with the judging criteria provided in Section III, Rule F. After a team's brief score has

been determined, penalties for format and citation errors and rule violations will be subtracted from the initial score given.

(c) The following chart provides the point deductions for format and citation errors.

FORMAT ERRORS	POINT DEDUCTIONS
Non-heavy or hard cover surface or non-correct color	2
Non-bound brief	2
Non-one inch margin	2
Non-double spaced text and single spaced footnotes	2
Improper typeface, font size, or characters per inch	2
Non-81/2x11 paper	2
Improper ordering or omission of brief sections	2/section omitted
Exceeding page limits	1/page
Competitor names or name of team including law school on any location except on front cover of measuring brief	1
Late submission of briefs to Vice Chancellor (Deadline 5:30 p.m. EST on Friday, January 9, 2009). Hand-delivery of briefs is not permitted.	5/day
Late submission of briefs to competing teams (Deadline 5:30 p.m. EST on Friday, January 9, 2009).	2/day/team not served
Submission of wrong side brief	10
Submission of wrong number of briefs to Vice Chancellor	1/copy
Failure to include certificate of service to Vice Chancellor (Includes 1. A statement that the work product contained in all copies of the team's brief is the work product of the members of the team only; 2. A statement that the team has complied fully with its law school honor code or the honor code of CUA; and 3. An acknowledgment that the team has complied with all the Rules of the Competition).	1
Failure to submit Measuring Brief to Vice Chancellor (Includes 1. Typewritten names of all team members; 2. Their signatures; 3. Their social security numbers; 4. Team number assigned by the Vice Chancellor; and 4. The name of their law school on the front cover page of the brief).	1
Minor Citation Errors - does not impair the ability of the reader to identify or find the authority and that does not misrepresent the material. A minor repeated citation error will not be penalized more than one time per brief.	¼
Major Citation Errors – affects the ability of the reader to find or identify the authority or misrepresents the material. A major repeated citation error will not be penalized more than one time per brief.	½

E. ORAL ARGUMENT

1. *LOCATION*

The Competition will be held at The Catholic University of America, Columbus School of Law, 3600 John McCormack Road, N.E. Washington, D.C. 20064. The Vice Chancellor will determine the time and the room number for each preliminary round of arguments, and will notify each participating team of this information at least two (2) weeks prior to the date selected for the first round of arguments.

2. ***SCORING***

(a) The team score for its oral arguments will constitute fifty percent (50%) of each team's final score for each preliminary round. The brief score will constitute the remaining fifty percent (50%) of the team score for each preliminary round. A team's performance in the semi-final and final rounds will be judged *solely* on its oral argument performance. The brief score will not be used in determining the winner(s) of the semi-final or final round.

(b) Each individual competitor's score will be the average of the various scores assigned to that competitor by the members of the judging panel in all of the preliminary rounds in which it has argued. **An individual competitor must argue at least twice in order to be eligible to receive the Best Oralist award**.

(c) The winning team will be designated Best Team based upon its performance in the final round, while the Best Oralist and Best Brief winners will be awarded based upon their performance in the preliminary rounds. Scoring will be on a scale of one (1) to one-hundred (100) points and in accordance with the judging criteria provided in Section III, Rule F.

3. ***FORMAT OF THE ORAL ARGUMENTS***

(a) Each team will be limited to thirty (30) minutes of oral argument, to be divided among its members, but **only two** (2) **members** may argue in any one (1) round. Each of those two (2) team members must argue for **at least** seven (7) minutes per round in which they participate. Each team is responsible for communicating to the bailiff, **prior to the beginning of oral argument**, how it wishes to allocate its thirty (30) minutes between team members. At their discretion, judges may interrupt arguments to pose questions and may allow additional time for the advocates' response. Appellant may ask to reserve up to ten (10) minutes of its team's allotted time for rebuttal. Prior to oral argument, the Appellant must notify the bailiff of its intention to request rebuttal time, and, at the beginning of oral argument, must seek leave of the panel for rebuttal.

(b) For those preliminary rounds in which the parties will be arguing on-brief, the judges may receive the briefs of the parties whose arguments the judges are slated to hear. Off brief and final round judges may, upon request, be given sample briefs.

(c) Judges will be encouraged to critique all advocates after the completion of each of the three (3) preliminary rounds of oral arguments.

F. GUIDELINES FOR JUDGING BRIEFS AND ORAL ARGUMENTS

The problem, a bench memorandum, and a copy of these Rules will be provided for the use of those judging team briefs. In accordance with Rule E(3)(b), sample

briefs also may be provided to those judging oral arguments. See Rule III, Rule A for additional information on the rounds of the competition.

G. ANNOUNCEMENTS AND AWARDS

The team that wins the final round will be designated the Best Team. The Best Team, the team that wrote the Best Brief (as determined by the final brief scores) and the Best Oralist (based solely on the competitor's preliminary round oral argument scores) will be announced at a Reception following the conclusion of the final round of the Competition. All participants and judges are invited to attend the Reception. At the conclusion of the Reception, the Committee will award plaques and/or cash prizes to the winning and second place teams, as well as to the winners of Best Brief and Best Oralist.

H. FACULTY OR OTHER ASSISTANCE

One of the purposes of this Competition is to develop the skills of appellate advocacy. Accordingly, the team members *themselves* must write their own briefs and prepare their own oral arguments. Faculty members, fellow students, attorneys or other individuals may **not** review, edit or otherwise assist in the preparation of a team's brief. Likewise, such individuals may not prepare the team members' oral arguments for them. Participants may discuss issues and ideas relating to the Competition problem with faculty, fellow students, or others, and may use the assistance of such individuals to prepare for oral arguments in the form of mooting, question and answer sessions, etc. However, no other form of external assistance may be provided to the competitors.

I. THE COMMITTEE'S AUTHORITY

1. Upon consultation with the Co-Chairs of the Competition, the Vice Chancellor will issue an interpretation of these Rules upon request. All Rule interpretations promptly will be provided to each team.

2. Upon consultation with the Co-Chairs of the Competition, the Vice Chancellor has the discretionary authority to modify or waive any of these Rules as required.

3. These Rules may be modified as necessary to present the most equitable scoring of the competition where there is an odd number of competing teams.

4. The Vice Chancellor will accept questions and requests for clarification of the problem until **5:30 p.m. EST on Friday, January 2, 2009.** Absent extenuating circumstances, **all such requests must be received by the Vice Chancellor by that date.** All requests for clarification must be via e-mail. All clarifications provided by the Vice Chancellor will be sent via e-mail to each participating team.

5. In the event of an ambiguity or conflict, these Rules and/or written communications to the participants will govern.

J. WITHDRAWAL

Teams wishing to withdraw from the Competition, must notify the Vice Chancellor via email by **5:30 p.m. EST on Monday, November 24, 2008**, or forfeit the $325.00 entrance fee.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Mobile Video Public Safety and Consumer Education Initiative	)	WT Docket No. 08-9999
	)	

REPORT AND ORDER

Adopted: November 20, 2008 **Released:** November 20, 2008

By the Commission: Commissioner Dobler dissenting.

I. INTRODUCTION

1. In this *Report and Order*, we require mobile video providers – which operate networks dedicated to delivering one-way, IP-based, broadcast or multicast video programming to mobile telephone customers – to ensure that every video file played on a mobile device using their service is preceded by a warning explaining the dangers posed by using the service while operating a motor vehicle. The evidence in our record shows a strong need for such warnings. The warning requirement adopted here is in the public interest, falls well within the Commission's jurisdiction, and is consistent with the requirements of the First Amendment.

II. BACKGROUND

2. More and more wireless subscribers are watching videos on a third screen: their mobile telephone. The Commission's Eleventh Report on the state of commercial mobile radio services competition found that approximately one million people subscribed to video services on their cellphones at the end of 2005.[2] Since then, research firms indicate that the number of Americans watching mobile videos, which include both TV programming and downloaded or

[2] Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Eleventh Report,* 21 FCC Rcd 10947, 11012 (2006).

streaming video, has grown dramatically. Reports estimate that now 6 million or more Americans are watching mobile videos.[3]

3. Mobile video services have become so prolific that, in our Twelfth Report on wireless competition, we for the first time identified a new category of service provider – "mobile video providers," defined as service providers that operate networks dedicated to delivering one-way, IP-based, broadcast or multicast video programming to mobile telephone customers.[4]

4. Unfortunately, the rise of mobile video offerings has not been an unmitigated boon for our society. During the course of 2007, media reports periodically indicated that the consumption of mobile video offerings by individuals operating motor vehicles was playing a substantial role in an increasing number of automobile collisions. For example:

- In May, 2007, 18-year-old Billy Hicks lost control of his Ford Explorer, colliding with three other vehicles before his own vehicle rolled over and tumbled into a ravine. The accident killed Hicks, his sole passenger, and a child in one of the other vehicles struck, and injured five others. Forensics reports indicated that at the time he lost control of his vehicle, Hicks had been using a hand-held device known as the "iVid," which downloads and plays streaming video on its five-inch screen.

- In July, 2007, 20-year-old Leslie Hunter collided head-on with 22-year-old Kevin Dolenz, killing both and injuring four passengers. Testimony from passengers in both cars indicated that Hunter and Dolenz had each been using mobile video devices to watch the very same content at the time of the collision: A then-popular clip of three Siamese kittens playing soft-rock classics on guitar.

- On Thanksgiving night, 2007, while driving home from a holiday gathering on a major highway, 36-year-old Dale Biberman slammed her Toyota RAV-4 into a car driven by another holiday commuter, 40-year-old Alec Newbary. The collision caused a chain of other collisions, in which 45 vehicles suffered at least some damage. To the amazement of all involved, not a single person was injured in any significant way. Ms. Biberman admitted that the accident was triggered by her attempt to manipulate her "OnTheGoVideo" device to find a program for her 5-year-old son to watch while she drove home.

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[3] *See Telephia: Mobile Video Popularity Reaching New Heights With Triple-Digit Growth in Revenues and Subscribers,* News Release, Telephia, June 26, 2007 (estimating that the number of U.S. mobile video subscribers had grown to 8.4 million in the first quarter of 2007); Brad Smith, *Mobile TV's High Wire Act,* WIRELESS WEEK, Apr. 15, 2007 (describing M:Metrics estimate that 6 million Americans watched mobile video at least once a month during the three-month period ending in February 2007, and that about 650,000 people watched it nearly every day); Li Yuan, *Cellphone Video Gets On the Beam,* WALL STREET JOURNAL, Jan. 4, 2007, at B3 (describing Yankee Group estimate that about 6.045 million U.S. cellphone users watch video content on their cellphones at least once a month).

[4] *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Twelfth Report,* 23 FCC Rcd 2241 ¶ 8 (2008).

5. On January 2, 2008, in response to these incidents and others like them, we issued the Notice of Proposed Rulemaking in this Docket.[5] The Notice described these incidents, and also mentioned letters that had been filed with the Commission by various law enforcement and highway safety organizations urging action to ensure that drivers be made aware of the dangers associated with driving while consuming mobile video content. In light of the evidence before us at the time, we tentatively concluded that we should adopt a rule requiring "mobile video providers," as defined in our Twelfth Report ("MVPs"), to ensure that any streaming video downloaded over their networks for real-time showing on a mobile device be prefaced by a thirty-second warning explaining the dangers of viewing mobile video content while operating a motor vehicle. We explained our tentative view that this warning should appear before any video file accessed on the device, even if the user had watched another video immediately beforehand. We sought comment on numerous issues, including: (1) the effect that this requirement might have on the video market broadly; (2) the Commission's jurisdiction under the Communications Act of 1934, as amended,[6] to promulgate such a requirement with respect to mobile video; and (3) the First Amendment implications, if any, of the requirement under consideration.

6. In the months following the issuance of the Notice, we received nearly 1,000 filings in the instant docket. More than 300 parties filed comments, reply comments, or both; these parties included MVPs, equipment manufacturers, broadband access providers, public interest groups, law enforcement agencies, and several self-styled "Youth Rights" groups. In addition, we received numerous *ex parte* presentations filed by entities and individuals addressing the various legal and policy issues posed.

III. DISCUSSION

7. In this Order, consistent with the Notice's tentative conclusion, we adopt a rule that requires all MVPs to ensure that any streaming video downloaded over their networks for real-time showing on a mobile device be prefaced by a thirty-second warning explaining the dangers of viewing mobile video content while operating a motor vehicle. We find in particular that (1) this requirement is in the public interest; (2) we possess the requisite authority to adopt the requirement; and (3) the First Amendment presents no bar against our action today. We explain these points in greater detail below.

A. The Public Interest Supports the Adoption of a Rule Requiring MVPs to Ensure that Mobile Video Is Played Only After the Showing of a 30-Second Safety Warning.

8. We hereby adopt the Notice's tentative conclusion. Specifically, as of the end of the transition period described below, any MVP whose network is used to carry streaming video content must ensure that each separate file accessed is preceded by a thirty-second message warning users of the danger of watching mobile video content while operating a motor vehicle.

[5] *Mobile Video Public Safety and Consumer Education Initiative*, Notice of Proposed Rulemaking, DA 08-911, WT Docket No. 08-9999 (rel. Jan. 2, 2008) ("*Mobile Video Notice*" or "Notice").
[6] 47 U.S.C. § 151 et seq.

The message presented must convey, in writing and orally, the following message: "The viewing of mobile video content while driving puts you, your passengers, and other drivers in great danger. Studies have proven that drivers who use mobile video devices suffer impairment equal to or greater than that suffered by drivers who are legally intoxicated. [Provider's name] warns you that you should not drive while viewing the requested content. Please contact [Provider's name] at [telephone number] for further information about driving safely while using your mobile video device." This message must precede the showing of every individual video file.

9. Our action here is supported by extensive record evidence. In addition to the incidents described above, parties have brought to our attention at least 15 separate incidents in which the use of a mobile video device played a significant role in causing a collision in which drivers or passengers were injured or killed. Moreover, the Coalition of Protective Services has submitted a statistical study produced by Massachusetts Institute of Technology professor Ben Sanderson ("Sanderson Study") showing that use of mobile video devices while driving substantially increases the odds that a driver will be involved in an accident.[7] Indeed, the Sanderson Study indicates that drivers consuming mobile videos are impaired to a degree at least as great as drivers who have consumed enough alcohol to render them legally intoxicated.[8] The Sanderson Study adds that the great majority of the drivers whose accidents are caused by use of mobile video devices are under the age of 25, and that almost 53 percent are under the age of 20.[9]

10. The record also shows that the use of mobile video content is growing exponentially among the more than 240 million mobile telephone subscribers in the United States.[10] As noted above, more than 6 million are watching mobile videos.[11] One report estimates that approximately 650,000 of these wireless users watch mobile video nearly every day.[12] Accordingly, we conclude that absent Commission action, the likelihood of further accidents will only increase.

11. The record further demonstrates that the use of pre-show warnings could substantially reduce the use of mobile video by those operating a motor vehicle. Commenter SafetyFirst submits a declaration executed by its chief statistician, Blane McDonnagh, who testifies that "over a broad range of contexts, studies have shown that explicit warnings regarding the danger posed by a given activity has a statistically significant role in diminishing risk-taking

[7] *See* Comments of the Coalition of Protective Services at Appendix A.
[8] *See id.*
[9] *See id.*
[10] *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Twelfth Report,* 23 FCC Rcd 2241 (2008) at 2246 ("At the end of 2006, there were 241.8 million mobile telephone subscribers in the United States, up from 213 million at the end of 2005.").
[11] *See supra* note 3.
[12] Brad Smith, *Mobile TV's High Wire Act,* WIRELESS WEEK, Apr. 15, 2007 (citing an M:Metrics study reviewing a three-month period ending in February 2007).

behavior."[13] McDonnagh also avers that "contemporaneous warnings are generally deemed to be more effective than warnings delivered two or more hours before the activity commences."[14]

12. Several commenters note that many devices are capable of playing previously downloaded content but are unable to download the content from a mobile wireless network. We clarify here that our action today does *not* apply to the use of pre-loaded video content on a mobile device. We believe that devices capable of playing "streaming" video pose a greater danger than those that simply play pre-stored programs. Among other things, the use of devices capable of streaming video generally involves a far greater degree of interaction between the user and the device, and thus far greater danger to drivers, as the user is likely to take time to search for, select, and download the content while driving.

13. We note that some commenters have raised concerns regarding the technical difficulty associated with inserting the consumer message we require here prior to allowing access to a streaming video file on a mobile device.[15] We do not credit that evidence, and in any event conclude that the public interest considerations at issue compel us to adopt our requirement notwithstanding any technical challenges that may be involved.

B. The Commission Has Authority to Adopt a Rule That Is Applicable to MVPs and Designed to Promote Public Safety.

14. Many parties have argued that our legal authority to adopt the rule at issue turns on whether mobile video services are properly classified under the Act as "information services," as "telecommunications services," or otherwise.[16] We need not address those arguments or resolve the question of how mobile video should be classified for regulatory purposes, however. Rather, we conclude that we may exercise our Title I ancillary authority to require that MVPs ensure that every video file played on a mobile device using their service is preceded by a warning explaining the dangers posed by using the service while operating a motor vehicle. Title I provides the authority for our action today regardless of how mobile video services may ultimately be classified under the Act.[17] Thus, for present purposes we will assume *arguendo* that mobile video offerings constitute "information services," because we believe that even under

[13] Comments of SafetyFirst at Exhibit 1.
[14] *Id.* Commenter Youth Empowerment Posse ("YEP") argues that the warnings proposed here might increase the incidence of collision by prompting drivers to view even more video content than before (i.e., the requested video *plus* the warning). Comments of the Youth Empowerment Posse at 10. We disagree. The warning at issue will only be played when the user would otherwise already have been watching video content, and YEP provides no evidence that the extra 30 seconds taken by the video warning will not be fully offset by the content viewers choose not to watch as a result of having seen the warning.
[15] *See, e.g.*, Comments of the Mobile Video Providers Association at 3 ("MVPA Comments").
[16] Many of the arguments on this issue are summarized in Nicole A. Behar, *Regulating Chimeric Communications Technology: The Future of Mobile TV*, 15 COMMLAW CONSPECTUS 187 (Catholic Univ. 2006).
[17] We have followed this same approach repeatedly with respect to other services—most recently, in our decisions concerning interconnected voice-over-IP ("VoIP") services. *See, e.g.*, *IP-Enabled Services; Implementation of Sections 255 and 251(a)(2) of The Communications Act of 1934, as Enacted by The Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment*

these circumstances – where the Commission's jurisdiction is at its weakest – we possess sufficient authority to take the actions described in this Order.

15. The Commission may employ its ancillary authority where Title I gives it subject matter jurisdiction over the service to be regulated and where the assertion of jurisdiction is "reasonably ancillary to the effective performance of [our] various responsibilities."[18] In this regard, we note that the U.S. Supreme Court has confirmed that the Commission possesses "jurisdiction to impose additional regulatory obligations [on IP-based service providers] under its Title I ancillary jurisdiction to regulate interstate and foreign communications."[19]

16. Regarding our subject matter jurisdiction, the Act grants us authority over "all interstate and foreign commerce in communication by wire or radio" as well as "all persons engaged within the United States in such communication."[20] Relatedly, we have an obligation under the Act to make available "to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . for the purpose of promoting safety of life and property through the use of wire and radio communication."[21]

17. We conclude that mobile video services constitute "communication by wire or radio" and thus fall within our general jurisdictional grant. Mobile video services involve "transmission by radio" of video images and related audio content, consistent with the relevant statutory definitions.[22] Moreover, to the extent that compliance with the rule we adopt today requires the participation of device manufacturers, we conclude that we have subject matter jurisdiction over equipment that is designed to support mobile video service. Indeed, the statutory definitions referenced above extend our jurisdiction to the "instrumentalities, facilities, [and] apparatus . . . incidental to [the] transmission" at issue.[23] Because the device that supports mobile video is an integral aspect of the mobile video offering, it necessarily is "incidental" to the service itself, and thus falls within our jurisdiction.[24]

18. We next find that the rule we adopt today is "reasonably ancillary" to the effective performance of our responsibilities under the Act. As noted, we are statutorily obligated to make

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by Persons with Disabilities, Report and Order, WC Docket No. 04-36, WT Docket No. 96-198, FCC 07-110 (rel. June 15, 2007).

[18] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968); *see also Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1040 (8th Cir. 1978), *aff'd*, *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

[19] *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 976 (2005).

[20] 47 U.S.C. § 152(a).

[21] *Id.* § 151.

[22] *Id.* § 153(33); *see also id.* § 153(52).

[23] *See, e.g.*, *id.* § 153(33).

[24] Our decision here thus does not run afoul of the D.C. Circuit's ruling in *American Library Association v. FCC*, 406 F.3d 689 (D.C. Cir. 2005), in which the court held that we lacked authority to regulate equipment to the extent it is not engaged in the process of transmission by wire or radio.

available a communications network "for the purpose of *promoting safety of life and property* through the use of wire and radio communication."[25] We would be delinquent in pursuing this important mandate if we neglected to address a service – mobile video – that, as discussed above, is increasingly being relied upon by consumers but which poses a unique and particular threat to public safety generally. Moreover, our obligation to preserve public safety is underscored by the existence of various other statutory mandates and our implementing rules and decisions, most notably in the context of 911 emergency services.[26] In short, protection of the public is one of this Commission's principal goals, and the requirement adopted here is reasonably ancillary to the fulfillment of that goal.

19. In addition, by enhancing public safety in connection with the use of IP-based mobile video services, we believe we will spur demand for such products and thereby fulfill our obligation under Section 706 of the Telecommunications Act of 1996 to promote the deployment of advanced services and broadband generally.[27] In so doing, we will ensure that the trend described above concerning the proliferation of mobile video will continue, but in a manner that more directly protects consumers.

20. Finally, we emphasize that the rule we adopt today is not in conflict with the Act's language favoring preservation of "the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[28] Indeed, that policy does not preclude us from adopting regulations designed for the singular purpose of protecting the safety of consumers; rather it would limit us only to the extent we might seek to impose "traditional common carrier economic regulations" of a sort we do not adopt today.

C. The First Amendment to the United States Constitution Does Not Preclude Adoption of the Requirements We Impose Here.

21. The actions we take in this Order to ensure that citizens are informed regarding the dangers posed by viewing mobile video content while driving are entirely consistent with the First Amendment. For various reasons, the mandate at issue here is not subject to First Amendment scrutiny similar to that which would be warranted in other contexts. Furthermore, even if the rule adopted here were subject to "strict scrutiny," it would survive such scrutiny because it is narrowly tailored and designed to fulfill a compelling governmental interest.

22. We note at the outset that the delivery of information using publicly owned electromagnetic spectrum is subject to a lesser degree of First Amendment protection than other forms of communication. As the Supreme Court has long recognized, given the scarcity of spectrum resources and the privileged status of those granted use of such resources, "it is idle to

[25] 47 U.S.C. § 151 (emphasis added).
[26] *See, e.g.*, *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, First Report and Order, WC Docket No. 04-36, WC Docket No. 05-196, FCC 05-116 (rel. June 2005); Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, 113 Stat. 1286, § 2(b) (1999) (911 Act).
[27] 47 U.S.C. § 157 note (a).
[28] 47 U.S.C. § 230(b)(2).

posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[29] Indeed, "[t]here is nothing in the First Amendment which prevents the Government from requiring a licensee to . . . conduct himself as a proxy or fiduciary with obligations to present . . . views and voices [other than his own]."[30] We reject arguments that MVPs more closely resemble cable providers than television broadcasters, and are therefore subject to stronger First Amendment protections.[31] Like broadcasters and unlike cable providers, MVPs utilize public spectrum to deliver their messages, and their services are thus subject to the same scarcity as those of other broadcasters.

23. We also observe that MVPs are commercial enterprises to the extent that they earn revenues through their mobile video offerings (either directly, through client billing, or indirectly, through advertising or otherwise). As such, these providers are subject to less rigorous First Amendment protections than would otherwise apply. As the Supreme Court has repeatedly held, "[t]he Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."[32]

24. Even setting aside the limited scope of the First Amendment in this context, we do not agree with commenters arguing that the MVP requirement adopted herein constitutes some form of unconstitutional "compelled speech." While various parties have criticized the findings of the Sanderson Study, no commenter has denied that the viewing of mobile video content while driving does in fact pose grave safety risks. Thus, there can be no claim that the safety messages at issue would constitute speech with which the speaker (i.e., the MVP) *disagreed*. As the courts have recognized, the compelled speech doctrine poses a barrier to state requirements only in the context of a forced expression that the speaker "would not otherwise make."[33]

25. In any event, even if the requirement adopted here were subject to strict First Amendment scrutiny, it would survive such scrutiny. In order for a legal requirement to satisfy strict scrutiny, it must (1) serve a compelling governmental purpose and (2) be narrowly tailored.[34] The mandate at issue here meets both of these requirements.

26. First, the MVP requirement adopted here serves a compelling governmental interest. As described above, the rise of mobile video offerings has been linked to a concomitant increase in automobile accidents triggered by the use of such offerings. In numerous cases, motorists and their passengers have lost their lives or been injured in collisions apparently triggered by the use of mobile video offerings. The Sanderson Study, for example, suggests a

[29] *Red Lion Broadcasting, Inc. v. FCC*, 395 U.S. 367, 388 (1969).
[30] *Id.* at 389.
[31] *See, e.g.*, *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994).
[32] *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 562-63 (1980). *See also Morse v. Frederick*, 127 S.Ct. 2618, 2650 (2007) (naming commercial speech as among "categories of expression that are less deserving of protection than others").
[33] *Riley v. National Federation of the Blind*, 487 U.S. 781, 795 (1988).
[34] *See, e.g., Hill v. Colo.*, 530 U.S. 703, 748 (2000); *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983).

clear causal relationship between the use of mobile video and the incidence of collision.[35] Likewise, the McDonnagh declaration and other evidence in the record shows that warnings such as those considered here can substantially reduce risky behaviors, such as driving while viewing mobile video content. Thus, the warning requirement adopted here serves the compelling governmental interest in protecting citizens from death or injury.

27. Second, the MVP requirement is narrowly tailored to serve the government's interest. In particular, the requirement is only implicated when a viewer attempts to access a video file, and conveys only as much information as is necessary to warn the viewer regarding the dangers of watching such videos while driving. Although several parties suggest more tailored means of achieving our goals, we deem the proposed limitations to be infeasible or unwarranted. For example, several commenters argue that a requirement that mandates broadcast of the warning before the viewing of any file is too burdensome, given that many or even most viewers will not be operating a motor vehicle.[36] We do not, however, believe that it would be technically feasible to differentiate between users in this fashion: As many MVPs have themselves acknowledged, these providers have no way of knowing what a user is doing when he or she requests a video.

28. We also reject calls for an age-restricted warning regime. For example, the Association of Mature Drivers contends that the Commission's goals could be met by messages targeted at younger drivers.[37] As discussed above, the Sanderson Study indicates that the great majority of drivers involved in mobile-video-related accidents are under the age of 25, and that more than half are under the age of 20.[38] However, YEP presents a critique of the Sanderson Study, showing that this conclusion mostly reflects the fact that younger drivers are far more likely to own mobile video devices in the first place. YEP shows that when the data is analyzed in a manner that reflects relative usage patterns, younger drivers using mobile video devices are only slightly more likely than average to cause accidents. Indeed, YEP's analysis suggests that among all drivers using mobile video content, drivers aged 65 and over are the most likely to cause accidents.[39]

IV. CONCLUSION

29. Thus, for the reasons addressed above, we adopt the rule set forth in Appendix A hereto.

V. ORDERING CLAUSES

30. IT IS ORDERED that, pursuant to the authority contained in Sections 1, 2, 4(i), and 157 note (a) of the Communications Act of 1934, as amended, 47 USC Sections 151, 152, 154(i), 157 note (a), this Report and Order **IS HEREBY ADOPTED** and Part 21 of the

[35] *See supra* ¶ 9.
[36] *See, e.g.*, MVPA Comments at 22.
[37] Comments of the Association of Mature Drivers at 16.
[38] *See supra* ¶ 9.
[39] Reply Comments of the Youth Empowerment Posse at 22-24 & Appendix A.

Commission's rules **IS ADOPTED** as specified in Appendix A. This Report and Order and the related rule amendments SHALL BE EFFECTIVE thirty days after publication in the Federal Register.

31. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of the Report and Order, including the Final Regulatory Flexibility Analysis, to the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

John Bender
Secretary

APPENDIX A: RULE

A new Part 21 is added to the Commission's rules to read as follows:

§ 21 Driving Safety Warnings by Mobile Video Providers

(a) Any streaming video downloaded over a mobile video provider's network for real-time showing on a mobile device shall be prefaced by a thirty-second warning explaining the dangers of viewing mobile video content while operating a motor vehicle.

(b) The mobile video warning shall convey, orally and in clear and conspicuous print, the following message: "The viewing of mobile video content while driving puts you, your passengers, and other drivers in great danger. Studies have proven that drivers who use mobile video devices suffer impairment equal to or greater than that suffered by drivers who are legally intoxicated. [Provider's name] warns you that you should not drive while viewing the requested content. Please contact [provider's name] at [telephone number] for further information about driving safety while using your mobile video device."

(c) For the purposes of this section, a "mobile video provider" is any provider of Commercial Mobile Radio Services, as defined in 47 C.F.R. § 20.9(10), that delivers one-way, IP-based, broadcast or multicast video programming to mobile telephone customers.

STATEMENT OF COMMISSIONER LLOYD DOBLER, DISSENTING

Re: *Mobile Video Public Safety and Consumer Education Initiative*, Report and Order, WT Docket No. 08-9999

I, like my fellow Commissioners, am deeply troubled by reports of automobile accidents caused by individuals watching mobile videos while driving. Most at risk are our nation's youth, who have less driving experience but are more likely to watch these videos. Given these risks, my wife Diane and I have warned our children of these driving hazards, and I have warned others in public remarks and the "Consumer Corner" portion of my website. I also applaud the mobile video providers who have voluntarily launched the "Watch the Road" driving safety campaign. These providers' educational efforts include a website and paid media placements over cable television, print publications, and billboards.

But today my fellow Commissioners have gone too far in their desire to respond to concerns regarding mobile video usage. While I believe that the Commission is afforded significant statutory authority, that authority does not trump the First Amendment, and the First Amendment clearly applies here. As recognized by the U.S. Supreme Court, "[t]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."[40] This protection extends to mobile video providers: "For corporations as for individuals, the choice to speak includes within it the choice of what not to say."[41]

The mandates adopted by the Commission here cannot possibly survive First Amendment review, for they are hopelessly overbroad. The rule enacted here requires warnings that are far too long to be played prior to every single video file, irrespective of whether the viewer is in fact driving a motor vehicle or falls within the age range most responsible for the string of tragic accidents described in shocking particularity by the majority's Order. Given this overbreadth, the rules prescribed today impermissibly trample on mobile video providers' First Amendment rights. Put simply, these entities cannot under these circumstances be forced to speak out against use of their services while driving.

[40] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (emphasis added).
[41] *Pac. Gas & Elec. Co. v. PUC of Cal.*, 475 U.S. 1, 16 (1986) (holding that a state could not require a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagrees).

The Commission's rules are all the more troubling given that the agency bases its authority to act on Title I of the Act. The Commission's authority to impose content-related mandates in the absence of explicit statutory authority is questionable at best. If Congress had intended for the Commission to enact requirements of this sort, it could well have directed such action in clear statutory language. Instead, the majority relies today on a string of "authority" with little or no relationship to the matter at hand, citing the Commission's responsibility for promoting deployment in the interest of public safety and its responsibilities with regard to E911 service. These provisions simply do not authorize imposing these rules on mobile video providers. The majority's reliance on its "ancillary authority" is especially troubling here, where the action taken impinges on the regulated parties' speech rights. "To avoid potential First Amendment issues," the D.C. Circuit has found that "the very general provisions of § 1 have not been construed to go so far as to authorize the FCC to regulate program content."[42]

Because the Commission lacks authority to adopt the rule it adopts today, and this rule violates the First Amendment to the United States Constitution, I respectfully dissent.

[42] *Motion Picture Association of America, Inc. v. FCC*, 309 F.3d 796, 805 (D.C. Cir. 2002).

UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

IVID COMMUNICATIONS, INC.,	)	
Petitioner,	)	
	)	Case No. _____
v.	)	
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,	)	
Respondents.	)	

PETITION FOR REVIEW

Pursuant to Federal Rule of Appellate Procedure 15(a), iVid Communications, Inc. ("iVid") files this Petition for Review of the Federal Communications Commission's ("FCC's") decision requiring mobile video providers to ensure that all videos played on their devices are preceded by a 30-second warning that explains dangers posed by using the service while driving. *Mobile Video Public Safety and Consumer Education Initiative*, Report and Order, FCC No. 08-9999 (rel. Nov. 20, 2008) (the "*Mobile Video Order*"). A copy of the *Mobile Video Order* is attached.

JURISDICTION AND VENUE

This Petition for Review is filed pursuant to Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.* ("the Act"), 47 U.S.C. § 402(a). The Court has jurisdiction over the matters in this case pursuant to 28 U.S.C. §§ 2342(1) & 2344. Venue lies in this Court pursuant to 28 U.S.C. § 2343, because iVid's principal office is in this Circuit.

NATURE OF THE CLAIMS

On November 20, 2008, the FCC adopted a rule requiring mobile video providers to ensure that every video delivered over their networks is preceded by a FCC-specified warning that explains the dangers posed by using their service while driving a motor vehicle. The FCC cited media reports and a handful of studies when reaching its conclusion that the public interest compelled adoption of this burdensome requirement. It also dismissed legal challenges to the rule made by iVid and other mobile video providers. In particular, the FCC found that Title I of the Act affords it authority to adopt a rule that applies to mobile video providers and is designed to promote public safety. It also determined that the First Amendment to the U.S. Constitution does not preclude adoption of the requirements imposed by the *Mobile Video Order*. For these reasons, the FCC determined that it had authority to require mobile video providers to air the driver safety warnings, notwithstanding the great costs that iVid and other providers would necessarily incur in fulfilling those obligations and the deterrent effect such warnings would impose on use of mobile video services even under conditions posing no safety risks whatsoever.

iVid argues in this appeal that the *Mobile Video Order*'s two principal legal conclusions were incorrect. First, there is no merit to the Commission's claim that it has statutory authority to impose requirements on mobile video providers. The Commission's "ancillary" authority does not stretch to empower the agency to impose a rule on these providers addressing so-called public safety concerns raised by the use of their services. Any claims to the contrary are particularly suspect in light of the Commission's reliance on this authority to abridge mobile video providers' free speech rights.

Second, the Commission erred in finding that the First Amendment does not preclude adoption of requirements imposed by the *Mobile Video Order*. The First Amendment clearly applies to government requirements that compel the speech of private actors, and in cases like this one, it prohibits requirements when they are not narrowly tailored to fulfill a compelling governmental interest.

For the foregoing reasons, iVid asks that this Court hold unlawful, set aside, enjoin, annul, and vacate the FCC's *Mobile Video Order*.

Respectfully submitted,

iVid Communications, Inc.

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Counsel for Petitioner

Dated: November 27, 2008

CERTIFICATE OF SERVICE

I, James Ford, hereby certify that, on November 27, 2008, a copy of the attached Petition for Review was delivered by hand to the following:

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