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Amending the Digital Divide

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This article will scrutinize the growth and pervasiveness of the Internet with regards to the disabled community and the need for Congressman Edward Markey's (D-MA) Twenty-First Century Communication and Video Accessibility Act to be passed. Broken into seven parts, this exposé will examine the following: **I.** The Internet Invasion; **II.** Current Status of Internet Access by Persons with Disabilities; **III.** The Americans with Disabilities Act (ADA) and the Internet; **IV.** Overview of the Twenty-First Century Communications and Video Accessibility Act (TCCVA); **V.** Statutory Requirements and Regulations of the TCCVA; **VI.** Positive and Negative Aspects of the TCCVA; and **VII.** Concluding Remarks.

I. The Internet Invasion

In 1962, Marshall McLuhan, a philosopher and scholar of media theory, pronounced that our newfound technological interdependence would inevitably birth a society reborn in the image of a "global village."² With the emergence of the Internet, it is evident that McLuhan's prophecies hold a great deal of weight, because they have by in large been actualized. The

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² MARSHALL MCLUHAN, THE GUTENBERG GALAXY: THE MAKING OF TYPOGRAPHIC MAN 31 (Univ. of Toronto Press 1965).

Internet has allowed for greater dissemination of information, because it is a unique technological medium that escapes the ordinary restraints of geographical communication. Access to international websites has created a free flow of information which has, for the most part, eradicated barriers initially inherent to the exchange of ideas. The moment to moment availability of content enables a wider array of engagement than ever present within the paradigm of intercontinental communication.

The wealth of postmodern American society has facilitated the expansion of the Internet. Internet technology and the World Wide Web have enveloped our society at an extremely high rate of frequency, causing the incidence of use to climb dramatically since its invention. According to one study in North America, 70% of Americans use the Internet regularly.³ As of September 30, 2009, the total number of Internet users in the United States was 227,719,000, and growth for the period of 2000 through 2009 has increased 138.8%.⁴ From purchasing goods to exchanging information, the Internet has changed the way in which we as a society communicate with one another, and it will likely continue to shape our collective dynamic.

II. The Current Status of Internet Access for Persons with Disabilities

The development of the Internet has ensured greater accessibility; however, the disabled community still often views it as a totalitarian regime which fosters discrimination. There are “roughly 54 million Americans who are disabled - almost twenty percent of the population,” and

³ *United States of America Internet Usage and Broadband Usage Report* (Sept. 30, 2009), <http://www.Internetworldstats.com/stats14.htm>.

⁴ *Id.*

the Internet as a whole has largely failed to accommodate this portion of our society.⁵ Although not every person's disability affects his or her ability to experience the benefits of the Internet, it is clear that many people with disabilities remain displaced by the failure of the Internet to incorporate them within its framework.⁶ It is imperative to note that as the "Baby Boomer" generation continues to age, the number of Americans with disabilities will grow significantly.

One significant group which has been chiefly defected from Internet participation is the visually impaired.⁷ People with visual impairments can utilize the Internet only with the aid of screen-reading technology, equipment that converts visual information into synthesized speech or Braille.⁸ In order for people with visual impairments to actively use the Internet, websites must contain embedded text within their graphics, describing their content.⁹ Text graphics are inexpensive to employ and do not "limit the creativity of the designer."¹⁰ In relation to Internet usage, these slight additions to a website decrease the line of demarcation between those who are disabled and those who are not.

Another group which has been considerably excluded from enjoying full Internet access is the hearing impaired. The deaf community relies on closed captioning when viewing videos, and many websites fail to include closed captioning or transcripts along with their visual

5 Nikki D. Kessling, Comment, *Why the Target "Next Test" Leaves Disabled Americans Disconnected: A Better Approach to Determine whether Private Commercial Websites are "Places of Public Accommodation"*, 45 HOUS. L. REV. 991, 998 (2008).

6 *Id.* at 998-999.

7 Jonathan Bick, *Americans with Disabilities Act and the Internet*, 10 ALB. L.J. SCI. & TECH. 205, 216 (2000).

8 *Id.*

9 Katherine Rengel, Comment, *The Americans with Disabilities Act and Internet Accessibility for the Blind*, 25 J. MARSHALL J. COMPUTER & INFO. L. 543, 551 (2008).

10 Cassandra B. Robertson, *Providing Access to the Future: How the Americans with Disabilities Act Can Remove Barriers in Cyberspace*, 79 DENV. U.L. REV. 199, 219-20 (2001).

broadcasts. Some web designers and operators argue that closed captioning could prove expensive; nevertheless, a simple transcription of video could easily narrow the accessibility gap.¹¹ Furthermore, with the growth of websites that employ visual broadcasting, it is evident that the need for these accommodations will only continue to increase.

In addition to the hearing and visually impaired, there are many other disabled individuals who struggle with using the Internet. For example, people who are quadriplegic often encounter problems when using a mouse or keyboard. It is evident that the Internet caters to the majority, but with a few minor edits, it could easily incorporate many disabled people who remain currently disenfranchised.

III. The Americans with Disabilities Act (ADA) and the Internet

The ADA's purposes and regulatory requirements arguably create a comprehensive national mandate for the elimination of discrimination against individuals with disabilities, though many believe that this coverage does not extend to the Internet.¹² The discrimination of people with disabilities will continue to pervade American society as long as a major component of our lifestyle fails to be universally accessible. Gary Wunder, a visually impaired American, advocated for Internet accessibility for the blind at the 2000 House Judiciary Hearing on the ADA and the Internet, stating "The Internet is not just a window on the world, but more and more the Internet is the world. It is where we talk, it is where we shop, and it is where we make

11 Cassandra B. Robertson, *Providing Access to the Future: How the Americans with Disabilities Act can Remove Barriers in Cyberspace*, 79 DENV. U. L. REV. 199, 221 (2001).

12 42 U.S.C. § 12101 (1990).

our living.”¹³ However, Congress has largely failed to provide sufficient standards to adequately address discrimination against individuals with disabilities.

Although Title III of the ADA prohibits such discrimination by public accommodations and commercial facilities, Circuit Courts across the nation remain split as to whether this legislation applies to the Internet.¹⁴ Title III prohibits discrimination based on one’s disability by any place of public accommodation regarding “full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations...”¹⁵ There are twelve types of private entities which Congress has enumerated as places of “public accommodation.”¹⁶ Nevertheless, the ADA remains fundamentally a goal based piece of legislation, because Congress has failed to create an enforcement agency to oversee compliance. Adding to the concerns regarding the Act’s implementation is the fact that the Internet is not listed within the succinctly itemized list of places of “public accommodation.”¹⁷ This deficiency has caused Circuit Courts to interpret Title III’s application to the Internet in a variety of ways. In addition, all twelve itemized places of “public accommodation” are physical concrete structures, further adding fuel to the argument that Title III was never intended to apply to the Internet.¹⁸

13 Katherine Rengel, Comment: *The Americans with Disabilities Act and Internet Accessibility for the Blind*, 25 J. MARSHALL J. COMPUTER & INFO. L. 543, 543 (2008).

14 *Part 36: Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, Department of Justice, <http://www.ada.gov/reg3a.html#Anch or- 36000>.

15 42 U.S.C. § 12182 (a) (1990).

16 42 U.S.C. § 12101 (1990).

17 42 U.S.C. § 12181 (1990).

18 *Id.*

According to current jurisprudence, the First and Seventh Circuits do not require a “physical place of public accommodation” for Title III of the ADA to be applicable.¹⁹ Therefore, these two circuits would likely find that Title III does in fact regulate the Internet.²⁰ Similarly, the Second Circuit would probably not require a “physical place of public accommodation”, because although it has not clarified its position, it has stated reasons for why it would not require a physical place.²¹ Nonetheless, the Third, Sixth, Ninth, and Eleventh Circuits do require a “physical place of accommodation” for Title III to hold authority.²² Further, the Fourth, Fifth, Eighth, and Tenth Circuits have yet to enter the debate concerning “physical places of public accommodation”.²³ The Supreme Court’s reluctance to determine whether Title III applies to the Internet has played a major role in furthering the dispute.²⁴

Moreover, Congress has yet to use its powers to establish that Title III of the ADA mandates all Internet websites to be accessible under the “public accommodations” framework, thereby thwarting any resolution of the apparent contradictory application of the law.²⁵ Considering the sweeping authority afforded to Congress, including the power to enforce the Fourteenth Amendment and to regulate commerce, perhaps the federal government is endowed with the unique ability to address the virtual discrimination faced by people with disabilities.

19 Nikki D. Kessling, Comment, *Why the Target "Nexus Test" Leaves Disabled Americans Disconnected: A Better Approach to Determine Whether Private Commercial Websites Are "Places of Public Accommodation"*, 45 HOUS. L. REV. 991, 1013-14 & 1023 (2008).

20 *Id.*

21 *Id.* at 1014-1015.

22 *Id.* at 1016-1022.

23 Nikki D. Kessling, Comment, *Why the Target "Nexus Test" leaves disabled Americans disconnected: A Better Approach to Determine Whether Private Commercial Websites Are "Places of Public Accommodation"*, 45 HOUS. L. REV. 991, 1016-1017 & 1023-1024 (2008).

24 *Id.* at 1023-1024.

25 42 U.S.C. § 12101 (1990).

Nevertheless, Congress has failed to step up to the plate and monitor industrial forces whose sole predominant prevalence remains the Internet. In order for Congress to accomplish the goals and objectives it so firmly declared in the ADA, it must regulate the Internet. Due to the dominance of the Internet within American society, it is vital that Congress recognize the widespread impact of this medium and minimize its discriminatory effects.

IV. Overview of the Twenty-First Century Communications and Video Accessibility Act

To combat this hole within the application of Title III of the ADA, Rep. Edward Markey (D-MA) introduced the Twenty-First Century Communications and Video Accessibility Act (TCCVA) on June 26, 2009.²⁶ This Act has the potential “to ensure that people with disabilities have access to Internet-based communications and video programming technologies,” according to the National Association of the Deaf.²⁷ This proposed legislation seeks to amend the Communications Act of 1934, which provides for the “regulation of interstate and foreign communication by wire or radio, and other purposes.”²⁸ As a result, the impact of the TCCVA may be far-reaching and affect a wide range of industries.

Recognizing the prospective reach of the TCCVA and its promise of technological equality, Sen. Mark Pryor (D-Ark) introduced a companion bill to the U.S. Senate on May 4, 2010.²⁹ However, it is critical to note that while Senator Pryor’s proposed legislation mimics

26 National Association for the Deaf, *Action Alert! Support the 21st Century Act*, NADMAG, Jul.-Aug. 2009, at 9, available at <http://www.nad.org/news/2009/7/action-alert-support-21st-century-communications-and-video-accessibility-act>.

27 *Id.*

28 Federal Communications Commission, *Communications Act of 1934*, <http://www.fcc.gov/Reports/1934new.pdf>.

29 OpenCongress, *S. 3304- Equal Access to 21st Century Communications Act*, <http://www.opencongress.org/bill/111-s3304/show> (last visited Aug. 18, 2010).

Congressman Markey's bill by in large, it fails to contain a few conditions pertaining to the FCC and television programming in addition to a stipulation concerning mobile phone Internet access.³⁰ Despite the differences between the House and Senate bills, both attempt to pioneer a largely unfettered technological tool, the Internet.

Recently, on the 20th anniversary of the ADA, July 26, 2010, the House passed the TCCVA with a vote of 348 to 23, with 61 abstainers. The Senate's companion bill also was unanimously ratified on August 5, 2010, showing that disability may be one of the last remaining bipartisan issues.³¹ Remarking on the success of the TCCVA, Congressman Markey stated that he "look[ed] forward to proceeding and getting legislation to President Obama for his signature, which ultimately occurred on October 8, 2010."³² Upon signing, the President stated that the TCCVA:

"will make it easier for people who are deaf, blind or live with a visual impairment to do what many of us take for granted from navigating a TV or DVD menu to sending an email on a smart phone...set[ting] new standards

30 Coalition of Organizations for Accessible Technology, *What H.R. 3101 Has that S.3304 Does Not*, <http://coat.access.org/node/9739> (last visited Aug. 21, 2010).

31 *On Landmark Law's 20th Anniversary, House Passes Bill To Make Internet More Accessible for the Disabled*, THE WASHINGTON POST, available at http://voices.washingtonpost.com/posttech/2010/07/house_passes_bill_to_make_inte.html (last visited Aug. 18, 2010); OpenCongress, *H.R.31 01-Twenty-first Century Communications and Video Accessibility Act of 2009*, http://www.opencongress.org/bill/111-h3101/actions_votes (last visited Aug. 18, 2010).

32 *Senate Approves Markey Bill on Technology Accessibility*, WICKED LOCAL STONEHAM SUN, <http://www.wickedlocal.com/stoneham/town-info/government/x1028351794/Senate-approves-Markey-bill-on-technology-accessibility> (last visited Aug. 19, 2010).

so that Americans with disabilities can take advantage of the technology our economy depends on.”³³

TCCVA’s victory is a far cry from Congressman Markey’s initial introduction of the bill in 2008, which failed to gain forward movement.³⁴ Nevertheless, the bill’s original lack of progression may be attributed to the Congressional schedule, because it was reintroduced in the following legislative session. The goals of the TCCVA, however, have always remained the same, seeking to “establish new safeguards for disability access to ensure that people with disabilities are not left behind as technology changes and the United States migrates to the next generation of Internet-based and digital communication technologies.”³⁵

To date, no other law has commanded that all newly created technology be accessible for people with disabilities. As noted by Mitch Pomerantz, President of the American Council of the Blind, “Contrary to the commonly held notion[s] about the blind, we do watch television, go to movies, buy DVD’s and participate actively on the web.”³⁶

V. Statutory Requirements and Regulations of the TCCVA

33 *Remarks by the President at the Signing of the 21st Century Communications and Video Accessibility Act of 2010*, <http://www.whitehouse.gov/the-press-office/2010/10/08/remarks-president-signing-21st-century-communications-and-video-accessib> (last visited Jan. 16, 2011).

34 Eric Bridges, *Rep. Edward Markey Re-Introduces the Twenty-First Century Communications and Video Accessibility Act, H.R. 3101*, EXPERTCLICK, Jun. 29, 2009, available at http://www.expertclick.com/NewsReleaseWire/Rep_Edward_Markey_ReIntroduces_The_TwentyFirst_Century_Communications_and_Video_Accessibility_Act_HR_3101,200927581.aspx.

35 *Summary of the 21st Century Communications and Video Accessibility Act*, http://markey.house.gov/docs/telecomm/summary_of_21st_century_communications__video_accessibility_act.pdf (last visited Dec. 30, 2009).

36 Eric Bridges, *Rep. Edward Markey Re-Introduces the Twenty-First Century Communications and Video Accessibility Act, H.R. 3101*, EXPERTCLICK, Jun. 29, 2009, available at http://www.expertclick.com/NewsReleaseWire/Rep_Edward_Markey_ReIntroduce_s_The_TwentyFirst_Century_Communications_and_Video_Accessibility_Act_HR_3101,200927581.aspx.

The disabled community is yearning for inclusion, and it is clear that the TCCVA is attempting to provide greater technological integration; however, we must critically examine both sections of the TCVA and determine their true merit. This paper will begin by exploring Title I of the TCCVA, Communications Access, later delving into the intricacies of Title II, Video Programming.³⁷

Title I, Communications Access, opens with a brief section containing relevant terms and definitions which are used throughout the TCCVA.³⁸ The first word which we encounter is disability, which is given the exact meaning as is crafted by the ADA (U.S.C. § 12102 (2)(A)), “as such section may be amended from time to time.”³⁹ Consequently, those disabilities covered under the ADA would also receive protection under the TCCVA; nevertheless, the amendment fails to broaden the definition. This point is important, because it reveals that the TCCVA only provides a safeguard for those disabilities currently within the scope of the ADA, and no more or no less.

TCCVA’s range is clear; however, we must parcel out the meaning of other relevant terms in order to understand the particular types of technology which will be affected by Title I.

Advanced communications is the next phrase defined as encompassing interconnected VoIP service, non-interconnected VoIP service, electronic messaging, as well as video conferencing.⁴⁰

This broad explanation includes various ways in which we technologically exchange information. From VoIP technology that routes “voice conversations over the Internet or a

37 The Twenty-first Century Communications and Video Accessibility Act, H.R. 3101, 111th Cong. § 101 (2009).

38 *Id.*

39 *Id.*

40 *Id.*

computer network” to electronic messaging which “provides non-voice messages in text form,” this definition runs the gamut.⁴¹ In addition, video conferencing is included in the above description of advanced communications, enabling the Act to regulate “services that provide real-time video communications.”⁴² This expansive definition is all-encompassing, even leaving room for new equipment to be within its regulatory grips, because it clarifies advanced communications in sweeping categorical, technological regimes.

Furthermore, the TCCVA contains specific policies pertaining to Internet accessibility. Title I defines the phrase Internet Access Equipment as the means “equipment that is used to combine computer processing, information provision and computer interactivity with data transport, enabling users to run a variety of applications including e-mail.”⁴³ This explanation shows that the Act not only seeks to cover communicative technology but also the applications and tools used to employ such functions. Similarly, the phrase Internet Access Service is also defined within this section; however it focuses on the services that would enable these types of communication rather than the software.⁴⁴ As a result, the TCCVA not only regulates the technology used to create the exchange of information but also the services, and consequently, the service providers enabling the process.

Moreover, the Act seeks to uniquely manage content created by consumers, for it defines computer generated media as being under its umbrella of control. The term Consumer Generated

41 *VOIP Defined*, 3CX: SOFTWARE PBX FOR WINDOWS, <http://www.3cx.com/PBX/VOIP-definition.html>; The Twenty-first Century Communications and Video Accessibility Act, H.R. 3101, 111th Cong. § 101 (2009).

42 The Twenty-first Century Communications and Video Accessibility Act, H.R. 3101, 111th Cong. § 101 (2009).

43 Coalition of Organizations for Accessible Technology, *Summary of Twenty-first Century Communications and Video Accessibility Act of 2009*, <http://coataccess.org/node/4623>.

44 *Id.*; The Twenty-first Century Communications and Video Accessibility Act, H.R. 3101, 111th Cong. § 101 (2009).

Media is described as the “posts or content to online sites and venues on the Internet, including video, audio, and multimedia content created by such consumers.”⁴⁵ The potential ramifications of such an open definition might prove disastrous, since society has largely granted Internet users an unrestricted right to generate online media, as exhibited by the popularized website YouTube. However, Section 203 of the TCCVA narrowly tailors this sweeping description, exempting almost all consumer generated media from the Act’s closed captioning and video description requirements under an undue burden clause explained below.⁴⁶ As a result, many feel that First Amendment concerns are unwarranted.⁴⁷

Therefore, it is important to scrutinize the TCCVA’s definitions, for while the bill must be read as a whole, it may be easily misconstrued. The next part of the TCCVA which we will investigate relates to Internet-based services and equipment, entitled Section 104 of Title I, and it describes the Act’s administrative scheme, including details concerning future industry responsibilities. For example, manufacturers must make certain that the equipment and software they produce to facilitate advanced communication is accessible to people with disabilities, unless it would result in an undue burden.⁴⁸

The expression “undue burden” is quite familiar to the disabled community, because it is also utilized in the ADA.⁴⁹ This phrase is defined by the ADA as an action causing a significant

45 Coalition of Organizations for Accessible Technology, *Summary of Twenty-first Century Communications and Video Accessibility Act of 2009*, <http://coataccess.org/node/4623>; The Twenty-first Century Communications and Video Accessibility Act, H.R. 3101, 111th Cong. § 101 (2009).

46 Coalition of Organizations for Accessible Technology, *Summary of Twenty-first Century Communications and Video Accessibility Act of 2009*, <http://coataccess.org/node/4623>.

47 Peter Hettich, *YouTube to Be Regulated? The FCC Sits Tight, While European Broadcast Regulators Make the Grab for the Internet*, 82 ST. JOHN’S L. REV. 1447, 1501 (2008).

48 The Twenty-first Century Communications and Video Accessibility Act, H.R. 6320, 110th Cong. § 2(d) (2009).

49 42 U.S.C. § 12182 (b)(2)(A)(iii) (1990).

difficulty or expense.⁵⁰ The use of this guideline illustrates another way in which the TCCVA mimics the ADA, tacitly reinforcing its clauses and scope of coverage. On the other hand, while the TCCVA may not expand the group of people protected or narrow the exceptions allotted, it undeniably fills in, at least in part, a gap currently present with regards to the ADA and Internet. Nonetheless, the axiom's prevalence is disquieting because it clearly fails to go the distance, although the purpose of the bill was to promote technological equality. Moreover, Senator Pryor's companion bill fails to incorporate an important condition in Section 104 of the TCCVA requiring all mobile devices with Internet capability to be accessible to people with disabilities if achievable.⁵¹

Delving further into the Act's regulatory design, it is evident that the expression "undue burden" applies not only to the compliance of manufacturers but also service providers and other specifications concerning compatibility with current devices.⁵² When a manufacturer or service provider claims the existence of an "undue burden," granting them an exemption from TCCVA's compliance, they must still develop services or equipment compatible with existing tools used by individuals with disabilities.⁵³ Ironically, however, there is an exception for even this exemption.⁵⁴ It is important to note that the reading of this particular section of the bill is slightly juvenile, because we are examining this provision prior to the creation of numerous department regulations, which may alter and reconcile some of the Act's inconsistencies. Title I of the

50 PETER BLANCK, *DISABILITY CIVIL RIGHTS LAW AND POLICY: CASES AND MATERIALS* 256 (2d ed. 2009).

51 Coalition of Organizations for Accessible Technology, *What H.R. 3101 Has that S.3304 Does Not*, <http://coat.access.org/node/9739> (last visited Aug. 21, 2010).

52 The Twenty-first Century Communications and Video Accessibility Act, H.R. 3101, 111thth Cong. § 104 (2009).

53 *Id.*

54 *Id.*

TCCVA currently dictates that “within one year after the enactment of the TCCVA...the Commission [Federal Communications Commission (FCC)] shall prescribe such regulations as are necessary to implement this section.”⁵⁵

When considering the execution of the TCCVA, it is obvious that these regulations will prove significant, for without rules and consequences, noncompliance is inevitable. The swift and distinct timeline afforded to the FCC to compile a list of procedures for enforcement provides a short grace period before the Act fully goes into effect. According to Title I, Section 104, the TCCVA will include both affirmative and negative responsibilities for network and service providers as well as manufacturers.⁵⁶ Nevertheless, while the TCCVA contains a reporting requirement for manufacturers, it fails to derail from the complaint driven archetype set forth by the ADA, because it deems private grievance as its primary mode of enforcement.⁵⁷

Consequently, the success of the TCCVA hinges largely upon the policing power of individual citizens. Although the TCCVA does not charge a fee to any person filing a complaint, the process in it of itself is not effortless, and therefore, without a separate agency overseeing compliance, it will likely fall short of accomplishing greater accessibility to the Internet.⁵⁸ Even though “the Commission shall establish separate and identifiable electronic, telephonic, and physical receptacles for the receipt of complaints filed” under the aforementioned sections, it is unclear whether this added bureaucratic element will aid in the Act’s implementation.⁵⁹ In addition, it is the sole responsibility of the FCC to investigate all complaints and issue a final

55 The Twenty-first Century Communications and Video Accessibility Act, H.R. 3101, 111thth Cong. § 104 (2009).

56 *Id.*

57 *Id.*

58 *Id.*

59 *Id.*

order within one hundred and eighty days (180) of its filing; however, the TCCVA never indicates how the Commission should complete this arduous task.⁶⁰ Nevertheless, the amendment requires that the final order include a determination of “whether a violation has occurred...and the manner in which the manufacturer or service provider will achieve accessibility, compatibility, or usability.”⁶¹ The TCCVA seemingly supplants all of its enforcement functions onto the FCC, and from an administrative standpoint, this distribution appears daunting at best.

The Commission must not only evaluate citizen complaints, but it is further endowed with the responsibilities of producing cease and desist orders for those violating the TCCVA and appraising all responses of the accused parties.⁶² If the Commission does not administer any of these required duties, then the complainant may move to file suit in Federal District Court.⁶³ The TCCVA levies an enormous task upon the FCC; however, it fails to provide an adequate explanation for imposing such an enterprise upon the Commission. Although the Communications Act of 1934 is regulated by the FCC, it is unclear whether the Commission, already burdened with hefty responsibilities, could effectively carry out the regulations of the TCCVA. Nonetheless, “[n]othing in the Commission’s rules or this Act shall be construed to preclude a person who files a complaint and a manufacturer or provider from resolving [the action]...prior to the Commission’s final determination in a...proceeding.”⁶⁴ Any resolution of this type would obviously absolve the FCC of all subsequent duties regarding the complaint,

60 The Twenty-first Century Communications and Video Accessibility Act, H.R. 3101, 111thth Cong. § 104 (2009).

61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.*

though this problem-solving opportunity falls short of addressing the bureaucratic concerns expressed above.

Moreover, the aforementioned tasks now afforded to the Commission are not finite, because Title II, Video Programming, includes further obligations to be bestowed upon the FCC. Beginning with a Commission-wide inquiry on technological subjects that particularly influence the accessibility of the Internet for individuals with disabilities, Title II launches by enlarging the Commission's undertaking.⁶⁵ While it is evident that these activities may be better handled by an agency set up to deal solely with the TCCVA given its broad scope, we must further determine the relevancy of the proposed tasks no matter the way in which they are dispatched.

Title II, Section 201 commences by ordering a large scale study by the FCC on the following subjects: 1) closed-captioning decoders; 2) video description capability; 3) user interfaces; and 4) video programming menus.⁶⁶ The Commission's research will include an investigation of industry standards and protocols for each of the four topics, as well as other pertinent procedures and general information.⁶⁷ However, the FCC will focus its exploration primarily on the accessibility of the aforementioned categories.⁶⁸ The Commission is also required to submit a report based on their findings within eighteen months of the TCCVA's enactment.⁶⁹ This inquiry will likely raise awareness concerning technological accessibility, bridging gaps of knowledge and furthering the successful employment of the TCCVA.

⁶⁵ See generally, The Twenty-first Century Communications and Video Accessibility Act, H.R. 3101, 111th Cong. § 201 (2009).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

Thus far, the Act has designated the Commission as its institute of study that occasionally examines private complaints when they trickle into the office. Nevertheless, Title II changes this paradigm, granting the FCC the power to regulate various components of video programming, specifically those mechanisms which ensure greater access to individuals with disabilities.⁷⁰ The Commission is endowed with the authority to control the following types of technologies: 1) closed captioning decoders and video description capabilities; 2) video description and closed captioning; 3) user interface regulations; and 4) access to video programming guides and menus.⁷¹ Many of these devices were monitored under the Communications Act of 1934, yet as accessibility concerns flourished, the need for additional requirements increased resulting in the creation of the TCCVA.⁷²

Congressman Markey's bill highlights four technological tools; however, only a few of its provisions pertain to Internet access. For example, Title II, Section 202 relates to closed captioning decoders and video capabilities, but just a small portion of its directives relate to the Internet.⁷³ Although the focus of this legislation is to mandate closed captioning for all video programming that meets the outlined specifications, this Section of the Act neither mentions the Internet directly nor refers to any Internet-based protocols.⁷⁴ Nevertheless, the Act need not spell out its application to the Internet, because its expansive scope reveals this inclusion. The TCCVA requires all devices made or used in the United States with screens thirteen inches or

70 The Twenty-first Century Communications and Video Accessibility Act, H.R. 3101, 111thth Cong. § 201-205 (2009).

71 *Id.*

72 *Id.*

73 *Summary of the 21st Century Communications and Video Accessibility Act*, http://markey.house.gov/docs/telecomm/summary_of_21st_century_communications__video_accessibility_act.pdf (last visited Dec. 30, 2009).

74 The Twenty-first Century Communications and Video Accessibility Act, H.R. 3101, 111th Cong. § 201 (2009).

larger and which receive or present video programming with sound to be equipped with a built-in closed caption decoder or the capability to display closed captioned video programming.⁷⁵

Rather than carving out an exception for programs transmitted over the Internet, this amendment seeks to encompass such technology in an attempt to regulate video programming in general, no matter the medium used for its display. According to Congressman Markey, Section 202 intends to regulate closed captioning on certain tools that collect or dispatch programming accompanied by sound, “including those that can receive or display programming carried over the Internet.”⁷⁶ Therefore, while the TCCVA may not explicitly refer to the Internet within this segment, its presence is nonetheless apparent.

In contrast, Senator Pryor’s companion legislation fails to include certain provisions present in the House’s bill requiring broadcast and cable networks to report to the FCC the amount of closed captioned programs disseminated over the Internet imitating television programs.⁷⁷ Furthermore, the Senate bill excludes a stipulation mandating that the FCC report to Congress on the subject of requiring the captioning of “television-like programs that are shown only on the Internet.”⁷⁸

In spite of this, Title II, Section 203 of Congressman Markey’s bill explicitly provides information concerning video programming, stating that it must incorporate programming

75 The Twenty-first Century Communications and Video Accessibility Act, H.R. 3101, 111th Cong. § 201 (2009).

76 *Summary of the 21st Century Communications and Video Accessibility Act*, http://markey.house.gov/docs/telecomm/summary_of_21st_century_communications_video_accessibility_act.pdf (last visited Dec. 30, 2009).

77 Coalition of Organizations for Accessible Technology, *What H.R. 3101 Has that S.3304 Does Not*, <http://coat.access.org/node/9739> (last visited Aug. 21, 2010).

78 *Id.*

distributed over the Internet.⁷⁹ This declaration reinforces the objectives listed above, and it stipulates future video description obligations.⁸⁰ Furthermore, this portion of the TCCVA unambiguously focuses on the increased amount of television media on the Web, for it discusses video programming content which has been distributed and redistributed over the Internet.⁸¹ The purpose of this segment, according to Congressman Markey, is to “ensure the continued accessibility of video programming to Americans with disabilities, as the programming migrates to the Internet.”⁸² However, thus far, “the FCC has refrained from regulating the Internet,” and even attempts by Congress to restrict indecent speech have been thwarted.⁸³ As a result, while such regulation may be necessary, it must also be prudent.

With these conflicting views aside, a significant amount of accountability has been assigned to the FCC regarding the success of the TCCVA. There is one additional set of circumstances, however, that releases the Commission from its duties: the “undue burden” exemption.⁸⁴ This feature allows video programming providers or owners to petition for a discharge from any requirements concerning accessibility.⁸⁵ The FCC is entitled to grant any petition that has sufficiently shown that the TCCVA’s regulations, if enforced, would lead to a significant hardship or expense.⁸⁶ Nevertheless, an owner or provider can only cease from

79 *Summary of the 21st Century Communications and Video Accessibility Act*, http://markey.house.gov/docs/telecomm/summary_of_21st_century_communications__video_accessibility_act.pdf (last visited Dec. 30, 2009).

80 *Id.*

81 *Id.*

82 *Id.*

83 Peter Hettich, *YouTube to Be Regulated? The FCC Sits Tight, While European Broadcast Regulators Make the Grab for the Internet*, 82 ST. JOHN’S L. REV. 1447, 1458 (2008).

84 The Twenty-first Century Communications and Video Accessibility Act, H.R. 3101, 111th Cong. § 203 (2009).

85 *Id.*

86 *Id.*; PETER BLANCK, *DISABILITY CIVIL RIGHTS LAW AND POLICY: CASES AND MATERIALS* 256 (2d ed. 2009).

complying with the Act's requirements subsequent to the Commission's determination.⁸⁷ Despite these exceptions, the FCC retains supreme authority over the TCCVA, ultimately dictating the preliminary management and supervision of the Internet.

Section 204 of Title II continues to create additional instructions pertaining to the Internet; however, it delves further into the future than its counterparts, because it references the potential of an Internet revolution and includes it within the Act's authoritative grips.⁸⁸ The amendment specifically includes any "apparatus designed to receive or display video programming by means of services using Internet protocol (or successor protocol)."⁸⁹ In particular, this reference allows the TCCVA to continue its regulatory responsibilities, amending its provisions when necessary in response to any technological transformation or inevitable evolution.

Focusing on user interface technology, this portion of the TCCVA expressly requires on-screen text menus, other visual indicators, and user controls to be accessible by persons with disabilities.⁹⁰ In addition, the Act mandates that closed captions and video descriptions appear when on-screen menus are displayed.⁹¹ These provisions reveal an identifiable focus of the amendment to concentrate its regulatory scheme on the needs of individuals who have a visual or hearing impairment. Although the provisions fail to account for other types of disabilities, the focal point remains on video programming. Overall, this Section requires a heightened level of accessibility to provide increased usability.

87 The Twenty-first Century Communications and Video Accessibility Act, H.R. 3101, 111th Cong. § 203 (2009).

88 The Twenty-first Century Communications and Video Accessibility Act, H.R. 3101, 111th Cong. § 204 (2009).

89 *Id.*

90 *Id.*

91 The Twenty-first Century Communications and Video Accessibility Act, H.R. 3101, 111th Cong. § 203 (2009).

Section 205, the last and final subdivision of Title II, resumes the responsibility of providing accommodations to the disabled community. Nevertheless, this part of the TCCVA neglects to specifically mention the Internet, though its application is arguably apparent.⁹² Whenever multichannel programming distribution occurs through a medium, it is evident that the directives within this section would apply. The clauses in question, however, pertain solely toward ensuring that the “navigational device, guide, or menu is accessible in real-time by individuals with disabilities who are unable to read the visual display.”⁹³ Furthermore, like its predecessors, this spotlight on video programming access will need additional rules to govern its goals.⁹⁴

VI. Positive and Negative Aspects of the TCCVA

Although the TCCVA calls for additional directives, it is evident that the amendment’s proposed regulations seek to fulfill the current concerns of the disabled community, modifying technological tools often found to be inaccessible. However, the Act is not without criticism, for it breaches a very stark line of noninterference, thereby ending the Commission’s laissez-faire attitude toward Internet control.⁹⁵ There are both positive and negative aspects of the TCCVA; however, the recent ratification of the bill affirms that its benefits far outweigh any potential harm.

92 The Twenty-first Century Communications and Video Accessibility Act, H.R. 3101, 111th Cong. § 205 (2009).

93 *Id.*

94 *Id.*

95 Peter Hettich, *YouTube to Be Regulated? The FCC Sits Tight, While European Broadcast Regulators Make the Grab for the Internet*, 82 ST. JOHN’S L. REV. 1447, 1497 (2008).

The TCCVA offers numerous advantages, beginning with its aim to establish a regime of Internet accessibility. As mentioned earlier, the Circuit Courts remain in controversy regarding the ADA and its application to the Internet. Nevertheless, by developing user requirements, the TCCVA successfully bypasses the debate.⁹⁶ No rules exist to control the configuration of websites or the programs they provide, creating a gap in the ADA's coverage and giving rise to the need for an amendment such as the TCCVA.⁹⁷

Congressman Markey's bill establishes a wider range of access and provides a framework for a host of online communications tools, including guides, menus and video programming. Specifically, Section 104 of the TCCVA requires VoIP manufacturers and providers to better enable their services by "creat[ing] new safeguards for Internet-based communications technologies... unless doing so would result in an undue burden."⁹⁸ Additionally, Sections 202 through 205 increase availability for individuals with disabilities through technologies such as video descriptions, closed captioning, user interfaces, video programming and menu guides.⁹⁹ The TCCVA tackles the issue of deficient access to the Internet by engaging people who are deaf, hard of hearing, blind or visually impaired. Moreover, the bill stipulates that the Commission will need to authorize a multitude of studies in this arena, investigate contemporary advances and

96 Nikki D. Kessler, Comment, *Why the Target "Nexus Test" leaves disabled Americans disconnected: A Better Approach to Determine Whether Private Commercial Websites Are "Places of Public Accommodation*, 45 HOUS. L. REV. 991, 1012 (2008).

97 *Id.*

98 *Summary of the 21st Century Communications and Video Accessibility Act*, http://markey.house.gov/docs/telecomm/summary_of_21st_century_communications__video_accessibility_act.pdf (last visited Dec. 30, 2009).

99 The Twenty-first Century Communications and Video Accessibility Act, H.R. 3101, 111th Cong. § 201-205 (2009).

generate reports regarding the existing status of communicative tools in operation.¹⁰⁰ Overall, the Act attempts to erase barriers to full engagement and interaction on the Internet.

Several advocacy groups hailed the amendment as a digital gateway and urged their members to voice their support to their elected officials. The National Association for the Deaf (NAD) stated that “[c]aptioning is needed for video material shown on the Internet for the same reasoning captioning is needed on T.V.”¹⁰¹ Similarly, the Communication Service for the Deaf (CSD) espoused the purpose of the Act, stating, “[the Act] puts people with disabilities squarely into 21st century broadband communications so we can take full advantage of Internet advancements enjoyed by everyone else.”¹⁰² By and large, the deaf community embraced Congressman Markey’s bill as a pillar of strength, because it recognized the threat of exclusion due to technological advancement and directly confronted these concerns. Additionally, the American Foundation for the Blind (AFB) endorsed the TCCVA, stating that as a whole they “are fed up with playing catch up whenever new technologies are released.”¹⁰³ It is obvious that this piece of legislation not only enforces standards of accessibility for all future devices, but it also changes our existing Internet paradigm, transforming the lives of countless people living with disabilities in an increasingly technological world.¹⁰⁴

100 The Twenty-first Century Communications and Video Accessibility Act, H.R. 3101, 111th Cong. § 201-205 (2009).

101 Coalition of Organizations for Accessible Technology, *Rep. Markey Introduces the 21st Century Communications & Video Accessibility Act of 2009*, <http://www.coat.access.org/node/4011> (last visited Jan. 10, 2010).

102 *Id.*

103 *Id.*

104 The Twenty-first Century Communications and Video Accessibility Act of 2010, H.R. 3101, 111th Cong. § 204 (2009).

Nevertheless, the bill is not without its opponents. Despite valiant efforts to remove blockades that obstruct Internet access, the question remains whether the Act combats the entire range of technological problems that confront the disabled community. Although the TCCVA enforces strict guidelines concerning many aspects of the Web, it is evident that it falls short of regulating Internet sites in general. Notably, absent from Congressman Markey's bill are accessibility provisions which could set the structure and framework of various web pages. This defect permits many sites to remain inaccessible. Even though Sections 202 through 205 address the Internet, their administrative authority solely pertains to apparatuses that specifically provide video programming.¹⁰⁵ Therefore, the ADA's gap with regards to the Internet remains partially intact and unresolved by the TCCVA.

Further adding to the above complaint is the inclusion of the ADA's exception based language, which provides an exemption from the TCCVA's regulatory grips.¹⁰⁶ The Act excuses manufacturers and providers from complying with its provisions provided that they claim an "undue burden," a hindrance that renders them ill-equipped to meet their obligations.¹⁰⁷ In addition, the amendment excuses consumer generated media whether due to an overabundance of content, an unprepared watchdog, or even First Amendment concerns. No matter the reason, the TCCVA fails to produce a universally accessible Internet.¹⁰⁸ As a result, "[v]ideos made and

105 The Twenty-first Century Communications and Video Accessibility Act of 2010, H.R. 3101, 111th Cong. § 202-205 (2009).

106 The Twenty-first Century Communications and Video Accessibility Act of 2010, H.R. 3101, 111th Cong. § 104 (2009).

107 *Id.*

108 Peter Hettich, *YouTube to Be Regulated? The FCC Sits Tight, While European Broadcast Regulators Make the Grab for the Internet*, 82 ST. JOHN'S L. REV. 1447, 1501 (2008).

shared by users on YouTube or Facebook wouldn't require captioning."¹⁰⁹ Therefore, the Act fails to fully combat the exclusivity of the Web, and in a way, facilitates the growth of unattainable content on the Internet, ultimately barring people with disabilities from complete participation.

Another problem plaguing Congressman Markey's bill is the complaint driven nature of the TCCVA. The influential predecessor to the bill, the ADA, is often reproached for maintaining a public regime of compliance, and the proposed legislation follows in its condemned footsteps. Self-regulation is dangerous, because there is little, if any, oversight that reigns in the tyranny of the majority. Advancing these fears, is the exclusion of the disabled from participation due to their minority status, and therefore, the FCC's request that the public hold manufacturers and providers accountable for inaccessibility remains flawed at best.

VII. Concluding Remarks

In conclusion, the TCCVA promises to foster a new era of technological feasibility and engage a frontier which the ADA has largely failed to address; however, the Act fails to completely meet the challenges that continue to face disabled individuals regarding Internet access. Nevertheless, many organizations and elected officials have supported the TCCVA, because it spurs manufacturers to include a section of our society which they have previously ignored.

¹⁰⁹ Cecilia Kang, *Bill Seeks to Make Electronics Accessible to Blind, Deaf*, THE WASHINGTON POST, August, 17, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/16/AR2010081602756.html>.

While the bill may infringe on technological boundaries which our nation has struggled to maintain, it is obvious that perpetual scientific progress cannot be constrained. Therefore, the current lack of regulation in this area appears a bit naïve. Accordingly, the TCCVA's biggest challenge remains extemporaneous factors rather than inherent inadequacies. For while Congressman Markey's bill may fall short of curing all defective technological gaps between people with and without disabilities, it addresses most of the fundamental problems the community faces, and therefore, the Act should be hailed as a success.