Mixed Media: Conflicting Community Standards for Indecency for Broadcast, Cable and the Internet

Dana Duffield

Follow this and additional works at: https://via.library.depaul.edu/jatip

Recommended Citation
Available at: https://via.library.depaul.edu/jatip/vol15/iss1/5

This Case Notes and Comments is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Art, Technology & Intellectual Property Law by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.
MIXED MEDIA: CONFLICTING COMMUNITY STANDARDS FOR INDECENCY FOR BROADCAST, CABLE AND THE INTERNET

I. INTRODUCTION

Since the Super Bowl XXXVIII incident in February 2004, in which Janet Jackson’s “wardrobe malfunction” in a halftime dance number revealed her breast, the “seven dirty words” and other broadcast indecencies have been met with zero tolerance. The show “Married by America,” a Fox reality show with an episode featuring strippers at a bachelor party, recently cost approximately $7000 each in indecency sanctions by the Federal Communications Commission (“FCC”). Radio personality Howard Stern, who is currently suing his former broadcaster Clear Channel Entertainment (“CCE”) for breach of contract and is subject to a return suit by CCE for breaking indecency laws and thereby breaching his contract, has recently announced he will leave traditional broadcast radio for newcomer Sirius Satellite Radio—all due to FCC fines levied on CCE earlier this year for Stern’s offensive conduct on his morning show. Janet Jackson’s “wardrobe malfunction” cost CBS Broadcasting $550,000. And legislation has passed both houses of Congress to

1. Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broad. of the Super Bowl XXXVIII, 19 F.C.C.R. 19230 (2004) [hereinafter Super Bowl]. The “Seven Dirty Words” were defined in a famous monologue by George Carlin as the seven words that absolutely cannot be said on the air. To find out what they are, see the transcript of Carlin’s monologue in the Appendix to the decision in FCC v. Pacifica Found., 438 U.S. 726 (1978).
significantly raise broadcast indecency fines from a maximum of $27,500 per incident to a maximum of $500,000 per incident, as well as, in the Senate bill, to add violent programming to the material the FCC can regulate.\(^5\) The bills are awaiting conference.\(^6\)

Meanwhile, the opposite of this regulation crackdown is happening on the Internet. One of the most recent cases is the second visit to the Supreme Court of *Ashcroft v. ACLU*, a challenge to the Child Online Protection Act ("COPA").\(^7\) The Court is refraining from enforcing COPA because it does not meet the strict scrutiny test for content-based regulation.\(^8\) This follows in the wake of *Reno v. ACLU*, the 1997 case that struck down COPA's predecessor, the Communications Decency Act ("CDA").\(^9\) The dichotomy involves the difference between

---


8. *Ashcroft II*, 124 S. Ct. 2783. Content-based regulations of free speech, as opposed to those that merely limit the time, place and manner of the speech, must have "narrow tailoring" to ensure that the government's compelling interest – here, protecting children from indecent speech – does not place more of a burden on the speech than necessary. *Reno v. ACLU*, 521 U.S. 844, 882 (1997).

9. *Reno*, 521 U.S. at 859-60. The Court ruled two portions of the CDA unconstitutional: 47 USC § 223(a), which reads in part:

(a) Whoever—

(i) in interstate or foreign communications —

(B) by means of a telecommunications device, knowingly—

(i) makes, creates, or solicits, and

(ii) initiates the transmission of, any...communication which is obscene or indecent, knowing that the recipient...is under 18 years of age...

(2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph

https://via.library.depaul.edu/jatip/vol15/iss1/5
broadcast media and "wired" or subscription media such as cable television and the Internet.\textsuperscript{10} Cable, the Internet, and, as the FCC stated in December 2004, satellite radio, are not subject to FCC indecency controls that reign in broadcast.\textsuperscript{11} The Supreme Court upheld this dichotomy in \textit{Reno v. ACLU}, citing the factors allowing for stricter regulation of broadcast media – existing governmental regulation, the scarcity of available channels of communication, and the invasiveness of the medium into the home – that are not present online.\textsuperscript{12}

And while two different levels of regulation now exist for broadcast and wired media, three different levels of "contemporary community standards" – the understood standard for determining

\begin{quote}
(1) \ldots shall be fined under Title 18, or imprisoned not more than two years or both.
47 USC § 223(a) (2005).
\end{quote}

The second provision struck down, 47 USC § 223(d), reads in part:

\begin{quote}
(d) Whoever—
(1) in interstate or foreign communications knowingly –
(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or \ldots to display in a manner available to a person under 18 years of age, any \ldots communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs \ldots or
(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) \ldots shall be fined under Title 18, or imprisoned not more than two years, or both.
47 USC § 223(d) (2005).
\end{quote}

\textsuperscript{10} \textit{Reno}, 521 U.S. at 868. "Some of our cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers." \textit{Id.}


\textsuperscript{12} \textit{Reno}, 521 U.S. at 868.
what is indecent and what is not, since Miller v. CA in 1973 – also exist since the first time Ashcroft v. ACLU went to the Supreme Court in 2002.\(^\text{13}\) There, Justice Thomas’s opinion suggested that COPA’s use of “community standards” in defining what is or is not indecent on the Internet did not invalidate the statute, thus overturning the Third Circuit’s contention that it did.\(^\text{14}\) Community standards, while not required to be local standards, can be interpreted by courts to mean certain communities and not others.\(^\text{15}\) Meanwhile, broadcast community standards for indecency now refer, and always have referred, to the “broadcast community as a whole,” understood to be national, while the most recent Supreme Court decision involving cable television rejects community standards as a basis for indecency regulation.\(^\text{16}\) Are these levels of community standards appropriate for the media in question?

This article will examine community standards for radio and television, cable television, and the Internet in light of Ashcroft I and other recent decisions. It will also examine whether the established community standard for indecency is appropriate for each medium, and will suggest an alternative in light of technological developments that are merging broadcast media with “wired” media.

II. BACKGROUND

A. The establishment of the “contemporary community standards”

---

\(^{13}\) Miller v. California, 413 U.S. 15 (1973); Ashcroft v. ACLU, 535 U.S. 564 (2002) [hereinafter “Ashcroft I”]. Community standards for obscenity and indecency as defined in Miller are what the community as a whole, rather than specific persons, finds “patently offensive.” What a “community” is has not yet been specifically defined.

\(^{14}\) Ashcroft I, 535 U.S. 564.

\(^{15}\) See generally Miller, 413 U.S. 15.

To paraphrase Justice Stewart’s famous statement about obscenity, when it comes to both obscenity and indecency, the community knows it when it sees it. The firm establishment of “contemporary community standards” as the standing definition of what is and is not obscene or indecent began in 1957 when the Supreme Court, in Roth v. United States, threw out the “sensitive person” standard for good. This standard, which could establish a work as obscene based on an isolated excerpt’s effect on a particularly sensitive person, was the standard in use since the 1868 English case of Regina v. Hicklin. However, the Court noted that lower courts often ignored this standard related to the work’s effect on “the average person in the community,” and stated that this was the correct standard to use in judging obscenity.

The “community standards” test was elaborated in the 1973 case of Miller v. California, which remains the controlling case regarding both obscenity and indecency. The Court, affirming the Roth community-standards test but stressing “[t]o require a State to structure obscenity proceedings around evidence of a national ‘community standard’ would be an exercise in futility,” determined that jurors could use the standards of their own communities when deciding what is “patently offensive” or “appeals to the prurient interest.” The lower court had instructed the jurors to use as the community in question the State of California, and the Supreme Court ruled that this instruction was correct. The community-standards test, the Court wrote, would

---

22. Id. at 30.
23. Id. at 31. The state had called an expert witness – a police officer specializing in obscenity offenses – to present his research as to what the
make sure "that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person – or indeed a totally insensitive one."24 The court also famously noted, "[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."25

Both Roth and Miller dealt with obscene printed material. However, the Miller test was applied to the airwaves in FCC v. Pacifica Foundation, in which the FCC’s ability to sanction radio stations for broadcasting indecent material was called into question.26 The FCC had issued an order stating that a New York radio station could be subject to sanctions for broadcasting George Carlin’s “Filthy Words” monologue at 2 p.m. when children were likely to be in the audience.27 The FCC’s ruling stated in part:

[T]he concept of 'indecent' is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience.28 [Emphasis added.]

The court affirmed the FCC’s ruling that indecency, while still protected by the First Amendment, could be channeled to hours when children were less likely to be listening, and stated that indecency, as well as obscenity, could be subject to the Miller test.
B. Who is the "community"?

For "contemporary community standards" to exist, a contemporary community must first exist. What is this community? Who comprises it? What are its geographical boundaries? A line of cases has treated this issue, but there is still no clear answer.

A year after Miller, Hamling v. United States addressed the size of the "community." Hamling had been convicted for mailing obscene material, and at his trial, the jury had been instructed to determine whether the materials were obscene using a national standard. The Court ruled that under Miller, these instructions were permissible; no distinct geographical area was to be understood by the term "community," as the main purpose of the community-standards test was to have the juror consider the effect of the material on an "average person." Interestingly, the Court stated that national distributors of sexually-oriented material could rightly be subject to differing community standards, and therefore to differing jury judgments on whether the material was obscene, depending on where the material was sent.

In Sable Communications v. FCC, the Court stated that the statute in question — 47 U.S.C. §223(b), a section of the Communications Act of 1934 — could constitutionally ban obscene interstate phone calls. The plaintiffs, dial-a-porn operators, protested that the Miller community-standards test would require them to tailor their messages to the community with the most restrictive standards for obscenity. The Court remarked:

29. Id. at 746.
31. Id. at 103.
32. Id. at 104-05.
33. Id. at 106-07.
35. See id.
There is no constitutional barrier under *Miller* to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others. If Sable's audience is comprised of different communities with different local standards, Sable ultimately bears the burden of complying with the prohibition on obscene messages.\(^{36}\)

Several other decisions have discussed the community, its size, its members and its right to define its own versions of obscenity and indecency. The Supreme Court in *Jenkins v. Georgia*, a 1974 case in which a movie-theater owner was prosecuted for showing the film "Carnal Knowledge," stated that the trial court's jury instructions, asking the jurors to apply "community standards" without specifying whether the community was the city, county, state or nation, were permissible.\(^{37}\) The Court cited *Miller*, which permitted but did not require the use of the standards of a "hypothetical statewide community."\(^{38}\)

While the above cases indicate that the community's size is flexible, its age is less so.\(^{39}\) In the 1978 case of *Pinkus v. United States*, the jury instruction in the trial court had included "men, women and children," and the Court of Appeals determined that the inclusion of "children" was improper.\(^{40}\) The Supreme Court agreed, stating that including children in the pool for determining what is obscene or indecent to the "average person" would considerably lower the average, especially since children were not the intended recipients of the material in this case.\(^{41}\) "Sensitive persons," however, were to be included, as long as "insensitive

---

36. *Id.* at 125-26.
38. *Id.* at 157.
40. *Id.* at 296-97.
41. *Id.* at 298.
persons” balanced them out at the other end.\textsuperscript{42}

The community standards as applied to the broadcast media (but not to cable television)\textsuperscript{43} stem from the \textit{Pacifica} decision, and those applicable to the Internet, as stated in \textit{Ashcroft I}, are based on the rulings in \textit{Hamling} and \textit{Sable}. The broadcast media are held to a national standard by the FCC, while \textit{Ashcroft I} uses the argument from \textit{Hamling} and \textit{Sable} that anyone who chooses to distribute obscene or indecent material online can choose to distribute only to communities that approve of the material.\textsuperscript{44} One problem with these standards is their inconsistency, despite the fact that they both apply to media that easily cross city, state, and even national borders. Another is that \textit{Hamling} and \textit{Sable} related to media that could be easily directed to certain communities, while it would be an overwhelming task to tailor Internet access to certain communities.

\section*{III. ANALYSIS}

"Each medium of expression...may present its own problems," wrote the Court in \textit{Southeastern Promotions Ltd. v. Conrad}.\textsuperscript{45} This concern is reflected in the way the Court has approached broadcast media, cable television, and now the Internet. Professor Christopher Yoo of Vanderbilt University refers to the media-regulatory model developed in \textit{Pacifica} as the “Broadcast Model” due to its focus on radio and television.\textsuperscript{46} The development of new standards, if not entirely new “models,” was necessary at the advent of cable television and now the Internet.

\begin{thebibliography}{99}
\bibitem{42} Id. at 300.
\bibitem{44} \textit{Ashcroft I}, 535 U.S. at 585.
\bibitem{46} Christopher Yoo, \textit{The Rise and Demise of the Technology-Specific Approach to the First Amendment}, 91 GEO. L.J. 245 (2003).
\end{thebibliography}
A. Broadcast

The FCC reigns supreme over regulation of broadcast indecency since *FCC v. Pacifica*. There, the commission was careful in its report to state that its suggestion of sanctions for George Carlin’s “Filthy Words” monologue related only to that particular instance. For nearly 10 years after the *Pacifica* decision, the FCC refrained from filing any indecency charges. However, the FCC has been running rampant in 2004: fining CBS Broadcasting over Janet Jackson’s exposed nipple, reaching a $1.7 million fine agreement with CCE over Howard Stern’s radio show, and, most recently, fining Fox for showing strippers on a reality show. The FCC is vested with this authority under 18 U.S.C. § 1464, as well as the Court’s ruling in *Pacifica* that regulating indecency—in fact, even pulling the licenses of broadcast stations to serve “the public interest, convenience and necessity”—is expressly within the power of the FCC. The justification in *Pacifica* for allowing the FCC this leeway is that broadcast is “uniquely pervasive” and accessible by any youngster with a transistor radio, and the justification was to keep indecent material away from unwitting kids. In order to keep the kids away without “lowering the level of material available to adults to what is fit for children,” a “safe

---

48. *Id.* at 734.
50. See Super Bowl, supra note 1; see also Clear Channel, supra note 3; see also Married by America, supra note 2.
51. 18 USC § 1464 (2005); *Pacifica*, 438 U.S. at 731. The statute forbids the utterance of “any obscene, indecent, or profane language by means of radio communication,” and is interpreted in the FCC’s 2001 guidelines on broadcast indecency to mean that broadcast obscenity is outlawed and broadcast indecency is limited to a “safe harbor” period of 10 pm to 6 am. *See* Indus. Guidance, supra note 16.
52. *Pacifica*, 438 U.S. at 748.
53. Butler v. Michigan, 352 U.S. 380 (1957) (invalidating a statute banning any reading or other materials that were “harmful to minors”).
harbor” of 10:00 pm to 6:00 am was established. Children were not likely to be listening or viewing at that time, so material protected by the First Amendment for adults but not protected in the case of children, such as Carlin’s monologue, could be broadcast.54

The FCC established that the standard for determining indecency in broadcast media was whether “an average member of the broadcast community” would find the material offensive.55 The standard is not related to any geographic region but is understood as a national standard.56 In a recent ruling, the FCC reiterated that this average viewer/average listener standard has nothing to do with whether or not the material at issue, such as Howard Stern’s show, is popular.57

The FCC does not use a jury to determine the standards of the “community.” Rather, the Commission’s members decide among themselves what does and does not meet the standards of the community.58 In reference to a Florida radio station’s broadcast of a rap/hip-hop show called “The Last Damn Show,” the Commission said, “The nation’s ever-changing contemporary community standards have not yet reached the point where the cited material is acceptable broadcast fare.”59

54. Congress attempted to shrink the “safe harbor” for indecency in 1992 with legislation establishing a midnight-to-6 am period for allowable indecency. However, the D.C. Circuit overruled that legislation in 1995, and the 10 pm to 6 am safe harbor stands. See Action for Children’s Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995).

55. Indus. Guidance, supra note 16.

56. Id.

57. In an opinion sanctioning a Tampa radio station for broadcasting indecent statements made during a live concert called “The Last Damn Show,” the FCC commissioners stated, “The relevant test for determining contemporary community standards is not the popularity of the speakers or the event but whether the material is patently offensive for the broadcast medium.” Infinity Radio License, Inc., 19 F.C.C.R. 5022, 5026 (2004) [hereinafter Infinity Radio].


59. See Infinity Radio, supra note 57. The material was a discussion of different methods of oral sex.
B. Cable Television

The courts have been much more reluctant to regulate cable television than broadcast media, even though the two often come to viewers through the same cable line. Even FCC Chairman Michael Powell is concerned about the contrast between the FCC’s stricter broadcast regulations and cable television’s self-regulation, not just in terms of exposing children to indecency, but in terms of free speech as well: “The notion that the First Amendment changes when you change channels is odd. It’s more than odd – it’s dangerous.”

Professor Yoo’s article on the failure of the technology-specific approach to the First Amendment notes that the Court has refused to extend *Pacifica* to any medium but broadcast. The Supreme Court did attempt to do so in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, where it ruled that all the rationales from *Pacifica* that allowed broadcast media to be subject to stricter regulation than other media – pervasiveness, penetration into the home, ineffectiveness of warnings, accessibility to children – also apply to cable television, even though it is a paid service. The *Denver* ruling invalidated a statute requiring cable operators to be excessively vigilant of certain types of stations by only unblocking them at the written requests of viewers. However, the Court upheld the application of *Pacifica* to cable stating, “[c]able television broadcasting, including access channel broadcasting, is as ‘accessible to children’ as over-the-air broadcasting, if not more so.”

The Court also quoted *Pacifica*, noting that cable channels of all types

---


61. *See* Yoo, *supra* note 46, at 298.


64. *Id.* at 744-45.
“have established a uniquely pervasive presence in the lives of all Americans.”65 The “community standards” test from Miller was upheld; cable operators are in a position to control channels locally.66 The case also mentioned that leaders of individual communities could notify cable operators of what is and is not appropriate programming for that community area.67

United States v. Playboy departed from that precedent by holding that a regulation requiring complete scrambling of “sexually-oriented programming” – or time-shifting of that programming to the safe harbor period – was an unconstitutional restriction of free speech.68 The Court ruled that even restrictions of “indecent” programming are subject to strict scrutiny, as indecent programming is speech protected by the First Amendment.69 The Court did not analyze Pacifica in terms of cable television, but held that broadcast television standards did not work for cable. Although cable is equally pervasive, it has a characteristic which broadcast television does not – individual choice as to what channels can and cannot enter the home. The Court ruled that individual households’ choice whether or not to fully block sexually-oriented channels in their homes was a less restrictive alternative than requiring cable operators to either fully scramble – a difficult task on analog systems – or time-shift the programming.70 Therefore, the law requiring full scrambling or time-shifting did not meet strict scrutiny.

The Court also mentioned that technological alternatives – televisions and VCRs with “V-chips” that selectively block “offensive” programming and digital cable that provides a blue screen instead of unreliable analog scrambling on blocked channels – would provide for more personal choice of programming in the home, therefore weeding out the need for

65. Id.
66. Id. at 753.
67. Id.
68. Playboy, 529 U.S. at 826-27.
69. Id. at 811.
70. Id. at 815.
cable operators to regulate programming at their end. The Court did not address whether these technological developments would ever be applied to broadcast in general.

Therefore, cable television’s “community standards” in light of Playboy regard each household as a “community” that can decide for itself which programming can and cannot be viewed, despite the pervasiveness of cable television.

C. Internet

Reno v. ACLU invalidated the parts of the Communications Decency Act (“CDA”) that would have banned “obscene or indecent” communications online where such communications were knowingly transmitted to anyone under age 18. The Court ruled that the act’s breadth was unprecedented, preventing access to a great deal of protected speech as well as unprotected obscene speech, and applying to all Internet communications (including private e-mails between individuals) instead of only to publicly viewable material on the World Wide Web.

Congress followed this decision by enacting the Child Online Protection Act (“COPA”). COPA’s first trip to the Supreme Court was Ashcroft I in 2002. Justice Thomas’s plurality opinion in Ashcroft I was very narrow. It did not authorize enforcement of COPA – in fact, this year’s decision in the same case, Ashcroft II, enjoined COPA’s enforcement because it did not meet strict scrutiny by using the “least restrictive means.” However, Ashcroft I overturned the Third Circuit’s ruling that the language below made the statute unconstitutional. The statute defined “material that is harmful to minors” in part as:

“any communication, picture, image, graphic image

71. Id. at 821.
72. Reno, 521 U.S. at 859-60.
73. Id. at 878.
74. See COPA, supra note 7.
76. Ashcroft II, 124 S. Ct. at 2795.
file, article, recording, writing, or other matter of any kind that

"(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to...the prurient interest...."

[Emphasis added]”

Thomas’s plurality opinion traced the “community standards” definition back to its origins in *Roth* and its outright establishment in *Miller*, in both cases as a test for obscenity. It then focused on *Hamling* and *Sable*, where “community standards” was approved as the measure of what could or could not be distributed by mail, as in *Hamling*, and through a telephone call, as in *Sable*. Because community standards need not refer to a particular geographical area, jurors in a hypothetical case involving COPA could either consider the standards of their own residential community, or the community of the nation as a whole. However, Thomas made it clear he was not dealing with a hypothetical; he was dealing with whether or not the “community standards” language, on its own, invalidated the statute, and simply ruled that it did not.

The plurality was also not concerned with the potential difficulties of Internet content providers who sought to limit their communications of material “harmful to minors” to certain geographical areas. “If a publisher wishes for its material to be judged only by the standards of particular communities, then it need only take the simple step of utilizing a medium that enables it to target the release of its material into those communities.”

Other justices concurred with the ruling but had their own impressions of the Internet’s “community standard.” Justice O’Connor supported a national standard, taking into consideration

77. See COPA, supra note 7.
78. *Aschroft I*, 535 U.S. at 574.
79. *Id.* at 585.
80. *Id.* at 583.
the average person of the adult community in the United States.\(^8^1\) Justice Breyer in his concurrence agreed with O'Connor, but noted that by these standards, the most puritanical town could still have a veto over the most relaxed.\(^8^2\) Justices Kennedy, Souter and Ginsburg concurred in the judgment but disagreed entirely with COPA's community standards language, which could subject every community with access to the World Wide Web to the most puritanical community's standards.\(^8^3\)

Therefore, it stands that if COPA were enforced, courts could, but would not be required to, use the standards of a local community to determine what online material was "harmful to minors," even if that material would or would not be considered harmful to minors in other communities, or in fact by the community of American adults as a whole. To borrow an idea from \textit{Miller v. California}, Maine and Mississippi may be able to set Internet content standards for New York and Las Vegas.\(^8^4\) As the Third Circuit noted in its opinion, this is not the ideal medium in which to be localizing community standards because, inherently, it is not only national, but international; it is "easy and cheap" for Internet content providers to distribute content nationally, but expensive and difficult to make sure their content does not pass geographical borders.\(^8^5\) Allowing a regional standard for a national medium is like using the sensitive person standard that was overturned in \textit{Roth} in 1957 -- the most sensitive community can have veto power over what the least sensitive, or the average, person can see on that medium.

\textbf{D. Wrong communities for the wrong media}

Broadcast media are subject to a national community standard for indecency regulation. Cable television is subject to an

\begin{flushleft}
\textcolor{red}{81.} \emph{Id.} at 589.  \\
\textcolor{red}{82.} \emph{Id.} at 590.  \\
\textcolor{red}{83.} \emph{Id.} at 593.  \\
\textcolor{red}{84.} See \textit{Miller}, 413 U.S. at 30.  \\
\end{flushleft}
individual-household standard. The Internet, as of Ashcroft I, is subject to whatever a court considers a “community” to be, often recognized as a certain locality. These differences do not make much sense.

In Pacifica, the controlling decision for regulation of broadcast indecency, broadcast’s “pervasive” qualities – its ability to be received by any person owning, or passing by, a radio or television within range of the broadcast station – seem to outweigh another of its primary qualities, which is that of locality. The maximum range for a ground-based radio antenna using a normal commercial broadcast frequency ranges from 15 to 400 miles. As any cross-country driver knows, most radio stations fade out after much less than 400 miles. While national networks can and do provide standardized programming for nationwide consumption, a normal radio or television antenna cannot broadcast this programming to the whole nation. Therefore, networks have local affiliates to broadcast the network’s programming as well as location-specific programming, especially news. A national standard homogenizes programming choices by local television and radio stations that may wish to provide raunchier, or more respectable, programming to their respective communities than the national average viewer would enjoy. The FCC’s authority to regulate indecency in broadcast communications and to establish a national standard has not been constitutionally challenged since Pacifica. However, commentators have expressed serious concern with the “wave of self-censorship” that has swept the media since the FCC began its recent crackdown on indecency with the Janet Jackson Super Bowl stunt. University of Pennsylvania communications law professor Clay Calvert cites Howard Stern’s departure from CCE as part of this self-censorship, as well as the editing of an 80-year-old

---


---
woman’s breast from an episode of the medical drama “ER” and the near-cutting of shots of vintage nude photos as items on PBS’s “Antiques Roadshow.” The court in Miller stated that the use of a “community standard” was to allow juries to think of material’s effect on an average person. While the Commissioners – and the supporters of S. 2056, the Senate’s version of the Broadcast Decency Enforcement Act – cite increased public complaints from “average persons” as a major reason for the crackdown on broadcast indecency, there are indications that a vocal, political minority might be standing in for the average person. Without a jury, and using the national standard the Miller court called “an exercise in futility,” the appointed Commissioners appear to be pursuing an agenda that may have less to do with what the average person finds offensive than it does with the Commissioners’ political leanings.

Broadcast television’s national standard is at odds with the cable television standard. While Denver correctly states that local cable service providers can control which channels are shown, the cable standard after Playboy is neither local nor national, but rather household-based. Autonomy of choice is the prevailing theme in Playboy, and the court held that a few fleeting sexual images that might be glimpsed by children flipping past poorly-scrambled Playboy programming were not harmful enough to validate the regulation. “It follows that all content-based restrictions must give us more than a moment’s pause,” the Court wrote, stating that any regulation seeking to keep children from indecent images, even in their own homes and without parental content, “must do so in a

88. Id.
89. See Miller, 413 U.S. at 33.
91. S. REP. NO. 108-253 (2004), statement of Sen. John McCain: “The number of complaints increased from 111 in 2000 to 2,240,350 in 2003.” However, ABC News examined the 159 complaints received by the FCC regarding Married by America, supra note 2, and found only 90 complaints, written by 23 people. Jake Tapper, World News Tonight (ABC television broadcast, Nov. 26, 2004.)
92. See Miller, 413 U.S. at 30; see also Calvert, supra note 87, at 82-83.
way consistent with First Amendment principles." Because cable is not subject to federal indecency regulation, each channel sets its own standards for what can be aired. This standard can vary by channel and can even vary by episode; for example, the internal standards committee of Comedy Central allowed an episode of the intentionally offensive cartoon "South Park" to pass muster, despite the fact that it contained 162 uses of the word "shit." To address increasing public concerns about indecency, the National Cable Television Association ("NCTA") has recently begun a campaign to educate consumers about selective channel blocking and to provide free channel blocking options. These options are being put forth to avoid the imposition of FCC indecency rules on cable, according to NCTA President Robert Sachs. When S. 2056, the Senate bill increasing fines for broadcast indecency, was being drawn up by the Senate Commerce Committee, an amendment adding cable television to the regulated stations failed by only one vote, and the cable industry hopes its consumer education campaign can preclude the revival of this amendment. However, a recent statement from FCC Media Bureau Chief Kenneth Ferree regarding satellite radio and indecency standards, stating in part that "[s]ubscription-based services do not call into play the issue of indecency," is a suggestion that the FCC does not intend to try to apply broadcast indecency standards to cable

94. Bradford Yates and Anthony Fargo, Talk dirty to me: Broadcast and cable push the envelope on indecency 4-5 (2002) (paper presented at the Broadcast Education Association 47th Annual Convention, April 5-8, 2002). Part of the reason Comedy Central let the South Park episode air was its intent in part to comment on FCC broadcast indecency regulation, as well as to spoof the highly hyped fact that in the fall 2001 broadcast season, the FCC allowed the use of the word "shit" before the "safe harbor" period. *Id.* at 1-2.
96. *Id.*
97. *Id.*
television in the immediate future.

Considering the limited range of broadcast stations and the local control of cable operators as described in *Denver*, applying the "community standards" indecency test locally to either medium would be much easier than applying it locally to the Internet. A Web site is, by nature, accessible from any computer across the world – hence the appellation World Wide Web. Setting up local community standards for Web content would allow enforcement agents to "forum-shop," or prosecute Internet content providers in the most restrictive community in which the providers' material could be received – in effect, anywhere. Therefore, the local community-standards language places the burden of screening readers solely on the content providers. Currently, screening is primarily done on the recipients' end, using software bought for the purpose; providers must participate, often using Platform for Internet Content Selection ("PICS") and/or Recreational Software Advisory Council ("RSAC") labels, codes which the providers attach to their sites. These codes signal the content of the site and notify screening software if the site contains adult material and should be blocked.

Gathering location information from Web site visitors admittedly would be a difficult technological task for Web site providers. Also, while it is natural and necessary for Web site viewers to know information about the sites they are viewing, privacy concerns abound regarding knowledge of the readers' personal details, including where those readers are physically located. One solution would be to create a virtual community online, the standards of which would be set by a private organization, or by relying on the standards of smaller "communities," such as people who visit a certain Web site or


102. *Id.*
message board. This is not likely to work, however, because it remains impossible to single out members of these "communities" to serve on juries. Using the community standard of the sender's community would also be impractical, because senders of obscene and indecent material would then gravitate toward permissive communities in which juries would be lenient. As many commentators have remarked since Ashcroft I, using local community standards for the Internet is particularly troublesome.

E. Smoothing out the differences

Professor Yoo addresses the issue of the technological merging of broadcast and wired technologies, making the Broadcast Model of indecency regulation obsolete. He points out that the justifications for treating broadcast media differently than wired media such as cable television or the Internet are no longer in existence. The scarcity doctrine was used in Red Lion Broadcasting Co. v. FCC to explain why regulation of broadcast media was necessary. Professor Yoo argues that the scarcity of frequencies available for public broadcast is no longer an issue due to more advanced technologies, and in the area of television, the pervasiveness of cable and its near-unlimited channel count as a means of distribution. He also argues that scarcity of frequencies available for broadcast is in part a result of, and not a reason for, regulation of them by the FCC. The court admitted in both Denver and Playboy that cable television is as pervasive and as accessible to children as broadcast – in fact, in Denver, the court stated that cable viewers are likely to get more exposure, not less, to indecent programming because they have more channels to

104. Id. at 294-95.
105. See Yoo, supra note 46.
107. See Yoo, supra note 46, at 251.
108. Id.
Both *Playboy* and *Pacifica* are still good law, even though *Pacifica* supports the idea of a lower standard for indecency review for a "pervasive" medium accessible to children, and *Playboy* refutes it, holding strict scrutiny as the correct standard.

Technology has also increased the ability of broadcast viewers and listeners to block out programming that is offensive to them. The Court has held, in *Playboy*, *Reno*, and most recently *Ashcroft II*, that where alternative means to block indecent programming exist, blanket restrictions or prohibitions of indecent speech cannot stand. In *Playboy*, having individual channel-blocking choices was a less restrictive alternative, and in *Ashcroft II*, content-blocking software was the alternative. In broadcast media, specifically television, means now exist to block indecent programming, the most notable being the V-chip, a programmable device required to be built into every television over 13 inches in size manufactured since January 1, 2000. As newer televisions replace older ones, parents can set their V-chips to block programming rated as indecent by the corresponding rating system established by the broadcast industry. In a 2000 survey, forty percent of parents surveyed had the V-chip or used other blocking technology on their television sets. In his report on the Senate's Broadcast Decency Enforcement Act, Senator John McCain (R-AZ) stated that the FCC would have no ability to regulate violence on television until it could be shown that the V-chip and other blocking technologies were ineffective in doing so.

As time passes, selective-blocking technology is becoming

110. *Playboy*, 529 U.S. at 815; *Ashcroft II*, 124 S. Ct. at 2792.
111. *See* Yoo, *supra* note 46, at 304-05.
112. *Id.*
much more effective. The television industry already rates its programs through the voluntary Parental Ratings System, which works in conjunction with the V-chip to allow or disallow programming according to its content and appropriate age level. The NCTA’s listed options for cable programming include entire channel blocking through digital or analog cable boxes, selective content blocking through digital cable boxes or use of the V-chip, or, if none of these options are available, communication with the local cable operator to aid in screening appropriate content. By the end of the 1990s, 70 percent of households received their television programming solely through cable, and the number is no doubt greater now. These selective-blocking options are therefore available to most of the population, so the “least restrictive alternative” discussed in Playboy is becoming a reality for broadcast stations as well as cable television.

With these advances, individuals are becoming more and more able to control their – and especially their children’s – access to indecent television programming. In Playboy, the court remarked that if parents do not wish to block the Playboy Channel, they do not have to do so – in agreement with Justice Brennan’s dissent in Pacifica, which mentioned that some parents might want their children to listen to George Carlin’s “Filthy Words” monologue as a comment on how we treat certain speech. Playboy, Reno and Ashcroft II place parents in control of what their children view on screens at home.

With technological advances that allow for selective blocking of indecent material in the home environment, individuals, not

115. See Parental Ratings System, at http://controlyourtv.org/images/content/TVRatings.pdf (last visited Nov. 22, 2004). The ratings range from TV-Y (all children) to TV-MA (mature audiences only), and specific content such as violence (V), sexual situations (S), and language (L) are part of the ratings and can also be read by the V-chip. Id. See also TV Parental Guidelines Monitoring Board, at http://tvguidelines.org (last visited March 230, 2005).


118. Playboy, 529 U.S. at 825; Pacifica, 438 U.S. at 770.
broadcasters, should be the ones choosing which programming enters their homes – whether that programming enters through the airwaves, through a computer, or through a cable television line.

**IV. CONCLUSION**

Three different community standards exist for three types of media. Two of these standards, the national community standard for the broadcast industry and the local community standard for the Internet, are not appropriate. The third community standard, the individual-home standard for cable television articulated in *Playboy*, is appropriate and should be the standard used for all three types of media.

The “local” community standards presented by Justice Thomas’s opinion in *Ashcroft I* are completely inappropriate for the Internet. Restricting World Wide Web content to geographical regions would be difficult and expensive. It would likely cause residents of blocked regions, who are currently able to access the content they want, to litigate the issue. If the case made it to the Supreme Court, the existence of blocking software, as noted in *Ashcroft II*, would be a less restrictive alternative than any regional blocking by Web content providers. Therefore, such a regional ban would not pass Constitutional muster.

The national “average member of the broadcast community” standard used by the FCC for broadcast media is also not appropriate. The rationale behind the FCC’s authority to restrict indecent programming due to contemporary community standards, interpreted by the FCC as a homogenized national standard, is being eroded by technological advancements that allow individual households to choose programming. Advancements such as the V-chip are not currently available in standard radios; however, if satellite radio takes hold and grows as rapidly as did cable television, the rationale for regulating at least some radio using a national standard may be gone. At the moment, the rationale for regulating radio through a national standard is also weak, since radio station broadcasts are confined within local areas and local community standards would be more appropriate.
Cable television is now intrinsically linked to broadcast television.\textsuperscript{119} The community standard for defining and regulating cable indecency now stands as the \textit{Playboy} standard – neither a local standard nor a national standard, but an individual standard, in which material is chosen by each household. Individual choices in entertainment – autonomy in what to allow into the privacy of the home – should exist in the legal world as well as the technological world. As FCC Chairman Powell once said, when you flip the channel, all the channels should be equally regulated.\textsuperscript{120} However, Congress’ intent to regulate all channels to the \textit{Pacifica} standard should not be valid, and autonomy of choice – the least restrictive alternative – should apply to all media.

\emph{Dana Duffield}

\textsuperscript{119} See History of Cable Television, \textit{supra} note 117.
\textsuperscript{120} See Becker, \textit{supra} note 60.