

Indecent Proposals:

Searching for standards in the new FCC Indecency Regulations

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I. Introduction

When a performer's breast was exposed on broadcast television for a fraction of a second during the 2004 Super Bowl halftime show, The Federal Communications Commission, Congress and hundreds of thousands of Americans reacted with shock and caused many to reevaluate their perceptions of decency and what is appropriate for broadcast television.¹ In addition to introducing the term "wardrobe malfunction" in the lexicon, this event, which lasted for a mere fraction of a second, generated more than half of a million complaints to the FCC.² This incident quickly became the most heavily viewed moment among TiVo users.³ For others, cable and broadcast news played the incident over and over. Lycos dubbed it the "most-searched event in the history of the Internet."⁴ Ever litigious, a plaintiff filed a class action complaint in US District Court against Viacom, Janet Jackson and Justin Timberlake alleging that this incident caused millions of people to "suffer outrage, anger, embarrassment, and serious injury."⁵ Furthermore, the complaint alleged that the incident harmed "the standing and credibility of Americans in the world."⁶

All five FCC Commissioners testified before Congress and shared their outrage about this event.⁷ FCC Chairman Michael Powell called the broadcast a "classless, crass,

¹ See e.g. *Apologetic Jackson says 'costume reveal' went awry*, CNN.COM, Feb. 3, 2004 at <<http://www.cnn.com/2004/US/02/02/superbowl.jackson/>> (includes streaming video) (last accessed Dec. 20, 2004), *FCC chair vows to investigate halftime flash*, MSNBC, Feb. 4, 2004 at <<http://www.msnbc.msn.com/id/4131637/>> (last accessed Dec. 20, 2004), Kelefa Sanneh, *During Halftime Show, a Display Tailored for Video Review*, THE NEW YORK TIMES, Feb 2, 2004 at D4.

² *In re* Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, FCC 04-209 (FCC rel. Sep. 22, 2004) (Hereinafter "Super Bowl").

³ Ben Charny, "Jackson's Super Bowl flash grabs TiVo users," NEWS.COM, Feb. 2, 2004 at <http://news.com.com/Jacksons+Super+Bowl+flash+grabs+TiVo+users/2100-1041_3-5152141.html>

⁴ "Janet Makes History," LYCOS TOP 50, Feb. 4-5, 2004, at <http://50.lycos.com/020404.asp>

⁵ Complaint in *Carlin v. Viacom Int'l Inc.*, No. 3:04-CV-617, 2004 WL 238414 (E.D.Tenn. Feb. 3, 2004.)

⁶ *Id.*

⁷ Michael Powell, *Protecting Children From Violent and Indecent Content*, presented Feb. 22, 2004, available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243802A2.pdf;

Michael J. Copps, *Protecting Children From Violent and Indecent Content?* presented Feb. 22, 2004, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243790A2.pdf;

Kevin J. Martin, *Protecting Children From Violent and Indecent Content*, presented Feb. 22, 2004, available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243865A2.pdf;

Jonathan Adelstein, *Protecting Children From Violent and Indecent Content*, presented Feb. 22, 2004, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243902A1.pdf;

deplorable stunt” and endeavored to begin a thorough investigation.⁸ The Commissioners supported stricter regulatory enforcement of indecent speech and advocated that Congress adopt larger fines for violations of indecency regulations. An ever-increasing flood of complaints caused the Commissioners to feel pressured to “do something.”⁹

In a ruling concerning a single exclamation of “the f-word” during an awards show, the Commission made its standard for indecency sanction somewhat stronger, without much guidance to broadcasters for the scope of the changes.¹⁰

This paper examines theories of regulations taken by the FCC during 2004 and whether it represents a discernable consistent with the First Amendment. First, this paper will examine the statutory authority and case law that allow the FCC to regulate broadcast indecency. Then, this paper will look at the complaint procedure and the role of public opinion. In Part III, this paper will examine the administrative indecency guidelines issued by the Commission in 2001 as well as the indecency decisions released during 2004. In Part IV, I will explore the interaction of structural media ownership rules and indecency regulation. Finally, this paper will examine whether indecency regulation can be justified under the First Amendment given the current state of technology and briefly discuss possible alternatives that may be less restrictive of speech.

II. Obscenity, Indecency and the First Amendment

Protected and Unprotected Speech

The First Amendment does not provide absolute protect for all speech.¹¹ Along with incitement of illegal activity and fighting words, obscenity is unprotected.¹² In *Miller v. California*, the Supreme Court set out a three-part test for defining obscenity.¹³ In order to find speech to be obscene speech, a court must evaluate whether “the average person, applying contemporary community standards’ would find that the work, taken

Kathleen Q. Abernathy, *Protecting Children From Violent and Indecent Content*, presented Feb. 22, 2004, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243910A1.pdf.

⁸ News Release: *FCC Acknowledges Hundreds of Thousands Who Have Complained About Super Bowl Halftime Show*, Feb. 6, 2004

⁹ Powell, Copps, Martin, Adelstein, Abernath, supra Note 7.

¹⁰ In re *Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, Memorandum Opinion and Order, FCC 04-43, File. No. EB-03-IH-110 (Mar. 18, 2004) [hereinafter *Golden Globe II*], available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-43A1.pdf. (last visited Dec. 19, 2004).

¹¹ See e.g. *Brandenburg v. Ohio*, 385 U.S. 444 (1969), *Roth v. United States*, 354 U.S. 476 (1957).

¹² *Id.*

¹³ 415 U.S. 15, 24 (1973).

as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic political, or scientific value."¹⁴

Limits on Indecency Regulation

Broadcasting is an area where the government has a greater interest in regulating indecent speech than in other media. In *FCC v. Pacifica Foundation*, the Supreme Court upheld the Commission's authority to prohibit indecent speech in the broadcast media and to punish broadcast licensees who air indecency.¹⁵ Two unique characteristics of broadcast allow the FCC to regulate indecent speech broadcasts, "pervasive presence" in the airwaves and its "unique accessibility" to children.¹⁶ These characteristics were balanced against the idea that indecent speech falls "at the periphery of First Amendment concerns."

Protecting children from inadvertent exposure to indecent speech represented the sort of interest that would allow the regulation of broadcast indecency.¹⁷ Both "the content and context of speech" are "critical elements" of the First Amendment analysis.¹⁸ Broadcast represents a pervasive presence in the household. The Court based its reasoning on a nuisance rationale under which "context is all-important."¹⁹ Among the factors to be considered include the time of day of the broadcast, and how the content of the program will affect the composition of the audience.²⁰ In contrast, the Supreme Court declined to extend the authority to regulate indecency to cable television and the internet because these media are not so pervasive. Citizens must make a conscious choice to subscribe to cable or to visit an internet location, while broadcast television permeates the airwaves and requires no subscription to view.

Because it is possible to prevent minors from accessing indecency on cable television,²¹ the internet,²² and for telephony,²³ the Court has applied strict scrutiny and struck down regulations on indecent speech in those media. These media lack the same sort of pervasive push into the home as broadcast and must be evaluated under strict

¹⁴ *Id.*

¹⁵ 438 U.S. 726 (1978).

¹⁶ *Id.* at 750.

¹⁷ *Id.* at 743.

¹⁸ *Id.* at 744.

¹⁹ *Id.* at 750.

²⁰ *Id.*

²¹ *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000).

²² *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997).

²³ *Sable Communications v. FCC*, 492 U.S. 115, 127 (1989).

scrutiny. The availability of channel-blocking or internet filtering technology provides a “feasible and effective means” of furthering its compelling interests, which is less restrictive to speech than a ban based on time-channeling.²⁴ Filtering and blocking make it possible to exclude certain individuals from access. Justice Powell noted that broadcast lacked that power to exclude a discrete part of its audience and must rely on time channeling to achieve similar results, where protected speech is available, but not readily accessible to minors.²⁵

Even with broadcast, an outright ban on indecency is impermissible under the First Amendment.²⁶ However, in order to target regulations of indecency to the times when children would be watching television or listening to the radio, a “time-channeling” approach is a “narrowly-tailored” regulation. A prohibition on indecent broadcasts outside of a 10 P.M. to 6 AM “safe harbor,” was found to be an acceptable balance of the First Amendment interests of adults with the public interest in preventing the broadcast of indecent speech to children.²⁷ While other media are not regulated for indecency, the D.C. Circuit continued to single out broadcast for unique treatment, allowing that “radio and television broadcasts may properly be subject to different-- and often more restrictive-- regulation than is permissible for other media under the First Amendment.”²⁸ Broadcast remains an anomaly within the Court’s First Amendment jurisprudence as the only field where government regulation of indecent, rather than obscene, speech is tolerated

Statutory and Administrative Authority

As part of its delegated authority to regulate broadcasting, the FCC has the specific authority to regulate the broadcast of “obscene, indecent, or profane language.”²⁹ The FCC’s authority to regulate indecency relies on the statutory authority in 18 USC §1464, which criminalizes the broadcast of “obscene, indecent, or profane language by means of radio communication.”³⁰ The Commission may impose a forfeiture penalty on

²⁴ 529 U.S. at 804.

²⁵ *Id.* at 758.

²⁶ *Action for Children’s Television v. FCC* 58 F.3d 654 (1995) (*en banc*) (in prior rulings, 852 F.2d 1332 (D.C.Cir.1988) and 932 F.2d 1504 (D.C.Cir. 1991) the court rejected Congressional language defining indecency as well as a 24-hour “safe harbor” as unjustifiably restrictive of speech).

²⁷ *Id.*

²⁸ 58 F.3d 654 (1995) (*en banc*) (in prior rulings, 852 F.2d 1332 (D.C.Cir.1988) and 932 F.2d 1504 (D.C.Cir. 1991) the court rejected Congressional language defining indecency as well as a 24-hour “safe harbor” as unjustifiably restrictive of speech).

²⁹ 18 U.S.C. §1464

³⁰ *Id.*

broadcast licensees for each violation of §1464, with a maximum penalty of \$27,500.³¹ As a final means of enforcement, the FCC may revoke broadcast licenses for violations of §1464.³² In contrast with §1464, the regulations omit “profane” material as a ground for sanctioning licensees.³³

The FCC Regulations prohibit licensees from broadcasting obscene material at all times and from broadcasting indecent material during the “safe harbor” period between 6 a.m. and 10 p.m.³⁴ In order to qualify as indecent, material must describe or depict sexual or excretory organs or activities and the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium.³⁵ This paper will examine the standard for indecency in greater detail in Section IV. Next, it will examine the complaint procedure that determines what broadcasts the FCC investigates regarding indecency.

III. Mechanics of Indecency Regulation

The FCC conducts no monitoring of broadcasts for obscenity, indecency or profanity. Enforcement actions in this area are based on documented complaints of indecent, profane or obscene broadcasting received from the public.³⁶ Chairman Powell describes the Commission’s attitude towards indecency enforcement as, “We wait for the American people to complain, and then we act on complaints.”³⁷ Commission staffers review each complaint to determine whether it alleges information sufficient to suggest that a violation of the obscenity, profanity or indecency prohibition has occurred.³⁸ If the complaint lacks sufficient information to ascertain whether a violation may have occurred, the complaint is dismissed.³⁹ If it appears that a broadcaster may have violated the standards, the staff will commence an investigation by sending a letter of inquiry to the licensee.⁴⁰

After an investigation by FCC staff, if the staff determines that a complaint meets

³¹ 47 U.S.C. §503(b)

³² 47 U.S.C. §312

³³ *Id.*

³⁴ 47 C.F.R. §73.3999

³⁵ *In re Industry Guidance on the Commission’s case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999 (2001). (Hereinafter “Industry Guidance”) at ¶8.

³⁶ *Id.* at ¶24.

³⁷ Drew Clark, Nick Gillespie, and Jesse Walker, *The Reluctant Planner*, REASON ONLINE, Dec. 2004 at <<http://www.reason.com/0412/fe.dc.the.shtml>> (last accessed Dec. 20, 2004).

³⁸ *Industry Guidance* at ¶24

³⁹ *Id.* at ¶25.

⁴⁰ *Id.* at ¶26.

the subject matter requirements of the indecency definition and the material was aired outside “safe harbor” hours, then the staff will evaluate whether the broadcast is patently offensive.⁴¹ If the material is patently offensive, the Enforcement Bureau may issue a Letter of Inquiry to the licensee seeking further information or explanation of the circumstances surrounding the broadcast.⁴² Alternatively, the Enforcement Bureau may issue a Notice of Apparent Liability (NAL) for monetary forfeiture.⁴³ Finally, the Bureau may refer the case to the full Commission for its consideration and action.⁴⁴

A licensee has the opportunity to respond to the NAL.⁴⁵ After the Commission has considered any response, the Commission may then rescind the NAL.⁴⁶ Alternatively, the Commission may impose a monetary penalty by issuing a Forfeiture Order. Following a Forfeiture Order, a licensee may refuse to pay the fine.⁴⁷ If the licensee refuses, the FCC may refer the matter to the U.S. Department of Justice to initiate a trial in U.S. District Court.⁴⁸

The primary justification for the new scrutiny of indecent broadcasting is the drastic increase in indecency complaints received by the Commission.⁴⁹ In 2001, the FCC received 111 complaints for all of television.⁵⁰ The number approached 14,000 complaints about 389 programs in 2002.⁵¹ In 2003, the Commission received more than 200,000 complaints about 375 different programs.⁵² Through November 2004, the Commission received more than one million complaints concerning 279 programs (124 radio programs, 127 broadcast television programs and 28 cable programs.)⁵³ By September 2004, the FCC received “over 542,000 complaints” concerning the broadcast of the Super Bowl XXXVIII Halftime Show.⁵⁴ In comparison, between 89.8 million and

⁴¹ *Id.* at ¶7.

⁴² *Id.* at ¶27.

⁴³ *Id.*

⁴⁴ *Id.* at ¶28.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at ¶29.

⁴⁹ Michael Powell, *Michael Powell's Thoughts on AO Innovation Summit and Silicon Valley Visit*, ALWAYS ON, Jul. 16, 2004 at http://www.alwayson-network.com/comments.php?id=P4921_0_4_0_C

⁵⁰ *Indecency Complaints and NALs: 1993-2004*, Fed. Comm. Comm'n, Nov. 23, 2004 at <<http://www.fcc.gov/eb/broadcast/ichart.pdf>>. (last checked Dec. 19, 2004).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ FCC 04-209, note 6.

140 million viewers watched the Super Bowl broadcast,⁵⁵ so the FCC received one complaint for every 165 viewers—roughly 0.6% of the viewing audience complained.

These unprecedented levels of complaints are largely the result of organized campaigns by advocacy groups such as Parents Television Council⁵⁶ and Morality in Media⁵⁷. The World Wide Web has made the process of filing a complaint incredibly easy. For example, Parents Television Council allows an outraged web user to file a complaint with the FCC by merely entering one's name, mailing address and e-mail address into a web page.⁵⁸ This information is merged with a complaint written by Parents Television Council staff, which meets FCC guidelines for filing a complaint, and includes the necessary specific references to indecent material.

The FCC received 234 complaints concerning the broadcast of the 2002 Golden Globes ceremony.⁵⁹ Of those complaints, 217 were from individuals associated with Parents Television Council.⁶⁰ The Commission levied a \$1,183,000 fine on Fox broadcasting for the April 7, 2003 episode of "Married by America" on the basis of the 159 complaints filed with the Commission.⁶¹ A Freedom of Information Act disclosure revealed that only 90 complaints filed with the FCC.⁶² The count of 159 complaints is the result of were sent to multiple individuals at the FCC. came from 23 individuals. Of these 23 complainants, all but 2 filed the same form letter generated by an automated complaint system. More than 200,000 complaints were filed with the Commission through a Parents Television Council web site.⁶³

Effectively, the FCC has outsourced monitoring broadcasts for indecent material to special interest organizations. The complaint procedure initially contemplated a

⁵⁵ CBS quotes the higher number in CBS Television Press Release, *CBS Sports Coverage of Super Bowl XXXVIII Watched by 140 Million Viewers*, Feb. 2, 2004, available at <<http://viacom.com/press.tin?ixPressRelease=80254180>>, while the AP reports the lower figure, *Super Bowl dominates ratings* CNN.com, Feb. 4, 2004, at <<http://www.cnn.com/2004/SHOWBIZ/TV/02/04/nielsens.ap/>>. (last checked Dec. 19, 2004).

⁵⁶ Parents Television Council is a 501(c)(3) advocacy group with a \$5.4 million annual budget that "advocates a dramatic reduction in gratuitous sex, violence and profanity on television, films, video games and in other media." < <http://www.parentstv.org/PTC/press/factsheet2.pdf>>. See also Lynn Smith, *For 'Indecency' Watchdogs, Work Is a Day Full of TV*, LOS ANGELES TIMES, May, 10, 2004, at A1.

⁵⁷ Morality in Media is a 501(c)(3) organization which seeks to curtail obscenity and indecency in the media. See <<http://www.moralityinmedia.org/>>

⁵⁸ *FCC Complaint – Life as We Know It on ABC*, PARENTS TV COUNCIL, at <<https://www.parentstv.org/ptc/action/lawki/main.asp>>. PTC also offers a generic complaint form, *File an FCC Broadcast Indecency Complaint* at <<https://www.parentstv.org/ptc/fcc/fcccomplaint2.asp>>

⁵⁹ Golden Globes I, 03-3045

⁶⁰ *Id.*

⁶¹ In re: *Complaints Against Various Licensees Regarding Their Broadcast Of The Fox Television Network Program "Married By America" On April 7, 2003*, FCC 04-242 (FCC rel. Oct. 5, 2004).

⁶² Jeff Jarvis, *The shocking truth about the FCC: Censorship by the tyranny of the few*, BUZZMACHINE, Nov. 15, 2004 at <http://www.buzzmachine.com/archives/2004_11_15.html#008481>. (checked Dec. 19, 2004).

⁶³ "223,306 Complaints Filed Since January 1, 2004," Parents Television Council, <<http://cleanup.tv>>.

situation like *Pacifica*—an individual complainant uncomfortable with a broadcast that he personally experienced inadvertently or unexpectedly. When the Commission received relatively few complaints, this hand-off method was the most efficient method of responding to public concerns about broadcast indecency.

Today, the Parents Television Counsel conducts a sophisticated broadcast monitoring operation that tracks and catalogs indecent or otherwise “offensive” broadcast material.⁶⁴ One way the organization uses this data is to send action alerts to its mailing list and create automated complaint submission systems. Instead of an increase in outrage, the increase in complaint volume represents the primary effect of the decreased transaction cost in filing a complaint automatically. If efficiency no longer serves as a rationale for using a complaint-driven procedure and the cost of reviewing complaints would exceed the cost of monitoring broadcasts, the FCC should conduct its own broadcast monitoring. Instead of responding to complaints, it might become more efficient and lead to more consistent decisions if the Commission conducts its own broadcast monitoring and no longer relies on outside organizations to conduct monitoring operations.

In dissent in *Pacifica*, Justice Brennan worried that the decision would permit “majoritarian tastes completely to preclude a protected message from entering the homes of a receptive unoffended minority.”⁶⁵ In fact, the new campaign on indecent may allow a distinct minority to preclude a protected message from entering the homes of a receptive majority. This is not necessarily a perverse effect, but simply the regulations working the way that Congress intended. “Whether particular material is actionably indecent does not turn on whether the station that broadcast it (or the program) happens to be popular in its particular market.”⁶⁶ Whether such regulations are Constitutional depend on the form and application of those regulations. These issues are discussed in the next sections of this paper.

IV. Defining Indecency

2001 Industry Guidance

In 2001, the FCC released a Policy Statement to offer guidance to the broadcast industry for interpreting §1464 and presenting examples of unacceptable, indecent

⁶⁴ Bob Thompson, *Fighting Indecency, One Bleep at a Time*, THE WASHINGTON POST, Dec. 9, 2004 at C01.

⁶⁵ 438 U.S. at 766 (Brennan, J., dissenting).

⁶⁶ In re *Entercom Sacramento License LLC*, FCC 04-224, Oct. 15, 2004.

content.⁶⁷ In order for material to be in fact indecent, the material must describe or depict sexual or excretory organs or activities.⁶⁸ Second, the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium.⁶⁹ This community standard is not a local standard and is not based on any particular geographic area or the sensibilities of any individual complainant.⁷⁰

The full context in which the material appeared is critically important. Context is crucial to a finding of indecency.⁷¹ Three critical factors that the Commission evaluates are:

- (1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities;
- (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities;
- (3) *whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.*⁷²

Each of these factors has to be balanced on a fact-specific basis in order for the Commission to determine whether a particular broadcast is, in fact, indecent. The Industry Guidance goes on to present examples of content that has been deemed indecent and content deemed not indecent. Generally, the mere use of a word or display of human anatomy that may be explicit or graphic in certain contexts is insufficient to trigger indecency liability in the absence of any repetition or intention to shock or pander to the audience.⁷³

Explicit and graphic content that was found indecent includes “vulgar and lewd references to the male genitals and to masturbation and sodomy” in the Howard Stern Show, which described “sexual activity in patently offensive terms.”⁷⁴ Material that relies on innuendo to convey an unmistakably sexual or excretory meaning may be patently offensive.⁷⁵ A discussion about “size” on the “Stevens and Pruett Show” which relied on innuendo and suggestion was sufficiently descriptive to warrant indecency sanction.⁷⁶

⁶⁷ Industry Guidance

⁶⁸ *Id.* at ¶7.

⁶⁹ *Id.* at ¶8.

⁷⁰ *Id.*

⁷¹ *Id.* at ¶9.

⁷² *Id.* at ¶10.

⁷³ *Id.* at ¶¶15-21.

⁷⁴ *Id.* at ¶13.

⁷⁵ *Id.* at ¶14.

⁷⁶ *Id.*

A fleeting reference may be found indecent when other factors contribute to a finding that the reference is patently offensive.⁷⁷ However, where sexual or excretory references are made in passing or fleeting in nature, this characteristic tended to weigh against a finding of indecency. A news announcer's offhand comment, "oops, fucked that one up" did not warrant further consideration in light of the "isolated and accidental nature of the broadcast."⁷⁸ A fleeting and isolated utterance of "the hell I did, I drove mother-fucker, oh. Oh," within the context of live and spontaneous programming did not warrant a sanction.⁷⁹

Where the apparent purpose for which material is presented can substantially affect whether it is deemed to be patently offensive. The context of the broadcast is crucial.⁸⁰ A public radio broadcast of an excerpt from a wiretap of a telephone conversation where organized crime figure John Gotti used "fuck" or "fucking" 10 times in 7 sentences was found to be not indecent because the language was an integral part of a *bona fide* news story.⁸¹

Language presented in a pandering or titillating manner or intended to shock is more likely to be patently offensive than similar language presented for educational purposes. A "Bubba, The Love Sponge" discussion about sexual practices and preferences was found patently offensive and indecent because of the manner of presentation.⁸² In contrast, discussions of similar issues were found not to violate the indecency standards in the clinical language used in the broadcast of portions of a high school sex education class, in a segment about sexual practices on the Oprah Winfrey Show, and in a discussion of sexual advice books on the Geraldo Rivera Show.⁸³

As with words, broadcasts of images must also be evaluated for context. Broadcasts of full frontal nudity are not *per se* indecent. Nudity only becomes indecent in context. In a broadcast of Schindler's List, the serious, historical context precluded a finding of patent offensiveness.⁸⁴

The New Standard

During the "Golden Globes Awards" broadcast in January 2003, U2 singer Bono uttered the phrase "this is really fucking brilliant" while accepting an award. In

⁷⁷ *Id.* at ¶17.

⁷⁸ *Id.* at ¶19.

⁷⁹ *Id.*

⁸⁰ *Id.* at ¶20

⁸¹ *Id.*

⁸² *Id.* at ¶20

⁸³ *Id.* at ¶21

⁸⁴ *Id.*

response to complaints, the FCC Enforcement Bureau ruled that such a use—a single use of the word as an intensifier—does not rise to the level of indecency.

The word “fucking” may be crude and offensive, but, in the context presented here, did not describe sexual or excretory organs or activities. Rather, the performer used the word “fucking” as an adjective or expletive to emphasize an exclamation. Indeed, in similar circumstances, we have found that offensive language used as an insult rather than as a description of sexual or excretory activity or organs is not within the scope of the Commission’s prohibition of indecent program content.⁸⁵

This decision was consistent with previous FCC rulings,⁸⁶ but led to a vocal critique of this approach to indecency by those members of the public and members of Congress who support stringent regulations on broadcast indecency.⁸⁷

The Commissioners reevaluated the ruling and used the opportunity to reevaluate the Commission’s entire approach to isolated or fleeting broadcasts. “While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the “F-Word” such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law.”⁸⁸

While prior indecency rulings found that isolated and accidental uses of an expletive were not worth sanctioning, under the *Golden Globes II* standard, a single use of the “f-word” may be considered indecent, because it is “one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language” and its use “invariably invokes a coarse sexual image.”⁸⁹ The Commissioners consider this particular use “shocking and gratuitous.”⁹⁰

⁸⁵ In re *Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 18 F.C.C.R. 19859 (2003).

⁸⁶ See Industry Guidance at ¶18

⁸⁷ See H.R. 3717, 108th Cong. (2004) and S.2056, 108th Cong. (2004).

⁸⁸ In re *Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, FCC 04-43 (Mar. 18, 2004). (Herein after “Golden Globes II”). Additionally the FCC finds that this use qualifies as profane speech for purposes of §1464, based on a nuisance rationale. The profanity ruling represents an independent ground for sanction as well as a new path for enforcing language standards in broadcast. However, the Commission has specifically declined to base an indecency ruling on profane speech grounds. See , Ernest Miller, *Where's the Profanity?* CORANTE: THE IMPORTANCE OF..., Jun. 10, 2004 at <<http://www.corante.com/importance/archives/004299.html>>

⁸⁹ *Id.*

⁹⁰ *Id.*

The FCC stops short of declaring any utterance of “fuck” to be *per se* indecent.⁹¹ Rather, the Commission bases this ruling on a “reasonable expectation” test, made possible by the current technologies available to broadcasters.⁹² If a broadcast licensee should have a reasonable expectation of a live broadcast containing indecent or profane speech, the licensee is required to take measures to ensure that a single instance of indecent or profane language does not reach the public airwaves. The Commissioners ruled that NBC possessed sufficient notice about the possible uses of indecency because “this is not the first case where such language has been used by an award recipient in a live program.”⁹³ Two previous incidents within the previous eight years, Cher at the 2002 Billboard Awards and Bono during the 1994 Grammy Awards, apparently constitutes sufficient notice to a licensee that an entertainment awards ceremony may feature excited utterances of indecent language by award recipients.⁹⁴

2004 Indecency Rulings

Even a fleeting display of genitalia may constitute an indecent broadcast. Prior to finding indecency in the Golden Globes broadcast, the Commission made its first sanction of televised indecency in *In the Matter of Young Broadcasting of San Francisco*.⁹⁵ KRON-TV broadcast an interview with performers from the stage production “Puppetry of the Penis.”⁹⁶ During this interview, the performers demonstrated “genital origami” off-camera to the show’s hosts and “the penis of one [performer] was fully exposed on-camera.”⁹⁷ Despite the brief and fleeting nature of this exposure, the Commission finds that this material is patently offensive as measured by contemporary community standards, in particular because of “the presentation of full frontal nudity in a manner that was pandering, titillating and shocking.”⁹⁸

The Commission distinguishes this display of frontal adult nudity from the one depicted in a broadcast of the film *Schindler’s List* which was found not to be patently offensive.⁹⁹ Unlike *Schindler’s List*, the manner of presentation was “pandering, titillating and shocking,” in particular because of the encouraging comments of off-camera employees, who urged “the

⁹¹ John Eggerton, *F-Word Not Banned, Says FCC* BROADCASTING & CABLE, Jul. 7, 2004 at <<http://www.broadcastingcable.com/article/CA434719.html?display=Breaking+News&promocode=SUPP>>

⁹² *Golden Globes II* at ¶16.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Young Broadcasting* at ¶10

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Industry Guidance* at ¶21

performers to conduct a nude demonstration” and the controversial nature of the subject matter of the entire segment.¹⁰⁰

If a broadcast is pandering and titillating, it is likely to be considered indecent. During the halftime show of Super Bowl XXXVIII, performers Justin Timberlake and Janet Jackson performed the song “Rock Your Body.”¹⁰¹

[Timberlake] urged [Jackson] in the song to allow him to “rock your body” and “just let me rock you ‘til the break of day” while following her around the stage and, on several occasions, grabbing and rubbing up against her. At the close of the song, immediately after singing the lyrics, “gonna have you naked by the end of this song,” Mr. Timberlake pulled off the right portion of Ms. Jackson’s bustier, exposing her breast.¹⁰²

This exposure was broadcast for 19/32 of a second.¹⁰³ Although exposure was brief, when examined in context of the performance, song lyrics and choreography, which “discussed or simulated sexual activities,” the Commission finds that the brief exposure was intended to pander to, titillate and shock the viewing audience.¹⁰⁴ Even though the surrounding performance or other parts of the broadcast are not indecent on their own, their suggestive nature combined with the brief exposure lead to the finding of indecency.¹⁰⁵

The Commission found Viacom apparently liable for \$550,000, based on assessing the maximum statutory fine for each of the twenty Viacom-owned stations that broadcast the material.¹⁰⁶ Although nearly two hundred independently-owned CBS affiliates broadcast the same material, the Commission only assesses the fine on Viacom, because MTV, another Viacom company, produced the halftime show while taking into account the “history of recent indecent broadcasts by Viacom-owned radio stations.”¹⁰⁷

¹⁰⁰ Young Broadcasting at ¶14.

¹⁰¹ Super Bowl at ¶16

¹⁰² *Id.*

¹⁰³ *Id.* at ¶17

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* Viacom owns Infinity Broadcasting, the home to the Howard Stern radio program, which has accounted for 54% of all fines levied against broadcast licensees for indecency violations since 1990 (\$2.5 million of \$4.5 million total.) Opie and Anthony, also broadcasting on Infinity, generated an additional \$378,000 in fines between 1990 and 2004. John Dunbar, *Indecency on the Air*, THE CENTER FOR PUBLIC INTEGRITY, Apr. 9, 2004 at <<http://www.publicintegrity.org/telecom/report.aspx?aid=239&sid=200>> (last accessed Dec. 19, 2004).

Because other affiliates could not have reasonably anticipated this display, the Commission levied the fine only on Viacom.¹⁰⁸

In the absence of partial nudity, a broadcast may not rise to the level of indecency with only A “Buffy the Vampire Slayer” episode that featured “a scene depicting Buffy kissing and straddling Spike after fighting with him” was found insufficiently graphic or explicit to rise to the level of indecency.¹⁰⁹ An episode of “Will and Grace” which included a scene where “[a] woman photographer passionately kissed a] woman author and then humped her (what she called a ‘dry hump’)” was also insufficiently graphic or explicit to allow a finding of indecency.¹¹⁰

The FCC found 169 licensees broadcast indecent material when they showed Fox Television Network “Married by America.”¹¹¹ The Fox affiliates were found apparently liable for \$7,000 per station—a total proposed forfeiture of \$1.183 million.¹¹² This episode included a six-minute segment consisting of scenes in which “party-goers lick whipped cream from strippers’ bodies in a sexually suggestive manner” and “a man on all fours in his underwear as two female strippers playfully spank him.”¹¹³ Even though the broadcast “electronically obscures any nudity,” the Commission finds the sexual nature of these scenes to be “inescapable.”¹¹⁴ This suggestive context is sufficient to depict or describe sexual or excretory organs or activity.¹¹⁵ Even though the broadcaster obscured sexual organs via pixilation, that failed to obscure the “overtly sexual and gratuitous nature” of the scenes.¹¹⁶ The commission finds that the material shown goes far beyond that necessary for “character development” and is gratuitous, vulgar, and clearly intended to pander to and titillate.¹¹⁷

Suggestive content still must have more than just the mere implication of sexual or excretory content. An episode of “Coupling” was insufficiently graphic or explicit to find indecency, even though “the dialogue includes sustained and repeated use of sexual innuendo and double entendre, with sex the constant theme of the program episodes.”¹¹⁸ Despite the repetition of such themes, the lack of any explicit graphic depiction or description is sufficient to prevent the broadcast from falling into the realm

¹⁰⁸ *Id.*

¹⁰⁹ In re: Complaint Against Various Broadcast Licensees Regarding Their Airing of the UPN Network Program “Buffy the Vampire Slayer” on November 20, 2001, FCC 04-196, released Aug. 9, 2004.

¹¹⁰ In re: *KS AZ License, Inc.* FCC 04-197, released Aug. 9, 2004.

¹¹¹ Married by America at ¶12.

¹¹² *Id.*

¹¹³ *Id.* at ¶15.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ In re: *NBC Telemundo License Co.*, FCC 04-235, released Nov. 23, 2004.

of indecency.¹¹⁹ A Fox broadcast of “Keen Eddie” which featured a plot involving “trafficking in horse semen on the black market” was insufficiently explicit or graphic enough to be considered indecent.¹²⁰

V. Implications of the New Standard

As a direct result of this new standard for defining indecency, broadcasters are demonstrating a higher level of care in televising live awards ceremonies, with the additional cost of running a delay and preparing to edit out indecent speech. NBC implemented a ten-second delay during the 2004 Golden Globe Awards, CBS implemented a five-second delay for the Grammy Awards and ABC instituted a five-second delay during the Academy Awards.¹²¹

In addition to preemptive prudence in live broadcasts, broadcasters are more cautious in choosing content. Because broadcasters are unclear about the boundaries of this new standard, they are less likely to broadcast material that approaches the bounds of indecency. Dozens of ABC affiliates decided to not air “Saving Private Ryan” on Veteran’s Day in the wake of these new guidelines.¹²² Yet, these same stations had already broadcast the same movie “several years ago.”¹²³ Only after these licensees declined to broadcast the film did Chairman Powell conclude that the FCC “should not take action against the other 159 stations that aired [“Saving Private Ryan”] because the language was part of accurately portraying the story about the Allied invasion of Normandy during World War II,”¹²⁴

Immediately following the Super Bowl, NBC announced that it would cut a scene from an *ER* episode that showed the exposed breast of an eighty-year-old woman receiving medical care.¹²⁵ These decisions illustrate the need for more guidance from the Commission concerning the scope of current indecency regulations. Without certainty, broadcasters are more likely to be extra cautious, which may chill expressive speech.

¹¹⁹ *Id.*

¹²⁰ In re: *Complaints against Fox Television Stations, Inc. Regarding Its Broadcast of the “Keen Eddie” Program on June 10, 2003*, FCC 04-243, released Nov. 23, 2004.

¹²¹ Katharine A. Fallow, *The Big Chill? Congress and the FCC Crack Down on Indecency*, 22 COMMUNICATIONS LAWYER 1 (Spring 2004).

¹²² Paul J. Gough, *Network Chiefs Leery of FCC Indecency Push*, REUTERS, Nov. 22, 2004.

¹²³ *Id.*

¹²⁴ Jeremy Pelofsky, *FCC Chief Urges Denying ‘Private Ryan’ Complaints*, REUTERS, Dec. 13, 2004 at <<http://www.reuters.com/newsArticle.jhtml?type=domesticNews&storyID=7079935>>

¹²⁵ Katharine A. Fallow, “The Big Chill? Congress and the FCC Crack Down on Indecency,” 22 COMMUNICATIONS LAWYER 1 (Spring 2004).

In order to serve the public interest, differing standards may be necessary for regulating incidental uses of indecent speech in broadcasts with significant public interest. In *Golden Globe II*, a single use of the word “fuck” was sufficiently offensive to lead to a finding of indecency. If an excited utterance of a single word reaches the public airwaves, the broadcaster may be liable for violating the indecency regulations. Although the Commission allows that the licensee must have a “reasonable expectation,” the reasonable explanation in *Golden Globe II* rested on a single speech during the broadcast of a different awards show on a speech from Bono at an awards ceremony nearly 10 years earlier. Any event that occurs at least twice in a decade apparently constitutes a reasonable expectation.

What would the Commission do if a broadcaster was airing live footage of the United States Senate on June 22, 2004 and caught Vice President Richard Cheney tell Vermont Senator Patrick Leahy to “go fuck [him]self?”¹²⁶ Based on the reasonable expectation standard applied to NBC for Bono’s indiscretion, this hypothetical licensee should have had a reasonable expectation that a broadcast of Vice President Cheney in the Senate could result in the use of an indecent phrase. The Vice-President’s remark continues a long tradition of less than decorous remarks uttered on the Senate floor.¹²⁷ In September 2000, while on the campaign trail, then-Governor Bush and Rep. Cheney were caught on microphone agreeing that New York Times reporter Adam Clymer was a “big time” “major-league asshole.”¹²⁸ The theory behind *Golden Globe II* would suggest that this hypothetical broadcaster has violated the indecency standards. However, to sanction a broadcaster for showing such an exchange would likely violate the First Amendment, because speech concerning the acts of public officials goes to the core of the First Amendment.¹²⁹

Media Consolidation, Consent Decrees and Precedent

One justification for imposing the fine on Viacom-owned stations that broadcast the Super Bowl halftime show and not on independent CBS affiliates was that Viacom is not only the broadcast licensee, but also the parent of MTV, the producer of the halftime program.¹³⁰ Under this theory of liability, a media conglomerate is more responsible for

¹²⁶ Helen Dewar and Dana Milbank, *Cheney Dismisses Critic with Obscenity*, WASHINGTON POST, Jun. 25, 2004 at A04.

¹²⁷ Ann Gerhart, *Decorum Call*, WASHINGTON POST, Jun. 26, 2004 at C01.

¹²⁸ Jake Tapper, *A ‘major league asshole,’* SALON.COM, Sep. 4, 2000 at <http://archive.salon.com/politics/feature/2000/09/04/cuss_word/>

¹²⁹ *New York Times v. Sullivan*, 376 U.S. 254, 273 (1964).

¹³⁰ Statement of Powell, FCC 04-209

content of programs developed in-house than another broadcaster would be for airing those same programs. This creates a greater burden on media conglomerates than on independently owned broadcasters.

The Telecommunications Act of 1996 removed restrictions on media ownership and allowed for the growth of large media conglomerates. Clear Channel Communications owned 173 stations in 1997. By 2004, Clear Channel expanded to own 1,207 radio stations.¹³¹ A smaller player, Emmis Communications Group currently owns and operates 23 radio stations.¹³² Media conglomerate Viacom currently owns the CBS television network and 16 CBS stations, the UPN television network and 18 stations, popular cable television properties which include MTV, Nickelodeon and VH1. In addition, Viacom owns Infinity Broadcasting's 176 radio stations.¹³³

The FCC entered into consent agreements with Clear Channel, Entercom, and Viacom concerning indecent broadcasts during 2004.¹³⁴ Instead of investigating each broadcast and determining whether the broadcast was indecent, the Commission merely settled the complaints without any further investigation into the substance of the pending complaints.¹³⁵ Each conglomerate agreed to conduct training on obscenity and indecency for employees who work on-air or materially participate in programming decisions.¹³⁶

In the case of Clear Channel, the consent decree wiped clean indecency complaints concerning at least 200 broadcasts pending against Clear Channel.¹³⁷ Among the complaints pending for Viacom stations were more complaints about the Howard Stern show. Instead of providing guidance for other broadcasters, these consent decrees eliminated the need for the FCC to rule on the pending indecency complaints. Self-regulating broadcasters may be more cautious about speech than mandated by the scope of indecency regulations.¹³⁸

Congress attempted to raise the fines for violations of the indecency regulations to \$500,000 per incident, instead of \$27,500, in order to be able to have an effective

¹³¹ *The State of the News Media 2004*, JOURNALISM.ORG at <http://www.stateofthenewsmedia.org/narrative_radio_ownership.asp?cat=5&media=8> (2004).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ In re: *Viacom Inc.*, FCC 04-268 (Nov. 9, 2004); In re: *Emmis Radio Corp.*, FCC 04-199 (Aug. 12, 2004); In re: *Clear Channel Comm.* FCC 04-128 (Jun. 4, 2004),

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ In re: *Clear Channel Comm.* FCC 04-128 (Jun. 4, 2004) (Copps, dissenting).

¹³⁸ Clay Calvert, *Bono, the Culture Wars, and a Profane Decision: The FCC's Reversal of Course of Indecency Determinations and its New Path on Profanity*, 28 SEATTLE L. REV. 61, 65 (2004).

leverage over vast media conglomerates.¹³⁹ Instead of raising the fines for indecency violations, reinstating structural limits on media ownership may lead to more consistent rulings. Broadcasters who are part of a local community are more responsive to the demands of that community than a broadcaster who is merely one of a thousand stations following the same corporate policy. Reinstating structural media ownership rules may make local stations more responsive to community concern about indecency and citizens with such concerns may be able to resolve them without requiring the intervention of the FCC.

Problems with the New Standard: Are vague standards narrowly tailored?

This new standard is not only undefined, but it seems that the FCC has no intention to define the limits of the new standard. While the 2001 Industry Guidelines provided some guidance by establishing a standard framework for evaluating indecency, the Commission appears unwilling, to if not incapable of, producing a similar framework for guiding broadcast licensees through the changes in the standard for indecency. In a speech to the National Association of Broadcasters, Chairman Powell responded to broadcaster requests for further definition of the standard:

I have heard some of you call for an FCC rulemaking to create more “clarity” as to what is prohibited. I want to warn you that this is unwise. You do not want to ask the government to write a “Red Book” of Dos and Don’ts. I understand the complaint about knowing where the line is, but heavier government entanglement through a “Dirty Conduct Code” will not only chill speech, it may deep freeze it.¹⁴⁰

Instead of a new Commission guide to indecency, Powell would prefer to see the broadcasters, in addition to cable and satellite programmers, voluntarily adopt a code of conduct.¹⁴¹

This situation leaves broadcasters in a similar situation before the Commission issued the 2001 Industry Guidance. Broadcasters will be required to figure out the boundaries of acceptable conduct and faced with the choice of tempting new fines or becoming overly cautious in selecting programming that might be considered inoffensive. However, the Commission appears eager to have broadcasters censor

¹³⁹ H.R. 3717, 108th Cong. (2004) and S.2056, 108th Cong. (2004).

¹⁴⁰ *Remarks of FCC Chairman Michael Powell At the NAB Summit on Responsible Programming The Renaissance Hotel Washington D.C. March 31, 2004, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-245663A1.pdf*

¹⁴¹ *id.*

themselves. In a speech to the Media Institute, David Solomon, chief of the Federal Communications Commission's Enforcement Bureau believes that “broadcasters must start doing more to self-regulate, and not hide behind ‘the mantra of the First Amendment.’”¹⁴² Even if broadcasters choose not to “hide” behind the protections of the First Amendment, the Sherman Antitrust Act may prohibit broadcasters from adopting a voluntary code of conduct.

In *United States v. National Assoc. of Broadcasters*, a NAB code of conduct was found to violate antitrust law.¹⁴³ That code of conduct regulated the amount of time per broadcast hour that could be sold as commercials.¹⁴⁴ The code was stronger than a mere advisory standard because the enforcement provision of the NAB Code deprived broadcasters of individual judgment.¹⁴⁵ *National Assoc. of Broadcasters* suggests that a self-regulatory scheme can contain only advisory guidelines, and should not be interpreted or enforced by a centralized industry body.¹⁴⁶ Any code of conduct that the broadcast industry adopts on its own can not regulate broadcasters as firmly as the FCC. Broadcasters would be able to deviate from the standards of a voluntary indecency code if that fits market conditions better than remaining in such a decency cartel.

In the absence of clearly defined standards for indecency regulation, broadcasters are more likely to avoid broadcasting material that may not be indecent in order to avoid liability. The FCC can ameliorate this problem by revising the 2001 Industry Guidance policy statement to reflect the current indecency standard and detail the specific differences between the 2001 standard and the 2004 standard for defining indecency. Providing broadcasters with clear standards for defining indecency will allow broadcasters to make reasonable and educated decisions about choosing material to broadcast during the safe harbor period.

VI. Impact of New Technology

In *Pacifica*, the Court justified regulating indecency on broadcast because of the unique characteristics of the broadcast medium, its “pervasive presence” in the airwaves and its “unique accessibility” to children. Today, however, the technological and media

¹⁴² John Eggerton, *F-Word Not Banned, Says FCC* BROADCASTING & CABLE, Jul. 7, 2004 at <<http://www.broadcastingcable.com/article/CA434719.html?display=Breaking+News&promocode=SUPP>>
¹⁴³ 536 F. Supp. 149 (D.D.C., 1982).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Mark McCarthy, *Broadcast Self-Regulation: The NAB Codes, Family Viewing Hour and Television Violence*, 13 CARDOZO ARTS & ENT LJ 667, 684 (1995).

environment is sufficiently different that these circumstances may not justify limiting indecent speech on broadcast more than on cable television, satellite television, satellite radio, or the internet.

The argument for eliminating indecency regulation on television is strong. Nearly 90% of all households in the US have access to television through cable or satellite.¹⁴⁷ For the vast majority of Americans, broadcast stations are just part of the televised content available. Cable and Satellite are not subject to indecency regulation because they are subscription services (one is less likely to unwittingly experience an indecent cablecast in their house than an indecent broadcast) and because they allow subscribers to filter out channels showing indecent content.¹⁴⁸

The V-chip allows television viewers to filter out content that may be indecent. Section 551 of the Telecommunications Act of 1996 encouraged the broadcast and cable industry to "establish voluntary rules for rating programming that contains sexual, violent or other indecent material about which parents should be informed before it is displayed to children," and to voluntarily broadcast signals containing these ratings.¹⁴⁹ Televisions equipped with the v-chip allow parents to block undesirable programming at the time it enters the home.

All televisions sold in the US since Jan. 1, 2000 are equipped with the V-chip. Initially, parents were enthusiastic about the prospect of the v-chip. A 1999 Kaiser family foundation survey found that 77% of parents surveyed would use the v-chip to block shows they didn't want their children to watch.¹⁵⁰ Yet, in 2004, usage of the V-chip stands at fewer than 15% of households, even though 74% have a v-chip equipped television.¹⁵¹ Researchers from the Annenberg Public Policy Center gave V-chip equipped television sets to families in Philadelphia and instructed the families on how to use the v-chip. After one year, only 30% of the families ever tried using the V-chip and only 8% of the families used the blocking feature regularly.¹⁵²

¹⁴⁷ Michael Grebb, *Uncle Sam Wants Your Airwaves*, WIRED NEWS, Sep. 22, 2004, at <<http://www.wired.com/news/politics/0,1283,65041-2,00.html>> (last checked Dec. 19, 2004).

¹⁴⁸ 529 U.S. at 807.

¹⁴⁹ Publ. Law 104-104 §551 (1996).

¹⁵⁰ *Campaign to Educate Parents About the V-Chip Announced*, KAISER FAMILY FOUNDATION, May 10, 1999 at <http://www.kff.org/entmedia/upload/14706_1.pdf> (last checked Dec. 19, 2004).

¹⁵¹ *Parents, Media and Public Policy*, KAISER FAMILY FOUNDATION, Sept. 23, 2004 at <http://www.kff.org/entmedia/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=46689>

¹⁵² Amy Jordan and Emory woodward, *Parents' Use of the V-Chip to Supervise Children's Television Use*. ANNENBERG PUB. POL. CENT. (Apr. 2003) at <http://www.annenbergpublicpolicycenter.org/05_media_developing_child/childrensprogramming/2003_Parentsuseofvchip.pdf>

The FCC is preparing to transition broadcast television from conventional analog television to new digital technology sometime during the 21st century.¹⁵³ DTV transition requires new sets or digital tuner converter equipment that will have the V-chip. At that point, all televisions capable of receiving broadcast television will have the V-chip and it will be as easy to filter broadcast television, as it is to filter cable television. Additionally, digital multicasting will ameliorate spectrum scarcity and allow broadcasters to increase the number of channels of content. Multicasting will also allow broadcasters to offer detailed metadata about the programs on subchannels. This data may include detailed information about potentially indecent content.

These new technological developments in broadcast tend to favor ending the regulation of indecency on broadcast media. Broadcast licensees incur many more affirmative and negative content-based obligations than comparable cable or satellite services.¹⁵⁴ Christopher S. Yoo argues that these technological developments make not only the *Pacifica* standard obsolete, but the entire technology-specific approach to First Amendment regulation.¹⁵⁵ This shift signals the end of the public trustee model for broadcasting.¹⁵⁶

Pervasiveness does not justify unique treatment for broadcast, because cable is just as ubiquitous. However, broadcasters do obtain a broadcast license and the rights to valuable spectrum from the public and should have some obligation to serve the public. The safe harbor does serve a public policy by making a pragmatic decision to offer parents a set of “safe” channels that children can watch without concerns about indecency.¹⁵⁷

Although the current media and technological ecosystem may no longer justify the need for indecency regulations, until Congress revokes the power to regulate indecency (or the Supreme Court finds that power to be unconstitutional), the FCC must exercise this power in the way that is least restrictive of First Amendment rights. In order to meet this goal the Commission should offer a new set of clear policy guidelines illustrating the boundaries of current indecency law. Reintroducing structural media ownership regulations should create more precedent applying indecency regulations, because the FCC will be forced to issue reasoned and principled decisions rather than

¹⁵³ See 47 U.S.C. 309(j)(14), Grebb, *supra* note X,

¹⁵⁴ Sherille Ismail, *Parity Rules: Mapping Regulatory Treatment of Similar Services*, FED. COMM. L.J. 447, 465 (2004).

¹⁵⁵ Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L. J., 245,292 (Jan. 2003).

¹⁵⁶ *Id.*

¹⁵⁷ Jack M. Balkin, *The FCC's authority to regulate indecency*, BALKINIZATION, Nov. 19, 2004 *at* <<http://balkin.blogspot.com/2004/11/fccs-authority-to-regulate-indecency.html>> (last visited Dec. 19, 2004).

blanket consent decrees. Finally, the Commission should investigate the possibility of establishing its own monitoring operations rather than relying on outside ideologically driven organizations to find examples of offensive broadcasts.

While Congress would promote First Amendment interests by removing the authority of the FCC to regulate broadcast indecency, a Congress that is more conservative than the one that sought to impose stricter indecency regulations and harsher penalties for broadcasting indecency seems unlikely to change direction.