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S!*t, P*@s, C*^t, F*#k, C*@!s*&!er, M*!#$*@!*#^r, T*!s - The FCC's Crackdown on Indecency

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*S!*t, P*@s, C*^t, F*#k, C*@!s*&!er, M*!#$*@!*#^r, T*!s* – The FCC's Crackdown on Indecency

By Lindsay Weiss*

I. OBSCENITY, INDECENCY, AND PROFANITY

The Federal Communications Commission (FCC) is given statutory authority under 18 U.S.C. § 1464 to regulate the broadcast of any obscene, indecent, or profane material.[1] Although obscene speech is not protected by the First Amendment of the U.S. Constitution, courts have held that indecent material is protected under the First Amendment; therefore, indecent material cannot be banned entirely by the FCC.[2] Similarly, profane language is also protected under the First Amendment and the FCC may regulate (but not prohibit) the language.[3] The FCC utilizes its subjective definitions of the three types of speech in deciding whether a broadcasting network has violated its regulations.[4] In accordance with the Supreme Court of the United States, the FCC looks at a three-prong test to determine whether material is obscene:

> (1) an average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient interest (i.e. material

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1. 18 U.S.C. § 1464 (2006).

2. FCC Consumer Facts, *Obscene, Indecent and Profane Broadcasts,* http://www.fcc.gov/cgb/consumerfacts/obscene.html (last visited Oct. 6, 2008).

3. *Id.*

4. FCC Frequently Asked Questions, *Obscenity, Indecency & Profanity,* http://www.fcc.gov/eb/oip/FAQ.html (last visited Oct. 6, 2008).

> having a tendency to excite lustful thoughts); (2) the material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law; and (3) the material, taken as a whole, must lack serious literary, artistic, political, or scientific value.[5]

The FCC defines indecent material as information containing sexual or excretory material which does not rise to the level of obscenity.[6] Since the courts have held that indecent material cannot be banned entirely, the FCC has limited the broadcast of indecent material to times of day when children are least likely to be watching.[7] In determining whether material is indecent, the FCC must determine whether the material is "patently offensive" by analyzing three factors:

> (1) whether the description or depiction is explicit or graphic; (2) whether the material dwells on or repeats at length descriptions or depictions of sexual or excretory organs; and (3) whether the material appears to pander or is used to titillate or shock. No single factor is determinative. The FCC weighs and balances these factors because each case presents its own mix of these, and possibly other, factors.[8]

Lastly, profane language "includes words that are so highly offensive that their mere utterance" may amount to a nuisance.[9] Profane language is regulated in the same way as indecent material; it is prohibited between the hours of 6:00 a.m. and 10:00 p.m.[10] When a broadcast violation is found, the FCC has the authority to issue

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5. *Id.*

6. *See id.*

7. *See id.*

8. *See id.* The FCC has established that children are typically part of the audience from 6:00 a.m. to 10:00 p.m.. *Id.* Thus, the FCC has prohibited indecent programming on broadcast television during these hours. *Id.*

9. *Id.*

10. *See id.*

fines, and offenders may be subject to up to two years imprisonment.[11]

The purpose of this comment is to evaluate the FCC's indecency regulations and to examine whether these regulations are serving its purpose in strengthening our society. This comment will discuss examples of actions taken by the FCC in which the FCC analyzed content being broadcast. It will also determine whether the Commission acts fairly in all situations, or whether the FCC holds a biased viewpoint in certain situations.[12]

II. WELCOME TO THE FCC

The FCC was established by the Communications Act of 1934[13] with the purpose of regulating interstate and international communications by radio, television, wire, satellite, and cable.[14] As one of the seven operating bureaus of the FCC, the Media Bureau's purpose is to regulate AM and FM radio stations, television broadcast stations, cable television, and satellite services.[15] Thus, one of the main goals of the FCC is to regulate obscene, indecent, and profane material broadcast over the public airwaves.[16]

> Title 18 of the United States Code, section 1464, prohibits the utterance of 'any obscene, indecent or profane language by means of radio communication.' Consistent with a subsequent statute and court case, the Commission's rules prohibit the broadcast of indecent material during the period of 6 a.m. and 10

11. FCC Enforcement Bureau, *Regulation of Obscenity, Indecency, and Profanity*, http://www.fcc.gov/eb/oip (last visited Oct. 6, 2008).

12. *See infra* note 148 and accompanying text.

13. 47 U.S.C. § 151 (2008).

14. About the FCC, http://www.fcc.gov/aboutus.html (last visited Oct. 6, 2008).

15. *Id.* The other six bureaus are: Consumer and Governmental Affairs Bureau; Enforcement Bureau; International Bureau; Wireless Telecommunications; Public Safety and Homeland Security Bureau; and Wireline Competition Bureau. *Id.*

16. *See generally id.*

> p.m. FCC decisions also prohibit the broadcast of profane material between 6 a.m. and 10 p.m.[17]

In *Roth v. United States*, defendant Samuel Roth was convicted of sending nude pornography by mail for advertising and publication.[18] Roth ran a literary business in New York and was convicted for violating a federal statute outlawing sending obscene and lewd materials through mail.[19] The Supreme Court of the United States affirmed Roth's conviction, acknowledging that obscene material is not protected by the First Amendment of the U.S. Constitution.[20] Similarly, in *Alberts v. California*, the defendant also conducted a mail-order business and was convicted for selling and publishing lewd and obscene material.[21] The defendant was convicted under a state penal code which prohibited the selling, publishing, or distributing of obscene or indecent material.[22] In both *Roth* and *Alberts*, the defendants challenged the constitutionality of criminal obscenity statutes and were unsuccessful; the criminal obscenity statutes remained intact.[23]

Further, the Court in *Miller v. California* reaffirmed *Roth* and *Alberts*, in ruling that the federal government may ban material that is found to be obscene.[24] In *Miller*, defendant Marvin Miller operated one of the West Coast's largest mail-order businesses dealing in sexually explicit material and had conducted a mass mailing campaign to advertise the sale of illustrated books called "adult material."[25] Miller's actions constituted a violation of the California Penal Code, which made it a misdemeanor to knowingly distribute obscene material.[26] The suit arose from a complaint by a restaurant

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17. FCC, Frequently Asked Questions, *supra* note 4 (last visited Oct. 6, 2008).
18. *See* Roth v. United States, 354 U.S. 476 (1957).
19. *See id.*
20. *See generally id.*
21. *See generally* Alberts v. California, 354 U.S. 476 (1957).
22. *Id.*
23. *See generally Roth*, 354 U.S. 476; *see also Alberts*, 354 U.S. 476.
24. *See generally* Miller v. California, 413 U.S. 15 (1973).
25. *See id.* at 15.
26. *See id.* at 16-17.

manager who received five unsolicited brochures from Miller.[27] The brochures consisted of pictures and drawings explicitly depicting men and women engaging in various sexual activities, often with their genitals displayed.[28] The Court acknowledged the dangers of regulating any form of expression and held that the regulation of obscene material must be carefully reviewed and limited.[29] The *Miller* court set forth three criteria to determine whether displayed work can be subject to state regulation.[30]

Federal Communications Commission v. Pacifica Foundation is the landmark Supreme Court decision that defined the power of the FCC over indecent material as applied to broadcasting.[31] In *Pacifica*, a father complained that his son overheard George Carlin using "filthy words" during a broadcast of Carlin's routine on one of Pacifica's radio stations.[32] Pacifica received a sanction from the FCC for broadcasting indecent material.[33] The Court found that there was a compelling governmental interest in protecting children from patently offensive material and gave the FCC the authority to prohibit such broadcasts during hours in which children would likely to be listening.[34] The Supreme Court focused on seven "dirty" words that they deemed to be indecent.[35] Once the Court determined that the words were indecent, the Court held it an offense to air those

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27. *See id.* at 17-18.

28. *See id.* at 18.

29. *See id.* at 36.

30. *See Miller,* 413 U.S. at 39. The Court added a three-pronged test:

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken 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.

Id.

31. *See* Federal Commc'n Comm'n v. Pacifica Found., 438 U.S. 726 (1978).

32. *Id.* at 726. Carlin's dialogue included some of the seven dirty words: sh*t, p*ss, c*nt, f*ck, c*cks*ck*r, m*th*rf*ck*r, and t*ts. *Id.*

33. *See id.*

34. *See id.* at 729.

35. *See id.*

words on the public airwaves.[36] It was not until the 1980s that the FCC expanded the definition of indecency to reach beyond the seven "dirty" words, and began to find crude radio personalities and media moguls in violation for displaying indecent material, even if they did not use one of the seven dirty words.

President Ronald Reagan in 1987 eliminated the Fairness Doctrine, which was an FCC regulation requiring broadcasters to address controversial issues of public importance.[37] Under this doctrine, the stations were required to allow opportunity for discussion of contrasting viewpoints on issues of public importance.[38] Ultimately, under the doctrine, broadcasters had the obligation to cover issues of public interest in a manner that presented both sides.[39] By the 1980s, however, many journalists and reporters thought the FCC regulation was unconstitutional; the arguments put forward were that the policy affected individuals' freedom of speech and of the press, and their right to address stories in the manner they deemed appropriate.[40] The removal of the Fairness Doctrine was due to President Reagan's belief that the policy failed to serve the public interest.[41] President Reagan believed that by forcing broadcasters to present both sides of controversial stories, the FCC was actually limiting broadcasters' coverage of the controversial issues of public importance.[42]

In 1990, Congress enacted the Children's Television Act (CTA),[43] which aimed to increase the amount of educational programming on television.[44] After conducting studies regarding the

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36. *See Pacifica Found.*, 438 U.S. at 729 (1978).

37. PBS, History of the Fairness Doctrine, http://www.pbs.org/now/politics/fairness.html (last visited Oct. 6, 2008).

38. *See id.*

39. Senate Republican Policy Committee, The Fairness Doctrine: Unfair, Outdated, and Incoherent, http://rpc.senate.gov/_files/072407FairnessDoctrinePL.pdf (last visited Oct. 6, 2008)

40. *See id.*

41. *See id.*

42. *See id.*

43. *See* 47 U.S.C. § 303(a) (2006).

44. FCC Consumer Facts, *Children's Education Television,* http://www.fcc.gov/cgb/consumerfacts/childtv.html (last visited Oct. 6, 2008).

impact of television on children, Congress found that children spent approximately three hours per day watching television.[45] The CTA required broadcast television stations to offer educational and informational programming for children.[46] Furthermore, satellite services, cable operators, and television licensees had a duty to limit the amount of commercials aired during children's programs.[47] Under the CTA, television stations had to: "[1] provide parents and consumers with advance information about core programs being aired; [2] define the type of programs that qualify as core programs; and [3] air at least three hours per week of core educational programming."[48] Core programming is programming that is designed to serve the interest of children sixteen and under.[49] Core programming must be, "[1] at least thirty minutes in length; [2] aired between the hours of 7:00 a.m. and 10:00 p.m.; [3] a regularly scheduled weekly program."[50] In addition, the FCC adopted a rule requiring commercial television stations to file quarterly reports with the Commission regarding their educational programming.[51] Congress' enactment of the CTA illustrates the government's goal in making television more beneficial, and less harmful, for children.

In 1992, Congress adopted the Public Telecommunications Act, requiring the FCC to establish a safe harbor time for broadcasters to have the ability to air indecent material.[52] "The 'safe harbor' refers to the time period between 10 p.m. and 6 a.m., local time. During this time period, a station may air indecent . . . material."[53] In 1996, Congress amended the 1934 Telecommunications Act, which was an attempt to make the Internet a safer tool for children to use.[54] Congress felt that obscene and indecent content on the Internet

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. FCC Consumer Facts, *supra* note 44.

51. *Id.*

52. *See* Action for Children's Television v. FCC, 58 F.3d 654 (D.C.C. 1995) (en banc), *cert. denied*, 516 U.S. 1043 (1996).

53. FCC Frequently Asked Questions, *supra* note 4.

54. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), *available at* http://www.fcc.gov/telecom.html.

should be regulated by the FCC as it is with public radio and television.[55] President Bill Clinton signed the bill on February 8, 1996, imposing criminal sanctions on anyone who:

> (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.[56]

Following the Janet Jackson wardrobe malfunction during the halftime show of Super Bowl XXXVIII, the FCC began to impose stricter penalties upon violators of the indecency regulations. In 2006, President George W. Bush enacted the Broadcast Decency Enforcement Act of 2005, which stiffened the penalties for each indecency regulation violation.[57] Through this new legislation, the FCC was now able to fine a violator up to $325,000 for each indecency regulation violation.[58] Prior to this Act, the FCC was only able to fine up to $32,500 per violation; the new law increased the

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55. *Id.*

56. *Id.*

57. Press Release, The White House , President Signs the Broadcast Decency Enforcement Act of 2005, *available at* http://www.whitehouse.gov/news/releases/2006/06/20060615-1.html (last visited Oct. 6, 2008); *see also* Robert Combs, *Christian Coalition of America,* WASHINGTON WEEKLY REVIEW, June 17, 2006. "In other words, the language is become coarser during the times when its [sic] more likely children will be watching television. It's a bad trend, a bad sign." President Bush added, "By allowing the FCC to levy stiffer and more meaningful fines on broadcasters who violate decency standards, this law will ensure that broadcasters take seriously their duty to keep the public airwaves free of obscene, profane and indecent material. *Id.* The house voted 389-38 to pass the Broadcast Decency Enforcement Act. *Id.*

58. Combs, *supra* note 57.

penalty tenfold.[59] The government enacted this legislation as a response to the corruption of children from television programs.

One study found that during the hours between 8:00 p.m. and 9:00 p.m.—the time when most families are watching television—the use of profanity on television shows increased by 95 percent from 1988 to 2002.[60] In other words, the language was becoming coarser during the times when it was more likely children were watching television. Since 2000, the number of indecency complaints received by the FCC increased from just hundreds per year to hundreds of thousands per year.[61]

President Bush believed it was the government's duty to regulate what children were viewing on television.[62] He stated that it was the duty of the FCC to impose penalties upon violators of the decency regulations and assumed that it was their responsibility as the executive branch to adhere to people's expectations of good-natured television.[63]

The FCC supports the voluntary ratings system most broadcasters have agreed to follow; which include placing the rating (TV-Y; TV-7; TV-G; TV-PG; TV-14; or TV-MA) in the corner of the screen for the first fifteen seconds of the program.[64] The rating system's goal is

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59. *Id.* The executive branch found that the $32,500 maximum penalty fee was a meaningless amount for large broadcasting companies. *Id.* Congress wanted to make a statement to the broadcasting companies; therefore, they set the new maximum penalty at $325,000. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. FCC TV Rating & Channel Blocking, http://www.fcc.gov/eb/oip/RateBlock. html (last visited Oct. 6, 2008).

> (TV-Y, (All Children) found only in children's shows, means that the show is appropriate for all children; TV-7, (Directed to Older Children) found only in children's shows, means that the show is most appropriate for children age 7 and up; TV-G (General Audience) means that the show is suitable for all ages but is not necessarily a children's show; TV-PG (Parental Guidance Suggested) means that parental guidance is suggested and that the show may be unsuitable for younger children (this rating may also include a V for violence, S for sexual situations, L for language, or D for suggestive dialog); TV-1U4 (Parents Strongly Cautioned) means that the show may be unsuitable for

to help parents monitor television shows that their children watch, and to warn viewers of the type of material they may view during each program.[65] The FCC utilizes the rating system and the use of time slots to protect minors against indecent material.[66] Furthermore, parents can also block unsuitable programs by using a V-chip, which the FCC requires all new television sets that are thirteen inches or larger to contain as of January 1, 2000.[67] "The V-chip is a technology [built into a television set] that lets parents block television programming that they don't want their children to watch."[68] If a network violates the FCC's regulations, they can be fined by the FCC from $7,000 to $325,000 per violation.[69] In determining the amount to fine the network, the FCC looks at such factors as the "nature, circumstances, extent and gravity of the violation."[70] "Any person or entity that the FCC determines has willfully or repeatedly violated the indecency, obscenity and/or profanity prohibitions is potentially liable for a forfeiture penalty, which is a monetary sanction paid to the United States Treasury."[71]

III. THE FCC WILL WASH YOUR MOUTH OUT WITH SOAP AND DOLLAR BILLS

Radio personality Howard Stern, also known as the "King of All Media," has been a controversial figure in the broadcasting world, and his vulgarity has brought vast attention to the content regulations imposed by the FCC.[72] Stern is best known for his crude nature and

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> children under 14 (V, S, L, or D may accompany a rating of TV-14); and TV-MA (Mature Audience Only) means that the show is for mature audiences only and may be unsuitable for children under 17 (V, S, L, or D may accompany a rating of TV-MA)).

Id.

65. *See generally id.*

66. *See generally id.* For example, "the FCC imposed monetary sanctions for indecency violations up to $1,183,000" in 2004. *See id.*

67. *See id.*

68. *Id.*

69. FCC, Frequently Asked Questions, *supra* note 4.

70. *See id.*

71. *See id.*

72. Rita Kempley, *Howard Stern: Less Than the Sum of His 'Parts'*, WASH. POST, Mar. 7, 1997, at B01.

constant battles with the FCC regarding his often vulgar language on his morning radio show.[73] The "King of All Media" went so far as to star in an autobiographical film, "Private Parts," depicting the suffocation he felt from the FCC.[74] Stern became a target for the Commission due to his consistent controversial remarks during his radio show, and in 1992, Stern and his Los Angeles radio outlet, KLSX, were fined $100 and $5,000 for twelve counts of "verbal indecency" during his morning show.[75]

The Howard Stern Show consists of Howard Stern and his sidekick, Robin Quivers, talking about "sex, ethnic humor, the news and whatever else happens to come to mind—mostly complaints, about wife, staff, celebrities, politicians and the F.C.C."[76] The FCC fined Howard Stern for talking about masturbation, defecation and other related topics, under the indecency regulations. [77] Angered by the regulations, Stern challenged the FCC by saying "Hey F.C.C, penis." during one of his broadcasts. [78]

From 1990 to 2004, the FCC proposed $4.5 million in fines for broadcast indecency, more than half of which was assessed to Howard Stern's radio stations.[79] In 2004, the FCC fined Clear Channel Communications for airing a segment on Howard Stern's show in which he discussed anal sex and the sex lives of the hosts of the show.[80] The hosts of the show also made up a fictional character called "Sphincterine" which was a phony product intended for use of

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73. *See id.*

74. *See id.*

75. Jon Pareles, *Shock Jocks Shake Up Uncle Sam*, N.Y. TIMES, Nov. 15, 1992, at 32.

76. *Id.*

77. *Id.* Stern was fined because his conversation violated laws under broadcasting "indecent material at times when there is a reasonable risk that children may be in the audience." *Id.*

78. *See id.*

79. John Dunbar, *Indecency on the Air: Shock-Radio Jock Howard Stern Remains 'King of All Fines'*, Center for Public Integrity, Apr. 9, 2004, *available at* http://www.publicintegrity.org/telecom/report; *see also In re* Clear Channel Broad. Licenses, Inc., 19 F.C.C.R. 6773 (2004).

80. *See In re* Clear Channel Broad. Licenses, Inc., 19 F.C.C.R. 6773.

anal hygiene.[81] In its discussion of whether the material was patently offensive, the FCC conducted the following analysis:

> We find that the material involving a discussion of the sexual practices, including anal sex, between certain of the show's cast members, is patently offensive. As for the second segment, we find that the discussion of "Sphincterine," a product purportedly developed for maintaining anal and genital hygiene, is patently offensive. In the second segment, two individuals uttered apparently indecent material, whereas in the first segment one individual uttered apparently indecent material.[82]

Because of Stern's morning show, the FCC imposed a $495,000 fine against six Clear Channel stations in 2004.[83] Fed up with the censorship, Stern left terrestrial radio and announced in 2004 that he had signed a five year contract with Sirius, a satellite radio service.[84] Stern's budget of $500 million given to him by Sirius was enticing, but was likely to be less valuable than the removal of regulation by the FCC.[85] As of now, the FCC does not have jurisdiction to regulate Sirius satellite radio (or any other satellite radio service).[86]

Part of the FCC's crackdown upon Howard Stern stemmed from incidents like the Janet Jackson wardrobe malfunction at Super Bowl XXXVIII, and entertainer Bono's profanity-filled acceptance speech during the Golden Globes. Jackson's breast was exposed while she was performing a dance routine with singer Justin Timberlake, and

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81. *Id.* at 6779.

82. *Id.*

83. *Id.*

84. *See* Dunbar, *supra* note 79.

85. Daren Fonda, *Howard Stern: The $500 Million Man,* TIME, Dec. 16, 2005, *available at* http://www.time.com/time/business/article/08599114176900.html. Satellite radio is subscription-based and is largely unregulated. *Id.* Because users have to pay for the service, the FCC has a much more difficult time regulating what is spoken upon the airwaves. *See* Krysten Crawford, *Howard Stern Jumps to Satellite,* CNN, Oct. 6, 2004, http://money.cnn.com/2004/10/06/news/newsmakers/sternsirius/index.htm.

86. Fonda, *supra* note 85.

while accepting a Golden Globe, Bono exclaimed "This is really, really f------ brilliant."[87] During the Super Bowl's halftime show, Jackson and Timberlake were supposed to engage in a costume reveal, but the clothing Jackson was wearing malfunctioned and accidentally exposed her right breast.[88] "Performing together in a routine that had included a number of bump-and-grind moves, Timberlake reached across Jackson, flicking off the molded right cup of the bustier, leaving her breast bare except for a starburst-shaped decoration held in place by a nipple piercing."[89] Jackson and Timberlake both profusely apologized to the public and stressed that they did not intend to expose Jackson's body part on national television.[90] The FCC's Chairman, Michael Powell, told CNN that he was not convinced the incident was done wholly by accident.[91] Powell stated that he was watching the Super Bowl halftime show with his two young children and he found the incident "outrageous."[92] The White House commented on the incident as well, explaining that it was the government's view that it is important for families to be able to expect a high standard of morality while watching television.[93] Even the NFL Commissioner was embarrassed by the incident, and stated, "[t]he show was offensive, inappropriate and embarrassing to us and our fans."[94]

The public outrage over the Super Bowl's halftime show played a large part in the hefty fine imposed by the FCC.[95] Because CBS aired the Super Bowl, Viacom, the owner of CBS, was fined $550,000 for the breast incident.[96] Following the Super Bowl, the

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87. Joel Achenbach, *Dropping the F-Bomb,* WASH. POST, June 25, 2006, at B01.

88. *Apologetic Jackson Says 'Costume Reveal' Went Awry*, CNN, Feb. 2, 2004, http://www.cnn/com/2004/US/02/02/superbowl.jackson.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *See Apologetic Jackson Says 'Costume Reveal' Went Awry*, *supra* note 88.

94. *Id.*

95. *Id.*

96. Krysten Crawford, *Howard Stern Jumps to Satellite*, CNN, Oct. 6, 2004, *available at* http://money.cnn.com/2004/10/06/news/newsmakers/sternsirius/index.htm.

FCC received a record 540,000 complaints, which ultimately led the Commission in issuing a costly fine to CBS.[97] The FCC's reaction to the Jackson Super Bowl incident is evidence of the Commission's intention to make programming suitable for children during times that it is reasonable a minor would be viewing.

In contrast, however, the FCC did not penalize the broadcasting network of the "Golden Globes" when Bono chose to use an expletive during his acceptance speech.[98] The FCC explained that although Bono's use of the word "f------" was crude and offensive, it was not spoken in a manner to describe sexual or excretory organs, and therefore, could not be deemed patently offensive.[99] The chief officer of the FCC's enforcement bureau stated, "We have previously found that fleeting and isolated remarks of this nature do not warrant commission action." [100]

In 2004, however, the FCC reversed its own decision, stating that fleeting uses of the "F-word" and "S-word" are always sexual or excretory by nature,[101] and broadcasting companies are subject to fines if an indecent or obscene word was used in a fleeting manner.[102] The Commission's rationale was deterrence; if they allowed Bono's use of the "F-word" and did not penalize the

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97. Bruce Horovitz, *NFL Strives to Ensure Super-clean Super Bowl.* USA TODAY, Feb. 4, 2005, at A1. The total penalty of $550,000 is the largest fine levied against a television broadcaster. *Id.*

> 'As countless families gathered around the television to watch one of our nation's most celebrated events, they were rudely greeted with a halftime show stunt more fitting of a burlesque show,' said FCC Chairman Michael Powell. 'The show, clearly intended to push the limits of prime time television.'

FCC Fines CBS $550,000 for Super Bowl Show, MSNBC, Sep. 24, 2004, http://www.msnbc.msn.com/id/6071905.

98. *FCC OK's Bono's F-Word Slip*, CBS NEWS, Oct. 7, 2003, http://www.cbsnews.com/stories/2003/09/17/entertainment/main573729.shtml.

99. *Id.* The distinction regarding how the word is spoken "is a key test to measure whether a statement meets a federal standard for broadcast indecency." *Id.*

100. *Id.*

101. Matthew L. Gibson, *Second Circuit Sends 'Fleeting Expletive' Policy Back to the FCC*, WILEY REIN, 2007, http://www.wileyrein.com/publication_newsletters.cfm?id=11&publication_id=13183.

102. *Id.*

broadcasting company, other networks would use fleeting expletives on their television programs freely.[103] Even though the FCC did not fine the broadcasting network that aired the Golden Globes, they used the Bono example as a precedent of what they would be penalizing networks for in the future.[104]

In 2007, the Second Circuit Court of Appeals threw out the FCC's 2004 policy concerning fleeting expletives, holding that it was "arbitrary and capricious" and may not survive the First Amendment scrutiny test.[105] The Second Circuit demanded, in a 2-1 ruling, that the Commission provide a "reasoned analysis" for its new approach to indecency, obscenity, and profanity.[106] Fox Television was the plaintiff in the appeal against the FCC, but representatives of other networks submitted written arguments and were deemed interested parties in the action.[107] Fox's appeal stemmed from a regulation by the FCC during the live airing of the 2002 and 2003 Billboard Music Awards in which two celebrities uttered indecent language in a fleeting manner.[108] In 2002, singer Cher exclaimed, "People have been telling me I'm on the way out every year, right? So f--- 'em," and in 2003, reality show star Nicole Richie said, "Have you ever tried to get cow s--- out of a Prada purse? It's not so f------ simple."[109] In its holding, the Second Circuit explained that the FCC's argument about broadcasters using fleeting expletives if a policy was not enforced held little merit, since networks have not done so in the thirty years prior to the 2004 fleeting expletives policy.[110] Furthermore, the court held that using the "F-word" does not automatically invoke a sexual connotation as the Commission had argued.[111] The dissenting judge, Judge Leval, explained that he

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103. *Id.*

104. *Id.*

105. Larry Neumeister, *Court Says FCC's 'Fleeting Expletives' Policy is Arbitrary*, N.Y. DAILY NEWS, June 4, 2007, *available at* http://seattletimes.nwsource.com/html/nationworld/2003734489_webwhoops04.html.

106. *Id.*

107. *Id.*

108. *Id.*

109. Neumeister, *supra* note 105.

110. *Id.*

111. *Id.*

agreed at least with the majority in there determination that the fleeting use of the "S-word" should not be deemed indecent or obscene as the FCC argues.[112]

In a situation similar to Howard Stern's morning show controversy, the FCC fined Infinity Broadcasting Company $357,000 for allowing one of its shows to hold a contest where individuals were encouraged to engage in sexual acts in public.[113] The Commission conducted a three-prong analysis, and found that the participants described organs of a sexual nature and "[were] sufficient to render the material actionably indecent because the 'sexual [and] excretory import' of those references was 'unmistakable.'"[114] Further, "the descriptions of sexual and excretory activity and organs were not in any way isolated or fleeting" since the broadcast consisted of a lengthy discussion of the sexual organs and excretory activity.[115] Lastly, the Commission found that "the manner in which the station presented this material establish that the program was intended to pander, titillate, and shock its listeners."[116] Ultimately, the FCC came to a conclusion that Infinity Broadcasting Company allowed indecent material to be aired on their station, thus violating the indecency regulations.

Additionally, several television broadcast stations were fined, because they aired indecent material.[117] The CBS drama "Without a Trace" was fined by the FCC for airing an episode that depicted teenagers engaging in sexual intercourse with one another, even though no nudity was shown on screen. [118] "The material contains numerous depictions of sexual conduct among teenagers that are portrayed in such a manner that a child watching the program could

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112. Gibson, *supra* note 101. "In a concluding footnote, Judge Leval explained that he did not find it necessary to consider the application of the Commission's policy to the "S-word.'" *Id.* "To illustrate this point, Judge Leval referred to the current regulatory treatment of excrement: use of the 'S-word' triggers an indecency analysis, but stations are free to broadcast 'crap.'" *Id.*

113. *See In re* Infinity Broad. Operations, Inc., 18 F.C.C.R. 19954 (2003).

114. *Id.* at 19961.

115. *Id.*

116. *Id.* at 19962.

117. *In re* Complaints Against Various Television Licensees Concerning Their Dec. 31, 2004 Broad. of the Program "Without a Trace", 21 F.C.C.R. 2732 (2006).

118. *Id.*

easily discern that the teenagers shown in the scene were engaging in sexual activities, including apparent intercourse."[119] Both prime-time dramas and reality shows have also been fined by the FCC.[120] Fox's reality program, "Married by America," was fined by the FCC for airing indecent material that contained contestants licking whipped cream off strippers' bodies and a man on all fours in his underwear while strippers spanked him.[121] The program obscured the nudity, but the FCC felt that "the sexual nature of the scenes was inescapable."[122] Fox argued that it electronically obscured the nudity, which removed the indecent nature of the program; however, the FCC stated that "merely obscuring (or '[pixilating]') sexual organs does not necessarily remove a broadcast from our indecency analysis."[123] "The Oprah Winfrey Show," however, was not fined for indecent material, when the show aired an examination of teenage sexual practices in which guests spoke about oral and anal sex.[124] The FCC held that the material was aired for educational purposes, rather than to induce sexual thoughts amongst its viewers.[125] In its analysis, the FCC analyzed whether the material was patently offensive as measured by contemporary community standards for the broadcast medium.[126] The FCC decided that the information was designed "to inform viewers about an important topic."[127] Furthermore, "It would have been difficult to educate parents regarding teenagers' sexual activities and alerting parents to the little-known terms . . . [without using the words] that many teenagers use to refer to them."[128] The FCC found the material not patently

119. *Id.* at 2735-36.

120. *See In re* Complaints Against Various Licensees Regarding Their Broad. of the Fox Television Network Program "Married By America" on Apr. 7, 2003, 19 F.C.C.R. 20191 (2004).

121. *Id.* at 20194.

122. *Id.*

123. *Id.*

124. *Id.* at 2705-06.

125. *See In re* Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005, 21 F.C.C.R. 2664 (2006).

126. *Id.* at 2706.

127. *Id.*

128. *Id.*

offensive, and therefore, not indecent.[129] This illustrated the Commission's viewpoint that material which is deemed indecent in one setting, may be allowed if the circumstances for the broadcast serve a public purpose.[130] However, it seems as though the FCC only regulates material that is used in a crude manner. If the characters of a television program use an indecent word jokingly, for example, it seems more unlikely the Commission will fine the broadcasting company.

Some may argue, however, that a child cannot make the distinction between a vulgar word that is used as a joke and a vulgar word that is used to incite sexual thoughts. It may be the case that when a child hears the word, the child would repeat the word and mimic the behavior, regardless of the circumstances or setting.

When ABC wanted to air "Saving Private Ryan" to commemorate war veterans on Veterans Day in 2004, the network was wary of the violence and language in the film because it would likely be considered indecent by the FCC.[131] Even though the airing had the purpose of honoring war veterans, ABC was concerned with being fined and having trouble renewing their broadcasting license.[132] In evaluating the situation, the FCC decided to allow ABC to air "Saving Private Ryan" without fining them for the indecent material and language in the film.[133] Although the Commission acknowledged the indecent material contained in the movie, the FCC decided that the language was vital to the film's artistic message and

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129. *See id.*

130. *See Id.*

131. *See generally* Lisa de Moraes, *'Saving Private Ryan': A New Casualty of the Indecency War*, WASH. POST, Nov. 11, 2004, at C01.

132. *See id.*

> Without an advance waiver from the FCC . . . we're not going to present the movie in prime time . . . Under strict interpretation of the indecency rules we do not see any way possible to air this movie. To be put in this position is unfortunate, and reflects the timidity that exists at the commission right now.

Id.

133. *See In re* Complaints Against Various Television Licensees Regarding Their Broadcast on Nov.11, 2004, of the ABC Television Network's Presentation of the Film 'Saving Private Ryan', 20 F.C.C.R. 4507 (2005).

censoring the language would remove the integral aspect of the story.[134]

> [T]he dialogue, including the complained-of material, is neither gratuitous nor in any way intended or used to pander, titillate or shock. Indeed, it is integral to the film's objective of conveying the horrors of war through the eyes of these soldiers, ordinary Americans placed in extraordinary situations. Deleting all of such language or inserting milder language or bleeping sounds into the film would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers. In short, the vulgar language here was not gratuitous and could not have been deleted without materially altering the broadcast.[135]

The most recent dispute between ABC and the FCC was over an episode of "NYPD Blue" in which a young boy walked in on a nude woman about to take a shower.[136] After receiving "numerous complaints" regarding the scene, the FCC sought $27,500 from each of the fifty-two stations that aired the scene in the 9:00 p.m. to 10:00 p.m. time slot.[137] Under FCC regulations, public channels cannot broadcast obscene material between 6:00 a.m. and 10:00 p.m.[138] Any of the stations that aired this specific episode of "NYPD Blue" between 9:00 p.m. and 10:00 p.m. were in clear violation of the obscenity and indecency laws imposed by the FCC.[139] Stations in the Eastern and Pacific Time zones were not fined; since they aired the

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134. *Id.* at 4512-13.

135. *See id.*

136. *Nudity May Cost ABC $1.4 Million*, L.A. TIMES, Jan. 26, 2008, at C2.

137. *Id.*

138. *Id.*

139. *Id.* "The law is simple," FCC Commissioner Deborah Taylor Tate said. "If a broadcaster makes the decision to show indecent programming, it must air between the hours of 10 p.m. and 6 a.m. This is neither difficult to understand nor burdensome to implement." *Id.*

episode after 10:00 p.m.[140] The Commission sought a total amount of $1.4 million for the broadcast of the woman's nude buttocks.[141]

The different responses by the FCC towards similar incidents exemplifies the FCC's goal in removing material from public airwaves that have an intention to describe sexual organs or excretory material, rather than words that are said in a fleeting or an educational manner. Furthermore, the FCC is more likely to allow the material to be broadcast if the indecency is integral to the program or film.[142] The Commission distinguished the "Saving Private Ryan" profanity from the Bono "Golden Globes" situation because at the Golden Globes, the use of the F-word was "shocking and gratuitous" and had no claim of "any political, scientific or other independent value."[143] The FCC decided the vulgar language in "Saving Private Ryan" held artistic merit for the film.[144] This distinction by the Commission could be seen as flawed because it does not take into account whether children would make the distinction between material with artistic merit and material without such merit. Perhaps then, the FCC should focus on fleeting words, as well as words with a sexual intent.

A. Say What You Want, There Won't be a Fine ("Hey FCC, Penis" – Howard Stern)

The FCC's guidelines towards what it considers to be patently offensive, and therefore indecent, do not allow vulgar words that many in the community would find offensive. There are some words, however, the FCC does allow, and though these words might be offensive to some, they are not offensive *enough* for the FCC to bring action against broadcasters who use them.[145] The FCC finds

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140. *Id.*

141. *Id.*

142. *See In re* Complaints Against Various Television Licensees Regarding Their Broadcast on Nov.11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan," 20 F.C.C.R. at 4507, 4514.

143. *See id.*

144. *See id.*

145. *See In re* Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material, 20 F.C.C.R. 1931 (2005). The FCC analyzed various television shows to determine

words that do not describe sexual organs and are not meant to be excretory allowable and reasonable to broadcast: "we find that fleeting uses of the words 'hell,' 'damn,' 'orgasm,' 'penis,' 'bastard,' and 'bitch,' . . . are not profane and do not represent graphic descriptions of sexual or excretory organs or activities that the material is rendered patently offensive by contemporary standards for the broadcast medium."[146] In an episode of the television show "Scrubs," a woman moaned while a doctor gave her a pelvic exam.[147] A character on the show said, "You're not the first person to give a patient an orgasm during a pelvic exam."[148] The FCC did not fine the television show for this, since the word "orgasm" is not considered indecent.[149] In an episode of "Will & Grace", one of the characters exclaims that she is going to have sex with another character, and tells someone to put on a condom – the FCC did not fine the network[150]

The FCC does not find it to be indecent for characters to use the words "bitch," "bosom," and "whore."[151] On a "Friends" episode, characters use the words "hell," "crap," "pissed," "bastard," and the phrase 'son of a bitch.'[152] The FCC did not fine the television show for airing these words.[153] Even partial nudity scenes can sometimes

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whether indecent material was aired, as the Parents Television Council claimed. *Id.* Ultimately, the FCC stated that in order for the Commission to find something patently offensive, and therefore indecent, there must be reference to sexual organs or activities and it must be designed to shock the conscience:

> To support a finding of indecency, we must determine whether any of the material cited by PTC meets the Commission's definition of "patently offensive" - namely, does any of the material graphically or explicitly depict or describe sexual organs or activities, does any of the material dwell on or repeat depictions or descriptions of sexual organs or activities, and is any of the material designed to pander, titillate, or shock.

Id. at 1937-38.

146. *Id.* at 1938.

147. *Id.* at 1936.

148. *Id.*

149. *Id.* at 1931, 1936.

150. *Id.*

151. *Id.*

152. *Id.*

153. *See generally id.*

pass FCC scrutiny. An episode of the cartoon "King of the Hill" aired partial nudity with a boy's buttocks; the FCC held it valid, due to the fact that the Commission did not find the material to be sufficiently graphic or explicit.[154]

IV. WHAT ABOUT FREEDOM OF SPEECH?

Because the FCC is regulating the content of speech, the courts must use a strict scrutiny test in deciding whether the regulation is constitutional.[155] Freedom of speech is a fundamental right protected by the First Amendment which states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The government must have a compelling interest in regulating the speech and it must use the least restrictive means of doing so.[156] If other less restrictive alternatives are available, the regulation will be deemed unconstitutional.[157]

Many critics of the FCC argue the Commission is infringing on First Amendment rights by censoring material on the public airwaves. For example, there has been great discussion regarding the Janet Jackson Super Bowl incident and whether or not she was within

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154. *Id.* at 1937. The Commission stated the buttocks were shown in a fleeting manner, and therefore was not shown with the intent to incite sexual thoughts. *Id.*

155. *See generally* U.S. Const. amend. I.

156. *See generally id.*

157. There have been various cases regarding freedom of speech and different forms of speech that may or may not be regulated. *See generally* New York Times v. Sullivan, 375 U.S. 254 (1965) (discussing libel and slander in terms of defamation); *Roth*, 354 U.S. 476 (1957) (discussing obscenity and pornography); *Miller*, 413 U.S. 15 (1973) (discussing obscenity and pornography); Brandenburg v. Ohio, 395 U.S. 444 (1969) (discussing political speech and war protests); Tinker v. Des Moines Indep. Cmty. School Dist., 393 U.S. 503 (1969) (discussing political speech and war protests); United States v. O'Brien, 391 U.S. 367 (1968) (discussing symbolic speech); Gitlow v. New York, 268 U.S. 652 (1925) (discussing the clear and present danger test).

her First Amendment rights.[158] In 2000, however, the Supreme Court ruled that prohibiting nude dancing in public did not infringe upon the dancers' First Amendment rights, since they were using the least restrictive means of prohibiting their erotic dancing.[159] In *Erie v. Pap's A.M.*, the Supreme Court explained that the dancers could still convey their erotic message without being fully nude.[160] Therefore, Janet Jackson could have conveyed her provocative message through her dancing without bearing her breast at all (even though it was done accidentally).

In *United States v. Playboy Entertainment Group, Inc.*, Playboy argued that the 1996 Telecommunications Act violated its First Amendment rights by requiring Playboy to fully scramble or block sexually explicit channels or to only display them during the safe harbor time of 10 p.m. to 6 a.m.[161] The Supreme Court held that the Commission was not using the least restrictive means available in achieving their goal of protecting minors from sexually explicit content.[162] The Supreme Court declared a portion of the 1996 Telecommunications Act unconstitutional and held that the FCC does not have jurisdiction over cable television in the way the Commission does with public television.[163] Because cable television gives parents the opportunity to block channels or programs, the least restrictive means of prohibiting children from seeing sexually explicit material is already being utilized and no further action is necessary.[164]

Courts have distinguished cases from *Playboy* when the audience is not as susceptible to being surprised by indecent or obscene material.[165] In *Sable Communications v. FCC*, Sable, a dial-in pornography business, alleged that the Communications Act of 1934 (Communications Act) violated their First Amendment right to

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158. *See* Michael C. Dorf, *Does the First Amendment Protect Janet Jackson and Justin Timberlake?* CNN, Feb. 4, 2004, www.cnn.com/2004/law/02/findlaw.analysis.dorf.jackson.indecency

159. *See generally* Erie v. Pap's A.M., 529 U.S. 277 (2000).

160. *See id.*

161. *See* United States v. Playboy Entm't Group, 529 U.S. 803 (2000).

162. *See id.*

163. *See id.*

164. *See id.*

165. *See generally* Sable Commc'ns v. FCC, 492 U.S. 115 (1989).

freedom of speech.[166] The dial-in pornography business contained obscene and indecent phone messages that were found to be illegal under the Communications Act.[167] The Court held that the obscene language could be banned, since obscenity is not protected under the First Amendment; but Sable's indecent phone messages could not be banned.[168] The court reasoned, "[t]here is no 'captive audience' problem here; callers will generally not be unwilling listeners. . . . Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message."[169]

It may be argued that the narrowly tailored prong of the strict scrutiny test would be satisfied given the invention of the V-chip and parental control on television. Since parents can block channels or programs they do not want their children to view, there does not need to be any other regulations to protect children from viewing obscene, indecent, or profane material. Of course, on the flip side, should parents have to block virtually every channel on a television set in fear that the Commission will allow vulgar language on a program? In addition, not all television sets come with the V-chip, so an argument illustrating the V-chip as a reasonable alternative is not applicable in all cases. Ultimately, by removing indecent language from the program, but not removing the program from being aired entirely, it seems as though the Commission is using its least restrictive means in preventing children from watching indecent, obscene, or profane material on television.

V. "THE FCC WON'T LET ME BE, OR LET ME BE ME . . ." – EMINEM (EFFECT)

A. Pro-Censorship

Organizations like the Parents Television Council, Morality in Media, Family Research Council, and Citizens for Community Values urge the Commission to consistently punish broadcasters for

166. *See id.* at 115-16.
167. *See id.*
168. *See generally id.*
169. *See id.* at 127-28.

airing indecent material.[170] Collectively, in 2003, the organizations recommended that the FCC punish repeat offenders (broadcasters) and to fine those who went against indecency regulations accordingly.[171] According to the Parents Television Council, complaints to the FCC for indecency regulation were very rare and fines were only levied in extreme situations, prior to the formation of their organization.[172] Currently, the FCC consistently fines broadcasting companies that air indecent material outside of the safe harbor time and levies large fines to those who disobey their regulations.[173]

The Smart Television Alliance (Alliance) is an association that is dedicated to improving what children see on television.[174] The Alliance has conducted various studies regarding the impact television has on children, and has found that television is linked to not only obesity and sleeping difficulties, but also to violence and behavioral patterns.[175]

Television is one of the most powerful mediums in the world. It can educate, inspire, and entertain us. At the same time, the alarming increase in violence, indecency, and sexual content on TV sends our children a very different message—one that undermines the positive values parents and caregivers are trying to instill in young people today.[176]

The Alliance endorses censorship and finds it necessary for inappropriate content to be removed from the airwaves during times

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170. Parentstv.org, Pro-Family Coalition Demands Action from FCC on Television Decency Standards, PARENTSTV.ORG, April 30, 2003, *available at* http://www.parentstv.org/ptc/facts/tvtimeline.asp. The Parents Television Council and other groups joined together in a petition to urge the FCC to take greater action against indecency on television: "We are alarmed and appalled by the rampant amount of indecency on the broadcast airwaves and we are outraged that the current definition of indecency does not address nudity, foul language, gross sexual innuendo or graphically depicted violence : . . " *Id.*

171. *See id.*

172. *See id.*

173. FCC, *Regulation of Obscenity, Indecency, and Profanity*, http://www.fcc.gov/eb/oip. (last visited Oct. 6, 2008).

174. *See generally* Smart Television Alliance, http://www.smarttelevisionalliance.org (last visited Oct. 6. 2008).

175. *See generally id.*

176. *Id.*

that it is likely children will be watching. It has found, "The average child spends 900 hours in a classroom during the course of a school year and nearly 1,023 hours in front of a television."[177] Their view is that children are extremely impressionable, and when they know that a certain phrase or act makes their friends or family react, they are bound to utilize the resource to get attention.[178]

Activists, like the Alliance, are in favor of censorship and argue that the Commission needs to remove all vulgar language and material from the public airwaves completely. Their criticism is with FCC regulations that allow curse words to be on prime-time television—"bitch," "crap," "hell," and the like—which causes children to think it is alright to act in the same manner. In their mind, a child hears the word regardless of any "artistic" merit behind it.[179] Are they less likely to repeat it when they do not hear a laugh track on the program? The FCC is on the right track in their goal to eliminate vulgarity and profanity from children's ears and eyes, but they are not being completely unbiased in their quest.

B. Anti-Censorship

Those who argue that censorship is dangerous and should be removed completely, heavily criticize the FCC and organizations such as the Parents Television Council. People Against Censorship (PAC) was formed in April 2007 after radio disc jockey Don Imus was fired from his morning radio show for saying supposed racist comments.[180] PAC's mission is to "further educate the public about

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177. *See generally id.*

178. *See generally id.*

179. If a child sees a breast as a medical example and sees the same breast in a sexual way, will the child interpret the image differently? The picture of the female body part will be ingrained in the child's mind, regardless of the surrounding circumstances. *See* Dorf, *supra* note 158. In discussing whether Janet Jackson's bare breast was truly "indecent" as the FCC claimed it was, the author writes: "Is an adult woman's bare breast necessarily indecent under this definition? Probably not. One can certainly imagine circumstances in which the mere sight of a bare breast would not, or should not qualify, as indecent— a medical report on breast cancer or a frame of a breast-feeding mother, for example." *Id.*

180. People Against Censorship, http://peopleagainstcensorship.org/pac (last visited Oct. 6, 2008). Don Imus made racist comments about a female basketball

the importance of free speech, free expression, and free media, and [show] that there are better means of opposing offensive or insensitive speech, than censorship."[181] There are many people who do not agree with government censorship, and groups like PAC are prime examples of these types of individuals. Activists in favor of censorship argue that free speech is important, but it is not important enough to cause our children's minds to be corrupted.[182] With the removal of the Fairness Doctrine, the government proved they did not want to inhibit freedom of speech or freedom of the press, but the government has the right to censor certain words or phrases that might be deemed indecent.[183] There is no reason for anyone, including children, to watch a television program or hear a radio show that has vulgar language or obscene acts.[184] Groups like PAC do not see the positive sides of censorship, instead, they see it as inhibiting their fundamental right to free speech, regardless of the reasons or circumstances.

The new technology of the V-chip and the rating system allows parents to control what their children watch and removes the government from controlling the entertainment our society has the ability to view.[185] Advocates for First Amendment rights argue that the utilization of the V-chip and parental control is the least restrictive means of controlling what children watch, and that further government action is unconstitutional.[186] Many feel that the government should not have any influence in what children watch on

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team following an NCAA tournament game. *Id.* Because of the public outrage and pressure put on CBS Radio, Imus was fired. *Id.*

181. *Id.* PAC publicly opposes the government censorship of broadcast radio, satellite radio, and all other forms of media. *Id.*

182. *See generally* Smart Television Alliance, *supra* note 172.

183. *See* PBS, *NOW with David Brancaccio: What Happened To Fairness?,* http://www.pbs.org/now/politics/fairness.html (last visited Oct. 6, 2008).

184. Drew Clark, *TV Has Grown Up. Shouldn't FCC Rules?* WASH. POST, May 16, 2004. "Television and radio have always occupied a unique space in the nation's public conversation, and politicians going back to at least Franklin Roosevelt and his 'fireside chats' have understood the power of the electronic soapbox." *Id.*

185. FCC, *V-Chip: Viewing Television Responsibly,* http://www.fcc.gov/vchip (last visited Oct. 6, 2008).

186. *See generally* Smart Television Alliance, *supra* note 172.

television, but rather parents should have complete control over what their kids see or hear in the media.[187]

Many parents desire to watch this programming together with their children. By causing quality television to disappear, the FCC has taken a powerful tool out of the hands of parents who use television to open up a dialogue with their kids about controversial topics like violence, poverty, racial disparity, and cultural diversity. For example, the broadcast of the program "Roots" created a forum for parents and children to discuss provocative issues. For the FCC to deny them that opportunity—is not helping kids, rather it is harming them.[188]

Anti-FCC advocates believe the commission has "caused the already small number of high-quality and thought-provoking television programs—precisely the kinds of programs that many parents want their children to watch—to be censored, canceled altogether, or postponed to a late hour when children are in bed."[189] Additionally, many entertainers feel the Commission threatens their creative voice, which is why the move to satellite radio seems inevitable for all musicians that have graphic language in their music.[190] Many radio disc jockeys are making the move from terrestrial radio to satellite radio because of the Commission's involvement in censoring what is spoken on terrestrial radio. Even songwriters are branching out to satellite radio so their songs can be played without censorship.[191] Songwriters are merging over to

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187. People Against Censorship, *supra* note 180.

188. *Big Chill: How the FCC's Indecency Decisions Stifle Free Expression, Threaten Quality Television, and Harm America's Children*, Center for Creative Voices in Media, CREATIVE VOICES, Nov. 24, 2006, http://www.creativevoices.us/php-bin/news/showArticle.php?id=164.

189. *See id.*

190. *See* FreeMuse, *Eminem to Start Censorship-Free Radio Station*, FreeMuse: Freedom of Musical Expression, July 12, 2004, http://www.freemuse.org/sw6367.asp; *see also* John Dunbar, *Indecency on the Air: Shock-Radio Jock Howard Stern Remains 'King of All Fines'*, CENTER FOR PUBLIC INTEGRITY, Apr. 9, 2004, http://www.publicintegrity.org/telecom/report.

191. *See* Eminem to Start Censorship-Free Radio Station, *supra* note 190. Rapper Eminem (Marshall Mathers) launched a twenty-four hour hip-hop station on satellite radio, due to his negative feelings towards censorship of his songs on terrestrial radio. *Id.* The rapper's animosity towards the FCC in his song "Without

satellite radio because "[s]atellite radio is a private industry which is not monitored by the FCC and many artists who have faced censorship troubles in the past are beginning to look at satellite for their much desired freedom of expression."[192] This could mean that future listeners will not be hearing songs on "traditional" radio in the way the songwriters intended them to be heard.

VI. THE WORLD WIDE WEB OF OBSCENITY, INDECENCY, AND PROFANITY

Even though the FCC has jurisdiction over all fifty states, the Internet, as of now, cannot be regulated by the Commission. There have been many debates, however, about the issue of whether the Internet should be regulated such as in *Reno v. American Civil Liberties Union*.[193] The American Civil Liberties Union (ACLU) joined with other litigants to challenge the constitutionality of the 1996 Communications Decency Act (CDA).[194] The ACLU argued the Act inhibited the liberties of adults and infringed upon their First Amendment rights.[195] The Communications Decency Act was Title V of the 1996 Telecommunications Act.[196] Part of Congress's intention in passing the Act was to regulate indecency and obscenity on the Internet.[197] The intention was spurred, because of the quick rise in online child pornography.[198] By imposing criminal sanctions upon those who made obscene or indecent material available by means of the Internet, Congress hoped to keep offensive material out of cyberspace.[199] In *Reno*, the government argued that similar indecency laws had been upheld in prior Supreme Court decisions.[200]

Me" which states, "So the FCC won't let me be, or let me be me, so let me see..." *Id.*

192. *Id.*

193. Reno v. ACLU, 521 U.S. 844 (1997).

194. *See id.*

195. *Id.*

196. The 1996 Telecommunications Act, Pub. L. No. 104-104, 110 Stat. 56 (1996).

197. *Id.*

198. *Id.*

199. *Id.*

200. *See generally Reno*, 521 U.S. 844.

The government cited to *Ginsberg v. New York, FCC v. Pacifica*, and *Renton v. Playtime Theaters, Inc.* in alleging the CDA was analogous to the issues in the three Supreme Court cases.[201] The Supreme Court rejected the government's argument and distinguished the three cases from *Reno* for various reasons.[202] Ultimately, the Court found that parents should be able to decide what their children see on the Internet, because the CDA did not properly define what they considered to be "indecent," and was too broad in what it aimed to prohibit.[203]

In *Ginsberg*, the Supreme Court upheld the constitutionality of a New York statute that prohibited selling obscene material to minors under the age of seventeen.[204] The Court in *Reno* found that parents cannot control what their children purchase, but they can control how their children use the Internet.[205] Moreover, the Court found that the New York statute in *Ginsberg* included a definition of material that is harmful to minors "with the requirement that it be 'utterly without redeeming social importance for minors,'" whereas the CDA fails to provide a definition of what the FCC deems to be indecent.[206] The *Reno* Court also distinguished the case at hand from *Pacifica*, holding that *Pacifica* regulated content during the specific time in which children would likely be listening, but with the CDA, there is no specification of time to limit the posting of obscene or indecent material.[207] Furthermore, in *Renton*, the Court upheld a zoning ordinance that kept adult movie theatres out of residential neighborhoods.[208] The Supreme Court distinguished *Reno* from

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201. *See id.*

202. *See generally id.*

203. *See generally id.*

204. *Reno*, 521 U.S. at 864. In *Ginsberg*, defendant was convicted of selling obscene materials to minors. Ginsberg v. New York, 390 U.S. 629 (1968). The Supreme Court held that the New York statute did not invade people's freedom of speech or expression and that there was a rational government interest in protecting minors under the age of seventeen. *Id.*

205. *Reno*, 521 U.S. at 865.

206. *Id.*

207. *Id.* at 867.

208. *Id; see also* Renton v. Playtime Theatres, 475 U.S. 41 (1986). In *Renton*, the zoning ordinance prohibited any adult movie theatre from being located within one thousand feet of any residential zone, single or multiple-family dwelling, church, park, or school. *See generally id.* The Court held the ordinance valid

Renton because the CDA intends to regulate the entire world of cyberspace, but in *Renton*, only residential areas were targeted.[209] In the end, the Supreme Court struck down the portion of the CDA relating to children and the Internet, holding it too broad and the Court held that the FCC could not regulate obscene or indecent material in cyberspace.[210]

After the Supreme Court struck down the portion of the CDA concerning regulation of indecent material on the Internet, Congress attempted to pass other laws to protect minors from harmful sexual material in cyberspace.[211] First, Congress passed the Child Online Protection Act (COPA) in 1998, which required all distributors of harmful material to restrict their websites from access by minors.[212] COPA defined obscene and indecent material in a much broader way than ever before, this time considering female breasts as indecent.[213]

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because it furthered the notion of preserving the quality of urban life. *See generally id.*

209. *Reno*, 521 U.S. at 868. "[T]he CDA is a content-based blanket restriction on speech, and, as such, cannot be 'properly analyzed as a form of time, place, and manner regulation.'" *Id.* at 868.

210. *Id.* at 885.

> The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.

Id.

211. Ashcroft v. ACLU, 542 U.S. 656 (2004). *See also* 47 U.S.C. § 231 (2006).

212. *Ashcroft,* 542 U.S. at 695.

> [COPA] imposes a $50,000 fine and 6 months in prison for the knowing posting, for 'commercial purposes,' of World Wide Web content that is 'harmful to minors,' but provides an affirmative defense to commercial Web speakers who restrict access to prohibited materials by 'requiring use of a credit card' or 'any other reasonable measures that are feasible under available technology.'

Id.

213. *Id.*

The ACLU challenged the constitutionality of COPA in *Ashcroft v. ACLU* and alleged that adults' First Amendment rights were being infringed upon once again.[214] Ultimately, the district court found that COPA violated First Amendment rights, and prevented Congress from actively enforcing the law.[215] The court reasoned that it is possible to warn viewers about the content of websites, whereas with radio it is nearly impossible to issue a warning to listeners.[216] The court did not find that the least restrictive means was being utilized by the government, and therefore, First Amendment rights were being infringed.[217] After COPA was struck down, Congress then passed the Children's Internet Protection Act (CIPA) in 1999.[218] Senator John McCain introduced CIPA to the Senate, and President Bill Clinton signed it into law in 2000.[219] CIPA requires public libraries and schools to use a technology protection measure on every computer that could access the Internet.[220] The technology would prevent children from accessing obscene or indecent material (CIPA focused heavily on child pornography) and could be removed if an adult wanted to use the computer.[221] Access would only be granted,

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214. *See generally Ashcroft*, 542 U.S. 656.

215. *Id.*

216. *Id.*

217. *Id.*

218. Children's Internet Prot. Act, Pub. L. No. 106-554 § 1732, 114 Stat. 2763 (2000).

219. Robert MacMillan, *Primer: Children, The Internet and Pornography*, WASH. POST, June 29, 2004, *available at* http://washingtonpost.com/ac2/wp-dyn/A39748-2002May31?language=printer.

220. FCC, *Consumer Facts, supra* note 2.

> Schools and libraries subject to CIPA are required to adopt and implement a policy addressing: (a) access by minors to inappropriate matter on the Internet; (b) the safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications; (c) unauthorized access, including so-called "hacking," and other unlawful activities by minors online; (d) unauthorized disclosure, use, and dissemination of personal information regarding minors; and (e) restricting minors' access to materials harmful to them.

Id.

221. Am. Library Ass'n, Inc. v. United States, 201 F. Supp. 2d 401 (E.D. Pa. 2002).

however, if it was to be utilized for a bona fide and lawful reason.[222] To lessen the burden placed on these facilities through the requirements, CIPA provided grants and funds to public libraries and schools.[223] In *American Library Association v. United States*, a group of libraries, library associations, library patrons, and Web site publishers brought suit alleging CIPA was unconstitutional because the Act requires libraries to relinquish their First Amendment rights.[224] The government defended the constitutionality of CIPA by arguing that the law would only infringe First Amendment rights if it was impossible for all public libraries to comply with CIPA's conditions without surrendering their constitutional rights.[225] The government also argued that filtering software successfully blocks most of the websites containing pornographic material.[226] The Supreme Court held that CIPA was constitutional and a valid use of congressional spending power.[227]

In 2006, Representative Michael Fitzpatrick (R-PA) brought a bill before Congress called the Deleting Online Predators Act (DOPA) which would require schools and libraries that receive E-rate funding to protect against online predators.[228] If passed, DOPA

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222. *Id.*

223. *Id.* at 406-07. Congress grants E-rate discounts, which public libraries and schools can utilize to install the technology onto their computers. *Id.* "[G]rant funds are awarded, *inter alia,* in order to: (1) assist libraries in accessing information through electronic networks, and (2) provide targeted library and information services to persons having difficulty using a library and to underserved and rural communities, including children from families with incomes below the poverty line." *Id.* at 407.

224. *Id.* at 407.

225. *Am. Library Ass'n, Inc.*, 201 F. Supp. 2d at 407.

226. *Id.* at 408.

227. United States v. Am. Library Ass'n, Inc., 539 U.S. 194 (2003). "Because public libraries' use of Internet filtering software does not violate their patrons' First Amendment rights, CIPA does not induce libraries to violate the Constitution, and is a valid exercise of Congress' spending power. Nor does CIPA impose an unconstitutional condition on public libraries." *Id.* at 214.

228. Declan McCullagh, *Lawmakers Take Aim at Social-Networking Sites*, CNET, May 10, 2006, http://www.news.com/2100-1028_3-6071040.html. Rep. Michael Fitzpatrick sees the danger of children going from their homes to public facilities in order to access social-networking sites: "When children leave the home and go to school or the public library and have access to social-networking sites, we have reason to be concerned." *Id.*

would require public libraries and schools to block access to social networking websites, such as MySpace, Facebook, and Friendster.[229] The Suburban Caucus, a group supporting DOPA, argues that it is necessary for there to be a further filter on the Internet in schools and libraries in order to protect children from online predators.[230]

Under the Children's Television Act, television programs directed at children ages twelve and under cannot display Internet website addresses, unless the website meets the following criteria:

> [1] it offers a substantial amount of bona fide program-related or other noncommercial content; [2] it is not primarily intended for commercial purposes, including either e-commerce or advertising; [3] the Web site's home page and other menu pages are clearly labeled to distinguish the noncommercial from the commercial sections; and [4] the page of the Web site to which viewers are directed is not used for e-commerce, advertising, or other commercial purposes (for example, contains no links labeled "store" and no links to another page with commercial material).[231]

The focus in the Children's Television Act on the Internet displays the Commission's interest in preventing children from accessing harmful websites.[232]

VII. VIOLENCE IN THE MEDIA

FCC Chairman Kevin Martin is an advocate for giving the Commission the ability to monitor violence on television in the same manner as obscene, indecent, and profane material.[233] In 2007, the Commission urged lawmakers to consider regulations that would

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229. *Id.*

230. *Id.* The Suburban Caucus is a group of Republican suburban districts that were polled by Rep. Michael Fitzpatrick. *Id.*

231. FCC, *Consumer Facts, supra* note 2.

232. *See id.*

233. Stephen Labaton, *F.C.C. Moves to Restrict TV Violence*, N.Y. TIMES, Apr. 26, 2007, at C01. Kevin Martin explained that "steps should be taken to protect children from excessively violent programming." *Id.*

restrict violent programming to late evening—after 10:00 p.m.[234] The Commission argues that violence on television is linked to aggressive behavior in children and that it is detrimental to their growth as healthy individuals.[235] To counter the argument that the V-chip and other parental controlling are adequate remedies in solving the issue concerning violence on television,[236] the Commission cited to reports suggesting nearly nine out of ten parents do not use the V-chip, and only half of parents surveyed used parental controls.[237]

Meanwhile, the ACLU is heavily against the censorship of violence and argues that parents should be able to monitor what their children watch and the government should not have any control over the parenting process: "[t]he government should not replace parents as decision makers in America's living rooms. There are some things that the government does well. But deciding what is aired and when on television is not one of them."[238] In addition, the ACLU is against the censorship of obscene and indecent material, leaving little doubt that they also would be against the censorship of violence.[239] The Commission faces First Amendment issues if they are given the ability to censor violence on television.[240] Currently, the FCC has not come up with a definition of "violence," so issues arise regarding which television shows are allowed to broadcast violent behavior—such as news and educational programs—and which are not.[241] For example, anti-censorship advocates argue that news broadcasting of violent events, such as the Virginia Tech school shooting, would have to be censored if television programs were not allowed to broadcast violent behavior.[242] This argument demonstrates the

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *See* Labaton, *supra* note 233.

240. *Id.*

241. Eric Bangeman, *FCC May Try to Regulate TV Violence–Even on Cable*, ARS TECHNICA, Feb. 19, 2007, http://arstechnica.com/news/ars/post/200702198876.html.

242. *See* Paul Farhi, *FCC Seeks to Rein In Violent TV Shows*, WASH. POST, Apr. 24, 2007, at C01; *see also* Ian Shapira & Tom Jackman, *Gunman Kills 32 at*

double standard that would likely exist if violence was regulated by the FCC.

In *American Amusement Machine v. Kendrick*, video game manufacturers challenged a city ordinance that sought to limit minors from accessing video games depicting violence.[243] The Indianapolis ordinance barred minors from video game arcades that contained five or more machines with simulated graphic violence.[244] Graphic violence, as defined by the ordinance, is "an amusement machine's visual depiction or representation of realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or disfiguration."[245] The ordinance also required video game arcades to post appropriate warning signs and required a partition surrounding machines depicting graphic violence.[246] The appellate court looked at the *Miller* test to differentiate obscene material and violent material.[247] The appellate court concluded that violent material may be classified as "offensive."[248] The appellate

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Virginia Tech in Deadliest Shooting in U.S. History, WASH. POST, Apr. 17, 2007, at A01. In 2007, a gunman killed thirty two individuals on the Virginia Tech college campus in Blacksburg, Virginia. *Id.* The shooter took his own life after killing the thirty-two victims. *Id.*

243. Am. Amusement Mach. Ass'n. v. Kendrick, 244 F.3d 572 (7th Cir. 2001).

244. *Id.* at 573.

245. *Id.*

246. *Id.*

247. *Id.* at 574.

> A work is classified as obscene not upon proof that it is likely to affect anyone's conduct, but upon proof that it violates community norms regarding the permissible scope of depictions of sexual or sex-related activity. Obscenity is to many people disgusting, embarrassing, degrading, disturbing, outrageous, and insulting, but it generally is not believed to inflict temporal (as distinct from spiritual) harm; or at least the evidence that it does is not generally considered as persuasive as the evidence that other speech that can be regulated on the basis of its content, such as threats of physical harm, conspiratorial communications, incitements, frauds, and libels and slanders, inflicts such harm.

Id. at 574-75.

248. *Kendrick*, 244 F.3d at 575.

> Maybe violent photographs of a person being drawn and quartered could be suppressed as disgusting, embarrassing, degrading, or disturbing without proof that they were likely to

court cited to the *Ginsberg* holding, which found that "potential harm to children's ethical and psychological development is a permissible ground for trying to shield them from forms of sexual expression that fall short of obscenity."[249] The city argued the video games depicting graphic violence are similar to stories, in that they create characters, a theme, and a beginning and an ending, in the same way as novels and narratives.[250] The city referenced a video game called "The House of the Dead," in which players must repeatedly shoot zombies in order to defend themselves and kill.[251] The appellate court struck down the Indianapolis ordinance, finding that violence is too broad to be defined and the city's argument was not strong enough for the court to conclude that to place barriers upon video game arcades and manufacturers was necessary.[252] The appellate court reasoned that there was not sufficient evidence that violent material in video games actually caused harmful behavior in children.[253]

The Commission would be in a better position to argue for a compelling governmental interest in regulating violence on television if the FCC could actually prove television violence causes societal violence.[254] The Commission, however, will likely have a difficult time in proving that psychological reports should be taken as factual evidence by Congress and the judicial system. But this may be changing. Regulators and lawmakers have noticed that the amount of violence on television has risen dramatically in the past few years.[255] FOX's popular drama, "24", for example, consistently broadcasts

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> cause any of the viewers to commit a violent act. They might even be described as "obscene," in the same way that photographs of people defecating might be, and in many obscenity statutes are, included within the legal category of the obscene, even if they have nothing to do with sex. In common speech, indeed, "obscene" is often just a synonym for repulsive, with no sexual overtones at all.

Id. at 576 (citations omitted).

249. *Id.* (citing *Ginsberg*, 390 U.S. at 639-43).

250. *Kendrick*, 244 F.3d. at 577.

251. *Id.*

252 . *See generally id.*

253. *Id.* at 579.

254. *See* Farhi, *supra* note 243.

255. *Id.*

torture scenes and other violent acts, while other networks air professional wrestling and martial arts.[256]

FCC Chairman Kevin Martin wants to expand the FCC's jurisdiction to cable television in his quest to regulate violence in the media.[257] Chairman Martin explains regulating a handful of broadcast channels will not suffice in keeping violence away from children's eyes and ears.[258] Despite the fact that cable television is an opt-in service, Martin feels that children are watching the popular cable television shows just as much as they are watching broadcast channels.[259] Again, however, those who are against censorship argue that it is not up to the Commission to decide what parents allow their children to watch[260] and violence is not always harmful, but sometimes, educational, as it shows children the negative aspects of being violent towards one another.[261] In the end, the Commission will have to prove violence on television causes societal problems, and is not an educational tool in teaching our children how to grow as upstanding individuals. The FCC is actively working towards a goal in regulating the amount of violent television during the hours of 6:00 a.m. and 10:00 p.m., and if they can come up with a definition of violence that is not overbroad, they may have a fighting chance.[262]

VIII. CAN'T WE ALL JUST GET ALONG?

The obvious problem with this issue centers around keeping children from being exposed to obscene, indecent, and profane language on television and the radio. Advocates in favor of FCC regulations argue that content within the public airwaves should be regulated by the government.[263] On the other hand, individuals in favor of First Amendment rights and against censorship maintain that

256. *Id; see also* TV.com-24, http://www.tv.com/24/show/3866/summary.html (last visited Oct. 6, 2008). The show, "24," often depicts torture scenes. *Id.*

257. *See* Eric Bangeman, *Dopey DOPA Bill Passes House,* ARS TECHNICA, July 28, 2006, http://www.arstechnica.com/news.ars/post20060728-7375.html.

258. *See id.*

259. *Id.*

260. *See* Labaton, *supra* note 233.

261. *Id.*

262. *See id.*

263. Parentstv.org, *supra* note 170.

parents themselves should be responsible for what their children view on television and hear on the radio, and that inhibiting content on the public airwaves restrains people's constitutional rights.[264] The ongoing debate between the two sides seems to be never-ending, as there are strong arguments for both ends of the spectrum. Perhaps there are certain solutions that can be utilized to create harmony within the battle of obscenity, indecency, and profanity within the public airwaves.

With the V-chip technology limitations, parents can alternatively purchase a TiVo, which is an electronic box that attaches to a television set and has the capability of recording programs or movies in a modern fashion.[265] The TiVo box and service, which can cost users $130 or more each year, also has a KidZone feature, which allows parents to pre-approve programs for their children and ensure that their children are watching programs that are suitable for them.[266] "TiVo KidZone Guides are lists of television programs hand-selected by experts like Common Sense Media, Parents' Choice Foundation, and Parents' Television Council to help [parents] discover and automatically record the best TV programming for [their] family."[267] Parents also can use the TiVo box to block channels from being accessed with a four digit password generated by the user.[268]

However, TiVo does have its own limitations. Popular channels, such as ABC, CBS, FOX, and NBC[269] have certain programs that are kid-friendly, but others that are too indecent for children to see. If a parent blocks NBC, for example, the child will miss out on watching morning cartoons that are acceptable for their maturity level. On the other side, if they do not block NBC so that their child can watch their favorite morning show, the child may be exposed to indecent language or behavior during the broadcast of an evening program.

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264. *See generally* Smart Television Alliance, *supra* note 174; see also Parentstv.org, *supra* note 170.

265. TiVo Home Page, http://www.tivo.com/whatistivo/index.html (last visited Oct. 6, 2008).

266. *Id.*

267. *Id.*

268. *Id.*

269. Nielsen Media Home Page, http://www.nielsenmedia.com (last visited Oct. 6, 2008).

But the use of the rating system and the V-chip can solve this problem; parents can block shows based on their ratings, rather than block these channels entirely.[270]

Another possible solution that may be effective is the use of a la carte cable—a service that allows users to pick the channels they want to purchase, rather than receive a bundle of channels pre-selected by their cable company.[271] Parents in favor of a la carte cable argue that they should not have to purchase channels that air obscene or indecent material.[272] This may help parents keep channels that are known to air indecent material away from their children's eyes and ears, however, again, popular channels such as ABC, CBS, FOX, and NBC, are likely to be purchased by users, since they are among the most popular television stations. According to the Nielsen Media Ratings, the top ten broadcast television programs are all on ABC, CBS, FOX, and NBC.[273] FCC Chairman Kevin Martin lends strong support of a la carte cable, citing a Nielsen study pointing out that the average user is paying for eighty-five channels and only watches sixteen of them.[274] Many cable

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270. FCC, *Consumer Facts*, *supra* note 2.

271. Frank Ahrens, *FCC Asked to Examine A La Carte Cable TV*, WASH. POST, May 20, 2004, at E04.

> Most satellite and cable companies require their customers to subscribe to packages of channels, arguing the system allows them to maintain robust lineups at affordable rates. But a la carte pricing, which would allow subscribers to pick and choose the channels they want, has been gaining momentum among some lawmakers and consumer groups as costs have risen and concerns have grown over televised indecency. Several parents groups have complained that consumers should not have to pay for channels that air content they find offensive.

Id.

272. *Id.*

273. Nielsen Media, *supra* note 269. As of January 7, 2008, the top ten television shows and their networks are as follows: NFC Playoff (FOX); AFC Divisional Playoff (CBS); All State BCS National Championship (FOX); Grey's Anatomy (ABC); CSI (CBS); Terminator: Sarah Connor Chronicles (FOX); Law and Order: SVU (NBC); Comanche Moon (CBS); Without A Trace (CBS); and Criminal Minds (CBS). *Id.*

274. Leslie Cauley, *FCC Puts 'a la carte' Cable on the Menu*, USA TODAY, Aug. 31, 2007, http://www.usatoday.com/money/media/2007-09-11-cable-fcc-a-la-carte-N.htm.

companies, such as Time Warner Cable, express their opposition to a la carte cable, arguing it will be more expensive for users to purchase cable channels one-by-one than purchasing bundles from their cable providers.[275] Further, new channels are usually packaged with more popular channels in order to help them gain viewers and popularity.[276] Nevertheless, if users were buying channels one-by-one through a la carte cable, those new channels would suffer and would likely fail.[277] In his report, Chairman Martin explains that a la carte cable will correct the inadequacies and unfairness of the existing blocking tools.[278] Chairman Martin states that consumers should not have to take extraordinary steps to block programming that they do not want their children to watch,[279] and feels that a la carte cable is the best way to aid parents in keeping indecent material away from their children.[280]

Under the strict scrutiny test, the government must use the least restrictive means in achieving their goal to protect children from indecent content.[281] Through the use of the V-chip, the rating system, parental controls, the TiVo service, and a la carte cable, it seems as though parents could have the ability to prevent their

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275. Burt Helm, *Cable a la Carte: Choice vs. Cost?*, BUSINESS WEEK, Dec. 7, 2005, http://www.businessweek.com/technology/content/dec2005/tc20051207-647629.htm.

276. *Id.*

277. *Id.*

> Consensus is emerging that some channels would suffer -- if not fall away altogether. Content providers now compel cable operators to offer their niche channels by bundling them with must-haves like ESPN or MTV. Without being bundled into a bigger package, less popular channels such as ESPN Classic and MTV2 could struggle to garner a large enough audience to survive. A la carte would also make it much harder and expensive for programmers to launch new channels and build an audience, if they have to convince new viewers to pay to watch in the first place.

Id.

278. *See* Letter from Kevin J. Martin to FCC, (Aug. 22, 2007), *available at* http://www.fcc.gov/commissioners/martin/documents/alacarte-ltr-082207.pdf.

279. *Id.* at 12.

280. *Id.*

281. U.S. Const. amend. I.

children from watching indecent or obscene programming.[282] However, there will always be instances in which television programs unexpectedly display indecent material beyond the content acceptable for children.[283] There will constantly be an argument that families should be able to watch evening programs together, without the fear of seeing indecent or obscene behavior. Efforts by the FCC, such as the delay on live programming to give the broadcasters opportunity to edit out unforeseen indecent or obscene material, will aid in keeping children from viewing indecent content.[284] Ultimately, those who oppose censorship will have to find common ground with those who advocate censoring the public airwaves. Until it can be proven that the least restrictive means is being utilized, however, the FCC will have the ability to continue censoring as they see fit, so long as it stays within the means of the regulations imposed by the Courts.

As of now, the Commission is fighting its own battles in attempting to regulate sources that are causing harmful effects on children.[285] Violence on television, cable, and satellite services, and

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282. *See generally* TiVo Home Page, *supra* note 265; *see also* Cauley, *supra* note 274.

283. *See generally Pacifica Found.,* 438 U.S. 726; *See also* FCC News Release, Statement of FCC Chairman Kevin Martin on 2nd Circuit Court of Appeals Indecency Decision, (June 4, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-273602A1.pdf. FCC Chairman Kevin Martin's report explains how children viewing Cher and Nicole Richie's statements during the Billboard Music Awards could not have been avoided even if parents were using the V-chip:

> These words [the f-word and s-word] were used in prime time, when children were watching. Ironically, the court implies that the existence of blocking technologies is one reason the FCC shouldn't be so concerned. But even a vigilant parent using current blocking technologies such as the V-Chip couldn't have avoided this language, because they rely on the program's rating, and in this case the programs were rated appropriate for family viewing.

Id.

284. *Jackson Overexposure: TV Feels Heat*, CNN, Feb. 5, 2004, http://www.cnn.com/2004/showbiz/tv/02/05/superbowl.jackson/index.html. CBS has placed both audio and video on a delay for the Grammys. *Id.* ABC announced it would do the same thing for the Oscars. *Id.*

285. *See* Labaton, *supra* note 233.

the Internet are all resources which minors use to view obscene, indecent, profane, and harmful material.[286] First Amendment rights will always be the biggest roadblock in the FCC's quest to keep children from viewing or hearing harmful material.[287] The FCC must properly define violence, illustrate the compelling governmental interests in regulating violence, and demonstrate that they are using the least restrictive means in regulating content. Perhaps through the use of some of the solutions listed above, pro-censorship and anti-censorship groups can come together to find a common ground. As the debate over indecency and obscenity has shown – the two sides of the spectrum are not likely to share similar beliefs or ideas as to how to reach a solution. For now, the debate continues.

286. *See id*; *see also Reno*, 521 U.S. 844.

287. *See generally* U.S. Const. amend. I.