

4-20-2007

## "Raised Eyebrows" Over Satellite Radio: Has Pacifica Met its Match?

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### Recommended Citation

Aurele Danoff *"Raised Eyebrows" Over Satellite Radio: Has Pacifica Met its Match?*, 34 Pepp. L. Rev. Iss. 3 (2007)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol34/iss3/3>

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Wait! Wait! Let me show you the black book. This is where the ideas go. I can't tell you everything we're gonna do, but you know that show *The View*, right? I've got a show coming on called *Crack Whore View*. We take all of the topics they discuss on *The View* that day, then take four crack whores and let them discuss those same issues. We're gonna have *The Lesbian Dating Game*, with a real host. Real lesbians. Play the game and guess what? We don't leave you for the date. The date goes on right in the studio afterward. We hear it all. We've got *Tissue Time with Heidi Cortez*. *Tissue Time* is for every guy who can't get to sleep. Heidi is not only hot, but she's incredibly great at phone sex.<sup>1</sup>

## I. INTRODUCTION

Can Howard Stern really get away with such programming? On January 9, 2006, Howard Stern joined Sirius Satellite Radio, Inc. and according to him, and the current Federal Communications Commission ("FCC" or the "Commission") regulations regarding satellite radio, he can.<sup>2</sup> Can he get away with this programming on traditional broadcast? According to the current state of FCC authority—absolutely not—and thus, the move to satellite.<sup>3</sup> While the future market of satellite radio looks promising,<sup>4</sup> its future regulation remains an uncertainty. Without a definitive Supreme Court ruling regarding satellite radio regulation, this new media has come under what is known as regulation by "raised eyebrow"—regulation through informal pressure rather than neutral rule.<sup>5</sup> In light of a growing sentiment

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1. Cal Fussman, *Howard Goes Berserk*, ESQUIRE MAGAZINE, Jan. 2006, at 79 (interviewing Howard Stern before his current move to satellite radio). As a disclaimer, I understand that this opening paragraph may offend one's personal sensitivities. But, indecency is the crux of this Article. The subject matter referenced by Howard Stern is exactly what he is currently airing on satellite radio and, as the law stands now, this speech on satellite radio is arguably as protected under the First Amendment as the magazine which published this excerpt.

2. News Release, Sirius Satellite Radio, Howard Stern Makes History! (Jan. 9, 2006), [http://www.shareholder.com/sirius/ReleaseDetail.cfm?ReleaseID=183533&cat=&newsroom=\[hereinafter Howard Stern Makes History!\]](http://www.shareholder.com/sirius/ReleaseDetail.cfm?ReleaseID=183533&cat=&newsroom=[hereinafter Howard Stern Makes History!].).

3. Surrounded by a fleet of strippers and thousands of fans in Manhattan, Howard hailed, "Down with the FCC! . . . [t]hey have ruined commercial broadcasting." Verena Dobnik, *Howard Stern Promotes Switch to Satellite*, ASSOCIATED PRESS, Nov. 18, 2004, available at, <http://www.sirius.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=EditorialAsset&cid=1102975182673> (article excerpt).

4. "In just three years since service launch, . . . 'satellite radio is being adopted faster than almost any other consumer product in history, including color TVs, cellphones and DVDs.'" Adam Thierer, *The Future of Radio Regulation: The Need for a Level Playing Field*, 2005 THE PROGRESS & FREEDOM FOUNDATION 3, <http://www.pff.org/issues-pubs/pops/pop12.27futureofradio.pdf>.

5. Jonathan Weinberg, *Vagueness and Indecency*, 3 VILL. SPORTS & ENT. L.J. 221, 238 (1996). See also Jeffrey McCall, *Raised Eyebrow Oversight Keeps Broadcasters in Line*, COLLEGENEWS.ORG, Mar. 31, 2004, <http://www.collegenews.org/x3186.xml>. The "raised-eyebrow" technique traces its roots to former FCC Chairman Newton Minow's "Vast Wasteland" speech in 1961, which

that the FCC overlooks broadcast decency, it has become apparent that regulation via "raised eyebrow" has the greatest potential to control indecency on the airwaves.<sup>6</sup>

In November 2004, Howard Stern announced that he was leaving terrestrial radio for satellite radio, and signed a five-year, \$500 million dollar contract with Sirius Satellite Radio.<sup>7</sup> He also promised to bring "his audience—six million a day—with him."<sup>8</sup> The impetus for the move came when Viacom terminated Howard's show on six Clear Channel Communications stations due to alleged indecency violations and a potential fine of \$495,000 by the FCC.<sup>9</sup>

criticized broadcasters for programming excessive "blood and thunder, mayhem, violence, sadism, murder." *Id.*

6. *McCall*, *supra* note 5.

7. Steve Hargreaves, *Howard Makes a Sirius Pitch*, CNN/MONEY.COM, Dec. 9, 2004, <http://money.cnn.com/2004/11/18/news/newsmakers/stern>. A relevant commentary, on February 28, 2006, CBS Radio Inc. filed suit against Howard Stern for multiple breaches of contract, misappropriation and unjust enrichment. The complaint stated that Stern misappropriated millions of dollars worth of CBS Radio airtime to promote his move to satellite radio, and fraudulently concealed his financial interest in hundreds of millions of dollars worth of Sirius stock options. *CBS Radio Inc. Files Suit Against Howard Stern and Related Parties for Multiple Breaches of Contract, Misappropriation and Unjust Enrichment*, PRNEWswire, Feb. 28, 2006, <http://sev.prnewswire.com/entertainment/20060228/NYTU19228022006-1.html> (last visited Jan. 30, 2007). In May 2006, the case settled and Stern regained control of twenty years worth of master tapes from his show. *Stern Wins Control of Old Master Tapes*, L.A. TIMES, May 27, 2006, at C3, available at <http://www.latimes.com/business/la-fi-briefs27.2may27,1,4725452.story>.

8. Sirius News Releases, *Howard Stern & SIRIUS*, ENTERTAINMENT WEEKLY, Oct. 28, 2005, <http://www.sirius.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=EditorialAsset&cid=1130574545921>. Since Sirius announced the Howard Stern deal, its subscriptions have quadrupled, from 600,000 to 3.3 million people. Ben Sisario, *Howard Stern Embarks on World Conquest Via Satellite*, N.Y. TIMES, Jan. 10, 2006, at E4. More than 1.1 million of those new subscribers came during the fourth quarter of 2005, an estimated 63% attributed to Mr. Stern. *Id.* According to numbers by Bridge Ratings, only 5% of Howard's fans will stick to whoever replaces Stern on terrestrial radio. *Showbiz Tonight* (CNNHN television broadcast July 27, 2005), available at 2005 WLNR 11830705 [hereinafter *Showbiz Tonight*].

9. *Clear Channel Nixes Howard Stern*, CNN MONEY.COM, Apr. 8, 2004, [http://money.cnn.com/2004/04/08/news/fortune500/stern\\_fines/](http://money.cnn.com/2004/04/08/news/fortune500/stern_fines/) (last visited Jan. 30, 2007) [hereinafter *Clear Channel*]. When an indecency violation occurs, the FCC's current remedy is to fine broadcasters. These fines are imposed retroactively, not prospectively, because otherwise this would constitute censorship. See *infra* notes 53 and 142 and accompanying text. In the past, Infinity Broadcasting (a Viacom unit) paid a settlement of \$1.7 million in response to FCC fines. In 2004, prior to Howard's removal, the FCC voted to fine Howard the then maximum amount of \$27,500 for each of eighteen violations, totaling \$495,000. See *Clear Channel*, *supra*. With the FCC threatening to increase fines, and a "per utterance" policy underway, Viacom decided it was time to let Howard go. *FCC Planning to Hit Stern Again*, CNN/MONEY.COM, Apr. 5, 2004, [http://money.cnn.com/2004/04/05/news/fortune500/stern\\_fcc](http://money.cnn.com/2004/04/05/news/fortune500/stern_fcc).

The following is a brief list of recent fines imposed by the FCC: \$1,183,000, the largest fine ever imposed, on Fox for *Married by America's*, "obscured nudity, spanking and a man licking whipped cream off a stripper's breasts;" \$755,000 on Clear Channel Radio for *Bubba the Love*

Howard admits, however, that ever since his announced move, there has been talk about regulating satellite radio. "But to do that," he continues, "they've got to change the Constitution. 'Cause it's not the public airwaves. This is the same as a book. Same as a movie. Same as a magazine. It's something we choose to bring into our home. We pay for it."<sup>10</sup>

The First Amendment, and the freedom of expression which it grants, is the cornerstone of our American society. It is premised by the right of self-fulfillment, the advancement of knowledge and truth, the creation of a stable and adaptable society, and the fostering of democratic thinking.<sup>11</sup> As Justice Kennedy stated in *United States v. Playboy Entertainment Group, Inc.*,<sup>12</sup>

It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control.

The issue presented in this Article is the dichotomy between broadcast radio and satellite radio, and how these two media regulate indecency differently. While broadcast has limited First Amendment protection,<sup>13</sup> satellite promises more free speech freedom. In spite of this framework, the basic guidelines regarding FCC regulation of indecent speech have changed little since the landmark 1978 Supreme Court case, *FCC v. Pacifica Foundation*.<sup>14</sup> Since then, a lot has changed: cable and broadcast television are virtually indistinguishable; and only in 1992 did the FCC allocate the spectrum for use by satellite radio, XM and Sirius receiving their licenses to operate in 1997.<sup>15</sup> Consequently, "the Stern move may expose traditional radio's Achilles' heel: Stations' free use of the airwaves makes them subject

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Sponge's, "chat about sex among Alvin the chipmunk, George Jetson and Scooby Doo;" \$550,000 on CBS for Janet Jackson's breast exposure at Super Bowl XXXVIII; \$495,000 on Clear Channel Radio when Howard Stern "discussed sexual proclivities as well as the hypothetical product 'Sphincterine.'" James Poniewozik et al., *The Decency Police*, TIME, Mar. 28, 2005, at 24, available at 2005 WLNR 4426027.

10. Fussman, *supra* note 1, at 81. Ken Paulson, former Executive Director of the First Amendment Center says, "You know, sometimes the First Amendment debate is not really about the content. It's about holding government to the rules, making sure that government continues to maintain its promise of keeping hands off free expression. It's not about Howard Stern; it's about James Madison and Thomas Jefferson." Showbiz Tonight, *supra* note 8.

11. CARTER ET AL., THE FIRST AMENDMENT AND THE FIFTH ESTATE: REGULATION OF ELECTRONIC MEDIA 14-15 (6th ed. 2003).

12. 529 U.S. 803, 817 (2000).

13. See *infra* notes 58-60 and accompanying text.

14. 438 U.S. 726 (1978). See John Dunbar, *Indecency on the Air: Shock-radio Jock Howard Stern Remains 'King of All Fines'*, THE CENTER FOR PUBLIC INTEGRITY, Apr. 9, 2004, <http://www.publicintegrity.org/telecom/report.aspx?aid=239>.

15. See *infra* note 41 and accompanying text.

to unique content regulations by the Federal Communications Commission."<sup>16</sup> The differences in regulation are now becoming apparent, and if satellite radio fails to comply with the "raised eyebrow" technique, then these differences may become obsolete. Satellite radio remains uncharted territory for First Amendment rights in an era when different media formats are becoming equally as pervasive as broadcast. And the ongoing concerns for children may tip the balance in favor of equal regulation, even though we pay for satellite subscription. Despite the plausible argument that satellite radio could become a direct substitute for terrestrial radio,<sup>17</sup> *Pacifica* is still not overruled, and the FCC has no option but to regulate new media with a "raised eyebrow."<sup>18</sup>

This Article will discuss whether the FCC has enough authority over free speech to regulate indecency on satellite radio, or rather, indirectly coerce [like they did with Howard Stern, by pushing him off the air] via "raised eyebrow" in instances when direct regulation would violate the First Amendment, and without the need for a new Supreme Court ruling. Part II of this Article discusses the historical background, covering the development of the FCC, the growth of satellite radio and the regulation of content with respect to the First Amendment impact on various forms of media.<sup>19</sup> Part III will examine the current state of the law, whether the regulatory concerns are being addressed, and offer a number of solutions—including less restrictive alternatives by means of "raised eyebrow."<sup>20</sup> Part IV will conclude the comment, resulting in my belief that Howard Stern *should* be regulated, but not in any manner which would require the Supreme Court to expand the *Pacifica* ruling to satellite radio.<sup>21</sup> Instead, the answer lies in a so-called *threat* to impose fines and apply like rules. The truth is, the FCC *can* regulate indecency on satellite radio, but is choosing not to at this point in time. It can also do so in a more Constitutional way than it can cable

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16. Scott Woolley, *Freedom of Speech on Satellite Radio*, FORBES.COM, Oct. 6, 2004, [http://www.forbes.com/2004/10/06/cx\\_sw\\_1006stern\\_print.html](http://www.forbes.com/2004/10/06/cx_sw_1006stern_print.html).

17. For example, "[w]ith a market of 220 million cars in America, and 16-17 million new cars" being introduced each year, satellite radio's potential is tremendous. Sirius News Releases, Karmazin: 'We Have the Best Content in Radio,' BILLBOARD RADIO MONITOR, June 9, 2005, <http://www.sirius.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=EditorialAsset&cid=1119299225556> [hereinafter Karmazin]. Although the number of cars pre-installed with Sirius and XM continues to rise, free subscriptions are only offered for a limited time. Thereafter, new car purchasers must pay for the monthly fees to continue satellite radio service. See Sirius Satellite Radio, *Vehicle Partners*, available at <http://www.sirius.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=Gateway&cid=1066857398286> (last visited Mar. 3, 2006).

18. See *supra* note 5 and accompanying text.

19. See *infra* notes 23-139 and accompanying text.

20. See *infra* notes 140-259 and accompanying text.

21. See *infra* notes 260-68 and accompanying text.

television, because satellite radio uses the airwaves. Thus, either Howard Stern is talking a lot of hype or the satellite radio industry will address the threat by self-imposing less restrictive means to accomplish the FCC's legitimate concerns. Otherwise, if Howard pushes the envelope too far, the FCC has its "eyebrows raised" over satellite radio and the Court may seek to revisit *Pacifica*.<sup>22</sup>

## II. HISTORICAL BACKGROUND

### A. An Overview of the Federal Communications Commission

The Communications Act of 1934 established the Federal Communications Commission in order to regulate the finite electromagnetic spectrum.<sup>23</sup> Congress gave the FCC *sole* power to allocate the electromagnetic spectrum, to establish general guidelines of operations and to grant licenses for use of the spectrum,<sup>24</sup> which encompasses the entire range of electromagnetic frequencies transmitting sound, data, and video.<sup>25</sup> Further, the FCC classifies radio stations and prescribes the service to be rendered by each licensed class.<sup>26</sup> This power is exercised in the "public convenience, interest, or necessity."<sup>27</sup>

The FCC has this power because the electromagnetic spectrum is a *limited* source. In other words, there is a growing demand for spectrum capacity—ranging from individual use such as cellular phones, garage door openers, and computer modems to private use such as radio, television broadcast and satellite to public health and safety official use such as police and emergency medical teams.<sup>28</sup>

The FCC is comprised of six Bureaus, including the Enforcement Bureau, which is the most important for our purposes in discussing

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22. See *infra* notes 260-68 and accompanying text.

23. The Radio Act of 1912 provided the statutory basis for the present regulatory scheme of the FCC. See Radio Act of 1912, ch. 287, §§ 1-11, 37 Stat. 302 (repealed 1927). In 1927, Congress created the Federal Radio Commission to rationalize the radio spectrum and make allocations, in light of growing interference. See Radio Act of 1927, ch. 169, §§ 1-41, 44 Stat. 1162 (repealed 1934). In 1934, the agency's jurisdiction expanded to include telephone and telegraph communications and it was renamed the FCC. CARTER, *supra* note 11, at 36. See generally Daniel Erksine, *Satellite Digital Radio Searching for Novel Theories of Action*, 1 J. HIGH TECH. L. 135, 139-42 (2002).

24. CARTER, *supra* note 11, at 46.

25. FCC, Spectrum, available at <http://www.fcc.gov/spectrum/> (last visited Dec. 30, 2005) [hereinafter Spectrum].

26. 47 U.S.C. § 303 (a)-(b) (2005).

27. *Id.* FCC, Connecting the Globe: Spectrum Allocation, Assignment and Enforcement, available at <http://www.fcc.gov/connectglobe/sec7.html> (last visited Dec. 30, 2005); see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 379-80 (1969) (discussing the "public convenience, interest, or necessity" standard as vague); see also *infra* note 59 and accompanying text.

28. Spectrum, *supra* note 25.

indecenty regulation.<sup>29</sup> The FCC Enforcement Bureau principally enforces the Communications Act, as well as the Commission's rules. This Bureau resolves complaints by investigating, recommending, and taking enforcement action for violations thereof.<sup>30</sup> The Commission does not independently monitor broadcasts for indecent material. Instead, its enforcement actions are based on the complaints received from the public.<sup>31</sup>

The FCC also works closely with the National Telecommunications and Information Administration ("NTIA"). The NTIA was established in 1978, as part of the Commerce Department, to study the long-term effects of and need for telecommunication regulation.<sup>32</sup> While the FCC has authority over commercial spectrum use, as well as control over state and local governments, the NTIA manages the federal government's use of the spectrum for defense and other federal endeavors.

### B. *The Development of Satellite Radio*

The history of satellite radio begins in 1992, when the FCC allocated the 2310-2360 MHz band (the "S" band) for satellite digital audio radio services ("SDARS" or "DARSS").<sup>33</sup> The FCC allocated the spectrum for satellite radio because satellite radio offered a number of potential benefits

29. CARTER, *supra* note 11, at 37.

30. FCC, The FCC Enforcement Bureau: A Broadcaster's Guide, available at <http://www.fcc.gov/eb/broadcast/bconf.html> (last visited Dec. 30, 2005). If someone wants to file a complaint, complaints are received in writing by the Bureau, and should include: the name of the call sign and address of the station allegedly in violation; detailed facts indicating the violation; supporting documentation including a full or partial tape or transcript of the program; the date and time of the alleged indecent broadcast; and the name and address of the complainant. *Id.* Simply put,

When the FCC receives a viewer complaint, the FCC Enforcement Bureau conducts an investigation to determine whether a violation occurred. The Enforcement Bureau recommends appropriate action depending on whether a violation appears to have occurred. If the FCC determines that no violation has occurred, the complaint is dismissed. If the FCC determines that a violation has occurred, the Commission issues a 'Notice of Apparent Liability' ('NAL'). The NAL includes a description of the alleged violation, an explanation of the Commission's indecency analysis, and (often) a proposed fine. Upon receipt of an NAL, the accused broadcaster may either pay the fine, contest liability, or negotiate a settlement with the Commission.

Matthew C. Holohan, *Politics, Technology & Indecency: Rethinking Broadcast Regulation in the 21st Century*, 20 BERKELEY TECH. L.J. 341, 345 (2005) (footnotes omitted). See also *In re Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. 7999 (2001) [hereinafter *Industry Guidance*].

31. See *Industry Guidance*, *supra* note 30, at 8002. See *infra* notes 149, 194-95 and accompanying text (exploring potential problems with the public as complainant).

32. CARTER, *supra* note 11, at 38-39.

33. Julie-Ann Amos, *The History of Satellite Radio*, 1ST-DISH-TV.NET, [http://www.1st-dish-tv.net/history\\_of\\_satellite\\_radio.htm](http://www.1st-dish-tv.net/history_of_satellite_radio.htm) (last visited Jan. 23, 2006).



unavailable by traditional terrestrial radio. First, it provided a continuous radio service of compact disk quality for all listeners, without interruption and without fading, across the entire continental United States.<sup>34</sup> Second, it made it possible to serve segments of the United States underserved or not served at all by traditional radio.<sup>35</sup> Third, it had the potential to increase the variety of programming available to the listening public.<sup>36</sup> Fourth, it provided new opportunities for domestic economic development and improved United States competitiveness in the world marketplace.<sup>37</sup>

Despite concerns that satellite radio would directly compete with the broadcast radio market, the FCC was “not prepared to deny the allocation of spectrum for future SDARS and the benefits that may accrue from the provision of such service to the public, on the basis of potential for economic harm to some stations.”<sup>38</sup> In recognizing the public value of terrestrial radio, the FCC weighed “the potential public interest benefits of SDARS against its potential adverse impact on terrestrial radio.”<sup>39</sup>

In terms of public interest benefits, the FCC considered service to areas with limited or no coverage, as well as the need for diversity of programming and the potential development of new technology. The FCC also found it likely that additional terrestrial stations posed a greater threat to the broadcast market than the development of satellite radio. Further, the FCC found no evidence that satellite SDARS would compete with the local advertising revenue on which terrestrial radio depends.<sup>40</sup>

In 1997, six companies submitted bids for SDARS, but the FCC granted only two licenses: one to Sirius Satellite Radio, Inc. (formerly CD Radio) for

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34. Satellite radio functions anywhere there is a direct line between an antenna and satellite. If there are major obstructions, such as tunnels or buildings, the service does not work as well. Satellite radio utilizes a single channel, so that no matter where you are, you are listening to one continuous signal from east coast to west coast. *Satellite Radio*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Satellite\\_radio](http://en.wikipedia.org/wiki/Satellite_radio) (last visited Jan. 23, 2006) [hereinafter *Satellite Radio*].

35. When the FCC established its rules and policies for SDARS, one study indicated that 722,102 persons (0.3% of U.S. populations) received no FM stations, 2.4 million people (1.0% of U.S. population) received one or fewer FM stations, and 22 million people (8.9% of U.S. population) received five or fewer FM stations. *In re Establishment of Rules and Policies for the Digital Audio Radio Satellite Serv. In the 2310-2360 Band* ¶ 10 (FCC) (No. 90-357) (Mar. 3, 1997), available at <http://www.fcc.gov/Bureaus/International/Orders/1997/fcc97070.txt> [hereinafter *Rules and Policies for DARSS*]. While the satellite signal covers millions of square kilometers, AM/FM requires mid-to-high population densities, thereby making it less practical in rural or remote areas. *Satellite Radio*, *supra* note 34.

36. The FCC found that satellite programming targeted “a need for more educational programming, rural programming, ethnic programming, religious programming, and specialized musical programming.” *Rules and Policies for DARSS*, *supra* note 35, ¶ 14. *See, e.g., infra* note 43 and accompanying text (highlighting specialized programming on Sirius Satellite Radio).

37. CARTER, *supra* note 11, at 62; *Rules and Policies for DARSS*, *supra* note 35, ¶ 1.

38. CARTER, *supra* note 11, at 62. Despite the competition factor, it was believed that satellite radio would actually complement terrestrial radio and make up for deficiencies in service and quality. *Rules and Policies DARSS*, *supra* note 35, ¶ 1.

39. *Rules and Policies for DARSS*, *supra* note 35, ¶ 9.

40. *Rules and Policies for DARSS*, *supra* note 35, ¶¶ 10-17, 19-21.

\$83 million and one to XM Radio, Inc. (formerly American Mobile Radio) for \$89 million.<sup>41</sup> At that time, Sirius and XM faced two major obstacles in achieving a success for satellite radio. First, there were no consumer-accessible portable satellite radio receivers. Second, there was uncertainty as to whether consumers would be willing to pay for satellite programming.<sup>42</sup>

### C. How Satellite Radio Works and Why It's Attractive

To overcome these obstacles, XM and Sirius first linked with electronic manufacturers to build satellite radio receivers for "cars, homes, offices, trucks, RVs, boats, and even airplanes."<sup>43</sup> Sirius' Senior Vice President of

41. American Mobile Radio Corp., 13 F.C.C.R. 8829 (1997), Satellite CD Radio Inc., 13 F.C.C.R. 7971 (1997). Despite its growing popularity, these two stations are the only two players in the market. See Stephanie Watson, *Sirius v. XM*, HOWSTUFFWORKS.COM, <http://electronics.howstuffworks.com/satellite-radio-comp.htm/printable>; see also, Adam Cain, Comment, *Satellite Radio: An Innovative Technology's Path Through the FCC and Into the Future*, 25 J. NAT'L. A. ADMIN. L. JUDGES 223, 232 (2005). The FCC explained that because SDARS service required 12.5 MHz for viable and competitive service, they could license only two systems. Rules and Policies for DARSS, *supra* note 35, ¶ 73. Having two systems ensured competitive subscription rates and diversity of programming voices. *Id.* ¶ 78. To note, there is also WorldSpace, a satellite provider for Europe, Asia and Africa. *Satellite Radio*, *supra* note 34. XM Radio's license remains valid until 2009, and Sirius until 2010. Then, both SDARS operators will apply to renew their licenses or opt to decommission their satellites. Cain, *supra* at 232.

In February 2007, Sirius and XM proposed a \$13 million merger between the two satellite radio companies, code-named Project Big Sky by XM. At first, FCC Chairman Kevin J. Martin appeared skeptical of the merger, but later said that if proposed, the FCC would consider it. Still skeptical is The National Association of Broadcasters, which stated that "When the [FCC] authorized satellite radio, it specifically found that the public would be served best by two competitive nationwide systems . . . . In coming weeks, policy makers will have to weigh whether an industry that makes Howard Stern its poster child should be rewarded with a monopoly." Also, the potential for antitrust violations remains another hurdle, despite XM and Sirius' respective executives Gary Parsons and Mel Karmazin, shaking hands on the merger. Richard Siklos & Andrew Ross Sorkin, *A Proposed Merger Would End Satellite Radio's Costly Rivalry*, N.Y. TIMES, Feb. 20, 2007, at A1-C2 (internal quotation marks omitted).

42. Watson, *supra* note 41.

43. *Id.* For example, Sirius is available in BMW, Rolls Royce, Chrysler, Dodge, Mercedes-Benz, Ford, Infiniti, Lincoln-Mercury, Land Rover, Jaguar, Mazda, Porsche and Toyota, as well as other vehicles. *Satellite Radio*, *supra* note 34. XM is available in Honda, Toyota, Hyundai, Nissan, Porsche, Buick, Saab and Volkswagen/Audi, just to name a few, and in September 2005, General Motors announced its plans to manufacture 1.55 million vehicles factory-installed with XM. XM Satellite Radio, XM in your New Car, at <http://www.xmradio.com/cars/> (last visited Jan. 23, 2006); Press Releases, XM Satellite Radio, XM Satellite Radio Holdings Inc. Announces Third Quarter 2005 Results and Reaffirms 6 Million Subscriber Guidance (Oct. 27, 2005), available at [http://www.xmradio.com/newsroom/print/pr\\_10\\_27\\_2005.html](http://www.xmradio.com/newsroom/print/pr_10_27_2005.html) [hereinafter XM Satellite Radio Holdings Inc.].

consumer electronics division says, "We want to make our service available over as many products as possible."<sup>44</sup>

In terms of programming, traditional radio and broadcast television offer a limited number of channels and weak signal quality. On the other hand, satellite radio offers up to 160 digitally transmitted channels with clear signal quality. Neither Sirius nor XM carry commercials on any of their music channels, and talk, sports, news and entertainment channels have fewer commercials than the average traditional, terrestrial radio station.<sup>45</sup> XM and Sirius also feature niche music and entertainment stations so that each station tailors programming to specific clientele needs.<sup>46</sup>

Most importantly, customers are willing to pay the price—about \$13 a month, plus \$100 for the equipment and a nominal activation fee.<sup>47</sup> Since its introduction, the number of subscribers has continued to grow. As of February 2006, XM reported more than 6 million subscribers, doubling the number of subscribers from the previous year,<sup>48</sup> and Sirius reported over 3 million subscribers, a 190% increase from the previous year.<sup>49</sup> While there

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44. Eric A. Taub, *Satellite Radio Leaves the Car to go Home and on Walks*, N.Y. TIMES, Jan. 12, 2006, at C9. Sirius channels can now be heard on the Dish Network and by AOL subscribers while XM has strategic marketing partnerships with Starbucks Coffee, JetBlue, AirTran Airways, Hyatt Hotels, Avis, National and Alamo. *Id.* Both XM and Sirius initially expected the biggest sales to come from the automobile market. As the industry now competes with such receivers as MP3 players and I-pods, both XM and Sirius are introducing portable devices into the market. *Id.*; XM Satellite Radio Holdings Inc., *supra* note 43.

45. Sirius Satellite Radio, <http://www.sirius.com> (follow "About Us" hyperlink) (last visited Jan. 4, 2006); XM Satellite Radio, <http://www.xmradio.com/learn/index.jsp> (last visited Oct. 10, 2006).

46. Mel Karmazin, CEO of Sirius, says:

It is all about content and we have the best content in radio. If you take all the Clear Channel stations and all the Infinity stations, you cannot have the same diversity as we offer. We have 120 channels in all markets. And we can offer all kinds of programs.

Karmazin, *supra* note 17. For example, in addition to such stations dedicated to blues, folk, reggae, big band, techno, comedy and gossip, as well as traditional rock, jazz, classical and country, Sirius also offers the OutQ channel, a channel entirely dedicated to America's gay, lesbian, bisexual and transgender population. Press Release, Sirius Satellite Radio, *Sirius Launches OutQ* (Apr. 15, 2003), available at <http://www.shareholder.com/sirius/ReleaseDetail.cfm?ReleaseID=152807&cat=&newsroom=>. In terms of sports coverage, Sirius has broadcasted the Super Bowl in five languages, and is the official satellite radio partner of the NFL, NBA and NHL. Press Release, Sirius Satellite Radio, *Sirius to Broadcast Super Bowl in Five Languages*, (Feb. 3, 2005), available at <http://www.sirius.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=EditorialAsset&cid=1109623905250>. (article excerpts); Taub, *supra* note 44. And, XM's sports coverage includes broadcast of over 5,000 live sporting events each year. XM Satellite Radio Holdings Inc., *supra* note 43. XM has also announced new shows produced by Oprah, Bob Dylan and the hosts of ABC's "Good Morning America." Taub, *supra* note 44.

47. Watson, *supra* note 41. In comparison to cable television, a survey showed that in December 2003, 67.7% of households with televisions subscribed to cable services, "[d]espite the costs of additional equipment and monthly subscription fees." Cain, *supra* note 41, at n.9.

48. Press Releases, *XM Satellite Radio, XM Satellite Radio Holdings Inc. Announces Fourth Quarter and Full Year 2005 Results; XM to Exceed Nine Million Subscribers and Reach Cash Flow Break-Even by Year-End 2006* (Feb. 16, 2006), available at [http://www.xmradio.com/newsroom/screen/pr\\_2006\\_02\\_16.html](http://www.xmradio.com/newsroom/screen/pr_2006_02_16.html).

49. Press Release, Sirius Satellite Radio, *SIRIUS Satellite Radio Reports Record Subscriber*

are still over 193 million terrestrial radio listeners, satellite subscription growth continues to exceed financial projections each quarter.<sup>50</sup>

#### D. A Primer to Content Classifications

At the time the FCC granted XM and Sirius its licenses, the FCC also developed its rule-making order governing SDARS.<sup>51</sup> To truly understand the meaning and impact of these rules, we must first look at the FCC's power and limitations regarding the regulation of content. Through examining the range in regulation from broadcast radio and television to cable and satellite television, we will understand more clearly whether or not the current rules for satellite radio will prevail and whether Howard Stern's programming will remain untouchable.

##### 1. First Amendment Limitations on Broadcast

The First Amendment of the United States Constitution provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."<sup>52</sup> Congress, however, empowered the FCC with the ability to regulate "obscene and indecent"<sup>53</sup> speech. This authority is found within the Communication Act of 1934, and specifically in Title 18 of the United States Code, Section 1464, which provides that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."<sup>54</sup> Nevertheless, the Commission is nowhere given the power to censor, particularly because prior restraints are presumptively invalid.<sup>55</sup>

*Growth and Revenue for Fourth Quarter and Full-Year 2005* (Feb. 27, 2005), available at <http://www.shareholder.com/sirius/ReleaseDetail.cfm?ReleaseID=187963&cat=&newsroom=>.

50. Thierer, *supra* note 4, at 3. Because of this, it is expected that there will be over 44 million satellite radio subscribers by 2010. *Id.*

51. Rules and Polices for DARSS, *supra* note 35.

52. U.S. CONST. amend. I.

53. See *infra* notes 66-78 and accompanying text.

54. 18 U.S.C. § 1464 (2005). The FCC is also entitled to impose further sanctions, as it sees fit.

55. 47 U.S.C. § 326 (2005) ("Nothing in this chapter . . . [gives] the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."). In *Near v. Minnesota*, 283 U.S. 697, 702 (1931), Minnesota had a statute authorizing the court to declare any obscene, lewd, lascivious, malicious, scandalous or defamatory publication a public nuisance, and the lower court thereby issued an injunction against future publication or distribution of the *Saturday Press*, an anti-Semitic, anti-Communist, and anti-labor paper. The Supreme Court held that the object of the law was

To examine the constitutionality of a First Amendment content-based challenge, the “strict scrutiny” test is normally used.<sup>56</sup> To pass strict scrutiny, regulations must be narrowly tailored to advance a *compelling* governmental interest, using the least restrictive means to advance that interest.<sup>57</sup> However, “because broadcast regulation involves unique considerations, our cases have not followed precisely the same approach that we have applied to other media and have never gone so far as to demand that such regulations serve ‘compelling’ government interests.”<sup>58</sup> The Court established that broadcast radio and television gets limited First Amendment protection in *Red Lion Broadcasting Co. v. FCC* because “differences in the characteristics of new media justify differences in the First Amendment standards applied to them.”<sup>59</sup> The Court reasoned that there are substantially

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editorship, and that prior restraints were principally unconstitutional. *Id.* at 712-14. The Court did note that prior restraints could be exercised in “exceptional cases,” i.e. during times of war, when sometimes newsworthy information leaked is confidential and of utmost importance to warrant its retraction. *Id.* at 716. The Court also cited Sir William Blackstone, the most famous common law compiler, who wrote in the late 1760s: “Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity . . . .” *Id.* at 713-14. *But see* Nat’l Ass’n for Better Broad. v. FCC, 591 F.2d 812, 818 (D.C. Cir. 1978) (holding that subsequent review is not “editorship” within the meaning of 47 U.S.C. § 326).

56. *Sable Commc’ns. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). In *Sable*, a dial-a-porn service sued for declaratory and injunctive relief against the Communications Act’s total ban on indecent and obscene interstate commercial messages. *Id.* at 118. While the Court upheld the provision regarding obscenity, it struck down the indecency provision. *Id.* at 124. The Court found that a content-based speech restriction can stand only if it satisfies strict scrutiny. *Id.* at 126. Under the strict scrutiny standard, a content-based regulation must promote a compelling governmental interest and be narrowly tailored to advance that interest. *Id.* The Court reasoned that the blanket denial of access to adults to indecent, but not obscene, telephone messages far exceeded the objective of limiting access to minors. *Id.* at 131. Distinguishable from *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), the Court explained that credit cards, access codes and scrambling methods were less restrictive methods of keeping dial-a-porn messages away from children. *Id.* at 127-28. Also, since listeners needed to take affirmative steps to dial, and because *Pacifica* emphasized the narrowness of its holding, the blanket provision regarding indecency did not withstand strict scrutiny. *Id.*

Additionally, cases involving the fundamental right to privacy get strict scrutiny review. *See* *Griswold v. Connecticut*, 381 U.S. 479, 504 (1965); *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Zablocki v. Redhail*, 434 U.S. 374, 381 (1978). Cases involving race and ethnicity also receive strict scrutiny review. *See* *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984).

57. S. REP. NO. 108-253, at 14 (2004). *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997) (if a less restrictive alternative would satisfy the Government’s purpose, then the legislature must use that alternative). *See* *United States v. Playboy Entm’t Group Inc.*, 529 U.S. 803, 813 (2000) (holding that the right of expression prevails when there is no less restrictive alternative).

58. *FCC v. League of Women Voters*, 468 U.S. 364, 376 (1984).

59. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969). *Red Lion* involved the application of the fairness doctrine and whether someone personally attacked had the right to respond on the broadcast medium within the purview of FCC regulation. *Id.* at 372. The FCC laid down a twofold duty: (1) a broadcaster must give adequate coverage to public issues; and (2) coverage must be fair to reflect opposing views. *Id.* at 377-78. This authority derives from the FCCs ability to operate in the “public convenience, interest, or necessity.” *Id.* at 379. *See generally* *Nat’l Broad. Co. v. United*

more individuals who want to broadcast than there are frequencies available.<sup>60</sup> Thus, the scarcity of the spectrum necessitates a stricter standard for broadcast media, as opposed to newspapers and magazines.<sup>61</sup>

Although the Court stated its rationale in *Red Lion*, it was not until *FCC v. League of Women Voters of California*<sup>62</sup> that the Court actually established the First Amendment test it would use for broadcast radio and television. The issue presented before the Court was whether the owner and operator of a noncommercial educational broadcasting station could engage in editorializing.<sup>63</sup> Such editorializing was contrary to the government's Public Broadcasting Act, which stated that any non-commercial station receiving government funding could not engage in editorializing, nor

States, 319 U.S. 190, 219 (1943) (noting that the public interest standard denoted to the FCC is an expansive power).

The "public convenience, interest, or necessity" standard is criticized for being vague, particularly the FCC's process of selecting licensees to operate airwaves is anything but clear and precise. Weinberg, *supra* note 5, at 245-46. Weinberg's Symposium Article poignantly states,

In the broadcast licensing context in particular, one would have thought that clear rules were essential. Because broadcast licenses are extremely valuable, a licensing system that allows a government agency extensive decision-making discretion leaves licensees and would-be licensees eager to curry favor with the agency and reluctant to offend it. To that end, licensees and would-be licensees may moderate their own speech to accord with perceived governmental desires. Even if there is no such self-censorship, vague decision-making standards allow the licensor to advance its own political agenda by granting licenses to those applicants whose speech it favors.

*Id.* at 247. See also *infra* notes 208-14 and accompanying text (discussing vagueness). In light of this vagueness challenge, the Court should recognize that there are less restrictive means to handle licensing than a public interest standard. And, the special First Amendment rules that apply to broadcast seem contrary to the entire broadcast "public interest" scheme. Under ordinary First Amendment analysis, the government cannot deny speech because speech advances the "public interest" and the marketplace of ideas. Weinberg, *supra* note 5 at 255. But, in the indecency context, potential censorship and selective voices are viewed as "the Commission's 'public interest' responsibility." *Id.* at 256. The problem is that these conflicting "public interests" do not rely on clear-cut rules. Thus, because FCC indecency regulation does not satisfy the precision required by a First Amendment vagueness challenge, the Court may feel compelled to revisit its entire trajectory of rule-making and the rationale supporting different rules for broadcast regulation.

60. *Red Lion*, 395 U.S. at 388.

61. *Id.* Given a limited spectrum, and the public's interest in hearing opposing voices, the FCC may impose duties on broadcast license holders that would not necessarily apply to newspapers. *Id.* at 391. See also *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding that requiring a newspaper to print replies interfered with the publisher's First Amendment rights). In terms of scarcity, the Court also discussed a future where scarcity would no longer be an issue. *Red Lion*, 395 U.S. at 396-97. The Court concluded that advances in technology may enable us to use the spectrum more efficiently in the future. Nevertheless, the Commission must reserve parts of the spectrum for other important uses, including radio-navigational aids for aircrafts and vessels, land mobile services for police, ambulance, and fire departments, and services for public utility companies. *Id.* at 397-98.

62. *League of Women Voters*, 468 U.S. at 364.

63. *Id.* at 366.

endorse any particular candidate.<sup>64</sup> The Court found that the test for a content-based broadcast regulation was whether the “restriction [imposed by the Act] is narrowly tailored to further a *substantial* governmental interest.”<sup>65</sup> Therefore, as opposed to the strict scrutiny test applied to normal free speech, traditional broadcasting gets less First Amendment protection.

## 2. Obscene vs. Indecent Speech

Although obscene speech is a form of expression, the Supreme Court has specifically held that obscenity is not protected anywhere by the First Amendment, and thereby cannot be broadcast at anytime.<sup>66</sup> The current definition of obscenity is found in *Miller v. California*:

(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

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64. *Id.* at 366.

65. *Id.* at 380 (emphasis added). The Court reiterated the fundamental principles regarding broadcast regulation, but focused on why Congress created the ban—to protect noncommercial educational broadcasting stations from feeling compelled to promote government editorial interests in exchange for funding. *Id.* at 388-89. Since editorial opinions lie at the heart of First Amendment protection, the Court therefore found that the ban on editorializing was not narrowly tailored to advance a substantial governmental end. *Id.* at 402.

See also *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (holding that “time, place, and manner” regulation is content-neutral and receives intermediate scrutiny). In *Renton*, the Court explored a challenge to a city ordinance which proscribed that all adult mini-theatres could not be located within 1,000 feet of any residential, church, park or school zone. *Id.* at 46. The Court held that this was a content-neutral, “time, place and manner” regulation, since it “does not ban adult theaters altogether, but merely provides that such theaters may not be located within [a designated area].” *Id.* at 46-47. These types of regulations are acceptable so long as they serve *substantial* governmental interests and less restrictive alternatives are unavailable. *Id.* at 47. See also *Craig v. Boren*, 429 U.S. 190, 197-98 (1976) (holding that gender-based classifications receive intermediate scrutiny). In *Craig*, the Court considered a gender-based classification, whereby an Oklahoma statute prohibited the sale of 3.2% beer to males under the age of twenty-one and females under the age of eighteen. *Id.* at 192. The Court reasoned that classifications based on gender receive an intermediate test, and to withstand a constitutional challenge, such gender classifications “must serve important governmental objectives and must be substantially related to achievement of those objectives.” *Id.* at 197 (citing *Reed v. Reed*, 404 U.S. 71, 76 (1971) (holding that different treatment afforded to persons within a statute based on criteria wholly unrelated to the objective of the statute is unconstitutional, and such classifications “must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike”) (citation omitted)). Thus, gender-based classifications get less protection than the strict scrutiny test applied to race-based classifications. See *supra* note 56 and accompanying text. While the Court uses such terms as “compelling,” “substantial” and “important,” proper analysis depends less on these words as adjectives and more on the classifications supporting different levels of scrutiny. See *generally Craig*, 429 U.S. at 190.

66. See *Roth v. United States*, 354 U.S. 476, 485 (1957).

applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>67</sup>

Unlike obscenity, indecent speech is protected under the First Amendment. But, in *FCC v. Pacifica Foundation* the Supreme Court held that the government could regulate indecency, specifically on the broadcast medium, because broadcast media receives less First Amendment protection than other media.<sup>68</sup> The indecency standard applied by the Court follows: "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."<sup>69</sup>

In *Pacifica*, at about two o'clock on a Tuesday afternoon, a New York radio station aired comedian George Carlin's twelve-minute monologue entitled "Filthy Words."<sup>70</sup> A few weeks later, the FCC received a letter from a parent, who heard the broadcast while driving with his young son.<sup>71</sup> The FCC consequently advanced several reasons why broadcast requires special treatment and why the FCC has authority to regulate indecent speech on broadcast: (1) access by unsupervised children; (2) privacy interests of the home are entitled to extra deference; (3) unconsenting adults may tune in

67. *Miller v. California*, 413 U.S. 15, 24 (1973) (citations omitted) (holding that mailing unsolicited sexually eliciting pornography violated the California obscenity statute, and that although courts must be sensitive to First Amendment infringement of genuinely serious literary, artistic, political or scientific expression, here there was none to be found). The *Miller* Court also noted that if a state statute would like to regulate obscene material, it must be limited to materials that "depict or describe patently offensive 'hard core' sexual conduct." *Id.* at 27. See generally Thomas G. Krattenmaker & Marjorie L. Esterow, *Censoring Indecent Cable Programs: The New Morality Meets the New Media*, 51 *FORDHAM L. REV.* 606 (1983). See also *Cohen v. California*, 403 U.S. 15 (1971); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

68. 438 U.S. 726, 748 (1978).

69. *Id.* at 732. See *infra* notes 208-14 and accompanying text (discussing the vagueness doctrine, as applied to the indecency standard).

70. *Pacifica*, 438 U.S. at 729. The following is an excerpt from the aired monologue:

Aruba-du, ruba-tu, ruba-tu. I was thinking about the curse words and the swear words, the cuss words and the words that you can't say, that you're not supposed to say all the time, [']cause words or people into words want to hear your words. . . . The original seven words were, s--t, p--s, f--k, c--t, c--ksucker, motherf---ker, and t-ts. Those are the ones that will curve your spine, grow hair on your hands and (laughter) maybe, even bring us, God help us, peace without honor (laughter) um, and a bourbon. (laughter).

*Id.* at 751 (Appendix).

71. *Id.* at 730. The FCC did not receive any other complaints. *Id.* The complaint was forwarded to *Pacifica* for comment. *Id.* *Pacifica* explained that prior to the broadcast, they advised listeners that Carlin's monologue contained "sensitive language which might be regarded as offensive to some." *Id.* The FCC thereby did not impose sanctions. *Id.* The FCC held that although the monologue was "patently offensive," it was not obscene, and informed the station that the order would be filed with the station's license file. *Id.* at 730-31.



without hearing the warning that offensive language is being or will be used; and (4) scarcity of the electromagnetic spectrum.<sup>72</sup> A three-judge panel of the Court of Appeals reversed, holding that the FCC order either constituted censorship, or that such authority was “overbroad” because Section 1464 only covers language deemed to be obscene or otherwise unprotected by the First Amendment.<sup>73</sup>

The Supreme Court reversed the Appellate Court’s decision, upholding FCC indecency regulation on the broadcast medium. The Court specifically emphasized two important reasons why broadcast should be treated differently. First, broadcast media has established a pervasive nature in the home, where the right to be left alone trumps the First Amendment rights of an intruder.<sup>74</sup> Second, broadcasting is uniquely accessible by children.<sup>75</sup> The Court held that these interests met the lower level First Amendment standard for broadcast content control and thereby gave the FCC authority to regulate indecent speech on broadcast, speech that would be more protected in all other forms.<sup>76</sup>

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72. *Id.* at 731. The Commission emphasized that the concept of indecency is inextricably linked to the exposure of patently offensive language at a time of day when there is a reasonable risk that children are listening. *Id.* at 732. The Commission suggested that if the offensive broadcast had some value, and warnings came before the broadcast, then the broadcast might not be considered indecent in the later evening, when children are less likely to be in the audience. *Id.* at 732 n.5.

73. *Id.* at 726-27.

74. *Id.* at 748-49. The Court recognized that broadcasting receives the most limited First Amendment protection. *Id.* at 748. Broadcast media is uniquely pervasive because patently offensive and indecent material not only confronts the citizen in public, but also in the privacy of the home. *Id.* Additionally, because the broadcast audience can turn on a program, without receiving prior warning of the alleged indecent or obscene material, prior warning cannot completely protect every viewer and listener. *Id.* The Court noted that, “[t]o say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.” *Id.* at 748-49. The Court also found that outside the home, the balance may tip in favor of the offensive speaker. *Id.* at n.27.

75. *Id.* at 749. The Court stated that perhaps a child may not understand the broadcast in the beginning, but as time elapsed, such language could become part of the child’s vernacular. *Id.*; see *Ginsberg v. New York*, 390 U.S. 629, 640 (1968) (holding that the government’s interest in protecting its youth, and supporting parent’s authority in the household, warrants the regulation of otherwise protected speech). But, recognizing the importance of accessibility to children does not mean that adults are limited to hearing only what is appropriate for children. *Pacifica*, 438 U.S. at n.28. The Court thus emphasized the narrowness of the *Pacifica* holding, and in particular cited the time of day in which the broadcast aired to be a major concern. *Id.* at 750.

76. While other commissioners wanted to rule the broadcast obscene, then FCC Chair Glen Robinson stated that the recording did not pass the three part test for obscenity, and thereby deemed the broadcast indecent. Eyder Peralta, *Howard Stern: Let the Fight Begin/Will the FCC let the Shock Jock Speak his Mind?*, HOUS. CHRON., Jan. 9, 2006, at 1, available at 2006 WLNR 480353. Peralta comments that if Stern does the show the way he likes, he might run into obscenity charges. *Id.* This potential charge would need to satisfy an extremely high rebuttable standard. *Id.* The *Pacifica* Court noted that the content of *Pacifica*’s broadcast was “vulgar,” “offensive,” and “shocking,” but that “such patently offensive sexual and excretory language need not be the same in every context. . . . [and that such speech] var[ies] with the circumstances.” *Pacifica*, 438 U.S. at 747. In his dissent, Justice Stewart said that he believes “‘indecent’ should properly be read as meaning no more than ‘obscene.’” Since the Carlin monologue concededly was not ‘obscene,’ I

It is important to recognize, however, that the basic guidelines established in *Pacifica* have not changed since this landmark 1978 case. Furthermore, the Court emphasized the *narrowness* of the holding.<sup>77</sup> Thus, this is the seminal case regarding indecency regulation, and the one most critical for Howard Stern's alleged emancipation from the FCC.<sup>78</sup>

### 3. Children's Bedtime Stories

The impact of media violence on children offers a substantial reason for indecency regulation on broadcast radio and television and a potential basis for extending *Pacifica* to other media. As television developed during the 1950s, media violence became a primary focus for researchers.<sup>79</sup> In 1969, a study conducted by the Surgeon General revealed that "(1) television content is heavily saturated with violence; (2) children and adults are watching more television; and (3) there is some evidence that, on balance, viewing violent television entertainment increases the likelihood of aggressive behavior."<sup>80</sup>

Although the FCC recognized the positive correlation between television violence and aggressive behavior, as well as its authority to regulate certain broadcasts of obscene and indecent material, the FCC did not recommend any Congressional action, and relied primarily on regulation

believe that the Commission lacked statutory authority to ban it." *Id.* at 778 (Stewart, J., dissenting). Since *Pacifica*, the indecency standard has been contested as being unconstitutionally vague. CARTER, *supra* note 11, at 249. See *infra* notes 208-14 and accompanying text (discussing vagueness doctrine).

77. *Pacifica*, 438 U.S. at 750. The Court explained that the decision rested entirely on a context-based approach. The concept requires consideration of a number of factors. Here, time of day was specifically emphasized. *Id.* The Court concluded the opinion, stating that a

'[N]uisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard.' We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.

*Id.* at 750-51 (citations omitted).

78. Andrew Sperry, Comment, *Smut in Space: The FCC and Free Speech on Satellite Radio*, 17 LOY. CONSUMER L. REV. 531, 535 n.28 (2005).

79. S. REP. NO. 108-253, at 6 (2004).

80. *Id.* A study released in 1975 by the Journal of Medical Association revealed that television violence threatened the welfare of America's youth. *Id.* at 7. After ten more years of research, the research community demonstrated positive correlations between violence depicted and aggressive behavior. *Id.* Another study in 1992 by Dr. Brandon Centerwall, a Professor of Epidemiology at the University of Washington, opined the homicide rates in South Africa, Canada, and the United States doubled about ten or fifteen years after the introduction of television. *Id.* In March 2003, the Committee on Commerce discovered that the correlation between violent media and aggressive behavior "is stronger than that of calcium intake and bone mass, lead ingestion and lower IQ, condom non-use and sexually acquired HIV, and environmental tobacco smoke and lung cancer." *Id.* at 8.

by “raised eyebrow.”<sup>81</sup> The FCC introduced an industry code of conduct, which sought a voluntary family viewing policy, but it was not until 1990 when the 101st Congress enacted the first law to address television violence, the Television Program Improvement Act (TPIA).<sup>82</sup>

Some noteworthy aspects of the TPIA included Congress adopting a policy that any broadcasting of violent programming state: “[D]ue to some violent content, parental discretion is advised.”<sup>83</sup> Also, Congress required television manufacturers to include a device, named the V-Chip, which would allow parents to block violent programming.<sup>84</sup> In addition, the FCC encouraged the video programming industry “to ‘establish voluntary rules for rating video programming that contains sexual, violent, or other indecent material about which parents should be informed before it is displayed to children . . . .’”<sup>85</sup>

Another proposal to combat television violence points to the various attempts at implementing safe harbor hours, otherwise called channeling. In *Action for Children’s Television v. FCC* (“*Act P*”) the Court reviewed the FCC’s delineation that safe harbor hours for indecent programming begin at 6:00 a.m. and end at midnight, rather than 10:00 p.m.<sup>86</sup> The Court found

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81. See Joel Timmer, *Incrementalism and Policymaking on Television Violence*, 9 COMM. L. & POL’Y 351 (2004). Timmer explains that the use of regulation by “raised eyebrow” can be used to help solve problems that appear to have no clear solutions, such as television violence. *Id.* at 361. Timmer cautions because regulation via “raised eyebrow” requires little government funding or resources, and this may lead to ineffectiveness in reaching intended policy goals. *Id.*

82. S. REP. NO. 108-253, at 10 (2004). The policy provided that, “entertainment programming inappropriate for viewing by a general family audience should not be broadcast during the first hour of network entertainment programming in prime time and in the immediately preceding hour.” *Id.* The industry code was challenged on antitrust grounds. *Id.* With the industry code’s elimination, so too went the family viewing policy. *But see infra* note 93 and accompanying text (discussing the implementation of safe harbor hours).

83. S. REP. NO. 108-253, at 10 (2004).

84. *Id.* at 11. The FCC required manufacturers to install the V-Chip in at least half of televisions thirteen inches or larger by July 1, 1999, and the remaining half by January 1, 2000. The V-Chip, in essence, was an attempt by Congress to maintain regulation through a more proactive approach while still maintaining a “raised eyebrow” technique. Instead of directly censoring what would be available to families on television, Congress allowed parents to censor what came into their homes, at their own discretion. Timmer, *supra* note 81, at 383. Such regulation utilized “raised eyebrow” because the V-Chip helped Congress meet intended goals without confronting First Amendment challenges. *Id.* at 385. In 1993, Congress introduced eight bills to address violence on television, but no formal action was taken on these measures. *Id.* at 368. In 1994, the V-Chip was re-introduced, but it did not become law until its inclusion in the Telecommunications Act of 1996. *Id.* at 369.

85. S. REP. NO. 108-253, at 11 (quoting the Telecommunications Act of 1996, PUB. L. NO. 104-104, 110 Stat. 136 (1996)). In 1998, the television industry adopted a rating system to attach to particular programming: (S) for sex, (V) for violence, (L) for language, and/or (D) for suggestive dialogue, as well as (FV) for fantasy violence for children’s programming in the TV-Y7 category. *Id.*

86. 852 F.2d 1332, 1335 (D.C. Cir. 1988). In determining whether safe harbor provisions are constitutional, the proposed Broadcast Decency Enforcement Act of 2004 utilized the test for broadcast regulation. S. REP. NO. 108-253, at 13. In terms of compelling governmental interest, there were interests in: (1) guarding children against harm caused by television violence; (2)

that the FCC did not adequately justify its new, more restrictive safe harbor approach, because in view of the First Amendment interest involved, the evidence set forth did not substantiate the designated period of restraint.<sup>87</sup> Then, in *Action for Children's Television v. FCC* ("Act II"),<sup>88</sup> the Court reviewed a 24-hour ban on indecent broadcasting and held that, "[o]ur holding in *ACT I* that the Commission must identify some reasonable period of time during which indecent material may be broadcast necessarily means that the Commission may not ban such broadcasts entirely."<sup>89</sup>

Finally, in *Action for Children's Television v. FCC* ("Act III"),<sup>90</sup> the Court faced the challenge of whether there should be different safe-harbor provisions for broadcast versus commercial television.<sup>91</sup> Specifically, it was to be decided whether commercial broadcast should have safe harbor hours

protecting society as a whole from television-induced violent acts; (3) helping parents supervise their children; and (4) sheltering the privacy of the home from the intrusion of violent programming. *Id.* at 15-16. In terms of the least restrictive means, the Act focused on three components: (1) industry self-regulation; (2) the use of warning labels; and (3) parental responsibility and control technologies. *Id.* at 16-19. The Committee concluded that in the absence of an effective V-chip and content based ratings system, safe harbor hours were the only approach which would ensure that its interests were met. *Id.*

Nevertheless, channeling is suspect to a number of First Amendment challenges. First, there is potential vagueness because the indecency standard only applies to the broadcast medium, and furthermore only applies to safe harbor hours. Weinberg, *supra* note 5, at 233. On the other hand, it is argued that even though the indecency standard is too vague to support a total ban of indecent material, it is precise enough to support channeling. Either channeling of indecent material to nighttime hours is *de minimis*, or in terms of balancing competing interests, the government's interest in protecting children weighs more heavily than the damage to free speech. *Id.* Both these arguments are flawed because not only is a *de minimis* effect more than insubstantial on the marketplace of ideas, but "[f]or First Amendment law to tolerate substantial vagueness, so long as a judge deemed governmental interests served by the regulation to be more important, would eviscerate vagueness doctrine." *Id.* at 234. See also *infra* notes 208-14 and accompanying text (discussing vagueness doctrine). A second argument is that channeling constitutes prior restraint. The fact that certain speech be aired only during certain times constitutes prior restraint of that speech. See Peter Alan Block, Note, *Modern-Day Sirens: Rock Lyrics and the First Amendment*, 63 S. CAL. L. REV. 777, 813 (1990).

87. *Act I*, 852 F.2d at 1335. The FCC advanced its new channeling approach because it wanted to shelter children from unwanted exposure to indecent programming, but the Court found that this channeling decision was "arbitrary and capricious . . . because it is not based on an adequate factual or analytic foundation." *Id.* at 1340-41. Also, the Court rejected the FCC's position that this was a time, place, and manner restriction because such restrictions must be content-neutral, and here, regulations which focus on indecent content are not content-neutral but content-based. *Id.* at 1343.

88. 932 F.2d 1504, 1504 (D.C. Cir. 1991). The Court reasoned that, despite the compelling interest of safeguarding minors from indecent programming, indecent, but not obscene, material is protected by the First Amendment. *Id.* at 1509. Thus, the interest of protecting children, in the context of speech control, must give rise to a narrowly tailored regulation respecting First Amendment concerns and safe harbor periods. *Id.*

89. *Id.*

90. 58 F.3d 654, 654 (D.C. Cir. 1995).

91. *Id.* at 656.

ending at 10:00 p.m. and traditional broadcast hours ending at 12:00 a.m., or if both should have the same safe harbor hours.<sup>92</sup> The Court utilized the test for broadcast—whether there is a compelling governmental interest, narrowly tailored, using the least restrictive means—and determined that the government “fail[ed] to explain how this disparate treatment advanced its goal of protecting” children.<sup>93</sup>

#### 4. First Amendment Application to Cable Television, Satellite Radio, and the Internet

##### a. *Cable Regulates Content Control*

Before expanding on the rules and explaining why there is greater First Amendment freedom for cable television, it is important to understand that cable does not operate via the electromagnetic spectrum, as does satellite radio and television.<sup>94</sup> Regardless, the Court in *United States v. Southwestern Cable Co.* held that the FCC has jurisdictional authority to regulate cable, or anything “reasonably ancillary” (i.e. networks, network programming, satellite, satellite television) to the Commission’s effective performance over broadcast radio and television regulation.<sup>95</sup>

In *Turner Broadcasting Systems, Inc. v. FCC* (“*Turner I*”) the Court reviewed whether cable operators should be required to carry local programming, called “must-carry” provisions.<sup>96</sup> The Court recognized that, “the cable industry today stands at the center of an ongoing telecommunications revolution with still undefined potential to affect the way we communicate and develop our intellectual resources.”<sup>97</sup> This undefined potential necessitated imposing “must-carry” provisions on cable.

To note, the rationale used to justify the development of cable television is strikingly similar to the justifications substantiating the development of satellite radio. For one, the cable systems were designed to bring clear broadcast television signals to remote areas. Second, the purpose was to

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92. *Id.* at 658-59.

93. *Id.* at 669. In *Act III*, the Court identified three compelling governmental interests: (1) support for parental supervision; (2) concern for children’s well-being; and (3) protection of the home against offensive broadcasters. *Id.* at 660-61. While the Court found that safe harbor hours served such interests, the Commission again failed to explain the disparate treatment, thereby forcing the Court to retain the less restrictive safe harbor hours. *Id.* at 669. *See also supra* note 57 and accompanying text.

94. Poniewozik, *supra* note 9.

95. 392 U.S. 157, 178 (1968) (finding that Congress granted the FCC in the Communications Act of 1934 an expansive power over all interstate communication by wire or radio).

96. 512 U.S. 622 (1994).

97. *Id.* at 627.

enhance broadcast television, not replace or substitute it. Third, cable is capable of transmitting more stations than traditional broadcast.<sup>98</sup>

The *Turner* Court recognized that over 60% of households with television subscribe to cable, and that among these households, cable has replaced over-the-air broadcast as the primary provider of video programming.<sup>99</sup> Therefore, the Court held that must-carry provisions were constitutional, particularly because such provisions were content-neutral and thereby narrowly tailored to advance important or substantial government interests of preserving local programming.<sup>100</sup>

Initially, indecency was not a problem for cable programming. More recently, however, the Court has addressed whether *Pacifica* applies to cable programming.<sup>101</sup> One of the first cases to examine whether *Pacifica* extends to cable was *Cruz v. Ferre* where the Court found an ordinance forbidding the distribution of indecent material on cable to be unconstitutional.<sup>102</sup> The

98. *Id.* at 627-28. See also *supra* notes 34-37 and accompanying text.

99. *Turner Broad. Sys. Inc.*, 512 U.S. at 638.

100. *Id.* The Court determined that must-carry provisions supported three governmental interests: "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming." *Id.* at 662 (citations omitted). The Court's main concern was to decide the level of scrutiny must-carry provisions should receive. The Court concluded that the rationale for providing less First Amendment protection to broadcast did not apply to cable. *Id.* at 637. And, since the must-carry provisions "confer benefits or impose burdens on speech without reference to the ideas or views expressed," they receive content-neutral regulation and do not infringe on First Amendment rights. *Id.* at 643-44. See also *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (holding that must-carry provisions receive "intermediate scrutiny," such that provisions must be narrowly tailored to advance an important government end).

In a recent FCC decision, the Commission unanimously held it would not impose on cable operators a dual carriage requirement to simultaneously carry broadcaster's analog and digital signals. *NAB to Fight FCC Rejection of Multicast Must-Carry*, COMMUNICATIONS DAILY, Feb. 11, 2005. Further, satellite radio does not have must-carry provisions—an important distinction from cable. See generally Cain, *supra* note 41 (discussing that groups such as the National Association of Broadcasters ("NAB") and the Society of Broadcast Engineers ("SBE") have proposed a number of rules for the FCC to restrict satellite radio development and to prevent satellite radio from competing with local over-the-air broadcast stations).

The Court also explored the issue of scarcity, and found that cable was not as scarce a resource as broadcast. *Turner Broad. Sys., Inc.*, 512 U.S. at 638. In terms of scarcity, the *Turner* Court recognized that the scarcity argument has been criticized since its inception, but the Court has "declined to question its continuing validity as support for our broadcast jurisprudence . . . and see no reason to do so here." *Id.* (citation omitted). The scarcity argument applies more to direct broadcast satellite television than to cable television because satellite uses the electromagnetic spectrum. But, scarcity alone does not justify regulation of indecency. Joel Timmer, *The Seven Dirty Words You Can Say on Cable and DBS: Extending Broadcast Indecency Regulation and the First Amendment*, 10 COMM. L. & POL'Y 179, 203 (2005). Additionally, since satellite offers more channel capacity than cable, it should not be subjected to a scarcity rationale. *Id.* at 200.

101. CARTER, *supra* note 11, at 515.

102. 755 F.2d 1415 (11th Cir. 1985).

Court reasoned that unlike broadcast, where privacy of the home trumps pervasiveness, cable subscribers must make “the initial decision” to subscribe, as well as purchase additional features, such as HBO or premium channels.<sup>103</sup> Furthermore, both cable and satellite systems have the capacity to block unwanted programming on a house-by-house basis.<sup>104</sup> Parents are also better able to manage cable television because cable providers supply a “lockbox” or “parental key” device enabling parents to eliminate objectionable programming.<sup>105</sup>

The Supreme Court made it clear that strict scrutiny applies to content-based speech restrictions on cable television in *United States v. Playboy Entertainment Group, Inc.*<sup>106</sup> There, the Court addressed whether Congress could regulate Playboy’s “signal bleed” by requiring the cable operator to scramble sexually explicit content in full or limit its airing to safe harbor hours between 10 p.m. and 6 a.m., when children were less likely to be in the audience.<sup>107</sup> The Court struck down the provision in question because a content-based regulation “can stand only if it satisfies strict scrutiny,” and since scrambling inhibited the viewing habits of adults too severely, this was not the least restrictive alternative.<sup>108</sup> The Court nevertheless revealed that Congress could regulate indecent content on cable, albeit a higher standard of review than that applied to broadcast media.<sup>109</sup>

#### *b. Satellite Radio Regulation Follows Cable Paradigm*

As technologies develop, offering new and diverse communication services, the FCC has attempted to classify those services under the paradigm of the Communications Act of 1934.<sup>110</sup> The Communications Act of 1934 defines “broadcasting” as “the dissemination of radio

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103. Timmer, *supra* note 100, at 187 (citation omitted). This Article notes that if a customer is unhappy with his or her cable service, the subscriber may terminate the service at any time. Thus, it is not as intrusive as broadcast. *Id.*

104. Timmer, *supra* note 100, at 179.

105. Timmer, *supra* note 100, at 188 (citation omitted).

106. 529 U.S. 803, 807-08 (2000).

107. *Id.* at 806.

108. *Id.* at 804 (citing *Sable Commc’ns. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)). The Court found a number of legitimate reasons to regulate the content, namely that many adults could find this content highly offensive; the content could enter the home unwanted; and there could be unnecessary exposure to children. *Id.* at 811. However, because this content is not obscene, and because cable systems have the ability to block unwanted channels, scrambling is not the least restrictive means for the Government to meet its legitimate goals. *Id.* at 814.

109. S. REP. NO. 108-253, at 21 (2004) (“[T]he District Court opinion in *Playboy* stated that, ‘. . . cable television is a means of communication which is pervasive and . . . [t]he Supreme Court has recognized that cable television is as accessible to children as over-the-air broadcasting, if not more so.’”).

110. *In re Subscription Video*, 2 F.C.C.R. 1001, 1001 (1987) (report and order).

communications intended to be received by the public, directly or by the intermediary of relay stations."<sup>111</sup>

It has been argued by subscription-based services that they should be treated differently than broadcast because they do not go out to the "public" in a traditional sense, since one pays for the service. In other words, broadcast "goes out to all alike, without charge or restriction to any listener."<sup>112</sup> When one pays a fee for service, the service no longer fits into the broadcast paradigm. On the other hand, the NTIA, a division of the Department of Commerce, believes that the FCC has the power to change classifications, as long as there is "a fully reasoned explanation for such action,"<sup>113</sup> which further correlates with the FCC's inherent authority to regulate in the "public convenience, interest or necessity."<sup>114</sup> The NTIA believes that the Commission should focus on the "intent" of the programmer by considering the question: to whom and by whom the transmission is directed. The National Association of Better Broadcasters ("NABB") further believes there is no statutory basis for distinguishing between subscription and advertising based programs.<sup>115</sup>

The FCC agrees, concluding that "intent" of the program purveyor remains the best practicable factor to determine whether a communications service should be treated as "broadcasting" under the Communications Act.<sup>116</sup> But, in establishing rules for SDARS, the FCC reasoned that satellite SDARS providers should decide if its service classification is either common carrier or broadcaster.<sup>117</sup> Since satellite radio did not fit into the

111. *Id.*

112. *Id.* at 1002.

113. *Id.* at 1001.

114. 47 U.S.C. § 302(a) (2005).

115. *In re Subscription Video*, *supra* note 110, at 1002.

116. *Id.* at 1003. A necessary condition for the broadcast classification is whether the programming is available to "all members of the public, without any special arrangements or equipment." *Id.* Consequently, subscription is an indicator that the service is not received by the public. Thus, satellite as subscription-based does not fall within the broadcast definition of the Communications Act of 1934.

117. Rules and Policies for DARSS, *supra* note 35, ¶ 81. The FCC considered a number of factors: "whether the customer needs a special receiver to decode the information, whether the information transmitted is encrypted and whether the operator and subscriber are in a contractual relationship." Sperry, *supra* note 78, at 534. The FCC further considered whether it should require all satellite radio providers to offer subscription service. Rules and Policies for DARSS, *supra* note 35, ¶ 81. The FCC concluded that, "satellite DARS licensees should be able to tailor their services to meet customer needs and that mandating a particular regulatory classification is unwarranted." *Id.* ¶ 84. During the period of establishing rules and policies for SDARS, Media Access Project recommended that the FCC classify SDARS as broadcasting to ensure statutory public service obligations. *Id.* ¶ 87. However, Commissioner Rachelle B. Chong's separate statement revealed that quantified programming obligations would "improperly place the heavy hand of government on



traditional broadcast classification, it chose to be regulated more like cable and satellite television.<sup>118</sup> Thus, as a non-broadcast medium, strict scrutiny review affords satellite radio a higher degree of First Amendment freedom.<sup>119</sup>

*c. The Internet is Offline with Indecency Regulation*

Despite the concerns for children, it is critical to understand that the Supreme Court has hesitated to authorize indecency regulations on the Internet. In understanding the Court's reasoning, we may consider why extending *Pacifica* to such media as the Internet, cable and satellite radio is not that simple. If the government would like to appease its compelling interest of regulating indecency, it must utilize the least restrictive alternatives narrowly tailored to meet that end.

In *Reno v. American Civil Liberties Union*,<sup>120</sup> the Court faced the challenge of determining whether the Communications Decency Act of 1996 ("CDA"), which sought to protect minors from harmful materials on the Internet, violated the First Amendment.<sup>121</sup> Specifically at issue in the statute were two criminal provisions, one for the knowing transmission of "obscene or indecent" material to persons under the age of eighteen years, and the other for the knowing sending or displaying of such material to persons under eighteen years old.<sup>122</sup> The District Court for the Eastern District of Pennsylvania, in a unanimous decision, held that the statute "sweeps more broadly than necessary and thereby chills the expression of adults."<sup>123</sup>

The Supreme Court specifically found the CDA too vague for anyone to comply with because it did not define obscene or "indecent" nor "patently offensive," thereby lacking the precision that a First Amendment content-based regulation requires.<sup>124</sup> The Court distinguished *Reno* from three prior

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the programming decisions of the SDARS providers." *Id.* (Separate Statement of Commissioner Rachelle B. Chong). It should be noted that at the time of this statement, the FCC did not know which SDARS applicants would receive licenses, nor whether these services would be subscription or advertiser based. *Id.* Now, these questions are answered, with both XM and Sirius being subscription based.

118. Sperry, *supra* note 78, at 534.

119. *Id.*

120. 521 U.S. 844 (1997).

121. *Id.* at 849.

122. *Id.* at 844, 859-60. The extent of these provisions is protected by two affirmative defenses: (1) whether there was a good faith effort to restrict access by minors; and (2) whether access was restricted by means of necessitating age proof, such as credit card verification or adult identification number or code. *Id.* at 860-61.

123. *Id.* at 862 (citations omitted). Chilling effect is defined as "[t]he result of a law or practice that seriously discourages the exercise of a constitutional right, such as the right to appeal or the right of free speech." BLACK'S LAW DICTIONARY 257 (8th ed. 2004). See also *Sable Commc'ns. of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989) (holding that a total ban on dial-a-porn was too invasive, and not narrowly tailored, with respect to First Amendment freedoms of adults).

124. *Reno*, 521 U.S. at 874, 877.

decisions regarding indecency regulation and minors. First, the Internet was distinguishable from the materials at issue in *Ginsberg v. New York*,<sup>125</sup> where the Court upheld the constitutionality of a New York statute making it a crime to sell obscene pornographic materials to minors. In that case, the Court found that although the statute prohibited sale to minors, it did not prohibit adults from purchasing such magazines.<sup>126</sup> Here, under the CDA, even a consenting parent would be susceptible to the application of the statute.<sup>127</sup> Since here the CDA infringed the First Amendment rights of adults too severely, there was thus the potential for censorship.<sup>128</sup>

Second, the Court distinguished *Reno* from *FCC v. Pacifica Foundation*,<sup>129</sup> where the monologue was "indecent as broadcast." The Court found the Internet did not receive the same limited First Amendment protection because the *Pacifica* decision was narrow and did not extend to the Internet.<sup>130</sup> Third, the Court found this case different from *Renton v. Playtime Theatres, Inc.*,<sup>131</sup> which upheld a zoning ordinance that kept adult movie theaters out of residential neighborhoods. There, the Court held that the zoning ordinance did not impact the content in the films, but rather the secondary content-neutral effects, such as advancing crime and diminishing property values.<sup>132</sup> In contrast, the CDA, as a content-based restriction, applied too broadly to the infinite world of cyberspace.<sup>133</sup>

In *Reno*, the Court held that the Internet was not as invasive as broadcast radio and television, and that free speech interests of adults were too strong in light of the interest to protect children via the CDA.<sup>134</sup> Thus, less restrictive alternatives were available.<sup>135</sup>

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125. 390 U.S. 629 (1968).

126. *Id.* at 637. There, the statute only applied to commercial transactions and it clearly defined "indecent" and "minor." *Id.*

127. *Reno*, 521 U.S. at 864-66. Further, the CDA does not limit itself to specific transactions and adds an additional year to the age of the minor. *Id.* at 864-66.

128. *Id.* at 880.

129. 438 U.S. 726, 735 (1978) (emphasis added).

130. *Reno*, 521 U.S. at 866-67; see *supra* note 77 and accompanying text (describing the narrowness of the *Pacifica* holding).

131. 475 U.S. 41 (1986).

132. *Reno*, 521 U.S. at 867. Additionally, the purpose of the CDA was to protect children from the "primary" effects of indecent and patently offensive content, rather than the "secondary" effects. *Id.*

133. *Id.* at 867. The Court also looked at the scarcity factor, and concluded that cyberspace was not as "scarce" a commodity as broadcast. *Id.* at 870.

134. *Id.* at 869.

135. *Id.* at 874. In particular, blocking or filtering technologies could be less restrictive means to prevent minors' from accessing harmful material online. *Id.* at 879. Also, such devices would not impose as great a burden on the free speech rights of adults as would the proposed Act. *Id.* at 875.

One may argue that the *Reno* Court did not necessarily foresee that the Internet would be as invasive as it is today. Nevertheless, in 2004 the Court again faced the issue of whether the Child Online Protection Act (“COPA”), the second attempt by Congress to make the Internet safe for minors, violated the First Amendment.<sup>136</sup> The Court eloquently stated:

In considering this question, a court assumes that certain protected speech may be regulated, and then asks what is the least restrictive alternative that can be used to achieve that goal. . . . The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to assure that legitimate speech is not chilled or punished. For that reason, the test does not begin with the status quo of existing regulations, then ask whether the challenged restriction has some additional ability to achieve Congress’ legitimate interest. Any restriction on speech could be justified under that analysis. Instead, the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives.<sup>137</sup>

Accordingly, the Court found that blocking and filtering software is a less restrictive alternative to COPA and held COPA unconstitutional.<sup>138</sup> The Court also equated its rationale with its holding in *Playboy*, where the Government failed to meet its burden that the proposed alternatives were most effective.<sup>139</sup> Thus, the Internet cases reveal that if the FCC would like to regulate non-traditional media, namely satellite radio, it must ensure that its regulations are narrowly tailored and use the least restrictive alternatives available.

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136. *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 661 (2004). The purpose of COPA was to restrict minors’ access to harmful material online. *Id.* at 661. The statute sought to do so by imposing criminal penalties of \$50,000 and six months of prison for the “commercial” Internet postings of content considered to be “harmful to minors.” *Id.* The Court defined material “harmful to minors” as:

“any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that – (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;” (B) depicts . . . sexual act[s] or sexual contact; and (C) . . . “lacks serious literary, artistic, political, or scientific value for minors.”

*Id.* at 661-62 (citations omitted). Thus, despite the affirmative defense that allows a person to escape conviction by demonstrating he “has restricted access by minors to material that is harmful to minors,” the Court found that there were less restrictive alternatives to handle “harmful” information than imposing the COPA statute. *Id.*

137. *Id.* at 666.

138. *Id.* at 666-67.

139. *Id.* at 670 (citing *U.S. v. Playboy Entm’t Group*, 529 U.S. 803 (2000)). See *supra* notes 106-09 and accompanying text.

## III. THE CURRENT STATE OF FCC REGULATION

A. *Fines Alone are Not Solving Indecency Concerns*

The turning point for FCC regulation occurred on February 1, 2004, when Janet Jackson's breast was "accidentally" exposed during the Halftime Show of Super Bowl XXXVIII and "[j]aws across the county hit the carpet at exactly the same time."<sup>140</sup> The FCC "received an unprecedented number of complaints" regarding the indecent material aired during the program.<sup>141</sup> Former FCC Chairman Michael Powell quickly responded, calling the incident, a "classless, crass and deplorable stunt."<sup>142</sup> The FCC consequently "proposed more fines for broadcast indecency in 2004 than the previous ten years combined."<sup>143</sup>

140. *In re Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, 19 F.C.C.R. 19230, 19239 (2004) [hereinafter *Super Bowl XXXVIII Halftime Show*]; Bill Carter & Richard Sandomir, *Halftime-Show Fallout Includes F.C.C. Inquiry*, N.Y. TIMES, Feb. 3, 2004, at D1. On March 16, CBS submitted a statement that "[t]he exposure resulted from a poorly-executed stunt that was planned by the performers without any involvement from Viacom, CBS, or MTV, all of whom would have forbidden the stunt if there had been any indication that it was planned." *Super Bowl XXXVIII Halftime Show*, *supra* at 19232. However, CBS's corporate affiliate MTV, offered a full recap of the stunt, and there were testimonials by Jackson's choreographer prior to the performance admitting that the Super Bowl most likely has never "seen a performance like this. The dancing is great. She's more stylized, she's more feminine, she's more a woman as she dances this time around. There are some shocking moments in there too," it makes one wonder whether or not this was planned. *Id.* at 19238-39. It also indicates that perhaps the broadcast industry believes this is what the public wants. *Id.* at 19239 (quoting an MTV web advertisement for the show, "armchair quarterbacks, fair weather fanatics and fans of Janet Jackson and her pasties were definitely in the right place"). See generally Holohan, *supra* note 30 (surveying the key events of 2004, as related to indecency regulation).

141. *Super Bowl XXXVIII Halftime Show*, *supra* note 140, at 19231. Prior to this incident, the FCC Enforcement Bureau was much more relaxed toward indecency regulation on broadcast radio and television. See Holohan, *supra* note 30, at 346-47. "According to data collected by the FCC, the Commission received complaints regarding 389 programs in 2002, and 375 programs in 2003. The Commission issued no NALs regarding television broadcasts during either of these years, fining only a total of ten radio broadcasts (seven in 2002 and three in 2003)." *Id.* at 346 (footnotes omitted). However, after the Super Bowl stunt, the FCC received more than 500,000 complaints. S. REP. NO. 108-253, at 5 (2004). Also, it is important to note that former FCC Chairman Powell, "was a First Amendment purist who had to change course in response to the proliferation of reality TV programs with crass sexual content, shock jocks with toilet mouths and a Super Bowl with a soft-sporn halftime show finale." Ted Hearn, *Powell Heads for Exit*, MULTICHANNEL NEWS, Jan. 24, 2005, available at 2005 WLNR 1079239.

142. S. REP. NO. 108-253, at 5 (2004).

143. Dunbar, *supra* note 14. In 2002, only eight of 15,000 stations received NALs from the FCC for airing indecent programming; and in 2003, only fifteen stations received NALs. *Communications Issues Before the S. Comm. on Commerce, Science and Transportation*, 109th Cong. (2006) (statement of Bruce Reese, Joint Board Chairman, National Association of Broadcasters). A poignant example of the FCC's stricter policies can be found in the FCC's review of a previous decision regarding the 2003 Golden Globe Awards. Poniewozik, *supra* note 9, at \*5.

The Super Bowl stunt spurred Chairman Powell to request from Congress an increase in maximum indecency fines, arguing that \$27,500 for each incident would be “easily absorbed as a ‘cost of doing business’ and fails to send a message that the Commission is serious about enforcing the nation’s indecency laws.”<sup>144</sup> Both the House and Senate recognized the need to

increase and strengthen the enforcement mechanisms available to the [FCC] to combat the broadcasting of indecent, obscene, and profane material over the airwaves . . . [as well as] to assess the effectiveness of technological tools designed to block violent programming, and if necessary, prohibit the distribution of violent programming during hours when children are likely to comprise a substantial portion of the audience.<sup>145</sup>

Accordingly, the Senate proposed the Broadcast Decency Enforcement Act of 2004; the House then passed the Broadcast Decency Enforcement Act of 2005; the Senate passed the Broadcast Decency Enforcement Act of 2005 in May 2006; the House passed the Senate Bill by roll call vote the following month; and finally President George W. Bush signed the Broadcast Decency Act of 2005 into law on June 15, 2006.<sup>146</sup> The House

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There, U2 singer Bono called his band’s winning of Best Original Song from a film, “f-king brilliant.” *Id.* In October 2003, the FCC ruled that this was not indecent because Bono did not refer to a specific sexual act. *Id.* The following March, the FCC reversed its decision, but did not fine NBC. *Id.*

144. Holohan, *supra* note 30, at 347 n.38. Accordingly, the fines imposed on Viacom, Inc., the licensee or ultimate licensee of the Viacom stations, was \$550,000, which represented the then current statutory maximum of \$27,500 multiplied by each Viacom station that broadcast the event. Super Bowl XXXVIII Halftime Show, *supra* note 140, at 19230. It is noted that, “[w]henever [Howard Stern] gets in trouble, when they have to pay fines, it’s worth it, because he brings in so much more money than it costs to have him.” Showbiz Tonight, *supra* note 8, at \* 7.

145. S. REP. NO. 108-253, at 1 (2004).

146. S. REP. NO. 108-253 (2004); H.R. 310, 109th Cong. (2005); S. 193, 109th Cong. (2005); Peter Baker, *Bush Signs Legislation on Broadcast Decency*, WASH. POST, June 16, 2006, at A6. Initially, the Senate’s first Bill looked like it would pass, but when there was an attempt to add violence to the list of indecent behaviors, the Bill was struck down. John Greenya, *Can They Say That on the Air? The FCC and Indecency*, DCBAR.ORG, Nov. 2005, [http://www.dcb.org/for\\_lawyers/resources/publications/washington\\_lawyer/november\\_2005/indecency.cfm](http://www.dcb.org/for_lawyers/resources/publications/washington_lawyer/november_2005/indecency.cfm). Because Senate Commerce Committee Chairman Ted Stevens wanted broadcasters to utilize filtering technology as a less restrictive alternative to imposing the Bill, the Senate 2004 Bill was struck down. Jim Puzanghera, *Lawmakers Poised to OK Indecency Bill*, L.A. TIMES, June 3, 2006, at C1. After the House passed the Bill, it was speculated that the Senate would not because it was “a tremendously unconstitutional thing to do.” Greenya, *supra*. Since Greenya’s prediction, in May 2006, the Senate passed the Broadcast Decency Enforcement Act, although less comprehensive a bill than the House Bill. Puzanghera, *supra*. When President Bush signed the bill into law in June 2006, he stated that an escalation in fines was in direct response to television and radio shows that have “too often pushed the bounds of decency . . . . People are saying, ‘We’re tired of it, and we expect the government to do something about it.’” Baker, *supra*. Nevertheless, it is important to note that the new law does not change the indecency standard, as defined by *Pacifica*. On the other hand, the National Association of Better Broadcasters released a statement, commenting that although pleased

Bill raises penalties for the broadcast transmission of obscene, indecent and profane material from \$27,500 to \$500,000 per incident, while the Senate Bill would have included a tenfold increase in indecency fines to a \$325,000 maximum per incident.<sup>147</sup>

In the case of a violation, the FCC may also assess a number of aggregating factors, which would further increase potential fines.<sup>148</sup> The FCC has also toughened its enforcement policies by imposing monetary penalties for each utterance in broadcast, rather than a single monetary penalty for the broadcast as a whole.<sup>149</sup>

Unfortunately, there are at least six problems with fines being the ultimate threat to broadcast, and increasing the fine rates does not necessarily address legitimate concerns. First, the current process of fining is ineffective because it places the burden on the public as complainants.<sup>150</sup> Second, filing an indecency complaint is such a long process that the FCC is often forced to dismiss a complaint before final review because the statute of limitations expires.<sup>151</sup> Third, prior restraints are presumptively invalid.<sup>152</sup>

with the Enforcement Act, such rules should apply to broadcast and satellite programming. *Id.*

147. H.R. 310, 109th Cong. (2005); S. 193, 109th Cong. (2005-06). The Senate's proposed 2004 Bill wanted to increase fines from \$27,500 to \$275,000 for the first offense, \$375,000 for the second violation and \$500,000 for the third and any subsequent violation, as well as authorizing the FCC to revoke licenses for repeated or serious offenses. S. REP. NO. 108-253, at 24 (2004). Prior to 2003, the highest indecency fine ever imposed by the FCC "was \$35,000 to WQAM (Miami, Florida) for a five-day indecent broadcast. *Id.* In 1995, however, the FCC issued NALs amounting to \$400,000, \$500,000, and \$600,000 against Infinity Broadcasting Corporation for indecency on "The Howard Stern Show." S. REP. NO. 108-253, at 4 (2004). These fines were never recorded because Infinity entered into a settlement agreement instead for over \$1.7 million. *Id.*

148. H.R. 310, 109th Cong. (2005). Such factors include:

- (1) whether the material was live or recorded, scripted or unscripted; (2) whether the licensee had a reasonable opportunity to review the programming or had reason to believe it may contain obscene, indecent, or profane material; (3) whether the violator used a time delay blocking mechanism in originating live or unscripted programming; (4) the size of the viewing or listening audience; (5) the size of the market; and (6) whether the material was aired during a children's television program, or television programs rated for general audience viewing, or aired on radio when the audience is likely to include children.

*Id.*

149. FCC, Regulation of Obscenity, Indecency and Profanity, <http://www.fcc.gov/eb/oip> (last visited Jan. 12, 2006). The Act also provides additional remedies for indecent broadcast, such as requiring the licensee to broadcast public service announcements that address "the educational and informational needs of children." H.R. 310, 109th Cong. (2005). Further, multiple violations of indecency prohibitions could result in license revocation or denial of license renewal. *Id.*

150. S. REP. NO. 108-253, at 3 (2004).

151. *Id.* According to the Center for Public Integrity:

[T]he average amount of time between the first airing of an indecent broadcast and the proposal of a fine since 1990 was 523 days. The law requires the commission to issue a notice of apparent liability [NAL] within a year of the broadcast or by the date of its next license renewal, whichever is later. . . . The Center was able to identify five instances

Fourth, tracking and collecting fines is difficult because the FCC only keeps information regarding fines from 2000 onward.<sup>153</sup> Fifth, while fines may not have a substantial effect on a company like Viacom, which earns billions of dollars each year, fines do have a direct negative impact on smaller station's bottom line.<sup>154</sup> Ultimately, this imposes the sixth and most constitutionally critical problem: a chilling effect on free speech. As a result, broadcasters compromise the discussion of mature topics because they fear being fined.<sup>155</sup>

Accordingly, broadcasters began to self-regulate to avoid being fined by the FCC.<sup>156</sup> "Notably, CBS and Limited Brands, Inc., announced in mid-April that the Victoria's Secret fashion show would not return to CBS that year. Other media outlets began to consider toning down popular yet racy

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since 1990 where fines totaling \$152,150 were canceled due to the expiration of the statute of limitations. Stern's show was responsible for more than three-quarters of the total. One case examined by the Center went on for nearly nine years. On Aug. 30, 1991, Flambo Broadcasting Inc.'s KFMH-FM in Muscatine, Iowa, aired jokes the FCC deemed indecent. A fine was issued on April 1, 1994. But it wasn't until July 27, 2000 that the FCC officially closed the books and dismissed the complaint.

Dunbar, *supra* note 14. Former FCC Commissioner, Gloria Tristani, who served from 1997 to 2001, says that her main concern was that the FCC was not even investigating complaints brought to them. Greenya, *supra* note 146. She says, "complaints weren't getting even past what I called first base, and I read the law to say that if a viewer or listener made a prima facie case, they were entitled to have the matter investigated." *Id.*

152. See *Freedman v. Maryland*, 380 U.S. 51, 57-59 (1965) (holding that censorship is "always fraught with danger and viewed with suspicion"). Therefore, while prior restraints are not necessarily unconstitutional, they involve high levels of procedural due process, including that: (1) the censor has the burden of seeking judicial review and must prove that the speech is not protected by the First Amendment; (2) any restraint prior to judicial review must protect speech as much as possible; and (3) there should be prompt judicial review of such restraints to determine their constitutionality. *Id.* Although it was argued that forfeitures violate *Freedman*, it is important to note that forfeitures occur subsequently, rather than prior to, any challenged broadcast. *Action for Children's Television v. FCC*, 59 F.3d 1249, 1253 (D.C. Cir. 1995). See also *supra* note 55 and accompanying text.

153. Dunbar, *supra* note 14. For example, the General Accounting Office of Congress reported that at the end of the fiscal year of 1998, the FCC had an uncollected balance of \$15 million for all civil monetary penalties, including indecency, and that 75% of those fees would remain uncollected. *Id.* Nevertheless, the collection process has improved since the formation of the FCC's Enforcement Bureau in November 1999. *Id.*

154. Greenya, *supra* note 146. "Large fines for even inadvertent incidents could drive some broadcasters, particularly those in small and medium markets, out of business." *Decency: Hearing Before the Comm. On Commerce, Science & Transportation*, 109th Cong. 5 (2006) (testimony of Bruce Reese, President and CEO, Bonneville International Corporation). For multibillion-dollar media companies, "they'll see [these increased fines] as the cost of doing business." Puzanghera, *supra* note 146 (quoting Douglas Gomery, Professor of Media Studies at the University of Maryland).

155. James L. Gattuso, *Broadcast Indecency: More Regulation Not the Answer*, THE HERITAGE.FOUND., Feb. 15, 2005, available at <http://www.heritage.org/Research/Regulation/wm666.cfm>.

156. FCC Commissioner Susan Ness states that "it is entirely within the power of broadcasters to address" the flood of letters and emails the Commission receives, which reflect a high degree of anger—"and to do so *without government intrusion*. . . . It is time for broadcasters to consider reinstating a voluntary code of conduct." Industry Guidance, *supra* note 30, at 8017.

programming in order to avoid the attention of the FCC."<sup>157</sup> CBS claimed to take advance precautions, such as the implementation of the five-second audio delay to allow editing of any unacceptable utterances during live performances, and a five-minute audio and video delay to ensure that no more unexpected or unplanned images would broadcast.<sup>158</sup> It was also at this time that Clear Channel Communications announced its "Responsible Broadcasting Initiative" which ensured that "material aired by its radio stations conforms to the standards and sensibilities of the local communities they serve."<sup>159</sup> This resulted in the termination of Howard Stern's show from six markets.<sup>160</sup>

In the aftermath of the Janet Jackson scandal, little has changed, and where it has changed, it has been "in scattershot and inconsistent ways."<sup>161</sup> There is now a disparity not only about "*what* you say, but *who's* saying what to whom."<sup>162</sup> The problem is broadcasters, and perhaps now satellite radio operators, do not know where to draw the line.

#### B. *Howard Stern Draws the Distinction Between Broadcast and Satellite Regulation*

The pivotal legal question now before us is: if the FCC attempts to regulate Howard Stern's content on satellite radio, can they? If this case were to be brought before the Supreme Court, who would win and what would the Court's rationale be?<sup>163</sup> Because Howard Stern's alleged

157. Holohan, *supra* note 30, at 349.

158. Super Bowl XXXVIII Halftime Show, *supra* note 140, at 19232.

159. Holohan, *supra* note 30, at 348.

160. *Clear Channel*, *supra* note 9.

161. Poniewozik, *supra* note 9. For example, in "November 2004, 65 ABC affiliates refused to air the uncut war movie *Saving Private Ryan* because of its alleged profanity, although it had run without incident twice before." *Id.*

162. James Harris Op-Ed., *The Stern Revolution: Getting Sirius About Free Speech on the Air*, THE RECORD, Jan. 13, 2006, at L09, available at 2006 WLNR 796363 (emphasis added). Harris poses the following example to illustrate his point: "It seems fine that rapper Snoop Dogg can say bitch as many times as he wants as long as his audience isn't too rich or too big. There seems to be no consistency in what's acceptable, and that's not fair to Stern or to the public." *Id.* Stern posted on his Web site that he was not surprised by Clear Channel's decision to drop his show, and called the FCC's action, a "McCarthy-type witch hunt." *Clear Channel*, *supra* note 9.

163. Former FCC Chairman Michael Powell says, the problem here is not whether you should [regulate]; it's whether you can. The Supreme Court, rightly or wrongly, has chosen to create different First Amendment protection levels for different medium. . . . And so I think that you're going to have a difficult time achieving, from a matter of legislation, that kind of policy extension without a new ruling from the Supreme Court.

Interview with Neil Cavuto with Michael Powell, Former FCC Chairman, March 3, 2005, available at



emancipation from the FCC has gotten the public thinking about the differences between broadcast and satellite regulation, lawmakers are now forced to consider whether the need for a two-tiered system is still appropriate. Before we can address the question of whether *Pacifica* should extend to satellite radio, we must first explore whether the same reasoning applied to broadcast radio and television could extend to satellite radio.

### 1. Retracing *Pacifica*'s Rationale: The Four Main Concerns

The four main concerns authorizing different regulations for broadcast media are: scarcity of the spectrum, pervasiveness, children and free public access as opposed to private subscription.<sup>164</sup>

#### a. *Scarcity of the Spectrum*

When the FCC licensed use of the spectrum to XM and Sirius, it only awarded two licenses because it wanted to achieve the most viable and effective service of the 12.5 MHz spectrum frequency.<sup>165</sup> Scarcity is thus an important factor for one principal reason: satellite radio, as opposed to cable television, uses the electromagnetic spectrum.<sup>166</sup> Furthermore, the FCC's main purpose in allocating spectrum use is for "public interest, convenience, and necessity . . . ." <sup>167</sup> Since scarcity considerations apply to the FCC's public interest determination, there may be a valid argument for regulating satellite radio more heavily.<sup>168</sup> Despite what Howard Stern and Sirius would *like* us to believe, satellite radio may be *more* restricted in First Amendment rights than cable television.

On the other hand, "scarcity has not been used to justify greater regulation of indecency than would otherwise be allowed."<sup>169</sup> As noted in *Turner*, the Court has continually declined to question the validity of the scarcity argument.<sup>170</sup> Therefore, we must look to see if there are other reasons for supporting indecency regulation on satellite radio.

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2005 WLNR 3259808. Andrew Levin, Clear Channel's Executive Vice President and Chief Legal Officer, agrees. He says that there is a "growing disparity" between FCC regulations concerning content over competing platforms. Both Congress and the FCC realize that, "the laws need to catch up with the technology." Paul Heine, *Clear Channel Calls for Satellite Indecency Regulation*, BILLBOARD RADIO MONITOR, Mar. 1, 2005, available at <http://freepress.net/news/print.php?id=6986>.

164. FCC v. *Pacifica Found.*, 438 U.S. 726, 731 n.2 (1977).

165. Timmer, *supra* note 100, at 199; see Watson, *supra* note 41.

166. See Timmer, *supra* note 100, at 199 (noting that the scarcity rationale does not apply to cable television because "it is possible to have a number of cable systems serving the same area").

167. 47 U.S.C. § 302a(a) (2005); see *supra* note 27 and accompanying text.

168. See *supra* note 61 and accompanying text.

169. Timmer, *supra* note 100, at 203.

170. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 638 (1994).

*b. Pervasiveness*

When satellite radio was first established, the rationale was not to replace broadcast radio, but to bring uninterrupted, high-quality radio across the entire United States—serving rural underserved and not served areas.<sup>171</sup> Now, satellite radio is available in cars, homes, and portable devices, offering a breadth of programming unavailable on traditional broadcast radio. Howard Stern gave the following description of the market potential of satellite radio, “you can download it [up to 125 channels of music and talk programming], you can carry it with you. The show all the time, uncensored, less commercial time—this technology is going to blow people away.”<sup>172</sup> Accordingly, it is expected that there will be over “44 million satellite radio subscribers by 2010.”<sup>173</sup>

There is also new evidence that since Howard Stern’s show aired, illicit downloading of satellite radio has increased fivefold.<sup>174</sup> Sirius reacted quickly, turning to help from its “nemesis” the FCC, but there are still no definite plans underway.<sup>175</sup> The fact that illicit downloading has occurred is a poignant illustration for several reasons. Not only does it demonstrate that the Howard Stern show is what a large number of Americans want to hear, but it also shows how pervasive satellite radio may become, and the potential need for FCC regulatory support.

Under *Pacifica*, the need to treat broadcast differently was in large part due to pervasiveness.<sup>176</sup> However, pervasiveness is no longer unique to broadcast radio and television. In fact, satellite radio may become a direct substitute for terrestrial radio.<sup>177</sup> On the one hand, the *Pacifica* ruling “came before the explosion of cable and satellite networks, which gave television and radio audience members a wider variety of programming.”<sup>178</sup> Now,

171. See Rules and Policies for DARSS, *supra* note 35, ¶ 1.

172. Harris, *supra* note 162, at L09.

173. Thierer, *supra* note 4, at 3. See *supra* note 50 and accompanying text (discussing 193 million terrestrial radio listeners).

174. Dawn C. Chmielewski, *Illicit Downloading of Stern’s Show Soars Fivefold*, L.A. TIMES, Feb. 3, 2006, at C1. This is very similar to Internet file-sharing, whereby New York and New Jersey pirate radio stations began re-broadcasting on unclaimed FM radio frequencies and websites without permission. *Id.* This happened because although sixty-eight commercial free music channels can be heard online, some talk shows are not included, including Howard Stern’s show. *Id.* Now, even those who buy subscriptions need to subscribe independently for Internet access to Stern’s show. *Id.*

175. See *id.*

176. See *supra* note 74 and accompanying text.

177. Taub, *supra* note 44.

178. Frank Ahrens, *New Year, New Gadgets and Maybe New Rules: Court Battles Likely to Heat Up As Media Redefines Itself for 2005 and Beyond*, CINCINNATI POST, Jan. 7, 2005, at C1, available at 2005 WLNR 325291.

fewer than ten channels are over-the-air channels, and over 85% of television viewers pay for television via cable or satellite.<sup>179</sup> Thus, “few homes have ‘uninvited visitors.’”<sup>180</sup>

On the other hand, the *Pacifica* Court focused on the narrowness of its holding,<sup>181</sup> and we can look to the Court’s reliance on narrowness in terms of the numerous, unsuccessful attempts to regulate content on cable and the Internet. In *Playboy*, the Court held a 24-hour scramble unconstitutional, pointing to the belief that cable is a different medium than broadcast.<sup>182</sup> Also, as pervasive as we may think the Internet is, the Court has not relied on pervasiveness as a strong enough rationale to regulate indecency on the Internet.<sup>183</sup> In both cases, the Court was looking for less restrictive alternatives rather than blatantly obstructing adult viewing habits.<sup>184</sup> Ultimately, the right of expression prevails when there is not a less restrictive alternative available.<sup>185</sup>

Thus, while pervasiveness of satellite radio is a strong factor, the Court has found pervasiveness in cable and the Internet insufficient to support content regulation and might apply the same rationale towards a satellite radio holding.

### c. Children

A study by the American Psychological Association revealed that a child who leaves elementary school and “watches 2 to 4 hours of television daily . . . will witness at least 8,000 murders and more than 100,000 other . . . acts of violence on television.”<sup>186</sup> The problem is that, “[o]nce the initial taboo is broken and the shock value wears off, more and more curse words fall into the category of ‘acceptable’ language, and TV must try to up the ante by introducing new words to prime time TV’s obscene lexicon.”<sup>187</sup> FCC Chairman Kevin J. Martin<sup>188</sup> in his “Open Forum on Decency” in

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179. *Id.*

180. Ahrens, *supra* note 178.

181. See *supra* note 77 and accompanying text.

182. See *supra* notes 106-09 and accompanying text.

183. See *supra* notes 120-39 and accompanying text.

184. *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 801, 813 (2000).

185. *Id.*

186. S. REP. NO. 108-253, at 2 (2004). Despite the promises made by the television industry, the amount of television violence is tantamount to that which exists in reality. For example, murders occur on television at a rate of one thousand times higher than real-world murders. *Id.*

187. *Id.* If terrestrial radio wants to compete, “terrestrial radio has to step up to the plate,” says Agnes Lukasewych, a Vice President of MPG, a media planning company. Taub, *supra* note 44. She suggests that either terrestrial radio attract new talent or solicit new advertisers to keep up with subscriber loss. *Id.*

188. Kevin Martin, who was already an FCC Commissioner, replaced Michael Powell as FCC Chair in March 2005, before Powell’s Chair expired. Greenya, *supra* note 146. Martin is said to have strong feelings about indecency regulation. *Id.* In a letter to L. Brent Bozell, President of the

November 2005 cited that, "the use of profanity during the family hour increased 95[%] from 1998 to 2002."<sup>189</sup> Also, sexual content was found in 78% of television shows in the 2004-2005 season, with the number of sexual scenes nearly doubling since 1998.<sup>190</sup>

It has come to the point where parents, who want to watch television with their children, simply cannot. They feel limited by what they can watch because broadcast networks are trying to compete with the "edgier" programming of cable.<sup>191</sup> Even if parents subscribe to cable, where they find some great family channels, they cannot subscribe to those channels alone and end up gaining access to channels they do not want their families to view.<sup>192</sup>

In *Pacifica*, the concern for children was strong support for regulation of the broadcast medium.<sup>193</sup> Nevertheless, concerns for children may be less of an issue than one might think. Additionally, the Court must consider that these concerns may be distorted in application. For example, the Parent Television Council ("PTC") recently filed a complaint arising from the February 17, 2005 episode of *CSI: Crime Scene Investigation*, where an obese man obsessed with infantilism committed suicide wearing only a diaper.<sup>194</sup> With a database of over 860,000 members, having seen the program or not, this creates a vast opportunity for parents to file complaints to the FCC. This skews the FCC into thinking that enforcement legislation is what the public wants.<sup>195</sup>

An exclusive *Time Magazine* poll outlines another reason why concerns over children may be overly-inflated. In the poll, more than half of the

Parents Television Council, Martin wrote that, "[w]e have been charged by Congress to implement its ban against broadcasting obscene or indecent programming, and I take this responsibility seriously . . . ." *Id.* See *supra* note 141 (citing former FCC Chairman Michael Powell as a "First Amendment purist").

189. Greenya, *supra* note 146.

190. *Open Forum on Decency Before the S. Comm. on Commerce, Science and Transportation*, 109th Cong. (2005) (statement of Kevin J. Martin, Chairman, FCC) (citations omitted) [hereinafter Statement of Kevin J. Martin].

191. *Id.* at 10.

192. *Id.*

193. *FCC v. Pacifica Found.*, 438 U.S. 726, 749-50 (1978).

194. *Fast Track*, BROADCASTING & CABLE, Mar. 7, 2005, at 6.

195. Holohan, *supra* note 30, at 361. Holohan states that:

The problem with the PTC's influence is not just that it overstates the indecency problem. The PTC's influence, coupled with the FCC's reactive approach to detecting violations, allows the PTC to channel the FCC's immense enforcement power toward programming that the PTC itself finds objectionable. This creates a strong possibility of *selective prosecution*, exacerbated by the PTC's political ties.

*Id.* (citations omitted) (emphasis added).

responses said there is too much violence, profanity and sex on television, but that this content does not personally offend them, nor do they want this content banned.<sup>196</sup> Another example of this over-inflation is found in regards to the V-Chip, where a March 2004 nationwide survey revealed that although parents with children two to seventeen years old had concerns about age-appropriate content on television, less than 10% of these parents actually used the V-Chip.<sup>197</sup>

There are also Internet cases where the government has attempted to pass regulations on content harmful to minors. But because the proposed regulations are not narrowly tailored and chill the free speech rights of adults too severely, the Court has still not approved Internet content regulation.<sup>198</sup>

While concerns for children are a legitimate government interest, this precedent has advanced that children alone do not justify regulations that are not narrowly tailored. Consequently, relying on “raised eyebrow” techniques might be the FCCs only answer to dealing with indecency concerns.

#### *d. Subscription*

Not only did XM and Sirius pay nearly \$200 million for their airwaves, while terrestrial stations got theirs for free,<sup>199</sup> listeners pay for their subscriptions as well.<sup>200</sup> Subscription invariably means *not* the public at large, as would apply to those who listen to broadcast for free.<sup>201</sup> The difference lies in people choosing to bring satellite into their homes,

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196. Poniewozik, *supra* note 9. While more than half of the responses said that the FCC should be stricter, 66% believed the FCC overreacted to Janet Jackson. *Id.*

When you talk to people about what bothers them in pop culture – if anything does – they tend not to talk about discrete, FCC-finable offenses. They talk about video games, ads, innuendos, magazine covers – things that the FCC doesn’t police or that are so nebulous and environmental as to be unpoliceable in a free society. They don’t want absolute rules. They want boundaries: they just want to know where the cultural deep end and the kiddie pool are.

*Id.*

197. S. REP. NO. 108-253, at 2 (2004). It has been argued that warning labels might increase the amount of violence on television. It is difficult to ensure their reliability because they only appear at the beginning of programming and may not be seen by the viewer. *Id.* at 18-19. Further, parents might not be able to monitor their children’s viewing at all times. *Id.* at 19; *see also supra* notes 81-85 and accompanying text (discussing how V-Chip technology, as regulation via raised eyebrow, may be ineffective in reaching intended policy goals).

198. *See supra* notes 120-39 and accompanying text.

199. Scott Woolley, *Freedom of Speech on Satellite Radio*, FORBES.COM, Oct. 6, 2004, [http://www.forbes.com/2004/10/06/cx\\_sw\\_1006stern\\_print.html](http://www.forbes.com/2004/10/06/cx_sw_1006stern_print.html).

200. Many new cars are equipped with free XM and Sirius for several months, which supports the pervasiveness issue. Heine, *supra* note 163.

201. *But see supra* note 17 (noting that subscription is required after a certain period of time). This suggests that the FCC should perhaps reconsider whether “subscription” is an important issue to differentiate regulation.

cars, and lives. This inevitably warrants a higher standard of review for content regulation.<sup>202</sup>

Neil Cavuto poignantly asks Representative Joe Barton, Chairman of the House Commerce Committee, "if I'm watching 'The Sopranos' on HBO, I know Tony might curse now and then. . . . So I know what I'm paying for and getting, right? Why should—why should that be effectively legislated?"<sup>203</sup> Barton's response for subscription service regulation is that there is so much on television today we do not opt into freely.<sup>204</sup> And, looking at the number of new cars manufactured with satellite radio, this also demonstrates inadvertent unwanted exposure to children without the need to subscribe.<sup>205</sup>

Nevertheless, the Supreme Court has stated: "It seems to us, however, that if an individual voluntarily opens his door and allows a pig into his parlor, he is in less of a position to squeal."<sup>206</sup> This is the same rationale that Howard Stern argues and weighs heavily in favor of upholding the *Pacifica* decision as specific to broadcast.

## 2. Should the Court Revisit *Pacifica*?

The main concern in extending *Pacifica* to satellite radio is that "if *Pacifica* lays down a general rule concerning 'intrusive media' that applies to cable, that rule equally affects all manner of communication that may enter the home when unsupervised children are present, including newspapers, magazines, books and records."<sup>207</sup> This is dangerous First Amendment protection territory.

*Pacifica* has consistently met its critics. For one, Viacom President Mel Karmazin says that Howard Stern's show was not indecent, specifically because the FCC's indecency standard is vague, generic and inconsistent.<sup>208</sup> First Amendment lawyer, John Crigler, agrees. He says,

202. See *supra* notes 112-19 and accompanying text.

203. Neil Cavuto, *Interview with Joe Barton*, FOX, Mar. 2, 2005, available at 2005 WLNR 3186867.

204. *Id.*

205. See *supra* note 16 and accompanying text.

206. CARTER, *supra* note 11, at 515 (citations omitted); see *supra* note 88 and accompanying text.

207. Krattenmaker & Esterow, *supra* note 67, at 627-28.

208. McCall, *supra* note 5. John Crigler says, "Ten years ago, I could have explained indecency to you in seven words, and now it would take volumes." Greenya, *supra* note 146. Soon after, the Commission expanded the definition to cover innuendos, double-entendres, and indirect references. *Id.* "The problem is," Crigler continues, "how do you know in advance what's offensive, or what five political appointees at any given moment are going to find to be offensive?" *Id.*

From the inception of the Communications Act in 1934 to the 1970s, no one really knew if indecency was a legal concept or not. The language was in the statute and people tried to use it, but the commission had never tried to define what it meant or to apply it in any systematic way, and when it did, it just made it up. Later, the definition was recast based upon the immediate factual circumstances, the George Carlin comic routine, which, I like to say, is the only constitutional standard invented by a comedian.<sup>209</sup>

When a vagueness challenge is brought to a rule that restricts speech, as in *Pacifica*, the Court must decide whether the boundaries drawn are clear enough to guide citizens, as well as judges.<sup>210</sup> Under *Pacifica*, there are no bright lines regarding what “contemporary community standards” would and would not find to be “patently offensive.”<sup>211</sup> In 2001, the FCC issued a Policy Statement to provide guidance to the broadcast industry in interpreting case law, as applied to 18 U.S.C. § 1464 and the enforcement policies regarding indecent broadcasting.<sup>212</sup> The Commission has overcome vagueness issues for phrases such as “patently offensive” or “contemporary community standards,” by highlighting the importance of the *Pacifica* Court’s emphasis on case-by-case analysis.<sup>213</sup> Thus, while vagueness is a

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209. Greenya, *supra* note 146.

210. Weinberg, *supra* note 5, at 225 (citations omitted). If the rule does not clearly mark the boundaries, then it violates the vagueness doctrine for two reasons. First, it will produce inconsistent decisions. Second, it will leave citizens who wish to avoid prosecution unsure about the prohibition’s scope. *Id.*

211. *Id.* at 222. On reconsideration, it was noted that the Commissioners would further look to “an average broadcast viewer or listener,” but again, there was no bright line rule as to “what programming the Commissioners would think the ‘average’ American viewer considered ‘patently offensive.’” *Id.* Instead, because the *Pacifica* Court found the decision to be a context-based, case-by-case analysis, the Commissioners could substantiate the notion that there were no clear-cut rules, and therefore rejected petitioner’s vagueness challenge. It is also argued that the narrowness of the *Pacifica* holding prevented the Court from addressing the vagueness issue. *Id.* at 240. The Court also failed to address a vagueness challenge in *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969), the justification being that special First Amendment rules apply to broadcast regulation. Weinberg, *supra* note 5, at 244-45; *see supra* note 59 and accompanying text.

212. *See* Industry Guidance, *supra* note 30. For example, after the *Pacifica* decision, and “in response to various Petitions for Clarification and Petitions for Reconsideration . . . [t]he FCC [rejected] a request . . . that some sexually explicit, yet non-obscene material be absolutely prohibited.” CARTER, *supra* note 11, at 247 (citation omitted).

213. The FCC has held that indecency rest on two fundamental decisions. First, the material must fall within the subject matter scope of describing or depicting sexual or excretory functions. Industry Guidance, *supra* note 30, at 8002. Second, the determination of contemporary community standards is “not a local one and does not encompass any particular geographic area. Rather, the standard is that of an average broadcast viewer or listener and not the sensibilities of any individual complainant.” *Id.* Thus, the FCC emphasized the importance of case-by-case analysis. The principal factors, in determining whether something is indecent, include:

(1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; (3) whether the material appears to pander or is used to titillate . . . .

potential problem, the Court will likely follow the case-by-case rule pronounced in *Pacifica* to examine satellite radio.<sup>214</sup>

Those who support Stern's rationale believe the extension of rules from broadcast to satellite is unlikely to occur because it is difficult for the Court to overcome the unconstitutional nature of regulating free speech. First, many of the factors that justify broadcast indecency regulation are not present in cable or satellite, and the Court has continually emphasized the narrowness of the *Pacifica* holding to the broadcast medium alone. Second, cable and satellite offer a number of different control devices for parents or people who would like to block unwanted programming.<sup>215</sup> Third, it is hard to justify regulation when cable and satellite radio are subscription-based services.<sup>216</sup>

On the other hand, there are a number of powerful arguments in favor of extending *Pacifica* to cable and satellite radio. For one, the programming's pervasiveness is still apparent, whether transmitted over airwaves, cable lines or satellite frequencies.<sup>217</sup> Second, cable and satellite radio are available in the home, which confers less First Amendment protection than communication outside the home.<sup>218</sup> Third, Senator Ted Stevens and

*Id.* at 8003.

The following excerpts of broadcasts cited by the FCC are therefore only research tools, and "should not be taken as a meaningful selection of words and phrases to be evaluated for indecency purposes without the fuller context that the tapes or transcripts provide." *Id.* at 8003. Some of the examples given, progressively found to be indecent, are: (1) KPRL (AM)/KDDDB (FM), Paso Robles, CA News Announcer Comment: "'Oops, f--ked that one up.' Not Indecent . . . 'the news announcer's use of single expletive' does not 'warrant further Commission consideration in light of the isolated and accidental nature of the broadcast;'" (2) WYSP (FM), Philadelphia, PA "Howard Stern Show": "God, my testicles are like down to the floor . . . you could really have a party with these . . . Use them like Bocci balls. (As part of a discussion of lesbians [and intercourse with animals]) Indecent – Warning Issued."; (3) KROQ (FM), Los Angeles, CA "You Suck" Song: graphic song detailing mutual oral sex. Indecent – NAL issued. *Id.* at 8004-09.

There are at least two problems with case-by-case holdings. First, when there are no clear cut rules, then regulators can act in an arbitrary way, "engaging in impermissible censorship" and "biased enforcement." Weinberg, *supra* note 5, at 224-25. Second, broadcasters impose self-censorship (including speech that may be permitted) when regulators have the authority to sanction for unascertainable reasons. *Id.* at 225. Having vague rules also compels post hoc decisions, where regulators can use "'shifting or illegitimate criteria'" far too eas[ily]. *Id.* at 226. Thus, the *Pacifica* Court relied on the "raised eyebrow" technique to some degree. *Id.* at 238. But, without bright-line rules, the Court inadvertently encouraged regulators to enter an "'unlawful zone.'" *Id.*

214. However imprecise the definition of indecency may be, it is still "sufficiently precise" to support channeling. *Id.* at 232. Channeling may therefore become an alternative option for the non-broadcast medium. *Id.*

215. See *supra* notes 104-05 and accompanying text.

216. See *In re Subscription Video*, *supra* note 110, at 1004.

217. Krattenmaker & Esterow, *supra* note 67, at 622. See also *supra* notes 177-78 and accompanying text.

218. Krattenmaker & Esterow, *supra* note 67, at 623.



Representative Joe Barton, Chairmen of the Senate and House Commerce Committee, respectively, further believe that since viewers can no longer tell the difference between pay-television and over-the-air, “there is no reason for Washington to make that distinction either.”<sup>219</sup> Fourth, because the safety measures offered to parents are seldom used, cable is still easily accessible by children.<sup>220</sup>

Thus, there are a number of compelling reasons why the Court should extend *Pacifica* to satellite radio. *However*, it is more likely the Court will find less restrictive alternatives, such as having the FCC keep its “eyebrows raised” to satellite radio, rather than a new ruling limiting the First Amendment’s pinnacle—“freedom of speech.”<sup>221</sup>

### C. “Raised Eyebrows” are Less Restrictive than Court Action

The main problem with the “raised eyebrow” technique is that the mere *threat* of legislation can cause a “chilling effect.”<sup>222</sup> However, this threat is probably more effective than having the Court impose First Amendment restrictions on satellite radio. It is also a less restrictive alternative than regulating satellite like broadcast. It is undeniable that the FCC has authority to regulate cable and satellite radio, that is, anything “reasonably ancillary,”<sup>223</sup> and may do so under the “public convenience, interest or necessity” standard.<sup>224</sup> However, the Court created a two-tiered system

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219. Bill McConnell, *Cable Under Attack: Programmers Could be Forced to Tone Down Content*, BROADCASTING & CABLE, Mar. 7, 2005, at 12. Both Stevens and Barton chair the key Congressional committees that oversee the broadcast and cable industries. *Id.* Stevens notes that “[85%] of people watching televisions today are watching through cable, but they think they’re watching local TV.” Poniewozik, *supra* note 9.

220. Krattenmaker & Esterow, *supra* note 67, at 623.

221. U.S. Const. amend. I.

222. *See supra* notes 123, 155 and accompanying text (defining and discussing “chilling effect,” respectively). In other words, “[t]he name of the [FCC] bureaucratic game is guilt. By using the ‘raised eyebrow’ approach, the FCC is able to plant, cultivate and harvest guilt, perhaps even fear, in those it regulates. Thus, it is able to control their behavior.” Erwin G. Krasnow & M. Wayne Milstead, *FCC Regulation and Other Oxymorons Revisited*, 7 MEDIA L. & POL’Y 7, 27 (1999). *See also* Ill. Citizens Comm. for Broad. v. FCC, 515 F.2d 397, 407 (D.C. Cir. 1975) (Bazelon, J., Separate Statement) (“[L]icensee political or artistic expression is particularly vulnerable to the ‘raised eyebrow’ of the FCC; faced with the threat of economic injury, the licensee will choose in many cases to avoid controversial speech in order to forestall that injury.”).

The threat of action also has the potential to raise First Amendment concerns of both vagueness and overbreadth. *See supra* notes 208-14 and accompanying text (discussing vagueness doctrine). Because the rulemaking in *Pacifica* was not clear, “broad statements by the regulator can have a chilling effect on speakers not before the Court; it is that chilling effect that triggers overbreadth concerns.” Weinberg, *supra* note 5, at 241. The Commission regulates via vague guidelines—“ad hoc, informal, case-by-case, fact-specific adjudication”—without bright line rules to follow and implement in a uniform fashion. Weinberg, *supra* note 5, at 242. Thus, the raised eyebrow technique invites prior restraint and censorship by both broadcasters and regulators, as well as unpredictable regulation by the FCC and courts. Block, *supra* note 86 at 824-26.

223. *See supra* note 95 and accompanying text.

224. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 379 (1969).

because of unique problems attributable to broadcast alone.<sup>225</sup> In light of the Court's hesitation to extend *Pacifica* for almost 30 years, regulation by "raised eyebrow" is probably the best way to achieve decency on the air.

The lesson to be learned from the government's attempt to regulate the Internet, and other non-broadcast media, is that if the government would like to regulate satellite radio's content, it must ensure that its method is the least restrictive alternative available in addressing a compelling governmental interest. We must "not begin with the status quo of existing regulations[.]" but determine whether any restriction on satellite radio would in fact achieve Congress' goal.<sup>226</sup> "Ultimately, the solution to offensive programming lies not with policymakers but with individual consumers and families."<sup>227</sup>

As I see it, the answer is *not* to regulate satellite *like* broadcast. Instead, there are a number of potential solutions and proposed legislation for creating a less restrictive mode of regulation via "raised eyebrow."

First, the satellite radio companies should address indecency problems themselves. For example, if one purchases Sirius, among the "68 channels of 100% commercial-free music" and "55 channels of sports, news, talk and entertainment" one also receives a tremendous lineup from Howard Stern including, *Tissue Time with Heidi Cortez*, *Crack Whore View*, *Meet the Shrink*, and *Red Peters Countdown* of "[u]ncensored songs, oddities, taboo subjects and the forbidden spoken word."<sup>228</sup> Additionally, Sirius is now featuring *Playboy Radio*, including segments with Playboy founder Hugh

225. Critics argue that there is a double standard; one applied to broadcast and one applied to media such as cable and satellite. While traditional broadcast is subject to a host of regulations, specifically those regarding indecency, "satellite radio providers have stormed into this market and offered an innovative new service—with hundreds of new channels—to compete against traditional radio broadcasters without having to face any of the public interest obligations imposed on terrestrial radio broadcasters." Thierer, *supra* note 4, at 9. The "public interest" burden, or rather the regulatory obligations imposed by the FCC on broadcast radio and television, include for example: unique control of "indecent speech," limits on the number of local station ownership (no more than eight in any given market); the responsibility to air public service announcements; and public access and election access rules. *Id.* at 8-9. Further, broadcasters are subject to indecency fines, while satellite operators escape the proverbial radar. *Id.* at 9. This, unfortunately, has a chilling effect on free speech rights in an uneven way. Greenya, *supra* note 146. There is also an inconsistent standard applied within broadcast itself. For example, "an NFL running back can let the f-word loose live on ESPN and the FCC is apparently powerless. The same word could cost CBS Sports \$300,000. It makes no sense and certainly does nothing to protect kids, which is the whole point in the first place." Ahrens, *supra* note 178. All the while, there are still apparent differences between broadcast and other media that the Court must respect. See *supra* notes 165-205 and accompanying text.

226. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

227. Gattuso, *supra* note 155.

228. *Howard Stern Makes History!*, *supra* note 2.

Hefner, live call-in shows, daily Playmate interviews and updates.<sup>229</sup> However, with this new program Sirius has done something unique—the subscriber wishing to hear *Playboy Radio* will opt-in for the channel at no extra cost.<sup>230</sup> Sirius also has a parental control system, which allows parents to block selective programming.<sup>231</sup> And, there is new evidence that Howard Stern is regulating his own show.<sup>232</sup> Therefore, perhaps the industry is addressing the FCC's concerns *without* government intervention because the industry knows the FCC has its “eyebrows raised.” And, if viewers have these options, then these options are the very thing that distinguishes satellite from broadcast. On broadcast, these options are not available because broadcast programming is free, all or nothing. On satellite, subscribers pay for a specific service, and would now have a choice to opt into or out of whatever programming they like or dislike, at no additional cost.

Next, “[p]arents need better and more tools to help them navigate the entertainment waters, particularly on cable and satellite TV.”<sup>233</sup> While V-Chip technology does not appear to be as effective as when mandated,<sup>234</sup> there are a number of other solutions that the industry can adopt. “First, cable and satellite operators could offer an exclusively family-friendly programming package as an alternative to the expanded basic tier on cable” and satellite, which would enable parents to enjoy increased options, while no longer requiring them to buy programming unsuitable for their children.<sup>235</sup> Second, “expanded basic” tier programming “could be subject to the same indecency regulations . . . [as] broadcast” while premium channels remain untouched by *Pacifica*.<sup>236</sup> Third, cable and satellite providers could offer programming in a more “a la carte” manner, where customers purchase channels individually.<sup>237</sup>

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229. Sirius News Releases, *SIRIUS Satellite Radio to Launch New Playboy Channel*, PRNEWswire-FIRSTCALL VIA COMTEX NEWS NETWORK, Jan. 5, 2006, <http://shareholder.com/sirius/ReleaseDetail.cfm?ReleaseID=183208&cat=&newsroom=>.

230. *Id.*

231. *Id.*

232. Don Kaplan, *Mouth Trap – Stern Will Have to Clean Up His Act on Sirius*, N.Y. POST, Jan. 23, 2006. Stern has encouraged his own staff not to use profanity unless necessary.

233. Statement of Kevin J. Martin, *supra* note 190, at 10.

234. *Id.* at 6.

235. *Id.* at 10. Other subscribers would still have the same options they currently enjoy. To support his proposition, Martin notes that some cable operators already offer digital sports tiers and Spanish-language tiers, so why not add a family-oriented tier. *Id.* at 10-11.

236. *Id.* at 11. Martin believes that if cable and satellite channels continue to refuse parents more tools, such as family packages, then basic indecency regulations might be the only solution to combat the increased indecency and outrage of parents. *Id.*

237. *Id.* Under some proposals, operators could offer tiers, so long as every channel is still available via the “a la carte” method. See Geoffrey R. Stone & Danid A. Strauss, *The First Amendment Implications of Government-Imposed A La Carte and Themed-Tier Requirements on Cable Operators and Program Networks*, THE NATIONAL CABLE AND TELECOMMUNICATIONS ASSOCIATION (2004), <http://ncta.com/IssueBrief.aspx?contentId=15#topic1> (follow “Additional Resources”).

In response to themed-tier programming, the National Cable and Telecommunications Association ("NCTA") propounds that this is content-based regulation because it requires cable operators to "make available to consumers one or more tiers of programming that include only channels that satisfy certain content-based criteria."<sup>238</sup> To satisfy a compelling state interest, the NCTA finds two possible justifications: one, that it would allow subscribers to eliminate a group of channels they may find offensive; and two, that it would enable subscribers to stop paying for these unwanted channels.<sup>239</sup> In the view of NCTA, neither withstands constitutional scrutiny. Citing *United States v. Playboy Entertainment Group*,<sup>240</sup> NCTA argues that, "[w]here the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternatives exist."<sup>241</sup> In fact, the NCTA says that less restrictive alternatives do exist, such as allowing subscribers the capability to block channels.<sup>242</sup>

Regarding adopting "a la carte" programming, Commissioner Martin suggests two ways for this to work: (1) parents could "opt in" particular satellite radio and cable programs; and (2) customers could choose a specific number of channels from a list of programming for a fixed price.<sup>243</sup> The NCTA argues that "a la carte" programming does not offer any benefit to most consumers, and will actually result in higher prices, less choice and less programming diversity.<sup>244</sup> The NCTA believes that, like magazines and newspapers, *cable operators* [and satellite radio] are best able to make programming decisions and how to package them, which "constitute the exercise of editorial control and judgment."<sup>245</sup>

238. Stone & Strauss, *supra* note 237, at 16.

239. *Id.* at 16-17.

240. 529 U.S. 803, 813 (2000).

241. Stone & Strauss, *supra* note 237, at 18 (citation omitted).

242. *Id.*

243. Statement of Kevin J. Martin, *supra* note 190.

244. The National Cable and Telecommunications Association, *The Pitfalls of A La Carte*, available at <http://www.ncta.com/DocumentBinary.aspx?id=42>. To counter the NCTAs argument of higher prices, parents could instead "opt-out" of specific programming rather than "opt-in."

245. Stone & Strauss, *supra* note 237, at 2 (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974)). In an e-mail correspondence, Jim Collins, Vice President of Corporate Communications at Sirius Satellite Radio, writes:

All I can tell you is that we have no particular position on trying to define what is considered indecent or not. Like cable and satellite TV, we try to offer the most variety, selection and choice that we can . . . to satisfy as many tastes as possible in music and entertainment. Yes, we have Howard, but we also have the Catholic network, EWTN.

Our position is that we are supporters of all, but advocates of none.

E-mail from Jim Collins, Vice President of Corporate Communications, Sirius Satellite Radio, to

Furthermore, the proposed “a la carte” requirement is unlike the must-carry provisions addressed in the *Turner* cases for at least four reasons. First, “a la carte” programming does not trigger an “important” governmental interest that justifies regulating expression.<sup>246</sup> Second, “a la carte” does not substantially “advance” the interests it is intending to serve.<sup>247</sup> Third, “a la carte” does not address the “special characteristics of the cable medium.”<sup>248</sup> Fourth, the burden on constitutionally protected speech is greater than the “modest” burden imposed by must-carry provisions.<sup>249</sup> Although satellite radio does not have must-carry provisions, these “a la carte” arguments advanced by the NCTA could be used by satellite radio operators.

Thus, while the NCTA makes valid arguments regarding basic tier, expanded tier, and “a la carte,” these *are* less restrictive alternatives, and if advanced by means of “raised eyebrow,” may well be a less restrictive way to handle indecency on cable and satellite radio than imposing like rules as broadcast.

Legislators have also proposed alternative bills to handle indecency. First, there is the Indecent and Gratuitous and Excessively Violent Programming Control Act of 2005,<sup>250</sup> a Bill designed to “inform the American public and to protect children” from indecent and violent video programming. The Act would require the Commission to assess “the technological and practical effectiveness of statutory and regulatory measures,” in light of the “prevalence of violent [and indecent] programming on television.”<sup>251</sup> It would “instruct the FCC to develop more effective technology to meet the government’s compelling interest.”<sup>252</sup>

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Aurele Danoff, Student of Law, Pepperdine University School of Law (Jan. 24, 2006, 06:52:41 PST) (on file with author).

246. Stone & Strauss, *supra* note 237, at 5-7. The NCTA notes that the *Turner* Court identified two “important” government ends for “must-carry” provisions. One was to protect non-cable households from the loss of broadcast television, and the second was to promote “widespread dissemination of information from a multiplicity of sources.” *Id.* at 7 (citations omitted). The NCTA concludes that these issues are not at play with “a la carte” programming.

247. *Id.* The NCTA believes that there is no guarantee that the proposed “a la carte” programming would either substantially increase customers’ choices or lower prices. *Id.*

248. *Id.* at 4 (citing *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 661 (1994)). While the NCTA notes that the concern in *Turner* was the “bottleneck monopoly power exercised by cable operators,” here the concerns for offering “a la carte” programming are not unique to cable television. For example, hospitals have medical service packages, law firms offer legal services packages, and automobiles and other consumer good manufacturers offer “‘standard’ features that must be accepted – and paid for – if the product is purchased.” *Id.* at 11-12.

249. *Id.* at 4-5. While “must-carry” provisions imposed minimal effects on cable operators, “a la carte” programming would drastically change the editorial and business practices of all cable operators. *Id.* at 14-15.

250. Indecent and Gratuitous and Excessively Violent Programming Control Act of 2005, S. 616, 109th Cong. (2005).

251. *Id.* § 4.

252. Sperry, *supra* note 78, at 547. This Bill does not apply to non-broadcasters, but may serve as

Technological developments, rather than applying the same rules as broadcast, could be a less restrictive alternative.

Another proposal is the Kid Friendly TV Programming Act of 2005, a measure that would create a child-friendly tier of at least fifteen channels that would carry nothing "inappropriate for children due to obscene, indecent, profane, sexual, or gratuitous and excessively violent content."<sup>253</sup> This is an example of regulation by "raised eyebrow" that would have little effect on chilling adult free speech rights. Third, there is the Stamp Out Censorship Act of 2005,<sup>254</sup> which directly responds to the growing sentiment for extended censorship.<sup>255</sup> The Bill seeks to limit FCC forfeiture penalties to broadcast radio and television exclusively.<sup>256</sup> This Bill also shows how the "raised eyebrow" approach works to advance freedom of speech on satellite radio. Together, in some form or another, these various legislative efforts could solve the indecency problem without Court interference.

In the end, it comes down to the highly polemical question: "If the same radio program can be heard over a broadcast station, via an Internet webcast or download, on an iPod or a cell phone, or on a multitude of other devices, exactly how long can the old sector-specific regulations stand?"<sup>257</sup> A final suggestion states that if traditional broadcast wants to compete with emerging technology, then the FCC needs to embrace that reality. To keep free radio on the air,<sup>258</sup> the FCC should regulate broadcast "down," and through "raised eyebrow," regulate satellite radio "up," so that all media meet on a "level playing field."<sup>259</sup> This means that concerns for children

a warning for potential FCC action. *Id.* Thierer believes that in its current form, the Bill is not likely to pass because it is "the everything-plus-the-kitchen-sink approach to regulating cable and satellite." Greenya, *supra* note 146. It is hypothesized, however, that this will come into law at some point as part of another bill. *Id.*

253. Kid Friendly TV Programming Act of 2005, S. 946, 109th Cong. (2005).

254. Stamp Out Censorship Act of 2005, H.R. 1440, 109th Cong. (2005).

255. Sperry, *supra* note 78, at 546-47.

256. Consequently, the Bill would bar enforcement legislation on cable, satellite carriers, the Internet and other non-broadcast providers, and finally settle the debate regarding a two-tiered regulatory system.

257. Thierer, *supra* note 4, at 10.

258. While the National Association of Better Broadcasters' main argument is that this may put an end to "free local news, information [and] other programming," Thierer believes that satellite operators are not interested in "comprehensive coverage of [all] local community affairs." *Id.* at 12-13. In fact, Thierer compares satellite radio's future market to satellite television. "While satellite TV providers such as EchoStar and DirectTV do retransmit local broadcast stations, [they generally] do not offer any unique local content of their own." *Id.* Unique local programming would enable broadcast to distinguish itself from satellite or cable services.

259. The approach to regulating broadcasters "down" would be: (1) remove all speech controls and provide the same First Amendment rights to broadcast as all other media; (2) no longer require

will be addressed more appropriately, without having to compare pervasive issues or overlook subscription sales.

#### IV. CONCLUSION

Senior Vice President of Communications at Sirius says, “Howard will be doing a show that he hasn’t done for 15 years, because he’s been held back [by the FCC]. It’s not about swearing, it’s about being candid, doing creative performance work for radio.”<sup>260</sup> And besides that, we need to allow for leeway for indecent material, says Henry Geller, who served as General Counsel for the FCC when *Pacifica* was decided.<sup>261</sup> Creative work is the premise of the First Amendment and free speech.

This Article is not about denigrating the importance of free speech; it is arguably the most cherished right we have as citizens.<sup>262</sup> But, when our children are exposed to things that are shocking, and that material is in our cars, in our homes, in our restaurants, available on flights, we must think of the least restrictive alternatives to address unwanted exposure. What Howard says, although often disgusting, offensive and at least enough to make one feel uncomfortable and perhaps personally offended, is not deplorable enough to violate the Constitution as it stands today. It is neither considered obscene, nor does it meet the higher indecency standard applied to non-broadcast media.<sup>263</sup> Nevertheless, the Commission could get tough without violating the Constitution, particularly via the principle of “raised eyebrow.”

As Justice Kennedy conveyed in my introduction, so too shall his words filter into my conclusion:

What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.<sup>264</sup>

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terrestrial broadcasters to have “affirmative” public interest obligations; (3) relax media ownership rules as they uniquely apply to broadcast media; and (4) allow broadcasters to use the spectrum more freely. *Id.* at 15. Regulating satellite radio “up” would mean that satellite would be subject to the same “raised eyebrow” techniques as applied to broadcast.

260. Eric A. Taub, *As His Sirius Show Begins, Radio Ponders the Stern Effect*, N.Y. TIMES, Jan. 9, 2006, at C3.

261. Greenya, *supra* note 146.

262. Congresswoman Janice Schakowsky (D-IL), “a panelist at the Future of Music Policy Summit . . . said . . . [p]ersonally, I am much more concerned about protecting my grandchildren’s First Amendment rights than about them seeing Janet Jackson’s nipple.” Greenya, *supra* note 146.

263. *Id.*

264. *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 818 (2000).

The plain truth is that the FCC imposed a tremendous amount of fines on Howard Stern. Howard then left broadcast media and his audience—*half* of six million—followed! Almost thirty years have passed since the *Pacifica* decision, and despite the numerous attempts to challenge it,<sup>265</sup> the Supreme Court has upheld its reasoning and decision. While fines alone have clearly not solved the problem, fines are only one of many “raised eyebrow” techniques that will help keep the industry under content control, without the need for the Court to interfere.

What prompted me to write this Article was why Sirius Satellite Radio would pay Howard Stern \$500 million to move from one medium to another? In the end, though Howard might rant about more First Amendment freedom, and say, “Down with the FCC,”<sup>266</sup> this may all be hype. If the FCC wants to regulate indecency on satellite radio, it has authority to revisit classifications, and act in the “public convenience, interest, or necessity.”<sup>267</sup> The FCC also has more authority to regulate satellite radio than cable because of spectrum considerations. On the other hand, the strongest arguments in favor of Stern’s position are that subscription-based services receive different treatment, and though harm to children is a legitimate concern, it cannot trump the chilling of adults’ First Amendment rights.

In conclusion, the FCC cannot apply the same rules regarding indecency to satellite as broadcast without a new Court ruling—a decree changing the standard from strict scrutiny compelling governmental interest to important or substantial government interest. I personally do not believe that the Court will extend *Pacifica* to satellite and cable. I do believe, however, that the Court will look at “raised eyebrow” techniques as a less restrictive alternative to assisting parents and the public-at-large from unwanted, indecent programming, while simultaneously maximizing our First Amendment rights.

Aurele Danoff<sup>268</sup>

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265. See, e.g., *supra* notes 208-14 and accompanying text (referencing vagueness doctrine).

266. See Dobnik, *supra* note 3.

267. See *supra* notes 27, 115 and accompanying text.

268. J.D. Candidate, Pepperdine University School of Law, May 2007; B.A. Columbia University, *cum laude*, 2002. I would like to thank my mother, father and brother—whose love, support, and encouragement have helped me get through law school and realize I love it! And to Professor James M. McGoldrick, Jr., whose Communications Law and Constitutional Law teachings both inspired and guided me in writing this Article.



