

YOU DON'T LIKE IT... CHANGE THE (EXPLETIVE DELETED) CHANNEL!: AN ANALYSIS OF THE CONSTITUTIONAL ISSUES THAT PLAGUE FCC ENFORCEMENT ACTIONS AND A PROPOSAL FOR DEREGULATION IN FAVOR OF DIRECT CONSUMER CONTROL

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I. INTRODUCTION

On March 18, 2004, the Federal Communications Commission (“FCC” or “Commission”) issued a ruling that departed from years of precedent.¹ For the first time, the FCC ruled that a fleeting expletive uttered on the air violated 18 U.S.C. § 1464.² In doing so, the Commission instituted a new approach to the profanity standard.³ This ruling responded

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1. *In re* Complaints Against Various Broad. Licensees Regarding Their Airing of the “Golden Globe Awards” Program (Golden Globes II), 19 F.C.C.R. 4975 (2004).

2. *Id.* at 4982. The Commission stated that context is always relevant. However, at the same time the FCC emphasized that “given the core meaning of the ‘F-Word,’ any use of that word or a variation, in any context, inherently has a sexual connotation.” *Id.* at 4978.

3. *Id.* at 4981-82. The FCC stated:

Broadcasters are on notice that the Commission in the future will not limit its definition of profane speech to only those words and phrases that contain an element of blasphemy or divine imprecation, but, depending on the context, will also consider under the definition

to complaints alleging that the January 19, 2003 broadcast of the *Golden Globe Awards* contained material inappropriate for broadcast.⁴ The controversy arose after Bono, the winner of a Golden Globe Award that night, said the words “fucking brilliant” on the air.⁵ This was Bono’s response to being presented with the award.⁶

Although the FCC ruled that this type of expletive constituted profanity, it declined to fine the broadcaster since the decision represented a break from precedent.⁷ The FCC confirmed that broadcasters would be held responsible in the future for similar occurrences.⁸ However, the ruling did not articulate which other words or phrases would be considered profane.⁹ Also, despite stating that context is relevant, the agency did not detail any situation in which vulgar expletives might be acceptable.¹⁰

This comment will illustrate that ambiguities in the FCC’s decision, along with the Commission’s history of inconsistent and seemingly arbitrary actions, not only infringe upon the First Amendment rights of broadcasters, but also those of the general public. The *Golden Globe Awards* decision, as well as pending legislation that will increase fines for indecent broadcasting tenfold,¹¹ has First Amendment and Due Process

of “profanity” the “F-Word” and those words (or variants thereof) that are as highly offensive as the “F-Word,” to the extent such language is broadcast between 6 a.m. and 10 p.m.

Id. at 4981.

4. *Id.* at 4975.

5. *In re the “Golden Globe Awards,”* 19 F.C.C.R. at 4976 n.4.

6. *Id.* at 4976.

7. *Id.* at 4981-82.

8. *Id.* at 4982.

9. *In re the “Golden Globe Awards,”* 19 F.C.C.R. at 4982. The ruling stated that the FCC “will analyze other potentially profane words or phrases on a case-by-case basis.” *Id.* at 4981. See also *In re Complaints by Parents Television Council Against Various Broad. Licensees Regarding Their Airing of Allegedly Indecent Material*, 20 F.C.C.R. 1920 (2005); *In re Complaints by Parents Television Council Against Various Broad. Licensees Regarding Their Airing of Allegedly Indecent Material*, 20 F.C.C.R. 1931 (2005) (In two decisions that together dismissed complaints regarding thirty-six separate broadcasts, the Commission detailed several words that will not be considered profane in the context in which they were presented. However, this did more harm than good in terms of future guidance. Commissioner Michael J. Copps issued a separate statement, pointing out that “[t]he Commission . . . denie[d] these complaints with hardly any analysis of each individual broadcast, relying instead on generalized pronouncements that none of these broadcasts violates the statutory prohibition against indecency on the airwaves.” *Id.* at 1941 (separate statement of Commissioner Michael J. Copps)).

10. *In re the “Golden Globe Awards,”* 19 F.C.C.R. at 4982. Effectively, this develops a *per se* rule that certain language will always violate FCC regulations. See Katherine A. Fallow, *The Big Chill? Congress and the FCC Crackdown on Indecency*, 22-SPG COMM. LAW. 1, 29 (2004).

11. H.R. 3717, 108th Cong. (2004); S. 2056, 108th Cong. (2004). The legislation passed by The House of Representatives and The Senate increases the maximum forfeiture amount from \$27,500 to \$500,000.

implications that call into question the constitutionality of FCC activities.¹² This, combined with the existing power that individuals have to control program content through other means, renders it improper for the FCC, or any other government agency, to regulate broadcast content.

The analysis begins in Part II with a brief explanation of the history of the FCC and its activities, focusing on the definitions of indecency and obscenity as well as the FCC's procedure for enforcement. Part III of this comment discusses constitutional issues that implicate FCC procedures, including inconsistent and arbitrary enforcement of regulatory standards as well as the issue of chilled speech. Part IV proposes that the federal government should allow the public to regulate the broadcast market through its own efforts. Part V briefly details how technological advancement has obviated some of the original justifications for strict regulation of content. Part VI concludes by reiterating that governmental measures are largely unnecessary due to the ability of the consumer to control the market and thereby control the airwaves. Thus, the FCC is unnecessary as a content regulator.

II. WHAT THE FCC DOES

The FCC was established in 1934 under the Communications Act.¹³ As its name suggests, the FCC is responsible for the regulation of communications and has jurisdiction over wire and radio transmissions in the fifty states and all U.S. territories.¹⁴ FCC responsibilities range from distribution of broadcast licenses to regulation of content.¹⁵ The Enforcement Bureau of the FCC, first established on November 8, 1999,¹⁶

12. See Fallow, *supra* note 10, at 29.

13. 47 U.S.C. §151 (1996). The statute provides:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

Id.

14. *Id.*

15. *Id.*

16. Establishment of the Enforcement and Consumer Information Bureaus, 64 Fed.Reg. 60715-

is charged with enforcement of 18 U.S.C. § 1464,¹⁷ which deals with prohibition of obscene, indecent, or profane broadcasts.¹⁸

The FCC does not monitor programming or bring actions against violators on its own. Rather, it responds to complaints of indecency that the public brings to its attention.¹⁹ The FCC provides guidelines to the public for making a complaint to the agency via its website,²⁰ and stresses that “context is key” when considering whether a particular broadcast is indecent.²¹ When a violation of § 1464 is reported, the FCC is authorized to take several different actions upon a finding that the broadcast was, in fact, indecent. First, the station in question can be issued a cease and desist letter.²² A fine can also be assessed.²³ Finally, the FCC is authorized to

01 (Nov. 8, 1999).

17. FCC Organization, 47 C.F.R. § 0.111 (2005). The FCC Enforcement Bureau is responsible for enforcement of all communications statutes. *Id.*

18. 18 U.S.C. § 1464 (1994). “Whoever 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.” *Id.* The FCC may impose civil penalties for violations of § 1464, even though it is a criminal statute. *See* FCC v. Pacifica Found., 438 U.S. 726, 739 n.13 (1978).

19. The procedure for analyzing a complaint is provided to the public via the FCC website: The Commission’s staff reviews each complaint to determine whether it alleges information sufficient to suggest that a violation of the obscenity, profanity or indecency prohibition has occurred. If it appears that a violation may have occurred, the staff will commence an investigation by sending a letter of inquiry to the broadcast station. If the complaint does not contain information sufficient to ascertain that a violation may have occurred, the complaint will be dismissed. In such a case, the complainant has the option of re-filing the complaint with additional information, filing a petition for reconsideration of the staff action, or filing an application for review (appeal) to the full Commission. If the facts and information contained in a complaint suggest that a violation did not occur, then the complaint will be denied. In that situation, the complainant has the option of filing a petition for reconsideration of the staff action or an application for review (appeal) to the full Commission.

FCC Obscene, Profane & Indecent Broadcasts, <http://www.fcc.gov/eb/broadcast/opi.html> (last visited Mar. 29, 2005).

20. FCC Obscenity, Indecency, & Profanity, <http://www.fcc.gov/parents/content.html> (last visited Mar. 29, 2005). At this web page, the FCC requests that the following information be provided in a complaint: “1. [T]he date and time of the alleged broadcast; 2. the call sign of the station involved; and 3. information regarding the details of what was actually said (or depicted) during the alleged indecent, profane or obscene broadcast.” *Id.*

21. *Id.*; *Pacifica Found.*, 438 U.S. at 747-48.

22. 47 U.S.C. § 312(b) (2004). The statute provides:

Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this chapter, or section . . . 1464 of Title 18, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this chapter . . . the Commission may order such person to cease and desist from such action.

Id.

23. 47 U.S.C. § 503(b)(1)(D) (1992). “Any person who is determined by the Commission . . . to have . . . violated any provision of section . . . 1464 . . . shall be liable to the United States for a forfeiture penalty.” *Id.* In actuality, the FCC first issues a Notice of Apparent Liability (“NAL”).

revoke the station's license.²⁴

When determining what content is actionable, the standards for dealing with indecent material differ from those applied to obscene material.²⁵ In *Miller v. California*, the United States Supreme Court held that obscenity is not protected speech.²⁶ Therefore, obscene material²⁷ cannot be broadcast at any time without violating § 1464.²⁸ On the other hand, indecent material²⁹ is protected under the First Amendment and cannot be banned outright.³⁰ However, in order to protect children from indecent broadcasts when they are more likely to be watching television or listening to the radio, this type of material can be relegated to certain times.³¹ The FCC regulations, therefore, require that this type of material may only be broadcast in the nighttime hours between 10:00 p.m. and 6:00 a.m.³² Profanity³³ is regulated in the same manner as indecency, and may also be broadcast only between the hours of 10:00 p.m. and 6:00 a.m.³⁴

In theory, this arrangement works well. Broadcasters retain their

Forfeiture Proceedings, 47 C.F.R. § 1.80(f) (2005). The broadcaster then has thirty days to either pay the forfeiture or provide a reason why the forfeiture should not be imposed. *Id.* See *The Rusk Corp.*, 8 F.C.C.R. 3228, 3229 (1993). However, for the purposes of this comment, there is no functional difference between a NAL and a forfeiture, since the distinction does not regard whether the FCC found that a violation occurred. Therefore, for simplicity's sake, any discussion of monetary sanctions imposed will be referred to as "fines" or "forfeitures".

24. 47 U.S.C. § 312(a)(6) (2004). "The Commission may revoke any station license or construction permit . . . for violation of section . . . 1464." *Id.*

25. See *Pacifica Found.*, 438 U.S. at 739-40.

26. *Miller v. California*, 413 U.S. 15, 36 (1973).

27. Obscene material is defined as material meeting a three-prong test:

- (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; . . .
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable . . . law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller, 413 U.S. at 24 (citations omitted).

28. FCC Radio Broadcast Services, 47 C.F.R. § 73.3999 (2005).

29. Indecent language "describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." *Pacifica Found.*, 438 U.S. at 732.

30. *Id.* at 744-45.

31. *Id.* at 750.

32. 47 C.F.R. § 73.3999.

33. The FCC defines profanity as language that denotes "certain of those personally reviling epithets naturally tending to provoke violent resentment or denoting language so grossly offensive to members of the public who actually hear it as to amount to a nuisance." *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program (Golden Globes II)*, 19 F.C.C.R. 4975, 4981 (2004) (quoting *Tallman v. United States*, 465 F.2d 282, 286 (7th Cir. 1972)).

34. *In re the "Golden Globe Awards"*, 19 F.C.C.R. at 4981.

broadcasting rights, and children and families are somewhat protected from indecent broadcasts.³⁵ However, in practice the FCC treads too close to the First Amendment in deciding what is objectionable. There are guidelines for determining indecency, but these guidelines are quite general and ascertaining whether material is indecent is often a subjective judgment.³⁶ The FCC defines indecent material as “language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community broadcast standards for the broadcast medium, sexual or excretory organs or activities.”³⁷

Based on this definition, the FCC has identified the three most relevant factors in an indecency analysis as “(1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate or shock.”³⁸ When this standard is examined closely, it is evident that what constitutes indecency is not entirely clear, as will be demonstrated in the examples below.

III. CONSTITUTIONAL ISSUES

As noted above, indecent speech is protected under the First Amendment of the United States Constitution,³⁹ although it can be regulated.⁴⁰ The Supreme Court noted in *FCC v. Pacifica Foundation* that the government’s interest in protecting youth and supporting parents’ authority justifies such regulation.⁴¹ When dealing with speech, any statute is facially unconstitutional if it is overbroad, prohibiting “a substantial amount of protected expression.”⁴² The regulation needs to withstand constitutional review employing strict scrutiny⁴³ and must be constructed

35. Since children are less likely to be in the viewing or listening audience between the hours of 10:00 p.m. and 6:00 a.m., they are less likely to be exposed to indecent or profane material broadcast at those times. See *Pacifica Found.*, 438 U.S. at 749-50.

36. See *In re Indus. Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. 7999, 8002-03 (2001). “[C]ontextual determinations are necessarily highly fact-specific, making it difficult to catalog comprehensively all of the possible contextual factors that might exacerbate or mitigate the patent offensiveness of particular material.” *Id.* at 8003.

37. FCC Obscenity, Indecency, & Profanity, *supra* note 20. See *Pacifica Found.*, 438 U.S. at 732.

38. *In re Complaint Against Various Broad. Licensees Regarding Their Airing of the UPN Network Program “Buffy the Vampire Slayer” on Nov. 20, 2001*, 19 F.C.C.R. 15,995, 15,997 (2004).

39. *Pacifica Found.*, 438 U.S. at 746.

40. *Id.* at 749-50.

41. *Id.*

42. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002).

43. If a statute or regulation infringes on a constitutionally protected right, it must be narrowly tailored to serve a compelling governmental interest and cannot be arbitrarily applied. *Clark v. Cmty.*

in the least restrictive way possible.⁴⁴ However, if the means employed are overly vague, then the statute will be void under a constitutional analysis.⁴⁵ Furthermore, if a statute that deals with a constitutionally protected right is applied arbitrarily, it will be subject to challenge.⁴⁶

A. Inconsistency in Enforcement: Analysis of Two FCC Decisions

The standard for a finding of indecency is determined by “contemporary community standards for the broadcast medium.”⁴⁷ Obviously, this is open to wide interpretation. Therefore, in order to better advise the broadcast industry as to what material is suitable for airing, the FCC issued a policy statement that included several examples of what would and would not be considered indecent.⁴⁸ This statement detailed complaints that the FCC has received, as well as the responses to those complaints.⁴⁹

In comparing the various rulings, the FCC intended to “illustrate the various factors that have proved significant in resolving indecency complaints.”⁵⁰ Although the intention was to clarify the Commission’s policies, the listed examples exemplify the disparate outcomes of indecency investigations⁵¹ and serve only to demonstrate that FCC enforcement of seemingly indecent material is arbitrary. To illustrate this point, consider these two examples.

One instance in which the FCC detailed a finding of indecency and issued a fine involved *The Stevens and Pruett Show* (“*Stevens and Pruett*”).⁵² During a radio broadcast of that program by The Rusk Corporation (“Rusk”) in March of 1991, there was a discussion of penis size as well as use of the organ in pleasuring a sexual partner.⁵³ The

for Creative Non-Violence, 468 U.S. 288, 293 (1984).

44. *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

45. *See U.S. v. Nat’l Dairy Prods. Corp.*, 372 U.S. 29, 32-33 (1963) (“Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed”).

46. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

47. *FCC v. Pacifica Found.*, 438 U.S. 726, 732 (1978).

48. *In re Indus. Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. 7999 (2001) (intending to inform broadcast licensees about FCC procedures, summarize FCC regulations, and provide guidance regarding compliance with indecency standards).

49. *Id.* at 8004-15.

50. *Id.* at 7999.

51. *See id.* at 8004-15.

52. *The Rusk Corp.*, 8 F.C.C.R. 3228 (1993). The program, a sex survey call-in program, aired between 7:00 a.m. and 10:00 a.m. on KLOL(FM) in Houston, TX. *Id.* at 3228.

53. *Id.* at 3231. The segment involved a female listener that called in to speak with the doctor who was a guest on the show. Quotes from the broadcast include:

segment also included satirical suggestions for matching up compatible people, with the broadcasters indicating that people with similar needs should be able to identify each other.⁵⁴

In responding to the complaint, Rusk informed the Commission that it examined past FCC complaints and made the determination to air the programming with the belief that it was in compliance with broadcast standards based on available decisions.⁵⁵ Rusk also explained that the program that aired consisted of “clinical discussions of sexual matters with qualified experts.”⁵⁶ The FCC responded that the program did not provide clinical information, but “*appeared* [to discuss] vulgar and explicit” subject matter.⁵⁷

Another complaint that the FCC received involved a broadcast of *The Oprah Winfrey Show* (“*Oprah*”).⁵⁸ During a segment entitled “How to Make Romantic Relations with Your Mate Better,” there was a discussion regarding erotic sexual aids, faking of orgasms, and masturbation.⁵⁹ Although the *Oprah* broadcast dealt with sexual issues, just as the *Stevens and Pruett* broadcast did, the FCC did not issue a forfeiture in the former

The doctor was talking about size. The man complained that he was so large that it was ruining his marriages. . . . Big is good if the guy knows how to use it. . . . I'm saying if the guy knows how to use his thing right. . . . [T]welve inches, about the size of a beer can in diameter. So, now could you handle something like that? . . . [S]omebody big is just going to have to find somebody that . . . [t]hat's big. . . . Do you have a device that, an instrument that measures. . . . It's called a tape measure.

Id. at 3231-32.

54. *The Rusk Corp.*, 8 F.C.C.R. at 3232. For example:

Now how are you going to just walk down the street and find out, I mean how's an average guy with this problem going to find you? I mean are you going to have a sign around your neck? . . . I think we ought to have her tagged. Have her ears tagged so if you're a big guy and you're in a bar, you know she is.

Id.

55. *Id.* at 3228.

56. *Id.*

57. *The Rusk Corp.*, 8 F.C.C.R. 3228 (emphasis added).

58. *The Oprah Winfrey Show* is an internationally broadcast television program. Oprah Winfrey's Biography, http://www.oprah.com/about/press/about_press_bio.jhtml (last visited Mar. 29, 2005).

59. *In re Indus. Guidance on the Commission's Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. 7999, 8011-12 (2001). Quotes from the broadcast include the following:

American wives all across the country have confessed to using erotic aids to spice up their sex life and . . . thousands of women say they fantasize while having sex with their husbands. . . . And most women say they are faking it in the bedroom. . . . I like the way my partner looks naked. . . . I like the way my partner tastes. . . . Do you know that you can experience orgasm, have you experienced that by yourself? . . . You need to at least know how to make your body get satisfied by yourself. Because if you don't know how to do it, how is he going to figure it out?

Id.

instance, noting that “while material may be offensive to some people, in context, it might not be actionably indecent.”⁶⁰

It is difficult to tell exactly why the outcomes are different with two broadcasts that discuss similar issues. There does not seem to be any great difference in the subject matter in terms of its graphic nature. It can be argued that Oprah Winfrey is generally seen as more appropriate than Stephens and Pruett or other so-called “shock jocks.” Thus, the FCC may tend to automatically view *Oprah* as acceptable to the community as a whole. After all, according to *Oprah*’s official website, the program has been the number one talk show for eighteen consecutive years.⁶¹ The site also explains that approximately 30 million viewers watch *Oprah* every week.⁶² However, in the *Stevens and Pruett* ruling, the FCC discounted Rusk’s contention that high program ratings evidenced acceptable community standards.⁶³

Also potentially relevant is the fact that Rusk received forfeiture notices previously in connection with *Stevens and Pruett*.⁶⁴ It is possible that the Commission begins with the assumption that a broadcast is indecent when dealing with licensees that have been sanctioned in the past, and is therefore more likely to find indecency when investigating them again.⁶⁵ This reasoning strengthens the notion that the FCC decides that a broadcast is or is not indecent based largely on who produced or aired the programming. Thus, the oft-repeated rule that context matters may be nothing more than a justification for allowing enforcement against broadcasters that the Commission does not like.

Yet another possibility for the different treatment is that the *Stephens and Pruett* broadcast was apparently intended to be humorous, while the issues on the *Oprah* broadcast were likely portrayed in a more serious light. Therefore, one might conclude that *Oprah* is acceptable solely because of its format, rather than content.

60. *Id.* at 8012. The FCC issued a similar response to complaints against *The Geraldo Rivera Show*. During a segment entitled “Unlocking the Great Mysteries of Sex,” the broadcast mentioned the following: “It’s important that a man learn to use the penis the way an artist uses a paintbrush . . . and if a woman is also willing to learn how to move her vagina. . . . [A] man can separate orgasm from ejaculation and have more than one orgasm.” *Id.*

61. Oprah Winfrey’s Biography, *supra* note 58.

62. *Id.*

63. The Rusk Corp., 8 F.C.C.R. 3228, 3229 (1993).

64. *Id.* at 3229 n.3.

65. To date, broadcasters have been fined several times in connection with *The Howard Stern Show*. See Clear Channel Radio Licenses, Inc., 13 F.C.C.R. 17,254 (1998) (issuing a fine for \$6,000); *In re Infinity Broad. Operations, Inc.*, 19 F.C.C.R. 5032 (2004) (issuing a fine for \$27,500); *In re Clear Channel Broad. Licenses, Inc.*, 19 F.C.C.R. 6773 (2004) (issuing fines for a combined total of \$495,000).

B. The Indecency Factors (Not) at Work

Some instances of FCC sanction focus on the description or simulation of sexual activities.⁶⁶ However, in response to complaints regarding an episode of the television show *Buffy the Vampire Slayer* that aired on November 20, 2001 on the United Paramount Network, the FCC declined to take any action.⁶⁷ The FCC simply stated that the broadcast of the episode did not violate indecency standards.⁶⁸ The episode in question depicted two characters, Spike and Buffy, in an extremely violent confrontation that ultimately led to apparent sexual intercourse between them.⁶⁹ The sequence lasted for approximately two minutes.⁷⁰ In some areas, this program aired at 7:00 p.m.⁷¹

Upon applying the three main factors used by the Commission in any indecency analysis, it becomes clear that this ruling was incorrect and a sanction should have been issued. First, it is quite apparent that the characters are engaging in sex. At one point, the viewer can hear the sound of pants unzipping as Buffy reaches her arm down out of frame, and then proceeds to move her body up and down while breathing heavily.⁷² While this may not be particularly graphic, it is certainly explicit and obviously sexual. Second, the scene dwells on the sexual activity for over a minute, with the characters changing position more than once during the depiction.⁷³ In considering the third element, it is not entirely clear whether the scene was intended to titillate or shock. However, as the FCC noted in its Policy Statement, not all of the elements must be present for a finding of indecency and other factors can be considered as well.⁷⁴ For example, a factor that might be relevant in this instance is that the two characters

66. See *In re* AMFM Radio Licenses, LLC., 18 F.C.C.R. 19,917 (2003).

67. *In re* Complaint Against Various Broad. Licensees Regarding Their Airing of the UPN Network Program "Buffy the Vampire Slayer" on Nov. 20, 2001, 19 F.C.C.R. 15,995 (2004).

68. *Id.* at 15,998. The FCC dedicated less than one paragraph to its legal analysis of the program.

Based upon our review of the scene, we did not find that it is sufficiently graphic or explicit to be deemed indecent. Given the non-explicit nature of the scene, we cannot conclude that it was calculated to pander to, titillate or shock the audience. Consequently, we conclude that the material is not patently offensive as measured by contemporary community standards for the broadcast medium.

Id.

69. *Id.* at 15,995.

70. *Buffy the Vampire Slayer: Smashed* (UPN television broadcast, Nov. 20, 2001).

71. *In re* "Buffy the Vampire Slayer," 19 F.C.C.R. at 15,995.

72. *Buffy the Vampire Slayer: Smashed*, *supra* note 70.

73. *Id.*

74. *In re* Indus. Guidance on the Commission's Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broad. Indecency, 16 F.C.C.R. 7999, 8011-12 (2001). "Each indecency case presents its own particular mix of these, and possibly other, factors." *Id.* at 8003.

threatened each other with deadly harm before engaging in sexual activity, thereby equating sexual pleasure with violence.⁷⁵ When all of the elements are considered, the FCC should have ruled that this broadcast violated indecency standards based on previous decisions and statements.

This incorrect ruling calls into question the consistency and therefore the constitutionality of the FCC's actions. Again, because the decisions are inconsistent and therefore essentially arbitrary, there is a serious question whether the Commission's standards of indecency must be void due to vagueness.⁷⁶

C. A Chilling Effect

"The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere."⁷⁷ A governmental regulation is therefore unconstitutional if it "prohibits a substantial amount of protected expression."⁷⁸

The nature and the enforcement of FCC indecency standards serve to chill speech. First, if broadcasters are unsure as to what specifically constitutes indecency, the fear of sanctions may cause them to be unnecessarily cautious. Due to this concern, many broadcasters will fail to communicate their messages accurately.⁷⁹ Second, some may choose not to speak on the air at all, thus preventing the public from having access to their views and opinions.⁸⁰ Both results are undesirable, as it is good policy to encourage the sharing of different ideas.⁸¹ That exchange must logically apply to both the giving and receiving of views.⁸²

75. *Buffy the Vampire Slayer: Smashed*, *supra* note 70.

76. See *U.S. v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 32-33 (1963).

77. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002).

78. *Id.*

79. See Comments of the Media Institute and Members of its First Amendment Advisory Council, at 4, available at <http://www.fcc.gov/eb/broadcast/Pleadings/TM11.pdf> (last visited Mar. 29, 2005) [hereinafter Comments of the Media Institute].

80. The chilling effect will also affect commerce. For example, advertisers seeking to reach certain audiences rely on programming that attracts those audiences. See *In re Infinity Broad. Operations, Inc.*, 19 F.C.C.R. 20,156, 20,157-58 (2004). For example:

In his Petition to Intervene, [Petitioner] states that he regularly listens to the "Howard Stern Show" and that he has purchased advertising time on radio stations in New York and elsewhere. He claims that based upon the forfeiture assessed in this proceeding, Infinity may decide to discontinue broadcasting the "Howard Stern Show," and if this occurs, he will lose an outlet for his infomercial advertisements and will not have access to material broadcast by Mr. Stern.

Id.

81. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 885 (1997); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 385 (1969).

82. *Red Lion Broad. Co.*, 395 U.S. at 390. See Comments of Public Broadcasters on Petitions for Reconsideration, at 5, available at <http://www.fcc.gov/eb/broadcast/Pleadings/PBC1.pdf> (last

The new ruling that fleeting expletives uttered outside of a sexual context are actionable under the profanity standards serves to chill speech even further.⁸³ Most strikingly, the policy places a great burden on producers and broadcasters of news and documentary programs.⁸⁴ Because of concern regarding possible sanctions, legitimate news and informational programs will undoubtedly be edited by producers, leading to a distortion of facts that are of interest to the public.⁸⁵ Furthermore, there is a public interest in live news programming and people should have access to necessary and important information as quickly as possible. It is an unreasonable inconvenience to the public to have to wait for vital information that could affect them simply because a news producer is concerned about editing out potentially profane words.⁸⁶ This is especially true given the uncertainty about which words or phrases are actionable under the new policy.⁸⁷

D. A Local Problem

Also endangering news broadcasts and other local programming is the fact that each station that broadcasts material found to be indecent or profane could be sanctioned, including network affiliates. Because affiliates rely largely on the parent network to supply their programming, affiliates often have limited control.

For example, when Janet Jackson exposed her breast during the *Super Bowl* half time show on February 1, 2004, several affiliates were fined along with the "parent" network,⁸⁸ although all the entities sanctioned in that instance were affiliates owned and operated by Viacom, the parent company.⁸⁹ This is because the FCC found that the non-Viacom owned

visited Mar. 29, 2005) [hereinafter Comments of Public Broadcasters]. See also *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976) (stating that consumers have a right to receive commercial speech).

83. Comments of the Media Institute, *supra* note 79, at 3-4.

84. Comments of Public Broadcasters, *supra* note 82, at 5.

85. Comments of the Media Institute, *supra* note 79, at 4. A news operation electronically distorted graffiti on a car that appeared as part of a news story. See Comments of Public Broadcasters, *supra* note 82, at 5. An issue that required attention included "whether the written correspondence of an infamous child killer, in a [news] segment exploring his motivations, had to be obscured because the 'f-word' was slightly visible on the screen." *Id.*

86. Comments of Public Broadcasters, *supra* note 82, at 5-6. "It is true, of course, that instances of words such as the 'f-word' in news and documentaries are rare. But they occur, as they do inevitably in everyday life." *Id.*

87. *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program (Golden Globes II)*, 19 F.C.C.R. 4975, 4982 (2004).

88. *In re Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004, Broad. of the Super Bowl XXXVIII Halftime Show*, 19 F.C.C.R. 19,230, 19,240 (2004).

89. *Id.* at 19,240.

affiliates had no control over the selection and airing of the content.⁹⁰ However, the FCC urged such affiliates to take precautions in the future, such as employing a delay system when broadcasting feeds from parent networks.⁹¹

This urging on the part of the Commission will harm local viewers interested in national broadcasts. For example, if there were an emerging news story that required the attention of the entire country, affiliates should not have to take the time to edit content. Delaying the transmission to the general public that needs the information as quickly as possible creates an unnecessary burden.

Although no forfeitures were issued with regard to the *Golden Globe Awards* decision,⁹² the FCC's inclusion of the non-parent owned affiliates in announcing the violation of broadcast standards⁹³ further complicates the issue. As noted above, one element of the *Super Bowl* ruling was that non-network owned affiliates could not be held responsible for programming over which they had no control.⁹⁴ On the other hand, although no fines were issued, the FCC clearly held local non-network affiliates responsible for the *Golden Globe Awards* broadcast.⁹⁵

This inconsistency makes it unclear when non-network affiliates will be held responsible for parent network programming. Since a *Super Bowl* halftime show seems similar in nature to a *Golden Globe Awards* presentation, affiliates should have been treated in the same way under both circumstances. This is another example of the vague standard that plagues FCC regulations. It also remains unclear if either the *Super Bowl* or *Golden Globe Awards* rulings affect the broadcast of other national news items of public interest.

This is also problematic because in airing live programming, network affiliates that serve their local communities have little to no control over unexpected occurrences, such as the examples in the *Super Bowl* and *Golden Globe Awards* broadcasts, other than choosing not to air, or delaying, the programming. Resorting to these measures would greatly impact local viewers who have an interest in seeing the broadcasts live.

Local affiliates will suffer all the more as a result of the proposed increase in maximum fines that the FCC can issue. The pending legislation in Congress allows the FCC to issue a forfeiture of up to \$500,000, which

90. *Id.*

91. *Id.*

92. *In re "Golden Globe Awards,"* 19 F.C.C.R. at 4981-82.

93. *Id.* at 4982. "We conclude . . . that NBC and other licensees that broadcast Bono's use of the 'F-word' during the live broadcast of the Golden Globe Awards violated 18 U.S.C. § 1464." *Id.*

94. *In re Super Bowl XXXVIII Halftime Show,* 19 F.C.C.R. at 19,240.

95. *In re "Golden Globe Awards,"* 19 F.C.C.R., appendix.

is almost twenty times the current maximum amount of \$27,500.⁹⁶ The proposed increase is justified as necessary to truly deter corporations with great resources from acting irresponsibly regarding programming. While this may make sense in terms of large corporations, it is unreasonably burdensome on local networks. While NBC can afford to pay out a large sum when indecency is found, a local affiliate may be effectively prohibited from operating if forced to pay exorbitant fines due to programming that it does not produce, but that its viewing audience has an interest in seeing.⁹⁷

Of course, this difficulty applies not only to live broadcasts, but prerecorded material as well. In the most recent FCC ruling, Fox and virtually all of its affiliates, owned by Fox or independent, were issued forfeitures in connection with the broadcast of the program *Married by America*.⁹⁸ The total fines reach almost \$1.2 million, representing the largest total forfeiture notice in FCC history,⁹⁹ and more than twice the amount issued in response to the Janet Jackson half time show complaint.¹⁰⁰ Again, all affiliates that broadcast the program were held responsible.¹⁰¹ Some affiliates chose not to air the programming and were not held liable.¹⁰²

This leads to the question of whether the public in local communities has a right to see or hear broadcasts that are aired on parent networks. In response to the recent decisions, a network affiliate may very well decide that the safest course of action is that the *Golden Globe Awards* or the

96. H.R. 3717, 108th Cong. (2004); S. 2056, 108th Cong. (2004).

97. The pending legislation addresses this issue by creating exceptions for affiliates that have not had a reasonable opportunity to "review the programming in advance." H.R. 3717, 108th Cong. (2004). However, what constitutes a reasonable amount of time is not defined, and the language provides that the FCC would make the determination of which affiliates would be exempt. "The Commission shall by rule define the term 'network organization' for purposes of this subparagraph." *Id.* The other difficulty with this provision is that, if the goal is to rid the airwaves of indecent material, creating exceptions for certain stations is at odds with this goal and makes FCC enforcement even more inconsistent. It effectively means that certain stations must be more careful than others. The standards should be the same for all.

98. *In re Complaints Against Various Licensees Regarding Their Broad. of the FOX Television Network Program "Married by America" on Apr. 7, 2003*, 19 F.C.C.R. 20, 191 (2004). The broadcast aired prior to 10:00 p.m. *Id.* at 20,192. The program was a reality show featuring bachelor and bachelorette parties and involved strippers engaging in playfully sexual situations with party guests, though any nudity was electronically obscured. *Id.* at 20,193-94.

99. *Id.* at 20,191. The combined amount was \$1,183,000. FCC Notices of Apparent Liability, <http://www.fcc.gov/eb/broadcast/NAL.html> (last visited Mar. 29, 2005).

100. *See in re Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004, Broad. of the Super Bowl XXXVIII Halftime Show*, 19 F.C.C.R. 19,230 (2004) (stating that the combined forfeitures equaled \$550,000).

101. *In re "Married by America,"* 19 F.C.C.R. at 20,191.

102. *Id.* at 20,192 n.13.

Super Bowl will not be aired next year. This impedes free speech and the free exchange of ideas. A local viewer has the right to view those broadcasts that the rest of the country enjoys. It is true that this same viewer can read about the game highlights or find out which celebrity won a Golden Globe Award the night before, but it is clear that there is a public desire to view programs live.¹⁰³

This scenario is ultimately inevitable as long as affiliates are held monetarily responsible for their parent network's actions. Of course, it is not a violation of the First Amendment for a network to choose not to air any particular programming. A network certainly has the right to air whatever content it deems appropriate. Therefore, if it feels that certain content is not suitable for broadcast, it can choose not to air it. However, when a network declines to air any given program only because there is a concern over potential sanction, the government has effectively banned the program,¹⁰⁴ sharpening the focus of the constitutional issue.

A recent example of this problem concerned the airing of the World War II movie *SAVING PRIVATE RYAN*.¹⁰⁵ A total of sixty-six ABC affiliates chose not to air the film during a scheduled broadcast. Consequently, approximately one third of the country was unable to view the programming, as their local networks did not cover the event.¹⁰⁶ The stations that chose not to air the Academy Award-winning film¹⁰⁷ based the decision on a fear of FCC action.¹⁰⁸ There was a fear not only of sanctions, but also of license revocations.¹⁰⁹ It is clear that the affiliates did not believe that the movie was indecent, but rather they declined to air the

103. Live sporting events, such as the NCAA Basketball Championships, as well as other live programming, consistently rank in the top 20 of all weekly television shows according to Nielsen Media Research. See *Nielsen Media Research Top 20*, available at <http://tv.yahoo.com/nielsen/> (last visited Mar. 29, 2005).

104. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002) ("a law imposing criminal penalties on protected speech is a stark example of speech suppression").

105. See Associated Press, *66 ABC Affiliates Didn't Show 'Ryan'* (Nov. 12, 2004), <http://msnbc.msn.com/id/6455962> (last visited Mar. 29, 2005). ABC aired the film on Veteran's Day. *Id.* Based on the licensing agreement with the film's director, Steven Spielberg, the movie was shown unedited. Kevin Reece, *Fearing FCC Sanctions, Stations Cancel 'Saving Private Ryan'* (Nov. 12, 2004), <http://www.komotv.com/stories/33944.htm> (last visited Mar. 29, 2005). The unedited version of the film contains the same language that factored into the *Golden Globe Awards* decision, as well as other potentially profane words. See *SAVING PRIVATE RYAN* (DreamWorks SKG & Paramount Pictures Corporation & Amblin Entertainment, Inc. 1998).

106. *66 ABC Affiliates Didn't Show RYAN*, *supra* note 105. Stations choosing not to air the film told dissatisfied viewers to contact the FCC. *Id.*

107. The film won a total of five Academy Awards, including a Best Director Award for Steven Spielberg. See *SAVING PRIVATE RYAN* official website, <http://www.rzm.com/pvt.ryan/videos.htm> (last visited Mar. 29, 2005).

108. Reece, *supra* note 105.

109. *Id.*

film solely due to uncertainty about the FCC's reaction.¹¹⁰ This is a direct result of recent FCC activity, and confirms the fear that vague and uncertain standards chill speech.¹¹¹

IV. POWER TO THE PEOPLE

Apart from the confusion created by overly broad indecency standards, increasing fines and more aggressive enforcement of indecency laws are simply unnecessary. Viewers who find certain programming offensive do not need the federal government to make their dissatisfaction known. As an initial matter, the public at large is in a position to affect television and radio programming independently of the FCC by simply not watching.¹¹² Also, and perhaps more importantly, any viewer or listener who objects to a specific program can contact the television network or radio station that aired it. Offended audience members can also direct complaints to sponsors of the program that they find offensive.

By taking this direct appeal to those responsible for the programming, concerned individuals have an opportunity to reduce or even eliminate indecent programming and promote responsible broadcasting. If enough people object to any given transmission, the advertisers, as well as the broadcasters, will be pressured to conduct their business in accordance with the public's wishes or risk loss of revenue. Logically, an advertiser will be less likely to sponsor a given program if consumers make it clear that they will not purchase their products if they do. If advertisers, responding to the threats of their consumers, do not sponsor the broadcast, then the program will not air because it will simply not be cost effective.

One striking example of this concept at work involved a radio broadcast of *The Opie and Anthony* show ("*Opie and Anthony*"). On August 15, 2002, *Opie and Anthony* broadcast a segment entitled "Sex for

110. *Id.* The current uncertainty regarding FCC regulations seems to have been directly responsible for the preemption decisions. Complaints about airings of the film in previous years brought no action from the FCC, but there was clearly a fear that the 2004 broadcast would result in sanctions. *Id.*

111. The FCC declined to advise the affiliates in question as to the appropriateness of the broadcast, saying that to do so would be equivalent to censorship. *ABC affiliates pulling "Private Ryan"* (Nov. 11, 2004), http://money.cnn.com/2004/11/11/news/fortune500/savingpvt_ryan/ (last visited Mar. 29, 2005). However, offering no guidance regarding the potential broadcast effectively amounted to censorship because the affiliates' decision not to air the film was based on fear of the FCC. Reece, *supra* note 105.

112. For example, the public had little interest in *Married by America*, with or without the FCC forfeitures. Nearly one million viewers stopped watching halfway through the show's premiere episode according to Nielsen Media Research. See Stephen Battaglio, *Spurned by America*, N.Y. DAILY NEWS, Mar. 5, 2003, available at <http://www.nydailynews.com/entertainment/story/64441p-60071c.html> (last visited Mar. 29, 2005).

Sam.”¹¹³ This segment involved a contest in which listeners engaged in sexual activity in a number of specified locations around New York City.¹¹⁴ One of the couples engaged in such activity in Saint Patrick’s Cathedral while an observer described the event on the air.¹¹⁵ These actions took place while religious worshippers prayed in the cathedral.¹¹⁶ Other locations in which couples either engaged or prepared to engage in sex included a zoo and an elevator in Rockefeller Center.¹¹⁷

There were several complaints forwarded to the FCC in response to this broadcast, but there were no sanctions issued in a timely manner.¹¹⁸ In fact, there was no action taken against the station that broadcast the segment for over a year after the complaints were first filed.¹¹⁹ However, the Commission’s delay in taking action had no impact on the situation. Despite the FCC’s silence, the hosts of the show, Anthony Cumia and Greg “Opie” Hughes, were suspended the next day, and never returned to the air because the station cancelled the program.¹²⁰ A spokesman for Viacom, the station’s parent company, indicated that the decision to take *Opie and Anthony* off the air was largely based on the public’s outrage regarding the stunt as well as the negative publicity that accompanied it.¹²¹ Viacom’s stock dropped four percent in the days following the incident.¹²²

The station was not the only entity affected by the public’s distaste for the broadcast. The main sponsor of the segment was the Boston Beer Company, which distributes Samuel Adams Beer products and other alcoholic beverages.¹²³ Its founder, Jim Koch, was a guest on the program and was there to award prizes to the winners of the “Sex for Sam”

113. *In re Infinity Broad. Operations, Inc.*, 18 F.C.C.R. 19,954, 19,956 (2003). The “Sex for Sam” contest was sponsored by the Boston Beer Company, maker of Samuel Adams beer. Jason Alstrom & Todd Alstrom, *Boston Beer Company. Ha! Ha?*, BOSTON’S WEEKLY DIG, September 4, 2002, available at http://www.beeradocate.com/news/stories_read/406 (last visited Mar. 29, 2005).

114. *In re Infinity Broad. Inc.*, 18 F.C.C.R. at 19,956. The chairman of the Boston Beer Company, Jim Koch, appeared on the show as well. See Alstrom, *supra* note 113.

115. *In re Infinity Broad. Inc.*, 18 F.C.C.R. at 19,956.

116. Stephen Battaglio & Tracy Connor, *Sleaze Ya Later, Opie & Anthony*, N.Y. DAILY NEWS, Aug. 22, 2002, available at <http://www.nydailynews.com/news/v-pfriendly/story/13063p12380c.html> (last visited Mar. 29, 2005).

117. *In re Infinity Broad. Inc.*, 18 F.C.C.R. at 19,957.

118. FCC Fails to Act on “Opie and Anthony” Outrage as Complaints Languish One Year Later, 2003 WL 21833785 (F.C.C. Aug. 7, 2003).

119. *Id.* The incident occurred in August of 2002, and this ruling was issued in October of 2003. *In re Infinity Broad. Inc.*, 18 F.C.C.R. at 19,955.

120. Jane Weaver, *Shock Jocks give Viacom a Black Eye*, MSNBC, available at <http://msnbc.msn.com/id/3073253/> (last visited Mar. 29, 2005).

121. Battaglio, *supra* note 116.

122. Weaver, *supra* note 120.

123. Boston Beer Company home page, <http://www.bostonbeer.com> (last visited Mar. 29, 2005).

contest.¹²⁴ After the public outcry over the stunt, Koch issued an apology.¹²⁵ However, this apology was not enough to satisfy all who were upset with the company as a result of its involvement with *Opie and Anthony*. Several bars in Boston and New York chose to discontinue the ordering of Boston Beer Company products.¹²⁶ Some establishments stated that they would never stock the company's products again, and many consumers still remain disenchanted with the organization.¹²⁷

It is apparent that the listening audience, not the FCC, effectively removed a show that it felt was indecent. Though FCC Commissioner Michael J. Copps spoke out against the Commission's failure to take action on the *Opie and Anthony* complaints,¹²⁸ FCC action was simply not needed to resolve the problem. The public let Viacom and its sponsors know that they felt the show was not suitable for broadcast, and the show was taken off the air.

The "Sex for Sam" issue is just one example of the public letting advertisers and broadcasters know that it felt that programming was inappropriate. In fact, an organization called The Parents Television Council ("PTC") exists primarily for this very purpose.¹²⁹ The PTC was established in 1995 and claims to have nearly one million members.¹³⁰ Its mission is to offer solutions to "promote and restore responsibility and decency to the entertainment industry."¹³¹

The PTC website has a variety of information, ranging from news regarding FCC activities¹³² to movie¹³³ and television reviews.¹³⁴ It also

124. Alstrom, *supra* note 113.

125. *Id.*

126. *Id.*

127. *Id.* In a BeerAdvocate.com poll, conducted shortly after the *Opie and Anthony* broadcast, asking whether the "Sex for Sam" stunt changed the minds of consumers, the results were as follows:

46% = No, not at all.

21% = Yes, and will still drink Sam Adams beers.

13% = Jim Koch should be publicly flogged.

12% = Yes, and will never drink a Sam Adams beer again.

8% = Had no opinion.

Alstrom, *supra* note 113.

128. FCC Fails to Act on *Opie and Anthony* Outrage as Complaints Languish One Year Later, *supra* note 118.

129. PTC About Us, <http://www.parentstv.org/PTC/aboutus/main.asp> (last visited Mar. 29, 2005).

130. *Id.*

131. Mission Statement of the PTC, <http://www.parentstv.org/PTC/faqs/faqsmission.htm> (last visited Mar. 29, 2005).

132. PTC publications, <http://www.parentstv.org/PTC/publications/main.asp> (last visited Mar. 29, 2005).

133. PTC movie reviews, <http://www.parentstv.org/PTC/publications/moviereviews/main.asp> (last visited Mar. 29, 2005).

134. PTC show reviews, <http://www.parentstv.org/ptc/publications/reviews/welcome.asp> (last

details ongoing PTC campaigns.¹³⁵ For example, on its MTV campaign site there are episode summaries that detail what the PTC deems to be objectionable content.¹³⁶ On other pages, there are lists of the companies that sponsor various programs.¹³⁷ In addition, there are pre-generated form letters that a visitor to the website can send to the advertisers and to the network.¹³⁸ The idea behind these campaigns is that the public can use the information to contact sponsors in order to voice their objections to the programming.¹³⁹ These PTC campaigns have met with success. For example, forty-six advertisers stopped sponsoring the FX show *Nip/Tuck* as a result of the PTC's efforts.¹⁴⁰ The PTC has convinced companies to cease sponsoring other programs as well.¹⁴¹

Another organization that takes an active role in policing broadcast content is the American Family Association ("AFA").¹⁴² The AFA was founded in 1977 and believes in "holding accountable the companies which sponsor programs attacking traditional family values . . . [and] commending those companies which act responsibly regarding programs they support."¹⁴³ Similar to the PTC, the AFA details action alerts on its website.¹⁴⁴ These alerts encourage visitors to contact the television stations that air what the AFA views as inappropriate content.¹⁴⁵ Also like the PTC,

visited Mar. 29, 2005).

135. PTC Campaigns, <http://www.parentstv.org/PTC/campaigns/main.asp> (last visited Mar. 29, 2005). Some of the campaigns at the time of this writing include *Sex and the City*, *Father of the Pride*, and *Nip/Tuck*. *Id.*

136. *Id.* The summaries on the website contain the name of the program, the date and time the program was aired, a short summary of the plot, and the details of the objectionable content. *Id.* There are also archived summaries of past shows. *Id.*

137. PTC Campaigns, *supra* note 135. If a visitor to the website selects the button "Sponsor Contact Info," a page opens up that details the address and phone number of the individual sponsors. *Id.*

138. See CSI complaint form, <https://www.parentstv.org/ptc/action/CSI/main.asp> (last visited Mar. 29, 2005).

139. PTC home page, <http://www.parentstv.org/PTC/aboutus/main.asp> (last visited Mar. 29, 2005).

140. PTC *Nip/Tuck* Campaign page, <http://www.parentstv.org/ptc/archive/niptuck/main.asp> (last visited Mar. 29, 2005). See *Nip/Tuck Lures Viewers, But Advertisers Won't Bite*, WALL ST. J., Oct. 7, 2003, available at <http://www.parentstv.org/ptc/archive/niptuck/wsarticle.htm> (last visited Mar. 29, 2005).

141. See Parents Television Council, *Cingular Pulls Ads From The Shield: Broadcasting & Cable Estimates More Than Twenty Advertisers Have Refused to Sponsor the Show*, <http://ourworld.compuserve.com/homepages/cafs/020604-2.htm> (last visited Mar. 29, 2005).

142. AFA general information page, <http://www.afa.net/about.asp> (last visited Mar. 29, 2005).

143. *Id.* According to its website, the "AFA has promoted successful boycotts of several national advertisers because they were leading sponsors of TV sex, violence and profanity. Because of the boycotts, some companies - including Burger King, Clorox and S. C. Johnson - have changed their advertising policies." *Id.*

144. AFA activism, <http://www.afa.net/activism/> (last visited Mar. 29, 2005).

145. One of the alerts details a commercial for the restaurant chain Hardee's that contains "a

the AFA has been successful in convincing advertisers to refrain from sponsoring certain shows.¹⁴⁶

Since effective watchdog organizations such as the PTC and the AFA exist, the public can influence those directly responsible for content that they feel is inappropriate. Therefore, it is increasingly unnecessary for the federal government to impose content regulation.

V. ADVANCING TECHNOLOGIES MAKE DEREGULATION APPROPRIATE

When the FCC was first commissioned, limited resources existed for the sharing of material.¹⁴⁷ Therefore, the frequencies available arguably should have been reserved for those broadcasts that best served to further the interests of the community. However, with the continuing development of new technologies, current resources for communication are virtually limitless.¹⁴⁸

Regulation of new technologies is not proceeding in the same way as radio and television guidelines. A prime example is the treatment of indecent material on the Internet.¹⁴⁹ The Supreme Court held in *Reno v. American Civil Liberties Union* that the Internet could not be regulated to keep content from children if that meant an undue burden on the communication of such material between adults.¹⁵⁰ The clear policy behind the decision was to encourage, rather than to discourage, “the free exchange of ideas.”¹⁵¹

This decision has First Amendment implications beyond the Internet context. It means that there are different standards for dissemination of ideas depending upon what media resource a broadcaster utilizes. Therefore, if a radio personality is broadcasting on an Internet-only radio station, there are no standards for his broadcast; but if that same broadcast airs on a FM radio station it would be subject to FCC regulation.¹⁵² Any

model simulating sexual moves while riding a mechanical bull” and provides the contact information for the company’s corporate headquarters so that individuals who viewed the commercial can complain. See *Hardee’s/Carl’s Jr. hires Hugh Hefner!* (Nov. 6, 2003), <http://www.afa.net/activism/aa110603.asp> (last visited Mar. 29, 2005).

146. Krysten Crawford, *The War Against Desperate Housewives* (Oct. 21, 2004), http://money.cnn.com/2004/10/21/news/fortune500/tv_decency/index.htm (last visited Mar. 29, 2005).

147. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375-76 (1969).

148. *In re Indus. Guidance on the Commission’s Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. 7999, 8022 n.7 (2001) (separate Statement of Commissioner Harold W. Furchgott-Roth).

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

150. *Id.* at 876.

151. *Id.* at 885.

152. *In re Indus. Guidance*, 16 F.C.C.R. at 8022 n.11 (separate Statement of Commissioner Harold W. Furchgott-Roth).

regulation of content should relate to the nature of that content, as opposed to distinctions between different types of media. After all, with advances in technology, the Internet is just as widely available to children as radio or television. This double standard is simply unacceptable under the First Amendment in light of available technologies.

The treatment of Internet content is not the only way in which new technology renders the FCC inappropriate and unnecessary as a regulatory agency. One historical justification for the regulation of speech on the radio was the fact that the medium at one time dominated communication.¹⁵³ This is no longer true. Because of the ever-increasing availability of broadcast and communication media, the government no longer needs to be concerned with the reservation of resources as far as communication is concerned.¹⁵⁴

VI. CONCLUSION

Because the FCC indecency standards are overly broad and applied arbitrarily, the Commission's activity in this regard is in violation of the First Amendment.

With the *Golden Globe Awards* decision hovering over broadcasters' heads, as well as a body of FCC decisions that provides limited guidance as to what other terms will be considered profane and what other situations will be considered indecent, it is more and more difficult for programmers to serve the public need.¹⁵⁵ As noted above, this leads to increasingly chilled speech and ultimately signals the end of the broadcast medium in favor of cable television, the Internet and other digital media, such as satellite radio.

These issues, combined with the historical inconsistency of FCC activity, lead to the conclusion that deregulation is necessary. Situations such as the cancelled broadcasts of *SAVING PRIVATE RYAN*, catalyzed by fear of FCC retribution, underscore a need for constitutional review.

Moreover, since private organizations such as the PTC and the AFA exist as a check on broadcast indecency, the FCC is simply not needed as a regulatory body. The general public is in a better position to judge "contemporary community standards"¹⁵⁶ than a non-elected governmental agency.¹⁵⁷ Allowing the public and the broadcasting community to self-

153. *Id.* at 8020-21 (separate Statement of Commissioner Harold W. Furchtgott-Roth).

154. *Id.*

155. Comments of Public Broadcasters, *supra* note 82.

156. *FCC v. Pacifica Found.*, 438 U.S. 726, 732 (1978).

157. See Clay Calvert, *Bono, the Culture Wars, and a Profane Decision: The FCC's Reversal of Course on Indecency Determinations and its New Path on Profanity*, 28 SEATTLE U. L. REV. 61, 90 (2004). "Is the public interest whatever the public is interested in watching, as determined by

regulate allows a more accurate gauge of what is acceptable to the community. Additionally, the FCC will avoid any further inquiry into the constitutionality of its practices.

Finally, consideration of the changing realities of our technological world brings the issue into clear focus. As we advance technologically, less and less communication is being subjected to what effectively amounts to government censorship. As previously noted, this arbitrary double standard implicates due process.¹⁵⁸ Furthermore, since many of the justifications for the different treatment of radio and television communications no longer exist, "deregulation is not only warranted, but long overdue."¹⁵⁹

marketplace forces such as audience size and demographics, or is the public interest whatever the public needs to watch, as determined by government agencies and politicians?" *Id.*

158. See *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

159. *In re Indus. Guidance Regarding Broad. Indecency*, 16 F.C.C.R. at 8021 (separate Statement of Commissioner Harold W. Furchtgott-Roth).