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INDECENT PROPOSALS:
A LEGAL ANALYSIS OF "INDECENCY" APPLIED TO BROADCASTING AND THE INTERNET

A Dissertation Presented for the
Doctor of Philosophy Degree
The University of Tennessee, Knoxville

Maria Irene Fontenot
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DEDICATION

This dissertation is dedicated to my parents, Jerrylene and Paul Fontenot, and my grandparents, Enola and the late Maurice Trahan and the late Irene and Douglas Fontenot.

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ABSTRACT

The purpose of the dissertation was to analyze indecency policy and identify valid arguments and approaches from which one can find a viable model or approach of content regulation for both broadcast media and the Internet. Broadcast media and the Internet are both under scrutiny by the federal government for increased content regulation; therefore, both media are facing threatened First Amendments rights.

This dissertation explored whether the public interest could be best served through the marketplace approach to content regulation of indecent speech on broadcast radio and television and the Internet. The dissertation explored, compared, and contrasted indecency regulation on broadcast radio and television with indecency regulation on the Internet. It attempted to find trends, patterns, similarities, and differences in the mandated and suggested policies centering on regulating indecency on commercial broadcast radio and television and the Internet. The study also looked at the direction the legislative and judicial branches are going concerning policies on regulating indecent content on the Internet.

The dissertation found that the marketplace approach to indecency regulation has so far prevailed on the Internet, with the exception of CIPA. With emerging technologies such as Internet filters and V-Chips, further government regulation of indecent content on the Internet or on broadcast television and radio would be not be useful. A receiver-based content control approach proposed in the dissertation suggested that the marketplace approach to content regulation would better serve the public interest because the public's interest would be defined by the public itself.

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CHAPTER 1 - INTRODUCTION

Over the decades, lawmakers and the FCC have implemented policies, many at the urging of special interest groups and parents, aimed at restricting content on broadcast television and radio and the Internet in the interest of protecting children. Such coercive efforts by the FCC and Congress raised serious First Amendment questions (Stern, 1995c). Some argued that if the FCC and Congress went along with suggestions made by strong special interest groups such as Action for Children's Television (ACT), broadcasters' freedom to create programs would be hindered (Corn-Revere, 1995). These same First Amendment issues are now threatening the Internet.

How mass media, particularly television, affect children has been the subject of heated discussions for decades: television violence, sex and advertising topped the list of parental and lawmaker concerns for years (Baker & Ball, 1969; Commission on Obscenity and Pornography, 1970; Television and Social behavior, 1971; Pearl, Bouthilet & Lazar, 1982; Attorney General's Commission on Pornography, 1986; Youth Violence, 2001). The same concerns continued through the birth and growth of cable television. A variety of media over the decades, especially at the time of mass adoption, have been blamed for lowering the public's cultural tastes, increasing rates of delinquency, contributing to moral deterioration, lulling the masses into political superficiality, and suppressing creativity (DeFleur and Ball-Rokeach, 1977). Now, there is a new medium that faces those same concerns and brings discussions to new levels – the Internet. The Internet is a new medium that has generated public anxieties concerning children (Orleans & Laney, 2000). Linking libraries, businesses, institutions, and people, the

Internet allows access to a wealth of information (Huang & Alessi, 1996). Children tend to be on the forefront of new technology use – early adopters (Livingstone, 2002). Exposure to inappropriate content such as sex and violence are of great concern to parents due to the level of interactivity while using the Internet and World Wide Web (Wartella & Jennings, 2000). Eagle, Bulmer, and De Bruin (2003) found that while parents recognize the potential benefits of the Internet and World Wide Web, they remain very concerned about children accessing the Internet outside their home, particularly if children are unsupervised at the homes of others. Parents are also bothered by the number of adult web sites with addresses very similar to appropriate sites. These sites often bring children to sites containing material that is considered objectionable by parents (Eagle, Bulmer, and De Bruin, 2003). In sum, the introduction of the Internet and World Wide Web into the lives of children parallels the introduction of earlier waves of new media throughout the past decades in the concerns raised.

This dissertation explores public interest arguments with regard to indecency regulation on broadcast radio, television, and the Internet, and the government and the court's ability to serve the public interest via content-based regulation. It also looks at whether technology will allow for such regulation. First Amendment issues of content-based regulation on the Internet are examined.

The dissertation will explore, compare, and contrast indecency regulation on broadcast radio and television with indecency regulation on the Internet. It will attempt to find trends, patterns, similarities, and differences in the mandated and suggested policies centering on regulating indecency on commercial broadcast radio and television

and the Internet. The study will also look at the direction the legislative and judicial branches are going concerning policies on regulating indecent content on the Internet.

Regulation of broadcast media has been based on three factors (Reno v. American Civil Liberties Union, 1997): the history of regulation on broadcasting (Red Lion Broadcasting Co., Inc. v. Federal Communications Commission, 1969), the scarcity of access (Turner Broadcasting System, Inc. v. Federal Communications Commission, 1994), and the level of intrusiveness (Sable Communications of California v. Federal Communications Commission, 1989). Those factors do not apply to the Internet.

The historical aspect is inapplicable. Unlike electronic media, no governmental agency has been given explicit power to monitor content on the Internet. The Federal Communications Commission is the governmental agency that regulates content on electronic media – radio and broadcast and cable television. The rationale for regulating broadcast media content is that the airwaves are owned by the public. The notion of publicly-owned airwaves dates back to 1925 and Secretary of Commerce Herbert Hoover. Hoover, at the Fourth National Radio Conference, said that the "ether" was a public medium, and it must be used for public benefit (Proceedings of the 4th Radio Conference, 1925). And, because the airwaves were considered a public resource and there were not enough frequencies to accommodate all who wanted to broadcast, a new regulatory agency was created. The Federal Radio Commission (FRC) was established in the *Radio Act of 1927*. The FRC was given the power to grant licenses, renew licenses, and otherwise regulate broadcasters according to the public interest, convenience, and necessity (The Radio Act of 1927).

Likewise, the scarcity of access argument is inapplicable to the Internet. Broadcast media are regulated because there is a limited amount of bandwidth for television and radio and because they use public airwaves. There is no physical limitation on the Internet preventing users from sending messages. A license is not needed to publish on the Internet, unlike broadcasters who need a government-issued license to broadcast over the airwaves. Scarcity is not a problem with the Internet (Reno v. American Civil Liberties Union, 1997). In *Reno v. ACLU* (1997), the Court said the Internet should not be subject to the kind of broad regulations to which broadcasting is subjected. It added that the Internet is a unique medium, different from broadcasting. In distinguishing *Reno* from *FCC v. Pacifica* (1978), the Court was quick to point out that the *Pacifica* decision was an extremely limited holding based upon a declaratory order relating to a specific broadcast media. On the other hand, the Communications Decency Act (CDA) was a broadly based criminal statute with categorical prohibitions not limited to particular times (Hale, 1998).

In *Pacifica*, the Court also reasoned that broadcasting was "uniquely accessible" to children. The Court noted that "other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material accessible to children." (FCC v. Pacifica, 1978, p. 749). In summary, since the broadcast medium is "pervasive," content-based speech restrictions placed on the medium will be subjected to a lower standard of review (Harper, 2002).

Applying the intrusiveness argument to the Internet is more complicated. Again, unlike broadcasting, the Court said Internet regulation should not be analyzed under the

same First Amendment standard applied to broadcasting because it is less intrusive than broadcasting. Broadcasting is an invasive medium because radio and television stations enter homes for free at all hours. No one knows what content they will be exposed to when turning on the television or radio. Seldom is content on the Internet encountered by mere accident. Gaining access to the Internet takes deliberate actions: turning on the computer, connecting to an Internet service provider, and entering a specific site. It is less likely that Internet users will accidentally receive objectionable material online (Reno v. ACLU, 1997).

There are clear distinctions between the Internet and other regulated media. Regulation is influenced by the kind of medium through which the message is transmitted: the printed press, the over-the-air broadcast media, cable television, and the telephone. The printed press or print media enjoy the greatest First Amendment protection while broadcast media has the least amount of First Amendment protection (Harper, 2002).

The Internet is similar to the print media and should be treated as such, in terms of the First Amendment. As with print media, there are virtually no physical limits on the number of websites that can be published. Also, like the printed press, the receiver must take an active role in surfing the Internet and then have the literacy skills to read the text (Magenau, 1997).

Central to the issue of regulating the Internet is the compelling government interest in protecting children from harmful material or content such as indecency. These issues are addressed in broadcast radio and television via content regulations. However, since there is no regulatory structure in place for the Internet, there are no content-based restrictions

on indecent speech; though there has been attempted regulation by Congress, which is concerned with children facing indecent and other harmful material online (Telecommunications Act, 1996; Child Online Protection Act, 1998).

The Internet has been a widely and generally available communications tool for over a decade; consequently, an entire generation of children is growing up with the new medium as part of their daily lives (The UCLA Internet Report - "Surveying the Digital Future," 2002). According to the U. S. Education Department, about 90 percent of young people between the ages of 5 and 17 use computers, and 59 percent of them use the Internet. Young school-aged children are increasingly plugging in as well – about three-quarters of five-year-olds use computers, and about 25 percent use the Internet. By the time they reach the age of 10, 60 percent use the Internet and by age 16, that figure grows to nearly 80 percent (National Center for Education Statistics, 2003).

While the debate on regulating the Internet in the interest of protecting children from harmful material continues, issues of indecent content on traditional media are resurfacing.

The results of a Kaiser Family Foundation study on broadcast television content released in September 2004 found that a majority of parents are very concerned about the amount of sex (60%) and violence (53%) their children are exposed to on television. Overall, more parents are concerned about inappropriate content on television (34%) than are concerned with inappropriate content on the Internet (16%) (Parents, Media, & Public Policy, 2004).

On February 2, 2004, then FCC Chairman Michael Powell issued a statement expressing his outrage over the halftime show of the February 1, 2004, Super Bowl aired

on the CBS network (Powell, 2004a). The performance that sparked Powell's statement featured recording artist Justin Timberlake tearing off part of fellow recording artist Janet Jackson's costume, which revealed Jackson's right breast. The Commission received more than 540,000 complaints about the performance (In the Matter of Complaints against various television licensees concerning their February 1, 2004, broadcast of the Super Bowl XXXVIII Halftime Show, 2004). He also instructed the Commission to open an immediate investigation into the halftime show broadcast and into all matters concerning indecency on radio and other television performances as well. The FCC defines indecent speech as language or material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium (FCC v. Pacifica, 1978).

Waves of fines were imposed on radio stations owned by media conglomerates such as Infinity and Clear Channel for violating indecency and safe harbor rules, airing indecent material outside the hours of 10 p.m. to 6 a.m., both before and after the Super Bowl incident (In the Matter of Clear Channel Broadcasting Licenses, Inc., 2004b & In the Matter of Infinity Broadcasting Operations, Inc., 2003b). With Congress threatening to raise indecency fines up to $250,000, media giants started to take measures to protect themselves from such fines. For instance, Clear Channel Communications announced in early 2004 that was initiating a responsible broadcasting initiative that included a zero-tolerance policy for indecent content. That zero-tolerance policy became part of the consent decree with the FCC (In the matter of Clear Channel Communications, Inc., 2004). Emmis Communications Corporation also entered into a consent decree with the FCC. Emmis agreed to participate in industry efforts to develop a voluntary industry-

wide response to indecency and violence (In the matter of Emmis Communications Corporation, 2004b). Viacom, Inc., also entered in a consent decree with the FCC over their violations of indecency. Viacom committed to implementing a company-wide Compliance Plan aimed at preventing future violations (In the matter of Viacom, Inc., 2004).

Concerning the Internet, a survey of case law reveals that the matter of regulating the Internet in the interest of protecting children from harmful material is problematic and may not be possible. The Supreme Court struck down two statutes, the Communications Decency Act (CDA) and the Children's Online Protection Act (COPA), legislation attempting to protect children from online material deemed harmful (Reno v. ACLU, 1997 & Ashcroft v. ACLU, 2002). The Supreme Court revisited the COPA statute in the 2003 – 2004 term. Again, COPA was struck down, and the case was remanded to the District Court to consider the changed legal landscape since the development of new technologies (Ashcroft v. ACLU, 2004). The High court has yet to definitively rule on content regulation of the Internet. The Court continues to remand cases back to lower courts, instructing them to review the issues and come up with less restrictive means of regulation. Because the Justices do remand cases dealing with content regulation on the Internet back to the lower courts, it seems as though they are looking for a regulatory framework.

The purpose of the dissertation is to analyze indecency policy and identify valid arguments and approaches from which one can find a viable model or approach of content regulation for both broadcast media and the Internet. Broadcast media and the Internet are both under scrutiny by the federal government for increased content

regulation; therefore, both media are facing threatened First Amendments rights. There is also an evolutionary link, legally speaking, between the two media. With the development of new media come fears of the effects on society, particularly those effects that are potentially harmful, such as sex and violence (Lowery & DeFleur, 1995).

While the FCC and broadcasters are battling over content regulation of indecent speech on the airwaves, the Courts and Congress are battling over the same type of content regulation on the Internet. The Internet is a unique medium. There is no regulatory structure for indecency regulation on the Internet. So, Congress, by attempting to pass a content regulatory measure, is trying to implement one, and the battle is being fought mainly in the Supreme Court. The government feels as though it needs to control access to the Internet in the name of protecting children, which raises First Amendment questions. These issues are explored in this dissertation.

This dissertation explores whether the public interest could be best served through the marketplace approach, which allows the market to define the public interest, to content regulation of indecent speech on broadcast radio and television and the Internet. This dissertation finds that it can. The marketplace approach has prevailed concerning content-based regulation on the Internet. This dissertation also finds that the age-old arguments or rationale for regulating content on the broadcast airwaves are weakening and are no longer viable. In fact, with emerging technologies such as Internet filters and the V-Chip, the government need not further regulate indecent content on the Internet or on broadcast television and radio. The government should allow technology to help protect children from harmful material on the Internet and indecent material on broadcast radio and television. Using filters and the V-Chip as a means of protecting children from

such content would be a less restrictive means of regulating content than further, more restrictive, content regulation. The choice would be left to the audience, particularly parents and guardians. They, not the government, would decide what their children should hear or see on broadcast and the Internet.

General Methodology

In an effort to analyze indecency policy and identify valid arguments and approaches from which a viable approach of content regulation for both broadcast media and the Internet can be found, the following research questions are addressed:

RQ 1: How do the federal government's public interest arguments contribute to indecency regulation on broadcast radio and television and the Internet?

The FCC and broadcasters are to adhere, in the application of the public interest standard in broadcasting, to the *Communications Act of 1934.* The FCC and the courts are to enforce violations of the public interest standard. But, as the literature review suggests, the public interest standard is vague. The same principle applies to the Internet and the decisions from the judicial branch. Though the literature suggests that federal courts and Congress do agree that the government has a compelling interest in protecting children from harmful material on the Internet, is that agreement a factor in judicial decisions?

RQ 2a: Which arguments have been used successfully or accepted by the courts?

RQ 2b: Which approach is consistently used or applied?

The literature review suggests that the public interest standard is vague. The debate over what comprises public interest in broadcast regulation is as old as the regulation of

broadcast itself. Krasnow, Longley, and Terry (1982) argued that an indistinct standard in broadcast regulation has daunted the development of any coherent policy because the legislative branch is free to leave the public interest definition open to interpretation. FCC Commissioner Kathleen Q. Abernathy, in remarks at the Practicing Law Institute Conference, called for a more precise interpretation and definition of the public interest standard (Abernathy, 2001). Abernathy said that the public interest should be reflected in the elected representatives in Congress. In seeking answers to RQ 2a and RQ 2b, this dissertation examined how the public interest standard is applied by the FCC and legislative and judicial branches in cases of indecent speech in broadcast media and the Internet. The researcher also looked for patterns, such as consistency or inconsistency, in the application of the public interest standard.

RQ 3: Are the arguments equally applicable to broadcast radio and television and the Internet?

A review of the literature uncovered that the government has battled the same issues over and over again without a clear outcome. For instance, the debate over Internet content regulation has already lasted nearly ten years, and the FCC has been dealing with radio personalities and their allegedly indecent programs for more than 20 years. A different model or approach to regulation could possibly clear up the chaos and free up the courts, Congress, and the FCC to address other issues.

RQ 4: What direction should broadcast and Internet policy take with developing technology?

The literature revealed that the courts, Congress, and the FCC have recognized the changing technological landscape. For instance, V-Chip technology was introduced in

the Telecommunications Act of 1996, Internet filters were upheld and promoted in the Children's Internet Protection Act (CIPA), and delay mechanisms were and continue to be promoted by the FCC. The FCC also released a Notice of Inquiry (NOI) seeking comment on how broadcasters can best serve the public interest during and after the transition to digital technology. In an effort to answer RQ 4, the researcher examined those statutes, case law, and FCC documents and policies that addressed and stressed technology and its impact on the future broadcast and Internet policy focusing on indecent content regulation.

In order to answer the research questions, a legal analysis of case law and legislation focusing on indecent speech was conducted. The researcher looked for acceptable arguments and approaches in federal courts for regulation in the *public interest*. Supreme Court and federal appellate case law dealing with indecent speech was studied. Federal appellate cases were chosen because the Communications Act of 1934 gives the Court of Appeals exclusive jurisdiction to review the FCC's declaratory ruling in those cases, as well as all policies, practices, and regulations adopted by the Commission (47 U.S.C. § 402). The Court of Appeals also has exclusive jurisdiction over any suit seeking relief that might affect the Circuit Court's future jurisdiction under the act (ACT v. FCC, 1993). Supreme Court case law was examined because Supreme Court Justices are the final arbitrators. Sixteen cases centering on indecent speech were identified and examined: seven Supreme Court cases and nine appellate cases. These cases were found through database searches, particularly Lexis-Nexis, and website searches, particularly government websites such as the FCC (www.fcc.gov), the Supreme Court

(www.supremecourtus.gov), and U. S. Court of Appeals for the District of Columbia Circuit (www.cadc.uscourts.gov). Case law that focused on broadcast indecency along with the relationship between the cases are discussed further in Chapter 3, which focuses specifically on broadcast radio and television.

Regulations pertaining to indecency on broadcast radio and television stations were studied in an effort to illustrate the government's rationale for regulation to best serve the public's "interest, convenience, and necessity." For more than 70 years, broadcasters have been required by statute to serve the "public interest, convenience, and necessity." Congress has charged the FCC with the duty of implementing and enforcing the public interest requirement.

Events that led up to the current regulatory climate were examined to uncover factors that contributed to the current climate of indecency regulation for over-the-air broadcasters. Original FCC documents, such as policy statements and reports, Memorandum Opinion and Orders, Notices of Apparent of Liability (NAL) for Forfeiture, Notices of Inquiry (NOI), consent decrees, and official orders were studied. Official statements and responses from Commissioners were also examined. These items were located on the FCC website. FCC items during the later half of 2001 - after the adoption of *Industry Guideline on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies regarding Broadcast Indecency* - through 2004 were examined. Twenty-seven FCC documents – 15 NALs for Forfeiture, eight Memorandum Opinions and Orders, three consent decrees, and one policy statement – were examined. In an effort to find such documents, the researcher monitored the FCC website almost daily. The researcher also examined Congressional attempts to curb indecent speech on

broadcast radio and television, such as the Broadcast Decency Enforcement Act of 2005. These items were found via various databases - Lexis-Nexis Academic, Lexis-Nexis Congressional, and CQ Weekly.

Congress has attempted to implement content regulations focusing on indecent material on the Internet. The researcher explored proposed governmental regulation of the Internet. Four statutes were examined: (1) The Communications Decency of 1996 (CDA), (2) The Children's Online Protection Act (COPA), (3) Children's Internet Protection Act (CIPA), and (4) Dot Kids Implementation and Efficiency Act of 2002. A search in Lexis-Nexis databases uncovered these items. Legislative intent, reason for failure, and whether developing technology will allow for content regulation were studied.

Supreme Court and Appellate Court case law related to legislation and proposed legislation were examined. A search of Supreme Court cases centering on First Amendment issues and the Internet on the Supreme Court website produced four cases - (1) *Reno v. ACLU* (1997), (2) *Ashcroft v. ACLU* (2002), (3) *U. S. v. American Library Association, Inc.* (2003), and (4) *Ashcroft v. ACLU* (2004). Appellate Court cases related to the Supreme Court cases were chosen. The appellate cases studied were *ACLU v. Reno* (2000) and *ACLU v. Ashcroft* (2003). The researcher looked for trends, patterns, consistencies, and inconsistencies within case law, particularly how the individual justices voted.

Other relevant case law, case law often cited in examined statutes, proceedings, and cases, was also studied. In addition to primary sources, secondary sources based on the primary sources were also examined. They included academic articles, law review

articles, published private sector studies and research, books, and trade magazines. Again, searches in several databases uncovered these items. In addition to the Lexis-Nexis databases, the following databases were consulted: Academic Search Premier, ComAbstracts, Communication and Mass Media Complete, CQ Researcher, Expanded Academic ASAP, Google Scholar, JSTOR, Reader's Guide to Periodical Literature, Social Sciences Abstracts, Social Sciences Citation Index, The University of Tennessee-Knoxville John C. Hodges Library catalog, The University of Tennessee-Knoxville Joel A. Katz Law Library catalog, and Web of Science.

The dissertation is divided into six chapters. The following chapter focuses on theoretical foundations - the First Amendment and theories of freedom of expression, the regulation of expression, theories of regulation, and the making of policy. Chapter 3 focuses on broadcast radio and television. It elaborates on the current regulatory climate in broadcast media by examining the role of the FCC, the courts, and Congress. It also discusses the battle between Congress, the courts, and the special interest groups concerning content regulation of indecent speech on broadcast media. Chapter 4 centers on the Internet. It begins with a history and evolution of computer communications. Then, a discussion of case law, regulation, and attempted regulation follows. Chapter 5 provides answers and an analysis to the research questions. It also provides insight into the legislative and judicial branch as well as the FCC and special interest groups. In Chapter 6, implications of the proposed model of regulation and technology are discussed, in addition to the factors that affect policy and where policy could be in the

future. The dissertation concludes with limitations of the study and suggestions for further research.

CHAPTER 2 – THEORETICAL FOUNDATIONS

The following chapter is divided into several sections – the First Amendment and theories of freedom of expression, the regulation of expression, theories of regulation, and the making of policy. This chapter provides an overview of the First Amendment and First Amendment theory. It outlines and discusses various First Amendment theories such as absolutism, balancing, and marketplace of ideas. The chapter also discusses approaches most prevalent in First Amendment case law. Chapter 2 also delves into the history and background of widely-used regulatory theories – public choice theory, capture theory, and public interest theory. A brief overview of administrative law, administrative agencies, and policymaking is also included.

The First Amendment and Theories of Freedom of Expression

"The First Amendment to the Constitution is, I believe, the most significant political statement which we Americans have made" (Meiklejohn, 1953, p. 461). When the Bill of Rights was drafted, the government was thought to be the danger to free expression. The experience of a repressive English monarchy and its workings in colonial America made the newly independent citizens sensitive to and troubled about governmental power (Horwitz, 1991). The First Amendment of the United States Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance" (U. S. Constitution, Amendment I). Scholars have long debated the actual

intentions of the framers of the First Amendment. The most common themes that have emerged from such debates include absolutism, balancing, and marketplace of ideas.

For absolutists, "no law" in Congress "shall make no law…abridging the freedom of speech, or of the press…," means *no law*. The absolutists' view holds that the words of the First Amendment mean precisely what they say in that "Congress shall make no law" absolutely prohibits Congress, and through the Fourteenth Amendment, the states, from making laws abridging the freedoms protected and secured by the amendment (Brennan, 1965). The late Justice Hugo L. Black categorically stated the position for a right of infinite expression, interpreting the First Amendment as an "absolute" power forbidding any restraint on press and speech (Ginzburg v. United States, 1966).

Philosopher Alexander Meiklejohn also believed in an absolute approach to the First Amendment, in terms of political speech. Meiklejohn said that the amendment declares that the American people are to be free – "free from certain forms of governmental control, free to govern themselves in ways which they may choose, free to control those governing bodies which they have established as their agents" (Meiklejohn, 1953, p. 461). He viewed the First Amendment in a pragmatic manner and argued that freedom of expression is not worth much as an abstract concept; its primary value is as a means to an end – the end being successful self-government. Expression that relates to the process of self-government must be protected absolutely by the First Amendment (Meiklejohn, 1948). Meiklejohn said that people need free speech because "they have decided, in adopting, maintaining, and interpreting their Constitution, to govern themselves rather than to be governed by others" (Meiklejohn, 1961, p. 263).

Thomas Emerson believed that the fundamental purpose of the First Amendment was to guarantee the preservation of an effective system of free expression (Emerson, 1963). Emerson (1963) wrote that the system of freedom of expression in a democracy can be grouped into four broad categories. Maintenance of a free expression system is necessary as a means of assuring individual self-fulfillment. Emerson said that the right to freedom of expression is first of all justified as the right of an individual wholly in his capacity as an individual. This concept derived from the Western notion that the proper end of man is the realization of his character and potentialities as a human being. Emerson believed that man has powers of imagination, insight, and feeling, and it is through the development of those powers that man discovers his meaning and his place in the world (Emerson, 1963).

Second, freedom of expression is an essential process for advancing knowledge and discovering truth. Discussions, Emerson wrote, must remain open no matter how true an opinion may seem and vice-versa. In fact, Emerson said that many of the most widely accepted truths have turned out to be erroneous, but that is no reason to suppress an opinion (Emerson, 1963). Third, freedom of expression is vital to provide for participation in decision making through a process of open discussion that is available to all members of society. The rights of all members of society to form their own viewpoints and communicate them freely to others must be considered as an essential principle of a democratically-organized society. The theory of freedom has particular significance in the field of political action. Emerson wrote that it is through the political process that most of the immediate decisions on the survival, welfare, and progress of a society are made. Crucial battles over free expression are most often fought in the

political sector. Supporters of freedom of political expression often asked themselves whether the members of society were competent to acquire sufficient information or possessed sufficient capacity for judgment. Emerson also wrote about the disagreement as to whether the right of political expression could safely be extended to societies that had not reached a certain point in the development of education and culture. Emerson said that those problems were questions relating to the viability of democracy itself (Emerson, 1963).

Finally, freedom of expression is a means of getting a more adaptable and therefore a more stable community. Emerson wrote that suppression of discussion makes a rational judgment impossible while open discussion "promotes greater cohesion in a society because people are more ready to accept decisions that go against them if they have a part in the decision-making process" (Emerson, 1970, p. 7). Emerson said that suppression of speech prevents the society from adjusting to changing circumstances or developing new ideas. However, supporters of the theory acknowledged that allowing full discussion, open to all, involves some risks. The competency of the society is again questioned. Emerson wrote that the risks are the lesser evil; suppression is far worse (Emerson, 1963).

Balancing refers to the view that freedom of speech and press are important human rights valued in the United States. These rights may conflict with other individual social rights, and when they do, the court is responsible for balancing the freedom of expression with other values. Professor Zechariah Chafee, Jr. was an early advocate of the balancing approach. In *Free Speech in the United States*, Chafee wrote:

> To find the boundary line of any right, we must get behind rules of law to human facts. In our problem, we must regard the desires and needs of the individual human being who wants to speak and those of the great group of human beings among whom he speaks. That is, in technical language, there are individual interests and social interests, which must be balanced against each other, if they conflict, in order to determine which interest shall be sacrificed under the circumstances and which shall be protected and become the foundation of a legal right. It must never be forgotten that the balancing cannot be properly done unless all the interests involved are adequately ascertained, and the great evil of all this talk about right is that each side so busy denying the other's claim to rights that it entirely overlooks the human desires and needs behind that claim. (Chafee, 1969, p. 32)

Justice Frankfurter was a strong supporter of the balancing approach. The legal authority for balancing originated in 1939 in *Schneider v. State*. Justice Roberts, writing for a majority that included Justice Frankfurter, characterized freedom of speech and press as "fundamental personal rights and liberties" whose exercise "lies at the foundation of free government" (Schneider v. State, 1939). Continuing, Justice Roberts wrote:

> In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts

> to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights (Schneider v. State, 1939, p. 161).

As such, the meaning of the freedom of expression is decided on a case-by-case basis. The Supreme Court has most frequently used a *balancing test* to determine the appropriateness of a restraint on freedom of expression (Frantz, 1962). In sum, balancing is a test in which opposing interests, rights, or policies are assigned a level of importance, and the ruling of the court is determined by which is considered greater. Balancing is more of a balancing of rights than of outcomes.

The marketplace of ideas centers on the theory that all ideas should be put before the public, and the public will decide what is best from the marketplace. It includes components of both democratic theory, which emphasizes citizen knowledge, informed decision-making, and effective self-regulation, and economic theory, which emphasizes efficiency, competition, and consumer satisfaction (Napoli, 1999). The marketplace of ideas extends the shelter of constitutional protection to speech so citizens can better understand the world in which they live. Robert Post (2000) wrote that "at a minimum, the Constitution ought to be concerned with all communication conveying ideas relevant to our understanding the world, whether or not those ideas are political in nature" (Post, 2000, p. 2363).

The marketplace of ideas, in relation to democratic theory, has been traced to the 17th century work of John Milton. During the concept's early development phase, the main ideas were those of truth being reached via the free exchange of ideas and the importance of individual rights of self-expression and freedom of thought (Napoli, 1999; Milton

1961). John Stuart Mill, in his essay *On Liberty*, offered a three-fold defense of free speech. Mill first proposed that the idea suppressed as false may really be true, since to challenge otherwise is to assume the infallibility of the individuals who adhere to the dominant opinion. Second, Mill argued that the suppressed opinion may be at least somewhat true, since one view hardly ever contains all of the truth in a given area. Third, he suggested that even if the suppressed idea were entirely false, the suppression would tend to result in the true idea's becoming a sterile and unchallenged belief that would lack the vital force necessary for a living truth (Spitz, 1869/1975).

The marketplace of ideas concept later progressed into an expression of citizens' rights and of effective democracy (Schwarzlose, 1989). The concept was further refined and more directly applied to Meiklejohn's discussion of First Amendment theory. Meiklejohn argued that the unhindered flow of information was vital to a self-governing society (Napoli, 1999).

The economic aspect of the marketplace of ideas concept dates back to Justice Oliver Wendell Holmes' dissent in *Abrams v. United States* (1919). Justice Holmes disagreed with the majority's decision to uphold the conviction of five Russian immigrants for disseminating anti-American leaflets. Holmes said, "The ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of thought to get itself accepted in the competition of the market…That at any rate is the theory of our Constitution" (Abrams v. United States, 1919, p. 630).

Justice Holmes' dissent in *Abrams* was the first time the marketplace of ideas was introduced into Supreme Court decisions. Holmes' use of the metaphor was the first of many by the justices. Between 1919 and 1995, 24 of the 49 Supreme Court justices used

the metaphor (Hopkins, 1996). Justices have also used the metaphor to strengthen free expression in nearly every area of First Amendment jurisprudence – prior restraint, libel, privacy, pornography, access, advertising, picketing, expressive conduct, broadcasting, and cable regulations (Hopkins, 1996). The Supreme Court's embracing of the linkage between free speech and truth was illustrated when the constitutionality of the Fairness Doctrine was upheld in the *Red Lion* decision. The Court said, "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail" (Red Lion Broadcasting Co. v. FCC, 1969, p. 390).

Though the Supreme Court accepted the link between free speech and truth, some constitutional scholars have rejected the linkage. Professor C. Edwin Baker suggested that the linkage between free speech and truth is hardly possible. He thought the marketplace of ideas might lead to the wrong person's or group's *truth* being accepted (Baker, 1978). Professor Stanley Ingber rejected the marketplace of ideas theory. He said that citizens must be capable of making determinations that are sophisticated and rational if they are to separate truth from fiction. Ingber also noted that the market is insufficiently competitive. He said that new ideas do not receive a fair chance to compete against more established ideas for the public's adherence (Ingber, 1984). Professor Frederick Schauer wrote that people are not very rational, as assumed by the theory. But, he also wrote, "Just as we are properly skeptical about our own power always to distinguish truth from falsity, so should we be even more skeptical of the power of any governmental authority to do it for us" (Schauer, 1982, p. 34). The marketplace of ideas is perhaps the most enduring image invoked by jurists and scholars to legitimate the First Amendment freedoms (Horwitz, 1991).

Earlier, in the discussion of the marketplace of ideas metaphor or theory, it was mentioned that Justice Holmes's dissent in *Abrams* was the introduction of the metaphor to the Supreme Court. Justice Holmes is also credited with the clear and present danger test. The clear and present danger test is worth mentioning because it is a test of the scope of the First Amendment. Originally articulated by Justice Holmes in Schenck v. U. S. (1919), the test was: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that will bring about the substantive evils that Congress has a right to prevent" (Schenck v. U. S., 1919, p. 52). Post (2000) argued that Justice Holmes' logic remained entirely within the domain of substantive criminal law. Justice Brennan (1965) said that the Supreme Court has held that the free press guarantee of the First Amendment bars punishment in criminal contempt in the absence of a showing of a clear and present danger of the obstruction of justice. In theory, the clear and present danger test protects some expression even though that expression interferes with the attainment of other social objectives, for the danger to the other interests must be immediate and clear (Emerson, 1966). Meiklejohn (1961) doubted the vitality of the test. Meiklejohn said that the test confused and defeated the intention of the Supreme Court to confer reasonably about what the First Amendment actually means (Meiklejohn, 1961).

Regulating Expression

When the Supreme Court scrutinizes a statute or law for constitutionality, it must be certain that the restriction is easily comprehensible and does not extend into areas of protected expression. In other words, or in legal terms, the courts examine content and

content-neutral regulations for vagueness and overbreadth. If purely content-based regulations are at issue, the courts subject the regulations to strict scrutiny analysis.

Strict scrutiny prevents the government from unconstitutionally favoring or discriminating against a subject or perspective. Applying strict scrutiny to content regulations reflects the doubt with which judges view regulations that hamper a fundamental right such as freedom of expression. Central to the First Amendment doctrine is the assumption that the government should not regulate the content of expression. The Supreme Court said in *Police Department of the City of Chicago v. Mosley* (1972) that unless the government has a compelling interest, it does not have any power to restrict expression because of its message, ideas, subject matter, or content. Content regulations are subject to strict scrutiny analysis by the courts; thus the speech at issue "must be narrowly tailored to promote a compelling government interest, and if a less restrictive alternative would serve the government's purpose, the legislature must use that alternative" (U. S. v. Playboy, 2000).

The Supreme Court said in *Connally v. General Construction Company* (1926) that an unconstitutionally vague law is one that is written so ambiguously that citizens "of common intelligence must necessarily guess at its meaning and differ as to its application" (Connally v. General Construction Company, 1926, p. 391). Furthermore, in *United States v. Harriss* (1954), the Court said that no one would be criminally responsible for behavior that he could not reasonably understand to be prohibited. Excessively vague statutes are invalid under the Due Process Clause of the Fifth or Fourteenth Amendments. However, the Court observed in *Rose v. Locke* (1975) that the void-for-vagueness doctrine does not invalidate each statute that a reviewing court

believes could have been written and drafted with greater accuracy but only that the law give adequate warning that individuals conduct themselves so as to avoid that which is forbidden. In *Papachristou v. City of Jacksonville* (1972), the Court invalidated a city of Jacksonville, Florida, ordinance that prohibited various forms of vagrancy, such as loitering and "prowling by auto." The Court objected to the "unfettered discretion" the ordinance placed in the hands of the police. The Supreme Court suggested in *Papachristou* that the vagueness doctrine is designed more to limit the discretion of police and prosecutors than to inform citizens as to the exact prohibitions of the law.

Closely related to the vagueness doctrine, the doctrine of overbreadth was developed solely in the context of the First Amendment. It tests the constitutionality of legislation in terms of its potential applications. The overbreadth doctrine is highly protective of First Amendment interests, not only because it sometimes prescribes invalidation of an entire provision but also because of the eagerness with which it can accomplish that result ("The First Amendment Overbreadth Doctrine," 1970). In *Coates v. City of Cincinnati* (1971), the Supreme Court stuck down a Cincinnati ordinance that made it "unlawful for three or more persons to assemble…on any sidewalks and there conduct themselves in a manner annoying to persons passing by…" (p. 611). The Court found the ordinance both vague and overbroad. The Court found that the ordinance was so broad that it criminalized speech and assembly protected by the First Amendment (Coates v. City of Cincinnati, 1971). Normally, an individual can challenge only a law that has been directed against him or her. But, the doctrine of overbreadth enables an individual to challenge a law imposing restrictions on First Amendment freedoms even when that

individual has not been charged with violating the law. The doctrine was designed to prevent a "chilling effect" on the exercise of First Amendment rights (Fallon, 1991).

The First Amendment and Obscene Speech

Legal scholars concur that the earliest reported case of obscenity dates back to 1663 – *The King v. Sir Charles Sedley*. Sedley, nude and intoxicated, exposed himself on a London balcony and shouted profane remarks (Alpert, 1938). In the United States, for more than 150 years after the adoption of the First Amendment, the Supreme Court had no occasion to pass on the constitutionality of legislation making obscenity a crime (Kalven, 1960). The first reported obscenity prosecution in the United States occurred in 1815 – *Commonwealth v. Sharpless*. In *Sharpless*, a Pennsylvania court declared it an offense of common law to exhibit for profit a picture of a nude couple. The first federal obscenity statute, a customs law regulating the importation of obscene articles, was adopted in 1842. The focus of the act was to regulate materials imported into the United States. It prohibited "all indecent and obscene prints, paintings, lithographs, engravings, and transparencies" (Attorney General's Commission on Pornography, 1986). In 1873, Congress passed a law prohibiting the mailing of obscene material. The law became known as the Comstock Act of 1873 – named after Anthony Comstock, who initiated a campaign to suppress obscenity. Comstock's efforts resulted in the enactment of anti-obscenity legislation in virtually every state; however, no definition of obscenity was provided by the Congress (Schauer, 1976). In the wake of the Comstock Act, U. S. courts had no definition of obscenity, so they borrowed the British definition called the *Hicklin* rule. The *Hicklin* rule was the result of a nineteenth-century British case, *Regina*

v. Hicklin (1868), in which Lord Cockburn ruled that work is obscene if it has a tendency to deprave and corrupt those whose minds are open to such immoral influences and into whose hands it might fall (Regina v. Hicklin, 1868).

In 1957, American courts abandoned the *Hicklin* rule and introduced a new test for obscenity in *Roth v. United States*. The new test, approved by the majority was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interests" (Roth v. United States, 1957, p. 489). It was the first time the U. S. Supreme Court addressed the issue of obscene speech. In *Roth*, the Court held that obscene speech is outside the protection of the First and Fourteenth Amendments. The Court also noted that the guarantees of freedom of expression in 10 of the 14 states that ratified the Constitution in 1792 gave no absolute protection for every utterance. Therefore, in light of history, the Court reasoned that the "unconditional phrasing of the First Amendment was not intended to protect every utterance" (Roth v. United States, 1957, p. 483).

The next major review of obscenity regulation by the Supreme Court, *Manual Enterprises v. Day* (1962), yielded a new addition to the original Roth standard - the element of "patent offensiveness." At issue in *Manual* was whether certain magazines declared non-mailable under law were obscene. The majority felt that, in most cases involving obscenity, patently offensive material would also appeal to prurient interests. The Supreme Court said that the Court of Appeals was mistaken in considering that *Roth* made "prurient interest" appeal the sole test of obscenity (Manual Enterprises v. Day, 1962). The next review by the Supreme Court, *Jacobellis v. Ohio* (1964), involved a French film, *Les Amants*. The film was not found to be obscene, though there was still no

definition of obscenity. Justice Potter Stewart, concurring in judgment, frustrated, said, “I know it when I see it” (Jacobellis v. Ohio, 1964, p. 197).

In *Memoirs v. Massachusetts* (1966), the Supreme Court held that the Massachusetts courts erred in finding *Memoirs of a Woman of Pleasure* to be obscene. The Court, applying the test for obscenity established in *Roth v. United States* (1957), held that the book was not "utterly without redeeming social value." The Court reaffirmed that books could not be deemed obscene unless they were unqualifiedly worthless, even if the books possessed prurient appeal and were "patently offensive."

In the nine years since *Roth*, the Supreme Court, through such decisions as *Manual, Jacobellis,* and *Memoirs,* the *Roth-Memoirs* test was developed. The test consisted of three parts: (1) applying community standards, the dominant theme of the material, taken as a whole, must appeal to the prurient interest; (2) the material must be patently offensive; and (3) the material must be utterly without redeeming social value (Kobylka, 1987).

By the late 1960s, obscenity regulation became essentially dormant, with a consequent proliferation of the open availability of quite explicit materials. This trend was reinforced by the issuance in 1970 of the *Report of the President's Commission on Obscenity and Pornography*, which recommended against any state or federal restrictions on the material available to consenting adults (President’s commission on obscenity and pornography, 1970). President Lyndon B. Johnson appointed the commission in 1967, but by the time the report was released, Johnson was no longer president – Richard Nixon was president. Although the Report was flatly rejected by President Nixon and by Congress, it nevertheless reinforced the tendency to withdraw legal restrictions in

practice, which in turn was one of the factors contributing to a significant growth from the late 1960s onward in the volume and explicitness of materials that were widely available (Attorney General's Commission on Pornography, 1986).

In 1973, the Supreme Court heard *Miller v. California*. In *Miller*, the Court discarded the *Roth-Memoirs* test and adopted a new test – the *Miller* test. Currently, the Supreme Court defines obscenity by using the *Miller* test set forth 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, *Roth, supra*, at 489, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value (Miller v. California, 1973, p. 24).

On the same day that the Court announced the *Miller* decision, it also issued decisions in four other obscenity cases. In these cases, the Supreme Court held that First Amendment considerations did not bar state governments from suppressing the commercial presentation of obscene films [Paris Adult Theatre I v. Slaton, 1973] or sale of obscene books to consenting adults [Kaplan v. California, 1973]. Likewise, the federal government could validly proscribe the importation of obscene material [U. S. v. 12 200-Ft. Reels of Super 8MM Film, 1973] and its interstate transportation [U. S. v. Orito, 1973] (Community standards, class actions, and obscenity under Miller v. California, 1975).

Obscenity has been one exception to the rule of absolutism. Justice Brennan (1965) wrote that from time to time, a majority of Supreme Court justices have recognized

contexts in which government has the power to curb speech, such as speech that does not have redeeming social value. Harry Kalven, Jr. (1988) wrote that the Court has been "handicapped by a treacherous political undertow: The justifications for obscenity regulation may be faint, but the political passions invested in the issue are fierce" (p. 34). Emerson (1966) said that there is not a clear agreement as to what social interests are sought to be protected by the laws restricting expression on obscenity grounds. The main justifications tend to fall into the five categories: (1) the speech has an adverse moral impact, apart from any effect upon convert behavior; (2) the speech may stimulate or provoke subsequent conduct in violation of law; (3) the speech may produce adverse effects on personality and attitudes, which could lead to illegal conduct; (4) the speech has a shock effect of an emotionally disturbing nature; and (5) the speech has especially adverse effects, as those described in the previous categories, upon children (Emerson, 1966). According to Emerson, most of the factual assumptions underlying the justifications are unsupported by empirical evidence; but, when children become part of the equation, different factors come into play. A child's immaturity imposes different rules. Emerson wrote, "Without attempting here to formulate the principles relevant to freedom of expression for children, it suffices to say that regulations of communication addressed to them need not conform to the requirements of the First Amendment in the same way as those applicable to adults" (Emerson, 1966, p. 91).

Regulatory Theories

Regulation has been used to serve particular functions: disclosure and publicity, protection and cartelization of industries, containment of monopoly and oligopoly, promotion of safety for consumers and workers, and legitimization of the capitalist order (McCraw, 1984b).

A review of the literature centering on theories of regulation, including regulation of the telecommunications industry, revealed that capture theory, public choice theory, and public interest theory (Berry, 1984, Croley, 1998; & Farber & Frickey, 1987; Horwitz, 1989; McGraw, 1975; Mueller, 1976; Posner, 1974; & Rowland, 1997) are the most prominent theories. Traditional theories of regulation center themselves on the "public interest" concept, which is rooted in welfare economics. Public interest legitimizes limited government intervention in the marketplace, even though the marketplace theory operates best without government interference (Horwitz, 1989).

University of Chicago Professor George Stigler, part of the "Chicago School" economists[1], (1971) wrote that regulation is acquired by an industry and is designed and operated primarily for its benefit. He added that there are two main viewpoints of the regulation of industry that are widely held. The first, he wrote, is that regulation is instituted principally for the protection and benefit of the public at large. The second viewpoint Stigler discussed was that, essentially, the political process defies rational explanation: "Politics is an imponderable, a constantly and unpredictably shifting mixture of forces of the most diverse nature, comprehending acts of great moral virtue (the

[1] The "Chicago School" is a group of economists that normally associated themselves with neoclassical price theory and free market libertarianism. The term refers to economists who were schooled in the Economics Department of the University of Chicago.

emancipation of slaves) and of the most vulgar venality (the congressman feathering his own nest)" (Stigler, 1971, p. 3).

Stigler also discussed policies that an industry may seek of the state. The most obvious contribution a group may ask of the government is a direct subsidy of money. Another major public resource commonly sought by an industry is control over the entry of new rivals. Third, Stigler wrote that an industry seeks out those government powers that affect substitutes and complements. Sigler used the following example to illustrate his point: "Butter producers wish to suppress margarine and encourage the production of bread" (Stigler, 1971, p. 6). Finally, Stigler wrote that an industry will seek out policies directed to price-fixing. Stigler said that even the industry that has accomplished entry control will often want price controls administered by the government (Stigler, 1971).

University of Chicago Law Professor Richard Posner (1974) identified two main theories of economic regulation: capture theory (sometimes called interest group theory) and public interest theory. Posner described economic regulation as a term referring to taxes and subsidies of all kinds as well as to explicit legislative and administrative controls over rates, entry, and other aspect of economic activity (Posner, 1974).

A well-known version of capture theory appeared in 1955 with Marvin H. Bernstein's formulation of the theory. Bernstein (1955) contended that the creation of a regulatory agency is characterized by a struggle between a scattered majority favoring regulation [the public] and a powerful minority resisting regulation [the regulated group] (Bernstein, 1955). Posner (1974) said that Bernstein's version of capture theory is more specific than the general interest group theory, for it singles out a specific interest group – the regulated firms – as reigning in the struggle to influence legislation and predicts a

standard order in which the original purposes of a regulatory program are later thwarted through the efforts of the interest group. However, Posner found the theory unsatisfactory. He wrote that capture theory ignores a fair amount of evidence that the interests promoted by regulatory agencies are frequently those of customer groups rather than those of the regulated firms themselves (Posner, 1974).

Berry (1984) said that capture theory once dominated explanations of regulatory politics; but, two fundamental assumptions of capture theory were challenged: "(1) that the character of an individual regulatory commission does not affect the ultimate nature of policy outcomes and (2) that consumers and the public have negligible influence on regulatory policy" (Berry, 1984, p. 553).

Anthony Downs postulated that a government is run by individuals who try to maximize a private, rather than public, utility function. Public officials are viewed not as bureaucrats concerned with public matters, but as private individuals trying to maximize their own agenda (Downs, 1957).

Downs is also affiliated with public choice theory. Downs (1967) said that at the heart of all public choice theories is the notion that an official at any level, whether in the public or private sector, acts at least partly in his own self-interest, and some officials are motivated solely by their own interests.

Public choice theory is essentially the application of economics to political science. In 1986, James M. Buchanan received the Nobel Prize in Economics for his groundbreaking work in the area. Buchanan and his colleague, Gordon Tullock, are credited with being the primary developers of public choice theory. Buchanan and Tullock's work, which dates back to 1962, increased awareness of public choice theory (Mueller, 1976).

University of Minnesota Law Professors Daniel A. Farber and Philip P. Frickey, names also affiliated with the theory, began their work in public choice theory just a year after Buchanan's recognition. Farber and Frickey (1987) said that public choice theory views the policymaking process as a battlefield where legislators, bureaucrats, interest groups, and individual voters compete to maximize their own interests.

Public choice theory challenges the idea that government administrative agencies' work-products genuinely respond to market failures. Specifically, the theory treats legislative, regulatory, and electoral institutions as an economy in which the relevant players, including everyday citizens, legislators, agencies, and organized interest groups most affected by regulatory policies, exchange regulatory goods and services, which are demanded and supplied according to the same basic principles governing the demand and supply of average economic goods (Croley, 1998). Croley added that those who subscribe to the public choice theory often argue for increased reliance on markets rather than on government regulation. It is believed that market outcomes, though imperfect, are far better than the regulatory products of an intractable regulatory regime.

Two principle schools of thought comprise modern public choice theory: the "Virginia School" and the "Indiana School." The Virginia School finds that bureaucrats and officials are rarely benevolent, but rather that they are self-interested and inefficient. So, government failure may produce more distortions and be a more demanding burden on the citizenry than market failure (Maggio, 1994).

In contrast to the Virginia School, the Indiana School places more emphasis on local and community preferences and arrangements for collective action. The Indiana School is concerned about the quality of information that the public has before them to make a

choice. It does not find that all bureaucrats are self-serving; a public service ethic can exist. Finally, it is interested in the use of local incentives for individuals and institutions, rather than top-down regulation, to change behavior and accomplish admittedly public goals (Maggio, 1994).

Public interest theory held that regulation is supplied in response to the demand of the public for the correction of inefficient or inequitable market practices (Posner, 1974). After the Civil War, the national economy grew rapidly. The banking and railroad industries became powerful industries, nearly too big and powerful for state regulatory commissions to control (Rowland, 1997). These enterprises combined grand economic power with a tendency toward corruption. Regulation was needed to protect potential victims from these powerful enterprises (McCraw, 1975). The rural Granger and Populist reform movements pressed the federal government for help beyond the authority of the individual states (Rowland, 1997).

The Granger, or farmers', movement sought to preserve a localized and personalized agrarian society. Farmers believed they were being robbed by middlemen and carriers of their just compensation. They argued that railroads and grain elevators should be placed under public authority. The disturbance created by these movements led local and state legislation to regulate grain elevator, warehouse, and railroad rates. These new regulations are referred to as the "Granger laws" after the largest of the farmers' movements – the Order of Patrons of Husbandry. In the Granger formulation, the "public interest" originates from the standpoint of the individual producer (Horwitz, 1989). The Granger perspective held that by the late 19th century, corporate productive power began to displace small independent producers in political and economic importance. This view

reflected a deep distrust of corporate power by local communities. Accordingly, economic power in general was originally thought of as a moral, rather than a purely economic, issue. The legislative debates surrounding the passage of the 1887 Interstate Commerce Act expressed this moral fever (Buck, 1913).

In 1887, Congress passed the Interstate Commerce Act, establishing the first federal regulatory agency – the Interstate Commerce Commission (McCraw, 1984a). Congress gave the first federal regulatory agency authority to require telegraph companies to interconnect their lines for more extended public service (History of Wire and Broadcast communication, 1993). The Interstate Commerce Act was the first of several laws that established many federal regulatory agencies (Rowland, 1997). Prior to 1930, there were only a few federal regulatory agencies: the Interstate Commerce Commission, the Federal Reserve Board, the Federal Radio Commission, and the Federal Trade Commission. During the New Deal period of the Franklin D. Roosevelt administration, several major regulatory agencies emerged: the Securities and Exchange Commission, the Federal Communications Commission, the National Labor Relations Board, and the Civil Aeronautics Authority. Like the Interstate Commerce Commission, the newer federal regulatory agencies were to regulate their prospective businesses and goods in the "public interest" (McCraw, 1984a).

After an increase in government regulation of such industries, public interest theory then developed into one that held that regulatory agencies are created for bona fide public purposes but then are mismanaged, and those purposes are not always accomplished (Posner, 1974). Posner found the reformulation of public interest theory unsatisfactory on two grounds. First, the reformulated theory failed to account for much evidence that

the socially undesirable results of regulation are frequently desired by groups influential in the enactment of the legislation setting up the regulatory scheme. Second, Posner said that there was little evidence of mismanagement by an agency. Posner added that an agency's head is accountable to both the legislative and executive branches. Posner wrote that the most plausible public interest theory holds that "regulation is an honest but frequently an unsuccessful attempt to promote the public interest" (Posner, 1974, p. 339). On a final note, Posner believed that there are serious flaws with any version of public interest theory:

> The theory contains no linkage of mechanism by which a perception of the public interest is translated into legislative action. In the theory of markets, it is explained how the efforts of individuals to promote their self-interest through transacting bring about an efficient allocation of resources. There is no comparable articulation of how a public perception as to what legislative policies or arrangements would maximize public welfare is translated into legislative action. (Posner, 1974, p. 340)

Robert Horwitz (1989) said that public interest theory treats the creation of regulatory agencies as the successful result of the people's struggle with private corporate interests. He added that the strength of the theory is that it is grounded in historical understandings about the origins of some regulatory agencies (Horwitz, 1989).

University of Michigan Law Professor Steven Croley (1998) wrote that public interest theorists view the regulatory world as populated by three kinds of players – the regulator, the citizenry, and special interest groups. Croley believed that the goals of the citizenry and special interest groups are clear-cut. He wrote that the citizenry look for what they consider desirable regulatory policies, but their quest of desirable regulatory policies

competes with their quest for other goals. Like the citizenry, special interest groups look for what they deem to be desirable regulatory policies in whatever regulatory areas that particularly affect them (Croley, 1998).

However, Croley saw the goals of the regulator as more complex. He wrote that regulators have one major important, self-regarding goal – "the prolonged enjoyment of holding their positions" (Croley, 1998, p. 66). Croley said, "Regulators seek to preserve their positions both for the current personal benefits associated with those positions and for the expected personal benefits they will receive upon leaving those positions as a consequence of having held them" (Croley, 1998, p. 67). Regulators also seek to advance the interests of the citizenry. Croley said that this can lead regulators to do what is "best for the misguided citizenry rather than what the citizenry might prefer" (Croley, 1998, p.68).

Croley said that the reformed public interest theory is in part a normative theory, for it embraces the correction of market failures as the dominant criterion against which regulatory outcomes are to be assessed. Regulation then is justified because the regulatory regime can do what the market cannot (Croley, 1998).

If public choice, public interest, and capture theories were on a continuum, public interest theory would lie between public choice theory and capture theory. Like capture theory, public interest theory recognizes that interest groups are part of the regulatory process. Public choice theory holds that interest groups and regulatory agencies want to advance personal agendas, whether or not it promotes public good. Public choice theory favors more of a marketplace approach to regulation, even when the market appears to be

failing, while public interest theory believes that regulation is needed to correct market failures.

Policymaking

With the rise of industry in the United States came the rise of regulatory and administrative agencies. The country is a government of commissions. Since the birth of the state railway commissions after the Civil War, the United States placed just about every business and profession under municipal, state, and federal commission control, hence the rise in administrative agencies and administrative law (Dimock, 1933).

"Administrative law is, in essence, a search for a theory of how public policy should be made" (Diver, 1981, p. 393). Boston law professor Colin Diver said that two influential and powerful traditions mark the boundaries of that search. On one hand, Diver wrote, "We leave the choice among competing values to a largely unstructured process of pulling and hauling by individuals directly accountable to the citizenry. On the other side, we demand a highly structured process of party-controlled proof and argument before a neutral arbiter to resolve disputes over the application of rules to specific facts" (Diver, 1981, p. 393). What Diver called policymaking is between these extremes.

Diver (1981) discussed two models of the policymaking process: comprehensive rationality and incrementalism. Comprehensive rationality seeks the best of all options available at a given moment. Values must be clearly and authoritatively articulated before any individual policy decisions are made. The process for making policy must be open-minded and expansive. It does not deny that policies will need to be modified over

time. On the other hand, incrementalism, developed by Braybook and Lindblom (1963), involves a continuous sequence of small adjustments. Those who subscribe to incrementalism do not expect to achieve permanent solutions but only to react continually to new conditions. Policies are made by adapting to outside changes, not by restructuring entire systems. The power to make policy must be fragmented, not concentrated (Diver, 1981).

Agency policymaking entails five basic steps. First, initiative for policy development stems from action of legislative bodies, administrators, or interest groups. Second, a preliminary draft of a policy may be made by any interested party, either within or outside the agency. Usually, the original draft is then submitted to an administrative superior. After, the preliminary draft has been written; agency administrators may or may not decide to elicit advice from representatives of the public via informal conferences, advisory committees, and/or public hearings. After public participation, a period of deliberation and revision addressing information from the public comments takes place before the final draft is written. Finally, the fifth stage is reviewing. Policymaking is a never-ending process, for agencies often modify or change existing policies as well as adopt new policies. The policymaking process can be considered cyclical with five sequential stages: initiating, preliminary drafting, public participation, final drafting, and reviewing (Boyer, 1960).

Summary

Two main concepts drawn from this chapter, the economic theory-based interpretation of marketplace of ideas and public interest theory, provide the theoretical focus of the

dissertation. Marketplace of ideas and public interest theory both examine the level to which governmental interference is allowed and under what circumstances and to what degree limitations are allowed in the name of the public good. Both approaches recognize aspects of other theories and approaches such as public choice theory and capture theory. For instance, each regulatory theory defines public interest differently. In capture theory, the industry defines the public interest, while public officials define the public interest in public choice theory. In public interest theory, the government defines the public interest. In the economic theory-based marketplace of ideas, the marketplace defines the public interest.

The next two chapters examine the application of marketplace of ideas and public interest theory. Through case law and other relevant material, such as FCC documents, the dissertation determines how public interest is defined and what definitions are accepted by the courts. The chapters also look at the degree to which the marketplace allows governmental regulation or interference.

The following chapter discusses the how public interest, marketplace of ideas, regulation, policy, and administrative law, elements discussed throughout this chapter, relate to content regulation on broadcast radio and television.

CHAPTER 3 – BROADCAST RADIO & TELEVISION

The following chapter is divided into several sections addressing various issues in broadcast radio and television regulation. The chapter begins with a broad discussion of broadcast policy and its various viewpoints. It recognizes the main players in broadcast regulation: the FCC, interest groups, the industry, Congress and the courts. The history and evolution of broadcast regulation are discussed. Discussion and examinations of public interest, broadcasting, and the judiciary in relation to indecent content are also included. This chapter provides the background and development of obscenity and indecency regulation of broadcasting along with discussions of case law that shaped current indecency regulation. The following cases help form this foundation; so they are discussed: *FCC v. Pacifica* (1978), *ACT v. FCC (ACT I)* (1988), *ACT v. FCC (ACT II)* (1991), *ACT v. FCC* (1993), *ACT v. FCC (ACT III)* (1995), *ACT v. FCC (ACT IV)* (1995).

This chapter also outlines indecency determinations, enforcement, and recent problems and issues. Finally, the chapter looks at other relevant case law [*Sable Communications of California v. FCC* (1989) and *U. S. v. Playboy Entertainment Group, Inc.* (2000)] that is often cited in cases discussed in this chapter and the next chapter.

Broadcast Policy

One of the mysteries of regulation and broadcasting is how the clear intent of the Constitution, so well and strictly enforced in the print model of regulation, has been neglected in the electronic revolution (Pool, 1983). Pool said that regulation is a natural

response to new media; it is what America knows. Communications policy should promote and maintain a competitive and efficient industry (Fowler & Brenner, 1982; and Napoli, 1999). However, with technology quickly developing, newer media are sometimes subjected to stricter control than old media. Chafee (1942) said that older media such as newspapers, books, and pamphlets for centuries were the only means of public discussion; so, the need for their protection has long been realized. With the introduction of new means of communication, writers and judges were not attentive to guarding these freedoms. Therefore, censorship of radio and motion pictures has been tolerated (Chafee, 1942).

In *Technologies of Freedom*, Ithiel de Sola Pool (1983) wrote that regulation has become a response to perceived technical problems. Pool examined three recognized models of communications regulations: print, common carrier, and broadcast. The print model, applicable to speech and the press, was based primarily on legal precedents that have guaranteed freedom of communication since the 1700s. Pool wrote that the courts understand the press and have a long tradition of protecting it from government repression. The courts recognized that in cases involving freedom of speech and of the press, the First Amendment must be interpreted and read with the broadest scope.

Pool (1983) said that in the domain of common carriers, which includes the post office, telephones, telegraphs, and computer networks, a different set of policies has been applied. The right of access is what defines a common carrier – it is obligated to serve all on equal terms without discrimination. Common carriers were designed to ensure universal service and fair access by the public to the services of the carrier. The carrier may be restricted in ancillary businesses in which it could become its own favored

customer. Most important of all, the carrier should not pay any attention to the content of what it carries – it should not read letters, monitor phone calls, or monitor any content at all.

Far from the print model, the third domain of communications - broadcasting - has been highly regulated by Congress and the courts. Based on scarcity of frequencies in the spectrum, Congress became convinced that frequency regulation was essential. America, Pool said, chose for the government to regulate broadcasting. The broadcast model assumed that the government had a positive role to play licensor and regulator (Pool, 1983). Pool continued by saying that it was actually policy, not physics, that led to the scarcity of frequencies. For instance, modern technology offers many different ways to increase the number of channels that are available, but Pool said that it is the regulators and the broadcasters who want to block the path to unlimited spectrum capacity. They want to maintain their oligopoly. Finally, Pool (1983) noted that new communications, like cable television, should weaken, if not eliminate, arguments for broadcast regulation. The scarcity argument offers the foundation for all areas of broadcast regulation. However, in the current technological environment of cable and satellite communications and the online computer world, Samoriski, Huffman, and Trauth (1997) claimed that scarcity does not prevail. Former FCC Chairman Reed Hundt disagreed. Hundt (1996) wrote that technological developments have strengthened the argument for regulation in areas such as indecency. Hundt (1996) said that when *Pacifica* was decided in 1978, the Court recognized that adults had sources other than the broadcast media for gaining access to indecent materials, so restrictions on broadcast media were not particularly burdensome. There were no video stores and almost no premium cable channels.

Technology provided the market with more indecent speech as the number of premium cable channels increased over time making it easier to justify regulation (Hundt, 1996).

The FCC regulates an array of diverse technologies, ranging from telephones to broadcast stations to satellites, just to name a few. Like other regulatory agencies, they are also responsible for writing and enforcing rules and regulations. Their role is a combination of executive, quasi-legislative, and judicial tasks (Krasnow, Longley, & Terry, 1982). The Commission has enjoyed an expansive congressional mandate to frame responsible public policy toward broadcasting. Though the Commission plays a key and central role in broadcast regulation, Krasnow, Longley, and Terry (1982) said that it rarely acts alone. They identified the FCC, citizen or interest groups, the industry, the courts, and Congress as other determiners of these regulatory policies.

The Commission's regulation of broadcast indecency has been controversial for decades (Lipschultz, 1997). Part of the regulatory rationale for broadcast radio and television is the public ownership of the airwaves; therefore, broadcasters should operate in the "public interest, convenience, and necessity." Regulating indecent content over the airwaves is arguably in the public interest. But what is "the public interest"? The lack of a clear definition of the public interest standard has long been problematic. The debate over what comprises public interest in broadcast regulation is as old as the regulation of broadcast itself. Ford (1961) wrote, "The public interest in any given set of circumstances has been for the Commission, not the Courts, to decide" (Ford, 1961, p. 212). Krugman and Reid (1980) studied how FCC Commissioners operationalized the concept of public interest and discovered that respondents felt the public interest was met when various viewpoints were balanced. In short, does the FCC have too much

discretion when it comes to interpreting public interest? Kalven (1967) wrote that the public interest formula is a powerful and flexible formula giving many discretionary powers to the FCC.

Krasnow, Longley, and Terry (1982) labeled citizen groups as one of the determiners of regulatory policy. Until 1966, citizen groups or groups that did not have an economic stake in the outcome of a case were not permitted to intervene in FCC radio and television licensing proceedings (Office of Communication of the United Church of Christ v. FCC, 1966). Since then, many citizen groups have been active in broadcast proceedings. In the late 1960s, these groups started to enter into agreements with broadcast stations relating to programming and employment practices.

The number of interest groups proliferated in the 1960s. The biggest explosion of special interest groups came between 1965 and 1985 (Cigler and Loomis, 2002). Cigler and Loomis (2002) argued that interest groups are ubiquitous, therefore, leading to a state of hyperpluralism or excessive representation.

Economists tend to define interest groups by objective interests imputed by the researcher. Empirical studies in economics traditionally focused on labor unions, political action committees, business organizations, and other formal organizations (Baumgartner & Leech, 1998). In *The Governmental Process*, political scientist David Truman defined "interest group" as any group, on the basis of shared attitudes, that "makes certain claims upon other groups in the society for the establishment, maintenance, or enhancement of forms of behavior that are implied by the shared attitudes" (Truman, 1951, p. 33). Truman added that if and when an interest group makes its claim through or upon any government institution, it becomes a political interest

group. Ken Kollman (1998) used the term "interest group" to include any nonparty organization that regularly tries to influence government policy and defined a "public interest group" as an organization that hunts for a collective good (Kollman, 1998).

The literature also mentioned that group life plays a pivotal role in the democratic process. The social integration provided by group membership and activity helps prepare citizens for their roles in the broader political system (de Tocqueville, 1945; Lowi, 1979). One way of participating as a group or group member is to engage in outside lobbying. Kollman defined "outside lobbying" as "attempts by interest group leaders to mobilize citizens outside the policymaking community to contact or pressure public officials inside the policymaking community" (Kollman, 1998, p. 3). Outside lobbying is applied selectively. Lobbyists and interest group leaders spend many hours and resources crafting careful public campaigns of persuasion. On some policy matters, groups on all sides widely use outside lobbying. On other issues, only groups on one side of the issue use outside lobbying (Kollman, 1998).

Congress interacts with the FCC, special interest groups, and the judicial branch frequently on matters concerning indecent content in broadcast media and the Internet. Congress' relationship with broadcast media dates back to the passage of the Radio Act of 1927 and the Communications Act of 1934. More recently, it passed the first major rewrite of the 1934 Act – The Telecommunications Act of 1996 (The Telecom Act). Congress also takes on the "raised eyebrow" role via the Legislative Reorganization Act of 1970. Under the 1970 act, each standing committee of the Senate and the House "shall review and study on a continuing basis the application, administration, and execution" by administrative agencies of any law within its jurisdiction (Legislative

Reorganization Act of 1970). The House Committee on Energy and Commerce and the Senate Committee on Commerce, Science, and Transportation are responsible for studies in communication areas, and those committees have key responsibility for the initiation and consideration of legislation affecting broadcasting and other telecommunications industries (Krasnow, Longley & Terry, 1982).

Congressional influence on such broadcast policymaking takes on different forms. Congress can control by statute (as noted above), spur investigations, and use the power of the purse. After the 2004 Super Bowl half-time performance, Congress launched an investigation and held hearings on the incident that led to proposed legislation, the Broadcast Decency Enforcement Act of 2004, which called for an increase in indecency fines and is discussed later in this chapter. The 2004 proposed legislation is an example of how Congress can control the broadcast industry by statute.

Ultimately, the courts are a determiner of regulatory policy (Krasnow, Longley, & Terry, 1982). The Communications Act of 1934 gives the D. C. Court of Appeals exclusive jurisdiction to review the FCC's declaratory ruling in those cases as well as all policies, practices, and regulations adopted by the Commission (47 U.S.C. § 402). The Court of Appeals also has exclusive jurisdiction over any suit seeking relief that might affect the Circuit Court's future jurisdiction under the Act (ACT v. FCC, 1993). The D.C. Circuit was the venue of the Action for Children's Television (ACT) cases, which are discussed later in this chapter. Though the D. C. Circuit had some impact on broadcast indecency policy (Lipschultz, 1997), the Supreme Court has been the most influential. The Supreme Court has always held that broadcasting must be subject to government regulation. In *NBC v. U. S.* (1943), the Supreme Court justified the

government's regulatory system over the structure and programming of the broadcast industry. The Supreme Court has also been the most influential body in validating content regulation, specifically indecent speech, on broadcast radio and television (Emord, 1991).

This section presented a broad discussion of broadcast policy and various viewpoints on broadcast regulation and policy. The section also mentioned key players - the FCC, interest groups, Congress, the industry, and the courts - in the regulatory scheme and how each contributed to basic broadcast policy. Now that the broad picture of broadcast regulation has been presented, the following sections take a more narrow and focused look at broadcast regulation.

Radio - Early Regulation

Around the turn of the 20th century, radio began to be used for ship-to-shore and ship-to-ship communication, which led to various proposals for legislation. These proposals were concerned with the promotion of safety at sea, by requiring the installation of radio equipment on ships and the employment of skilled operators. Other proposals were concerned with government control of industry operations as a whole (Coarse, 1959).

The earliest government regulation came in the form of the Wireless Ship Act of 1910. The Wireless Ship Act mandated that passenger ships with 50 or more passengers carry wireless sets. The Act was in response to a collision between a luxury liner and an immigrant-carrying ship. Two years later, another disaster at sea - the sinking of the *Titanic* – led Congress to take further action. The U. S. government took control of the airwaves after the sinking of the *Titanic* and passed The Radio Act of 1912

(Krattenmaker & Powe, 1994). The Radio Act established several key principles. First, it established that the federal government would regulate radio communication. Only those with licenses granted by the federal government, particularly the Secretary of Commerce and Labor, could engage in radio communications. Second, the spectrum would be assigned among uses and users. Finally, the government would determine what communication took precedence. For instance, distress calls were a first priority followed by military communication. However, during wartime, military communication took precedence. During World War I, the Navy gained control of all radio communications in the U. S., with the exception of those communications operated by the Army (Archer, 1938). After WWI, the Navy wanted to maintain its control over radio communications and petitioned Congress to allow such control. In fact, before the war ended, two bills were introduced that would have given control of radio communications to the Department of Navy. But, the Navy lost its bid for control and radio communication was returned to amateurs - private individuals who experimented with wireless communication (Barnouw, 1966).

After the war, in 1920, the Bureau of Navigation, under the Department of Commerce[2], licensed nearly 300 land radio stations and more than 6,000 amateur radio operators. It was apparent that growth of radio had begun (Bensman, 2000). Radio broadcasting, as we know it, began with the first national broadcast - the 1920 presidential election returns on Westinghouse-owned KDKA in Pittsburgh (Archer, 1938). The broadcast of election returns gave radio national recognition and publicity.

[2] In 1913, when the Wilson administration took office, the Department of Commerce and Labor was separated into two departments.

The election and other similar "broadcasts" attracted public interest and attention, which led to an increase in the number of individuals and companies requesting licenses. Earlier that year, Herbert Hoover became Secretary of Commerce. He fostered the wider use of the newly-emerging technology (Krattenmaker & Powe, 1994). In addition, the number of people who wanted to use that newly-emerging technology began increasing. In the fall of 1921, the Bureau of Navigation Radio Service, part of the Department of Commerce, started to license broadcast stations as "limited commercial stations." The department formally adopted "broadcasting" as a separate class of station (Barnouw, 1966). These stations could operate on only one frequency (832.8 kHz), the frequency utilized for entertainment, news, lectures, etc. Frequently, this was not physically far from the frequency used for international distress and calling. In December 1921, a second wavelength was added, which was allocated to stations that wanted to transmit government reports such as weather and crop information. By the end of 1922, there were nearly 600 radio stations broadcasting and anywhere from 500,000 to 1,000,000 radio receivers in the U. S. (Bensman, 2000). As broadcasting stations multiplied, so did interference on the airwaves.

As Secretary of Commerce, Herbert Hoover was responsible for the administration of the 1912 Act, and he faced the task of preventing inference on the airwaves. So in February 1922, at the instruction of President Harding, Secretary Hoover assembled the first in a series of annual national radio conferences at which representatives of the industry and government met to adopt a system of regulation. The Conference recommended that the powers of the Secretary of Commerce should be strengthened to

control the establishment of radio stations. It also proposed an allocation of wave bands for the various classes of services (Coarse, 1959).

The second radio conference was held in March 1923. This conference abandoned the policy of group allocation in broadcasting. The Department of Commerce could then assign frequencies from a predetermined wave band for each broadcast station. The conference proposed that stations be divided into three classifications: Class A [lowest-powered stations], Class B [mid-powered stations], and Class C [highest-powered stations] (Barnouw, 1966). The first whispers of program control were mentioned at the second conference. The conference considered whether the reading of letters or telegrams from non-local listeners over the air was permissible. It concluded that as long as the person's name was not read and that the subject matter was of general interest, it was acceptable (Bensman, 2000).

The third conference was held in October 1924. One noteworthy event was an address by David Sarnoff, vice president and general manager of the Radio Corporation of American (RCA), in which he advocated a chain of super-power radio stations (Archer, 1938). President Coolidge also spoke at the conference in recognition of the growing importance of broadcasting in politics (Bensman, 2000). The idea of a public interest in broadcasting was first officially expressed at the third conference (Ford, 1961).

The fourth radio conference took place in November 1925. At the urging of industry leaders, Secretary Hoover discontinued issuing licenses and began telling applicants that all wavelengths were used up and no further licenses would be issued. In his speech before the attendees, Secretary Hoover addressed the idea of a public standard in his speech before the attendees (Proceedings of the 4th Radio Conference, 1925).

Broadcast Regulation and the Public Interest

Hoover's vision of the public interest in broadcasting was as follows:

> The ether is a public medium and its use must be for the public benefit. The use of a radio channel is justified only if there is a public benefit. The dominant element for consideration in the radio field is, and always will be, the great body of listening public, millions in number, countrywide in distribution…. The greatest public interest must be the deciding factor, I presume that few will dissent as to the correctness of this principle, for all will agree that public good must overbalance private desire; but its acceptance leads to important and far-reaching practical effects, as to which there may not be the same unanimity, but from which, nevertheless, there is logical escape. (Proceedings of the 4th Radio Conference, 1925)

Hoover thought broadcasting utilized a national asset (the spectrum) and thought it became of key public interest to say who is to do the broadcasting, under what circumstances, and how to do it (Krattenmaker & Powe, 1994). The Conference endorsed the public interest concept and recommended legislation, hence the Radio Act of 1927, two years later (Ford, 1961). However, another variable also prompted the 1927 Act – *U. S. v. Zenith Radio Corporation* (1926). After the 1925 Radio Conference, Hoover publicized that no more applications would be granted, including those applying for increased power. The spectrum was dealing with overcrowding; so, Hoover urged stations to work out time-sharing agreements. However, Hoover's structure tumbled when Zenith Corporation jumped from 930 kHz to 910 kHz in late 1925. Hoover assigned Zenith 930 kHz for its Chicago broadcasts, but this was the same frequency that General Electric (GE) had previously acquired in Denver. Then, Hoover had to limit

Zenith's broadcasts but only if GE chose not to broadcast at that time. The controversy was settled in the federal court system. In *United States v. Zenith Radio Corporation* (1926), a federal district judge found that Hoover, under the Radio Act, could select applicable frequencies, and it was his duty to license; however, it was not within his power to impose restrictions. Hoover could encourage time-sharing, but he could not require it. The court ruled in favor of Zenith Radio Corporation (United States v. Zenith Radio Corporation, 1926). At that point, Secretary Hoover abandoned attempts at regulating radio, and even more chaos on the airwaves ensued as stations operated on whatever wavelengths they chose (Wollenberg, 1989). The Zenith decision considerably added to the pressure for new legislation of radio communication (Coarse, 1959).

President Coolidge signed The Radio Act of 1927 into law. The act created the Federal Radio Commission (FRC) and addressed the issue of ownership of the airwaves, which was covered in the Radio Act of 1912. It declared that there could be no private ownership of the airwaves. The airwaves were public and use could only occur with the government's permission (The Radio Act of 1927). The 1927 act established the phrase "public interest, convenience, and necessity" as the standard for licensing radio stations, often referred to as the "PICON" standard.

Licensing is the process through which the Commission grants permission to broadcast. First, a would-be licensee applies for construction permits. Those who hold a construction permit can then apply for a regular license to broadcast only after submitting satisfactory evidence of transmitter and antenna performance. Section 308(b) of the Communications Act of 1934 limits licensees to U. S. citizens or corporations owned primarily by U. S. citizens (How to Apply for a broadcast Station, 2002).

The FRC issued a comprehensive interpretation of the public interest standard indicating that it would apply the standard to programming content as well as technical issues. The FRC said that broadcasters should not use their stations for their own private interest. The interests of the audience should be above all other interests (Krasnow & Goodman, 1998). The FRC's statement on the public interest standard was tested shortly after its release. In *Great Lakes*, the Commission contented itself by noting that stations using formats that appeal to only a small segment of the public were not serving the public interest. The FRC said that each member of the listening public is entitled to service from each station in the community (Great Lakes Broadcasting Co. v. FRC, 1929). The *Great Lakes* decision established programming content as a criterion of the public interest standard (Krasnow & Goodman, 1998).

The FRC also used its power under the public interest standard to revoke the licenses of two stations. The following two cases were the first to deal with program content, not technical issues. The Commission denied the application for license renewal of KDEF in Los Angeles. KDEF broadcasted sermons by Trinity Methodist Church's pastor, the Rev. Bob Shuler. Shuler's sermons regularly defamed government institutions and officials and attacked labor groups and various other religions. A court affirmed the Commission's denial of renewal for KDEF concluding that broadcasts without facts to uphold or to justify them may be found not to be within the public interest (Trinity Methodist Church v. FRC, 1932). The FRC also denied the renewal of the license for KFKB in Milford, Kansas. The FRC found that this station was primarily controlled and used by Dr. John Brinkley, the "goat-gland doctor," to further his personal interest. Brinkley hosted the "Medical Questions Box," a program that featured Brinkley

answering questions from listeners on health and medicine. Brinkley would then give a diagnosis and prescribe medication from his own pharmaceutical business. Druggists paid a fee to Brinkley for each sale they made. The FRC held that Brinkley's practice of diagnosing patients without an in-person meeting was inimical to the public health and safety and therefore not in the public interest. An appellate court affirmed the FRC's decision (KFKB Broadcasting Association v. FRC, 1930). The appellate court agreed with the Commission that broadcasting "is impressed with a public interest and observed that because the number of available broadcasting frequencies is limited." Futhermore, the FRC has the power to "consider the character and quality of the service to be rendered" (KFKB Broadcasting Association v. FRC, 1930).

The Communications Act of 1934 established the Federal Communications Commission (FCC), which replaced the FRC. The public interest standard is rooted in statute under Sections 307 and 309 of the Communications Act of 1934. Under these two sections, the FCC can grant the use of a frequency for a limited term to an applicant that demonstrates that the planned service would serve "the public interest, convenience, and necessity" (Krasnow, 1997). The FCC was also given jurisdiction over telephone and telegraph communication in addition to the original powers of the FRC. The Post Office Department, the Interstate Commerce Commission, and the Department of State had previously exercised some authority over telegraph service (History of wire and Broadcast communication, 1993).

The FCC used its powers to regulate content cautiously during the 1930s and 1940s (Krasnow and Goodman, 1998). In 1946, the FCC issued another general policy statement on the Public Service Responsibility of Broadcast Licensees (the "Blue Book").

The Blue Book tried to clarify the FCC's position on the public interest standard. It set up programming guidelines for the Commission to consider when stations applied for license renewal. The Blue Book said that the Commission should give particular consideration to four types of programming: (1) noncommercial programs, (2) live local programs, (3) programming devoted to the discussion of local public issues, and (4) the elimination of advertising excesses. The Blue Book was never actively or explicitly enforced. It was unpopular with commercial broadcasters because of the economic threats it posed (Public Service Responsibility of Licensees, 1946).

The FCC's next major effort to influence broadcaster content was the *Report and Statement of Policy re: Commission En Banc Programming Inquiry* (referred to as the "1960 Programming Policy Statement"). The FCC acknowledged that additional clarification of the public interest standard was necessary so the *1960 Programming Policy Statement* listed the key components usually considered essential to the public interest. The fourteen components included (1) opportunity for local self-expression, (2) development and use of local talent, (3) programs for children, (4), religious programs, (5) educational programs, (6) public affairs programs, (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs, (10) news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups, and (14) entertainment programming (Report and Statement of Policy, 1960). In order to enable broadcasters and their legal counsel to prepare initial and renewal applications with ample specificity, the FCC issued a series of primers articulating an acceptable scheme for determining community needs (Fowler & Brenner, 1982).

In the late 1970s, the FCC began to reinterpret the public interest standard under the marketplace approach, where regulation is seen as necessary only when the marketplace evidently fails to protect the public interest (Krasnow, 1997). The FCC decided, in the early 1980s, under its new chair, Mark Fowler, that marketplace competition made it unnecessary for the Commission to control the number of commercial minutes or nonentertainment programming on commercial radio stations. In *A Marketplace Approach to Broadcast Regulation*, Fowler and Brenner (1982) rejected scarcity justifications for regulating only broadcast. Fowler suggested to Congress that much of the legislation supporting content regulation be repealed. Chairman Fowler noted that economic freedom and freedom of speech go hand-in-hand in broadcasting (Krasnow, Longley, & Terry, 1982). Fowler believed that the marketplace, itself, best served the public interest (Read & Weiner, 1997).

The 1980s brought about a period of deregulation, beginning with the Commission's *Deregulation of Radio* decision in 1981. The FCC removed rules and policies governing program logs, commercial time limits, ascertainment of community problems, and non-entertainment programming requirements. The FCC noted that Congress intentionally put the public interest standard in the Communications Act to provide the Commission with maximum flexibility in handling the fluid conditions in the broadcasting field (Krasnow, 1997). Even the courts, particularly the U. S. Court of Appeals for the District of Columbia in *Telecommunications Research and Action Center v. FCC* (1988), affirmed that the public interest is best left to the discretion of the Commission. The Court said that the Commission might rely on marketplace forces to control broadcast abuse, if that is the best and necessary means of doing so. Perhaps the most influential

deregulatory move of the FCC headed by Mark Fowler was the suggestion to repeal the Fairness Doctrine. The Fairness Doctrine was a policy imposed on radio and television broadcasters by the FCC that required discussion of public issues on broadcast stations and that each side of those issues be given fair coverage (Red Lion Broadcasting Co. v. FCC, 1969).

In *Red Lion Broadcasting Co. v. FCC* (1969), the Supreme Court had upheld the constitutionality of the Fairness Doctrine. However in 1985, the FCC released a report, the *1985 Fairness Report*, concluding that the Fairness Doctrine was no longer justified. The report noted that the diversity of opinions that the doctrine called for was being served by the array of voices in the marketplace. It concluded that the Fairness Doctrine actually inhibited robust discussion of ideas and restricted the journalistic freedom of broadcasters. The Commission did not immediately eliminate the doctrine but rather waited until Congress had an opportunity to respond to the 1985 report (Creech, 2003). The U. S. Court of Appeals for the D. C. Circuit upheld the Commission's decision to eliminate the Fairness Doctrine in *Syracuse Peace Council v. FCC* (1989).

A few years after the elimination of the Fairness Doctrine, Congress passed the Telecommunications Act of 1996 (The Telecom Act). The Telecom Act was a major rewrite of the Communications Act of 1934. The 1996 act classified electronic media services into categories – broadcasting, cable, and common carrier. Newer media and technologies, such as the Internet and World Wide Web, were also addressed in the 1996 act. The act relaxed many rules and regulations that once prohibited telephone companies, cable systems, and broadcasters from providing similar services. It also modified the multiple ownership rules and directs the FCC to incorporate rules requiring

television receivers to contain a V-chip – a new technology that allows blocking of violent or sexually explicit program content. The V-chip is a receiver-based program blocking technology.

The FCC was directed by the 1996 act to require manufacturers of television sets with screens larger than 13 inches to include the V-chip. V-chip technology works with a ratings system established by a panel headed by Motion Picture Association President Jack Valenti. The act called for the creation of an advisory panel composed of parents, television industry representatives, cable operators, public interest groups, and other interested individuals from the private sector. The National Association of Broadcasters (NAB), the National Cable Television Association (NCTA), and the Motion Picture Association of America (MPAA) jointly created the *TV Parental Guidelines*. The panel was charged with developing ratings for violent and sexually explicit programming. The guidelines were designed so that category and program-specific content indicators will provide parents with information that will help them to make better, informed decisions about what their children should watch on television. The guidelines apply to all television programming except for news, sports, and unedited MPAA-rated films on premium cable channels. Television stations retain the right to substitute ratings they consider appropriate for their audience. Cable networks and television stations provide guides and request that publishers include the appropriate information in their guides. Though the installation of the V-Chip in television sets is mandated by statute, broadcasters' use of the ratings system is voluntary (Commission Finds Industry Video Programming Rating System Acceptable, 1998). Finally, the 1996 act required the FCC to periodically review the rules issued under the act that apply to telecommunications

service providers to determine whether any regulations are no longer essential or necessary in the public interest due to meaningful economic competition and whether such regulations should be modified or repealed (Telecommunications Act of 1996).

Though the 1996 act relaxed some regulations, as discussed above, some thought the act did very little to reform broadcasting law and policy. Krattenmaker (1996) believed that the 1996 act extended censorship. The Communications Decency Act (CDA), discussed in the following chapter, was aimed at curbing indecent speech on the Internet while the V-Chip was aimed at curbing indecent speech on broadcast and cable television (Krattenmaker, 1996). Another potential problem cited about the V-Chip was the parental enforcement. The V-Chip cannot effectively work without the active participation of parents (Makris, 1996).

Results of a fall 2004 Kaiser Family Foundation Survey found that the use of the V-Chip is up since 2001 (when only 7% of parents said they use it). Use is modest at just 15% of all parents, or about 42% of those who report having a television equipped with the V-Chip. The V-Chip was required to be included in all television sets over 13 inches after January 2000. The study found that 26% of parents have not bought a new set since then. Thirty-nine percent of those who purchased a new set do not know it includes a V-Chip. One-fifth, or 20%, know that they have a V-Chip, but have yet to use it. Among those surveyed that have a V-Chip and know it, 42% have used it. Of those who have used the V-Chip, 61% found it very useful (Parents, Media, & Public Policy, 2004). While the V-Chip has yet to reach nationwide notoriety, its presence is slowly becoming known among parents as well as the use of it as a means of restricting content for the sake of children.

Kunkel, Farinola, Farrar, Donnerstein, Biely and Zwarun (2002) pointed out that the extent to which the V-Chip can be a helpful and useful tool for parents depends largely upon the way in which programs are categorized by the industry. The fall 2004 Kaiser Family Foundation Survey revealed that many parents did not understand what the various ratings guidelines meant. Parents who did understand and used the ratings guidelines, 50% of those surveyed, found them somewhat useful. And, about half (52%) of all parents said that most television programs were rated accurately (Parents, Media, & Public Policy, 2004).

A few years after the passage of the Telecom Act, the FCC released a Notice of Inquiry (NOI) titled *In the Matter of Public Interest Obligations of TV Broadcast Licensees*. The NOI outlined the various public interest duties of television broadcasters. It addressed public interest programming and service obligations as well as other compliances dictated by statute, i.e. Children's Television Act of 1990 and the Telecommunications Act of 1996. The NOI also addressed the transition from analog to digital television (DTV) technology. Through the NOI, the Commission sought comment on how broadcasters can best serve the public interest during and after the transition to digital technology (In the Matter of Public Interest Obligations of TV Broadcast Licensees, 1999). In January 2001, the FCC issued a report outlining major principles on how broadcasters can fulfill their statutory duty to serve the public interest. The report drew on comments received in the FCC's pending 1999 NOI - *In the Matter of Public Interest Obligations of TV Broadcast Licensees*. The outlined principles aimed at analog television broadcasting are to also apply to those broadcasters transitioning to digital television. The eleven principles are: (1) local issue-oriented programming, (2) public

service announcements, (3) communications with communities, (4) enriching children, (5) protecting children, (6) enhancing democracy, (7) disaster and emergency information, (8) consumer privacy, (9) diversity, (10), disabilities access, and (11) technology and the public interest (In the Matter of Public Interest Obligations of TV Broadcast Licensees, 1999). The Commissioners agreed that FCC rules should be moving towards deregulation, not further burdening the emergence of developing media. These principles provide some insight into the direction the FCC plans on taking with new media.

The Judiciary, Indecent Speech, and the Public Interest

The absence of a narrow and specific definition of the "public interest" permits broad discretion to administrative agencies like the FCC. Sometimes, the courts themselves delve deeply into the administrative process. Ramberg (1986) noted that in *FCC v. WNCN Listeners Guild* (1981), the Supreme Court acknowledged its deference to the Commission on matters of public interest. In *FCC v. WNCN Listeners Guild* (1981), the Court said,

> Our opinions have repeatedly emphasized that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference…. The Commission's implementation of the public interest standard, when based on a rational weighing of competing policies, is not to be set aside…for the weighing of policies under the public interest standard is a task that Congress has delegated to the Commission in the first instance. (p. 535)

Ramberg (1986) wrote that much of the Supreme Court's definition of the public interest rests in its characterization of the FCC. The Commission oversees the public interest and is the definitive arbiter of the public interest; yet, it does not have free reign. For example, in regard to free speech, *Red Lion Broadcasting v. FCC* (1969) asserted that the FCC does not have "a free hand to vindicate its own idiosyncratic conception of the public interest requirements of free speech" (Red Lion Broadcasting v. FCC, p. 395).

Content-based restrictions on broadcast radio and television, such as indecency regulations, must satisfy strict scrutiny to be declared constitutional. Strict scrutiny requires that a statute serve a compelling interest, be narrowly tailored to achieve that interest, and be the least restrictive means of advancing that interest (Sable Communications of California, Inc. v. FCC, 1989). In *Ginsberg v. New York* (1968), the Supreme Court held that there is a compelling interest in protecting the physical and psychological well-being of minors.

The Supreme Court long recognized that each medium of expression presents special and unique First Amendment problems. For instance, in *FCC v. Pacifica* (1978), the Court noted the uniquely pervasive presence of broadcast radio and that it was part of the rationale for regulating content. The *Pacifica* case and its implications on broadcast regulation of indecent content are discussed later in this chapter. In *U. S. v. Playboy Entertainment Group, Inc.* (2000), the Supreme Court stuck down the adult cable channel-scrambling requirement. In *Denver Area Educational Telecommunications Consortium, Inc. v.* FCC (1996), the Court stuck down certain statutory indecency requirements for commercial-leased access and public access channels on cable television systems. In *Sable Communications of California, Inc. v. FCC* (1989), a ban on indecent

telephone messages was stuck down. The Supreme Court has also repeatedly struck down legislation regulating indecent content on the Internet [(Reno v. ACLU (1997), Ashcroft v. ACLU (2002), and Ashcroft v. ACLU (2004)]. Further discussion of proposed indecent regulation on the Internet is in the following chapter. In sum, the Supreme Court has noted that the FCC is allotted an amount of deference in its interpretation of "public interest."

Indecency Determinations and Enforcement

In 2001, the FCC adopted and released *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency.* The policy statement provides guidance to the broadcast industry concerning the Commission's case law interpretation of 18 U.S.C. § 1464 ("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") and their enforcement policies.

In determining whether a broadcast is indecent, the Commission looks at two fundamental requirements. First, the material alleged to be indecent must fall within the subject matter scope of the Commission's indecency definition - the material must describe or depict sexual or excretory organs or activities. Second, the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast media (Industry Guidance…, 2001). The FCC stated in reference to community standards for the broadcast media, "The determination as to whether certain programming is patently offensive 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 complainant" (Industry Guidance…, 2001, p. 4). In determining if material is patently offensive, the Commission considers the entire context in which the material appeared as critically important.

The FCC looks at three principle factors in determining whether material is indecent: (1) the explicitness or graphic nature of the depiction or description 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, and (3) whether the material appears to pander or is used to titillate, or whether it appears to have been broadcast for its shock value (p. 5).

The FCC does not independently screen broadcasts for indecent material. Complaints must first be submitted to the Commission before an investigation is launched or deemed necessary. For a complaint to be investigated, the Commission's practice is that the complaint must include (1) a full or partial tape or transcript or significant excerpts of the program; (2) the time and date of the broadcast; and (3) the call letters of the station involved. When a station does not submit a tape or transcript, the Commission can accept a description from an audience member and then take action. If an enforcement action is warranted, the Enforcement Bureau, along with other Commission offices, examines the material and decides upon an appropriate disposition, which may include (1) denial of the complaint by staff letter based on finding that the material is not patently offensive and therefore not indecent, (2) issuance of a Letter of Inquiry (LOI) to the licensee seeking more information concerning or an explanation of the circumstances surrounding the broadcast at issue, (3) issuance of a Notice of Apparent Liability (NAL) for monetary forfeiture, and/or (4) formal referral of the case to the full Commission for

consideration and action (p. 17). This dissertation focuses on indecency regulation, so this section provides some insight into the Commission's regulatory practices centering on indecent content. The following two sections examine the FCC and the courts' role in determining and enforcing indecent content.

Background of Obscenity and Indecency Regulation

Obscene speech is not protected by the First Amendment and cannot be broadcast at any time. For material to be deemed obscene, it must meet a three-prong test. The test is based on *Miller v. California* (1973), which is discussed below. Indecent speech, on the other hand, is protected by the First Amendment and can be broadcast, but only during times of the day when children are less likely to be in the audience. This practice is known as "channeling." Indecent material can be aired between the hours of 10 p.m. and 6 a.m. This time frame is called the "safe harbor" and it is discussed, along with "channeling" later in this section.

The Supreme Court first addressed the issue of obscene speech in 1957 in *Roth v. United States*. In *Roth*, the Court held that obscene speech is outside the protection of the First and Fourteenth Amendments. The Court also noted that the guaranties of freedom of expression in 10 of the 14 states that ratified the Constitution in 1792 gave no absolute protection for every utterance. Therefore, in light of history, the Court reasoned that the "unconditional phrasing of the First Amendment was not intended to protect every utterance" (*Roth v. United States*, 1957, p. 483). Currently, the Supreme Court defines obscenity by using the *Miller* test set forth 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, *Roth, supra*, at 489, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value (Miller v. California, 1973, p. 24).

Section 326 of The Communications Act of 1934 prohibits censorship and forbids the use of obscene or indecent speech in broadcasting: "Whoever utters obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both" (47 U.S.C. 326). Issues of indecent speech on broadcast radio and television were not problematic until the 1960s (Palmetto Broadcasting, 1962). In *Palmetto Broadcasting Co*., the FCC refused to renew the license of a station that broadcasted material that, while not obscene, was "offensive or patently vulgar" (Palmetto Broadcasting Co., 1962). The Commission's decision was reviewed by an appellate court, which affirmed the FCC's decision (Robinson v. FCC, 1964).

In 1964, the FCC considered renewal of the licenses for Pacifica Foundation stations based on complaints that were filed for five programs: two poets reading their own works, an author reading his novel, a recording of Edward Albee's "Zoo Story," and a program in which several homosexuals discussed their feelings and difficulties. All of these programs were broadcast late at night with the exception of one poetry reading. The FCC indicated that it was not worried about the individual programs but with whether the pattern of programming was inconsistent with the public interest. The

Commission gave unconditional full-term renewals to the stations that had carried the programs because nothing was found to bar renewal (Pacifica Foundation, 1964).

Another radio incident involved a taped interview with Grateful Dead singer Jerry Garcia on a noncommercial station, WUHY-FM. Garcia used expletives and patently offensive words as adjectives. A fine for indecency was imposed by the Commission. The station paid the $100 fine, and the case was resolved (WUHY-FM, 1970).

Later, charges of indecency were leveled at a "topless radio program" on WGLD-FM. Topless radio programs consisted of call-in shows where hosts discuss personal sexual topics with audience members, who were usually female. The FCC received many complaints and responded by ordering its staff to tape several of the programs and to present a tape of some of the most offensive comments and language. The language was found to run afoul of both indecency and obscenity standards. A $2,000 fine was paid by the station. Citizen groups appealed but lost (Illinois Citizens Committee for Broadcasting v. Federal Communications Commission, 1974).

In 1978, the Supreme Court issued the landmark decision concerning indecency and radio broadcasts – *Federal Communications Commission v. Pacifica Foundation* (438 U.S. 726). At issue was whether a 12-minute monologue titled "Filthy Words" aired at 2 o'clock in the afternoon was indecent within the meaning of 18 USCS § 1464 ("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"). The Commission identified several words that referred to excretory or sexual activities or organs and stated that the repetitive and deliberate use of such words in an afternoon broadcast when children are in the audience was patently offensive. In a 5 - 4 decision,

the Court ruled that the broadcast was indecent, just as the FCC determined. The Supreme Court also addressed the concept of channeling in *Pacifica*. The Court said, "The law generally speaks to channeling behavior more than actually prohibiting it" (FCC v. Pacifica, 1978, p. 731). So, channeling indecent content to times of the day when children are less likely to be in the audience is a less restrictive means of regulating indecent speech.

Immediately after the *Pacifica* decision, the FCC's enforcement of §1464 ("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") was basically nonexistent. Under FCC Commissioner Charles Ferris, a Carter administration appointee, rules for radio broadcasters that were deemed unnecessary were eliminated. The Commission was on the edge of sweeping deregulatory action. With the election of a new president came a new FCC Chair, Mark Fowler. He brought to the Commission a new deregulatory philosophy that dramatically affected children's media issues, particularly television issues, which were hot-button topics at the time. Fowler emphasized reliance on the marketplace rather than government regulation (Watkins, 1987). Fowler viewed broadcasters as marketplace participants rather than as community trustees, and Fowler thought that communications policy should be directed toward maximizing the services the public desires. In short, he thought that the public's interest should define the public interest (Fowler & Brenner, 1982). However, in the mid-1980s, citizens groups put pressure on the Commission to actively enforce § 1464 and reinstate other policies concerning children and television.

One of those citizens groups was Action for Children's Television (ACT). Besides better programming and fewer commercials during children's programs, ACT wanted quality media content for children with as little indecent speech as the Constitution allowed. ACT was opposed to censorship. They supported the freedom of speech rights guaranteed under the First Amendment (Clark, 2004). ACT was a key player in lobbying Congress and the FCC. ACT fought the deregulatory days of the 1980s. The hard work ACT put into lobbying the government for changes was swept away during the Fowler's term as chair of the FCC. During Fowler's reign, the Commission had taken a more expansive definition of indecency – it used the actual definition affirmed by the Supreme Court instead of limiting its enforcement efforts to the *Pacifica* "seven dirty words" (Wise, 1996).

ACT filed suit against the FCC. In *Action for Children's Television v. FCC* (1987), ACT did not see the "marketplace" logic applying to the child audience. The U.S. Court of Appeals agreed in a ruling that remanded the case back to the FCC. The Commission had failed to justify changing its policies regarding children's television. The court noted that for the past 15 years, the FCC had justified its policy regarding television for children on the assumption that the marketplace does not work when children are in the audience (Action for Children's Television v. FCC, 1987). In short, the FCC had attempted to reverse its stance entirely without any sort of justification.

ACT remained active in their pursuit of quality television for children. Once again, they took their concerns with the FCC to the courts in *Action for Children's Television v. FCC*, 1988 (*ACT I*). The case stemmed from a December 1987 FCC order that affirmed three April 1987 rulings [*Infinity Broadcasting Corp. of Pennsylvania* (1987), *Pacifica*

Foundation, Inc. (1987), & *Regents of the University of California* (1987)] and announced a new gauge for administering the restraint imposed by 18 U.S.C. § 1464 on the use of indecent language in radio communications. In the 1987 order, the FCC also cautioned broadcasters that "10:00 p.m. can no longer be considered the hour after which indecent programming may be aired," instead, midnight was the Commission's view on a reasonable delineation point (Action for Children's Television v. FCC, 1988, p. 1334).

Petitioners argued that the FCC's broadened indecency enforcement standard was facially invalid because it is unconstitutionally vague. They also argued that the FCC's action was arbitrary and capricious because the change in regulatory course was not accompanied by the requisite *reasoned analysis*. But the FCC held the view that broadcast material that is indecent but not obscene may be channeled to certain times of the day, so it indicated in the 1987 order that midnight to 6 a.m. would be safe harbor hours for such material. The Circuit Court held that the Commission adequately explained why it decided to change its enforcement standard. However, the court said that the FCC failed to provide evidence or cause sufficient to support the hours of restraint, so it vacated two of the FCC declaratory orders and remanded for reconsideration of the hours at which program containing indecent material may be broadcast (Action for Children's Television v. FCC, 1988, p. 1335). The Circuit Court gave the FCC instructions to reopen the time limitation or channeling parts of the rulings. The court instructed the Commission to consider the following: (1) the speech at issue has First Amendment protection and (2) the Commission's avowed objective is not to establish itself as censor but to assist parents in controlling the material young children will hear (p. 1340). Before the FCC could carry out the court's mandate in *ACT I*,

Congress intervened. Two months after the *ACT I* decision, the President signed into law a 1989 appropriations bill containing following rider: "By January 31, 1989, the Federal Communications Commission shall promulgate regulations in accordance with section 1464, title 18, United States Code, to enforce the provisions of such section on a 24-hour per day basis" (Congressional Ban on Indecent Speech, 1988).

The FCC unanimously adopted a report supporting a 24-hour-a-day ban on indecency for both radio and television and litigation soon followed - *Action for Children Television v. Federal Communications Commission (ACT II)* (1991). At issue in *ACT II* was whether the FCC's definition of indecency is unconstitutionally vague and overbroad and whether a total ban on broadcast indecency can withstand constitutional scrutiny (p. 1507). The Circuit Court noted that indecent material qualifies for First Amendment protection regardless of merit, but even such material with considerable social value may have a strong negative impact on children. The court rejected the overbreadth challenge (Action for Children Television v. Federal Communications Commission, 1991, p. 1508). It also noted the fact that their decision reaffirmed the need for safe harbor hours during which indecent material may be broadcast and canceled the FCC's attempt to ban such broadcasts altogether. Finally, the Circuit Court found the FCC's elimination of the post-10 p.m. safe harbor period failed to satisfy constitutional standards. The Court instructed the Commission to give broadcasters clear notice of reasonably determined times at which indecent material may safely be aired (p. 1509).

An appeal to *ACT II* was filed with the Supreme Court, but the high court denied certiorari. Shortly after, Congress intervened and passed the *Public Telecommunications Act of 1992 (PTA)*. Section 16(a) of the Act required the FCC to promulgate regulations

to prohibit the broadcasting of indecent programming between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before midnight and between 6 a.m. and midnight on any day for any radio or television broadcasting station (Pub. L. No. 102-356). Subsequently a Report and Order was released, which articulated the government's interest as:

(1) ensuring that parents have an opportunity to supervise their children's listening and viewing of over-the-air broadcasts,

(2) ensuring the well being of minors regardless of parental supervision, and

(3) protecting the right of all members of the public to be free of indecent material in the privacy of their homes (*1993 Order*, pp. 705-706).

In 1993, the FCC adopted these new regulations, and once again, they were challenged. In *Action for Children's Television v. FCC* (1993), petitioners sought a review of these regulations, charging primarily that they are unconstitutional because they are not narrowly tailored enough to meet First Amendment standards due to the exception made for public broadcast stations (Action for Children's Television v. FCC, 1993, p. 172). The Circuit Court held that the government did not tailor the midnight to 6 a.m. ban on constitutionally-protected speech narrowly so as to advance the interests asserted without unnecessary abridgment of First Amendment rights. Therefore, the court vacated the 1993 Order and held section of 16(a) of the *Public Telecommunications Act of 1992* unconstitutional (Action for Children's Television v. FCC, 1993, p. 183).

Though the Circuit Court ruled in favor of ACT and other petitioners, Section 16(a) of the PTA was still controversial. The Circuit Court ruled Section 16(a) was

unconstitutional, but the FCC continued its efforts to channel the airing of indecent broadcasts.

In *Action for Children's Television v. FCC*, (*ACT III*) (1995), at issue was the constitutionality of section 16(a) of the PTA, which sought to shield minors from indecent radio and television programs by restricting the hours within which they may be broadcast (Action for Children's Television v. FCC, 1995, p. 656). The Circuit Court found that the government has a compelling interest in protecting children under the age of 18 from exposure to indecent broadcasts. It also ruled that the Commission had demonstrated sufficiently compelling justification for protecting children 17 years and younger against indecency up to midnight (Action for Children's Television v. FCC, 1995, p. 664). The court found that the limited midnight-6 a.m. safe harbor for indecency did not infringe on the First Amendment rights of adults for it was narrowly tailored to serve the government's compelling interest in the well-being of children (Action for Children's Television v. FCC, 1995, p. 667). However, the Circuit Court felt that the fact that some stations' safe harbor period began at 10 p.m. and others at midnight was unconstitutional. The Court remanded the case back to the FCC with instructions to revise its regulations to allow the broadcasting of indecent material between the hours of 10 p.m. and 6 a.m. (Action for Children's Television v. FCC, 1995, p. 669).

Action for Children's Television v. FCC (*ACT IV*) (1995) focused on penalties. Section 503(a) of the Communications Act of 1934 empowers the Commission to impose forfeitures for the violation of an FCC order or regulation. The Commission may take one of two routes in imposing forfeitures: (1) It may proceed against a broadcaster under 47 U.S.C. §503(b)(3), which authorizes the FCC to determine the penalty after a hearing,

subject to review in the court of appeals; and (2) It may issue a "notice of apparent liability" to the broadcaster, setting forth the relevant facts and granting the potentially liable party "an opportunity to show, in writing…why no such forfeiture penalty should be imposed (Action for Children's Television v. FCC, 1995, p. 1253).

At issue in *ACT IV* were these provisions as they relate to forfeitures arising from the broadcast of allegedly indecent material. The petitioners claimed that by forcing compliance by broadcasters under the FCC's unreviewed determinations of indecency, the system operates as a system of informal censorship. The petitioners also argued that the Commission forces broadcasters to fulfill its standards by considering unpaid and unreviewed forfeiture orders in assessing subsequent forfeitures. The Circuit Court affirmed the judgment of the District Court and rejected a facial challenge to the FCC's procedures for imposing forfeitures for the broadcast of indecent material (Action for Children's Television v. FCC, 1995). In other words, the court concluded that the appellants did not present sufficient facts to show that the FCC applied the statutes in an unconstitutional manner; so, the Commission's scheme for imposing forfeitures for the broadcast material was found to be constitutionally acceptable.

The ACT cases spanned eight years. After eight years of litigation, a constitutionally-sound safe harbor time frame was established – 10 p. m. to 6 a. m. That safe harbor time is still in effect today. Broadcasters can air indecent content during the safe harbor time period without being penalized by the FCC. But, as the next section illustrates, a safe harbor does not prevent the airing of indecent material before 10 p. m. and after 6 a. m. Throughout the 1990s and 2000, the FCC found numerous radio broadcasts indecent. From 1987 through 2000, 23 radio broadcasts were found indecent. These stations paid

thousands of dollars in forfeitures (Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 2001).

Recent Issues/Problems

This section describes various instances and allegations of indecency outside the safe harbor hours of 10 p.m. and 6 a.m. against several radio and television stations. It sets up what has been happening on the airwaves and how those actions have affected FCC policy and proposed Congressional legislation. Moreover, these recent issues demonstrate that current FCC policies are not very effective.

In June 2001, the FCC released a Notice of Apparent Liability for Forfeiture (NAL) charging Citadel Broadcasting Company, licensee of Station KKMG-FM, Pueblo, Colorado, with violating 18 U.S.C. § 1464 by willfully broadcasting indecent language. The Commission received a complaint in July 2000, centering on repeated broadcasts of a song titled "The Real Slim Shady" on KKMG-FM. The complaint included lyrics that the complainant claimed were offensive. The FCC reviewed the lyrics, and a letter of inquiry was issued. Even though an edited version of the song aired, the original lyrics contained sexual references in conjunction with sexual expletives that appeared to be intended to pander and shock. The Commission also found the broadcast of the edited version was willful and repeated. A forfeiture of $7,000 was imposed on Citadel (In the Matter of Citadel Broadcasting Company, 2001). However, in 2002, the Commission, after reviewing Citadel's response to the $7,000 forfeiture and relevant case law, the Commission overturned their initial ruling, concluding that the licensee did not violate

the applicable statute or the Commission's indecency rule and that no sanction was warranted (In the Matter of Citadel Broadcasting Company, 2002).

In April 2001, the FCC released a NAL against Emmis Radio License Corporation station WKQX-FM in Chicago. The Commission received complaints in March 2000 and May 2000 concerning broadcasts that aired on WKQX. Each complaint argued that on the date of the letters the station had broadcast indecent material on "Mancow's Morning Madhouse" program. The March complaint alleged that the host aired a telephone conversation with an adult-film actress who described "fisting" in graphic detail. The May complaint charges that the station aired a pre-recorded Mancow segment called "Bitch Radio." The segment allegedly featured an interview with three women who discussed their sex lives, particularly oral sex. One of the questions allegedly asked and answered was quite graphic in nature pertaining to oral sex. The complaint also charged that, during this question and answer session, sounds of women moaning were played in the background. A forfeiture of $21,000 against Emmis was ordered (In the Matter of Emmis Radio License Corporation of Chicago, 2001). Emmis, in its response, stated that it could not verify the accuracy of the broadcast transcripts because WKQX-FM does not regularly archive tapes or transcripts of its programming. Emmis also argued that programming in question is not patently offensive as measured by contemporary community standards for the broadcast medium and thus not actionably indecent. The FCC disagreed, and the forfeiture amount was found to be an appropriate sanction for each of the occasions on which WKQX broadcast indecent material. Emmis paid the fine (In the Matter of Emmis Radio License Corporation, 2002).

Noncommercial stations found themselves in the midst of indecency battles as well. The Commission received complaints alleging that KBOO-FM broadcast indecent material in October 1999 between the hours of 7 p. m. and 9 p. m. during a program entitled "Soundbox." The complainant submitted a tape containing the questionable content. After the Enforcement Bureau reviewed the tape, it issued a letter of inquiry (LOI) to the KBOO Foundation. In May 2001, after reviewing the licensee's response to the LOI, the Bureau issued a NAL, which found that "Your Revolution," material broadcast during the October 1999 "Soundbox" program, violated the FCC's indecency rule. The Bureau proposed a monetary sanction of $7,000. After further investigation and examination of the licensee's response to the NAL, the Commission found that the KBOO Foundation demonstrated that the lyrics of "Your Revolution," measured by contemporary community standards, were not patently offensive and therefore not indecent. The NAL was rescinded (In the Matter of the KBOO Foundation, 2003).

Infinity Broadcasting Operations, Inc., licensee of WKRK-FM in Detroit, received a NAL based on its willful violation of statutory and regulatory provisions restricting the airing of indecent material during the hours of 6 a.m. to 10 p.m. The FCC proposed a fine of $27,500 based on material aired on WKRK-FM in January 2002 between 4:30 p.m. and 5:00 p.m. The complaint centered on material in which the station personnel invited audience members to call the station to discuss sexual practices and techniques. The Commission deemed the broadcast indecent because it included explicit and graphic sexual and excretory references during separate discussions with nine individuals. Also, the Commission found the material extremely lewd and vulgar, and it appeared to have been used to pander, titillate, and shock. Infinity was warned by the Commission that

additional serious violations may lead to a revocation proceeding (In the Matter of Infinity Broadcasting Operations, Inc., 2003a). Infinity filed a petition for reconsideration, but the Commission rejected it, and the station was ordered to pay a fine of $27,500 (In the Matter of Infinity Broadcasting Operations, Inc., March 5, 2004). Commissioner Michael Copps said the extreme nature of that particular broadcast was the worst the Commission has ever faced (In the Matter of Infinity Broadcasting Operations, Inc., April 3, 2003).

Six months later, the Commission issued a Notice of Apparent for Liability for Forfeiture against Infinity Broadcasting Operations, Inc., for willfully and repeatedly broadcasting indecent material during an afternoon show on the "Opie & Anthony Show" (WNEW-FM) in August 2002. The FCC proposed a fine of $357,000 – the highest amount allowed by the Communications Act. The proposed forfeiture was based on the egregious nature of the material, the involvement of numerous Infinity employees and managers in the planning the marketing affair, and Infinity's recent history of the airing of indecent broadcasts. The FCC received more than 500 complaints regarding the broadcast of "Sex for Sam," an Infinity-hosted contest. The promotion involved having participants having sex in risky locations throughout New York City, including a cathedral, a zoo, a toy store, and Rockefeller Center. The material, the FCC concluded, met the indecency definition, and specifically, the aired material included repeated, graphic and explicit sexual descriptions designed to shock, pander, and titillate listeners; so, the station was fined (In the Matter of Infinity Broadcasting Operations, Inc., 2003b).

Also, in October 2003, AMFM Radio Licenses, LLC, (WWDC-FM in Washington, D.C.) was issued a NAL for Forfeiture. The Commission based the issuance on the

broadcast of indecent material outside the safe harbor hours. The broadcasts aired on May 7 and May 8, 2002. The FCC based its action on complaints about material broadcast during the "Elliot in the Morning" show. On May 7, it was alleged that the station aired a station-sponsored promotion, to which two female high school students responded by calling the station. During the conversation with the program's hosts, the females were asked about their sexual activities at the school and made repeated and graphic references to oral sex. The following day, May 8, the station aired conversations between the females and the hosts and other callers, including students, which also centered on oral sex. Not only were there graphic and explicit references to the sexual practices of the school's students and administrators, but the manner in which the station presented the material appeared to demonstrate an intent by the station's licensee for both broadcasts to pander and shock listeners. The forfeiture was also due to the recent history of the airing of indecent broadcasts on stations controlled by Clear Channel Communications, Inc., the corporate parent of AMFM (In the Matter of AMFM Radio License, LLC, 2003).

The Commission issued another NAL for Forfeiture to Clear Channel Communications. On January 27, 2004, several subsidiaries of Clear Channel Communications received the NAL for airing indecent material over several broadcasts stations during several days. At issue was material aired in connection with the "Bubba the Love Sponge" program. The Commission recommended the statutory maximum forfeiture of $27,500 for each of the 26 apparent indecency violations – the highest ever proposed. The Commission found that the 26 broadcasts involved graphic and explicit sexual and/or excretory material and were designed to pander to, titillate, and shock

listeners. Also, the proposed fine included $40,000 for Clear Channel's failure to maintain certain required documents in the public inspection files of these stations (In the Matter of Clear Channel Broadcasting Licenses, 2004a).

Young Broadcasting of San Francisco was also issued a NAL for Forfeiture on January 27, 2004, for willfully airing indecent material during a "KRON 4 Morning News" program in October 2002 at 8:25 a.m. The action was based on a broadcast in which the program's hosts interviewed performers with the stage production of "Puppetry of the Penis," who appeared in capes but were naked under the capes. During the interview, one performer exposed himself on camera. Although the broadcast was fleeting in that it occurred for less than a second, the FCC concluded that it was graphic and explicit, and the manner in which the station presented it confirmed that it was intended to pander to, titillate, and shock viewers. The Commission also concluded that the airing of indecent material during the interview was clearly foreseeable. The forfeiture was set at $27,500 (In the Matter of Young Broadcasting of San Francisco, Inc., 2004).

Outrage hit many Americans and the Commission over the halftime show of the Super Bowl that aired on the broadcast television network CBS. The halftime performance included a musical performance that ended with Justin Timberlake pulling off part of Janet Jackson's clothing and exposing her breast. On February 2, 2004, the Commissioners released separate statements concerning the indecent material aired during the Super Bowl halftime show, which aired outside of the safe harbor hours. FCC Chair Michael Powell said:

> I am outraged at what I saw during the halftime show of the Super Bowl. Like millions of Americans, my family and I gathered around the television for a celebration. Instead, that celebration was tainted by a classless, crass, and deplorable stunt. Our nation's children, parents, and citizens deserve better. I have instructed the Commission to open an immediate investigation into last night's broadcast. Our investigation will be thorough and swift (Powell, 2004a).

FCC Commissioner Jonathan S. Aldelstein stated:

> I applaud the Chairman for launching an immediate investigation into last night's broadcast of the Super Bowl halftime show. The Super Bowl should be a time for families can spend together in their homes without the intrusion of tasteless and inappropriate behavior. I look forward to a swift resolution of the FCC's investigation (Adelstein, 2004a).

FCC Commissioner Kevin Martin added:

> I am dismayed and disappointed by the broadcast of the halftime show of the Super Bowl. The Super Bowl is a time when families gather around the television. Indeed, the broadcast of indecent programming is prohibited before 10:00 p. m. because children are likely to be in the audience. I agree with Chairman Powell that our nation's children, parents, and citizens deserve better.
>
> For over a year, I have been urging the broadcast and cable industries and the Commission to provide more tools for parents desiring to watch television together with their families. I have been calling on the Commission to more vigorously enforce our indecency laws. Congress prohibited the broadcast of obscene, indecent and profane material, and it charged the FCC with implementing this ban.

> The FCC, therefore, plays an important role in protecting Americans, particularly children, from indecent programming. I take this responsibility seriously. I am concerned that the Commission is not doing all it should in this area. We have been interpreting the statute too narrowly. We need to enforce our rules more stringently.
>
> If we were implementing our statutory mandate effectively, our rules would serve as a significant deterrent to broadcasters considering the airing of obscene, indecent, and profane material, and our fines would punish violators sternly. I am concerned that we are failing on both fronts. Indecency complaints used to number in the hundreds, we now receive them by the tens of thousands. Clearly, consumers are concerned. The FCC needs to respond.
>
> I support the Commission opening an investigation into this broadcast and am pleased that a majority of the Commission has recognized the importance of addressing the increase in the amount of coarse programming on television (Martin, 2004).

FCC Commissioner Michael J. Copps stated:

> Hundreds of Americans have already registered their displeasure at the incident on the Super Bowl halftime show. I'm not surprised. I'll bet there are millions like me who wonder why parents wanting to watch an all-American sports show with their children have to worry about what's coming on their screen next. I urge the Commission to address these complaints promptly. But one thing is clear – nothing this Commission has done so far has accomplished anything to slow down Big Media's race to the bottom (Copps, 2004a).

FCC Commissioner Kathleen Q. Abernathy added:

> I am shocked and dismayed about what occurred during the half-time show of the Super Bowl. Particularly during an event that families and children watch together, Americans should not have to tolerate such a gratuitous display of nudity. Broadcasters should have more respect for their viewers and exercise a greater degree of social responsibility than what was shown last night.
>
> I am pleased that this Commission is opening an immediate investigation into last night's broadcast. I hope that we can be responsive to the concerns raised by the American people by addressing this matter expeditiously (Abernathy, 2004a).

The Commissioners were obviously angered by the Super Bowl halftime performance and felt that an immediate investigation into the matter was necessary, for a lack of an investigation would generate public anger.

On February 10, 2004, Chairman Powell sent out letters to the broadcasting and cable industry regarding the airing of indecent material asking for the voluntary code to be reinstated (Powell, 2004b). All Commissioners were called to testify before Congress relating to the broadcast of indecent material. Chairman Powell told Congress that the Commission would continue to protect children and respond to the public's concerns. Powell outlined additional steps, besides a swift and thorough investigation, that the Commission would take:

> Recognizing that $27,500 fines constitute peanuts to multi-million dollar operations, we will actively seek ways to increase penalties against those who engage in lasting and repetitive indecent programming, including taking steps to impose statutory maximum for serious violations of the law (up from $7,000 fines of previous

> Commissions). We will treat multiple indecent utterances with a single program as constituting multiple indecency violations. We will begin license revocation proceedings for egregious and continuing disregard of decency laws. We will pursue indecent programming on television more aggressively - including our proposal to overturn the Enforcement Bureau's decision in the Golden Globes case - a decision by the Commission in that case is imminent. We will continue to work aggressively to answer complaints in a timely manner and bring more cases up to the full Commission for review. And, we will continue to vigorously monitor industry developments to see if they, indeed, meet the challenge of their responsibilities to protect our children (Powell, 2004b).

Commissioner Michael J. Copps, in his testimony, asked his fellow Commissioners to use the Commission's full authority to punish transgressors with license revocation, license non-renewal and higher fines. Also, he asked that the complaint process be reformed, graphic violence be tackled, the rights of local broadcasters to control their programming be affirmed, and an industry summit that includes cable and DBS be convened (Copps, 2004b).

Commissioner Abernathy expressed her concerns that broadcasters are not taking enough responsibility and stated that their help is needed if the Commission is to ultimately address consumer concerns (Abernathy, 2004b). Commissioner Adelstein called for Congress to increase fines for each separate incident and for broadcasters to take more responsibility (Adelstein, 2004b).

On September 22, 2004, the FCC issued a NAL for forfeiture of $550,000 against various subsidiaries of Viacom Inc. for willfully broadcasting indecent material during

the halftime show of Super Bow XXXVIII on February 1, 2004. The material at issue – a musical performance that ended with Justin Timberlake pulling off part of Janet Jackson's clothing, exposing her breast – was found to be in violation of the broadcast indecency standard because the Commission viewed the act as partial nudity. The Commission examined the act against three principle factors significant to the contextual analysis: (1) the explicitness or graphic nature of the description, (2) whether the material dwells on or repeats at length the descriptions of sexual or excretory organs or activities, and (3) whether the material appears to pander or is used to titillate or shock. The Commission found the Jackson/Timberlake segment was both explicit and graphic and designed to pander to, titillate, and shock the viewing audience (In the Matter of Complaints against Various Television Licensees Concerning their February 1, 2004, broadcast of the Super Bowl XXXVIII halftime show, 2004).

The FCC proposed the statutory maximum fine against each of the 20 Viacom-owned CBS licensees that aired the halftime show due to the involvement of Viacom/CBS in the planning and approval of the telecast and the history of indecency violations committed by Viacom's Infinity Broadcasting Corporation subsidiaries. Though other CBS affiliates not owned by Viacom aired the material, the Commission did not propose forfeitures against them because of the unexpected nature of the halftime program and the evident lack of involvement in the selection, planning, and approval of the telecast (In the Matter of Complaints against Various Television Licensees Concerning their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, 2004).

Four Commissioners released separate statements concerning the Commission's action toward the Super Bowl incident. They emphasized the numerous complaints the

Commission received after the broadcast – more than 540,000. Chairman Michael K. Powell noted the Constitution's generous protection of free expression but said that it is not "license to thrill." " 'Anything goes,' is not an acceptable mantra for those that elect to earn their profit using the public's airwaves" (In the Matter of Complaints against Various Television Licensees Concerning their February 1, 2004, broadcast of the Super Bowl XXXVIII Halftime Show, 2004, p. 29).

Commissioner Michael J. Copps agreed that the broadcast indeed violated the indecency statute and was pleased that the Commission took steps to address the incident, but he expressed his concern by the precedent the FCC established in not issuing a penalty against non-Viacom-owned affiliates that aired the program. He dismissed the huge fine as merely a representation of a few seconds of ad time for Viacom. Copps also expressed his displeasure over the fact that the Commission dismissed complaints received about other aspects of the halftime show and some of the advertisements: "The FCC relies on views and listeners to file complaints about indecent broadcasts and places a heavy burden on complaining citizens. The citizens that filed these complaints have a right to expect more of a Commission follow-through on their complaints" (In the Matter of Complaints against Various Television Licensees Concerning their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, 2004, p. 31).

Commissioner Kevin J. Martin, like Copps, was bothered that the FCC did not address complaints about other aspects of the show: "We have a duty to the public to fully analyze all of the complaints that we receive" (In the matter of complaints against various television licensees concerning their February 1, 2004, broadcast of the Super Bowl XXXVIII halftime show, 2004, p. 32). Commissioner Jonathan S. Adelstein was the only

dissenter. Like the other commissioners, Adelstein found the fine inadequate because it could be paid by Viacom with only a few seconds of ad time. Adelstein also disagreed with the FCC's decision not to hold all licensees responsible for the material broadcast on their stations. He said, "I fear today we're responding to a 'wardrobe malfunction' with a regulatory malfunction" (In the Matter of Complaints against Various Television Licensees Concerning their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, 2004, p. 33).

With the outrage over the Super Bowl incident, past live events came into question, such as the Golden Globe Awards in 2003. During the live broadcast, Bono, of the band U2, used the F-word. On March 18, 2004, the FCC issued a Memorandum Opinion and Order concluding that the airing of Bono's phrase, "F***ing brilliant," used in response to winning the award for "Best Original Song," violated the statutory prohibitions on indecency and profanity. The Commission received numerous complaints from individuals associated with the Parents Television Council (PTC) about the phrase. In November 2003, the PTC sought reversal of an October 2003 Memorandum Order and Opinion issued by the Chief of the Enforcement Bureau that denied complaints alleging various licensees violated restrictions regarding the broadcast of obscene and indecent material. In response to the Application for Review filed by the PTC, the FCC issued the March 2004 Memorandum. NBC, the network on which the broadcast aired, argued that the F-word was used as an intensifier. However, the Commission said that, given the core meaning of the word, any use of it in any context inherently has a sexual connotation and falls within the first prong of the indecency definition. The FCC also found that the use of the word was patently offensive. The Commission noted that technological

advances could have eliminated the airing of the phrase at issue. Finally, the Commission declined to impose a forfeiture because the order reverses FCC precedent regarding the broadcast of the F-word (In the Matter of Complaints against Various Broadcasting Licensees Regarding their Airing of the "Golden Globe Awards" Program, 2004).

Also, on March 18, 2004, the Commission released a Memorandum Opinion and Order affirming a $7,000 forfeiture penalty against Infinity Broadcasting Operations, Inc., for willfully broadcasting indecent material on WLLD-FM in Holmes Beach, Florida. At issue was the station's presentation of a live hip/hop concert, "The Last Damn Show," in September 1999. The concert included patently offensive references to oral sex and other objectionable material (In the Matter of Infinity Radio License, Inc., 2004).

The Commission issued two NALs for Forfeiture on March 18, 2004, to Infinity Broadcasting and Capstar TX Limited Partnership. At issue in the Infinity NAL was material aired during the "Howard Stern Show" on WKRK-FM in Detroit in July 2001. Infinity willfully aired material in which the show's cast discussed sexual practices and techniques. Specifically, the Commission found that the broadcast included explicit and graphic sexual and excretory references. Also, it found that this material was lewd and vulgar and that it appeared to have been used to pander to, titillate, and shock the audience. So, the FCC concluded that the material apparently met the indecency standard and warranted sanction. The Commission fined Infinity the statutory maximum, $27,500 (In the Matter of Infinity Broadcasting Operations, Inc., 2004b).

The FCC issued a NAL for Forfeiture against Capstar TX Limited Partnership for broadcast of indecent material over stations WAVW-FM in Stuart, Florida, and WCZR-FM in Vero Beach, Florida. The broadcasts included a dialogue between the hosts and a male and a female while they were engaging in actual or simulated sexual intercourse. The FCC proposed the maximum forfeiture permitted by law, $27,500, for two broadcasts for a total fine of $55,000 (In the Matter Capstar TX Limited Partnership, 2004).

The "Howard Stern Show" and Clear Channel Broadcasting Licenses, Inc., found themselves dealing with the FCC. Clear Channel Broadcasting Licenses, Inc., was found in violation of 18 U.S.C. § 1464 ("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"). The FCC issued a NAL for Forfeiture on April 8, 2004, for willfully and repeatedly broadcasting indecent material in connection with the "Howard Stern Show" over six Clear Channel stations. The material at issue aired between 7:25 a.m. and 7:45 a.m. The material included dialogue between cast members concerning the sexual practices of certain program cast members and a discussion with a guest regarding "sphincterine," a purported personal hygiene product designed for use prior to sexual activity. The FCC proposed a total of $495,000 in forfeitures against these stations, representing the maximum statutory amount of $27,500 for each of 18 total apparent indecency violations (In the Matter of Clear Channel Broadcasting Licenses, Inc., 2004b).

Also released on April 8, 2004, was a Memorandum Opinion and Order affirming a $14,000 forfeiture penalty against Emmis Radio License Corporation for willfully airing

indecent material. Again, the material at issue aired during a popular syndicated radio program "Mancow's Morning Madness." The material at issue was a pre-recorded segment of the show entitled "Bitch Radio." The segment, aired between 7:45 a.m. and 8 a.m., featured the show's female personality interviewing three women about their sex lives. Specifically, the women were asked about their oral sex practices. Emmis argued that the complaints did not include enough information to support indecency findings, but the Commission rejected those arguments (In the Matter of Emmis Radio License Corporation, 2004a).

Entercom was ordered to pay $12,000 for indecent material aired during the "Andy Savage Show." The complaint alleged that during the broadcasts, discussions concerning whether and how a penis could be used to lift or pull objects. The day following the broadcast, the show's host ran a contest during which an individual in the studio attempted to pull objects with his penis. Whoever agreed to appear in the studio to pull objects would win concert tickets. The Memorandum Opinion and Order was released on May 14, 2004 (In the Matter of Entercom Seattle License, LLC, 2004).

On June 9, 2004, the FCC and Clear Channel Communications, Inc. and its subsidiaries entered into a $1.75 million consent decree to resolve investigations into whether Clear Channel stations had violated indecency laws. As part of the agreement, Clear Channel admitted that some of the aired material was indecent. Clear Channel is also, as part of the consent decree, implementing a company-wide compliance plan in an effort to prevent the airing of indecent material, such as conducting training on obscenity and indecency for all on-air talent and employees who participate in programming decisions. Clear Channel will also fully participate with representatives of the broadcast,

cable, and satellite industries in any efforts that may materialize to develop a voluntary industry-wide response to indecency and violence. The company will also make a "voluntary contribution" to the U. S. Treasury in the amount of $1.75 million. This agreement meant that Clear Channel waived any and all rights it may have to seek administrative or judicial reconsideration, review, appeal, or stay, or to otherwise challenge or contest the validity of the Consent Decree and the Adopting Order (In the Matter of Clear Channel Communications, Inc., 2004c).

On August 12, 2004, the FCC entered into a $300,000 consent decree with Emmis Communications Corporation to resolve investigations into whether Emmis stations had broadcast indecent or profane material. Per the agreement, Emmis admitted that some of the material it broadcast was indecent and agreed to pay $300,000 to the U. S. Treasury. It has also agreed to implement a company-wide compliance plan aimed at preventing future violations (In the Matter of Emmis Communications Corporation, 2004b).

On October 12, 2004, the FCC issued a NAL for Forfeiture against Fox Network stations. The Commission found that licensees of 169 Fox Television Network stations apparently broadcast indecent material during an episode of the Fox program "Married by America." The material included parties featuring strippers and various sexual situations – whipped cream licked off strippers' bodies in a sexually suggestive manner and a male in his underwear being spanked by strippers. Though there was no nudity, the Commission concluded that the pixilation did little to obscure the fact that the strippers were topless and that sexual activity was being shown. The FCC received 159 complaints about the material. A proposed forfeiture of $7,000 against each Fox owned and operated station and Fox affiliate station was issued. The Commission noted that the

material at issue was a taped episode in a taped series, and the affiliates could have preempted it, as at least one affiliate did (In the Matter of Complaints against Various Licensees Regarding their Broadcast of the Fox Television Network Program "Married by America," 2004).

The FCC and Viacom entered a $3.5 million consent decree on November 23, 2004. Per the agreement, Viacom admitted that some of the aired material violated indecency laws. Viacom also agreed to pay $3.5 million to the U. S. Treasury. The company also committed to implementing a company-wide compliance plan aimed at deterring and preventing future violations. The decree resolves the pending NAL, Forfeiture Order, Enforcement Bureau investigations, and third-party complaints for possible violations of indecency laws. The only exception is the $550,000 NAL released on September 22, 2004, concerning the Super Bowl halftime show. Acceptance of the decree signified the waiver of rights for the Commission and Viacom to seek judicial review or otherwise contest of challenge the validity of the decree (In the Matter of Viacom, Inc., 2004).

Also released on November 23, 2004, was a NAL for Forfeiture against WQAM License Limited Partnership. At issue were complaints alleging that WQAM (AM) aired indecent material on the "Scott Ferrall Show" between 8 a.m. and 10 a.m. The material at issue contained graphic and explicit references to sexual activities, including discussions of rape and child molestation. The Commission concluded that WQAM is liable for a monetary forfeiture in the amount of $55,000 (In the Matter of WQAM License Limited Partnership, 2004).

The FCC issued its last NAL for Forfeiture of 2004 on December 22 against Entercom Kansas City License. Stations KQRC-FM and KFH-AM were accused of willfully and

repeatedly airing indecent material during multiple broadcasts of the "Dare and Murphy Show." The content at issue included a game of "naked twister" with local strippers and an interview with an adult film actor that dwelled on descriptions of sexual acts in an explicit and graphic manner. The FCC proposed a forfeiture totaling $220,000 (In the Matter of Entercom Kansas City License, 2004).

In February 2005, the U. S. House of Representatives passed a new act, *Broadcast Decency Enforcement Act of 2005*. The objective of the Enforcement Act is to "increase penalties for violations by television and radio broadcasters of the prohibitions against transmission of obscene, indecent, and profane material, and for other purposes" (Broadcast Decency Enforcement Act of 2005, 2005, p. 1). A similar bill was introduced in the House in January 2004, but nothing came to fruition due to lack of compromise between the House and Senate (House Approves Tougher Indecency Fines, 2005).

Two events earlier discussed - the 2003 Golden Globe Awards and the 2004 Super Bowl halftime show - have placed increased attention on the FCC and its broadcast indecency regulations. With numerous and increased allegations of indecency on radio, these two television events "put the icing on the cake." A survey of NALs and consent decrees revealed that most of the content that generated complaints stemmed from conversations among on-air hosts and conversations between on-air hosts and audience members. Most of the stations that were accused of indecency are in Top 50 markets.

Over the past three to four years, the Commission ordered nearly three million dollars in forfeitures and entered into three consent decrees worth more than five million dollars. Since the 2004 Super Bowl halftime performance, complaints skyrocketed, not only due

to that performance, but for other programs as well. The number of Notices of Apparent Liability (NAL) actually declined from 2002 to 2003 and rose sharply in 2004.

At first glance, based on a review of NALs and Forfeiture Orders, it does not appear that indecency regulation is effective. Radio personalities seemed to push the regulatory envelope. As previously noted in this section, while they did not use any of the "seven dirty words," radio personalities did discuss sexual activities that contained strong sexual innuendos that fell into the scope of the FCC's indecency definition. But after the FCC threatened to take a stronger stance, such as "per utterance" fines replacing a single fine based on multiple utterances, on indecent broadcasts and Congress proposed legislation to increase indecency fines, media corporations were willing to cooperate. Three major media groups – Infinity, Clear Channel, and Emmis - entered in to consent decrees with the FCC in 2004. Each group admitted to violating indecency policy and agreed to implement anti-indecency policies in an effort to prevent further violations. It will be a matter of time before the effectiveness of the consent decrees and the regulatory climate can be measured.

Other Relevant Supreme Court Case Law

The following two Supreme Court cases do not involve indecent speech over the broadcast airwaves or the Internet, but they do involve indecent speech on other electronic media – telephone and cable. The cases are frequently mentioned as precedent in the Internet cases and are often cited in the broadcast indecency cases, so they are worth discussion.

***Sable Communications of California, Inc. v. Federal Communications Commission* (1989)**

Sable centers on Section 223(b) of the Communications Act of 1934, which, as amended, bans indecent and obscene interstate commercial telephone messages, commonly known as dial-a-porn. The FCC promulgated regulations laying out means by which dial-a-porn sponsors could screen out minor callers. In 1983, Sable Communications of California began offering sexually-oriented prerecorded telephone messages through the Pacific Bell telephone company. In order to provide the messages, Sable arranged with Pacific Bell to use special telephone lines designed to handle large volumes of calls simultaneously. Those who called to hear the adult messages were charged a special fee. Pacific Bell collected the fee, and it was divided between the phone company and the message provider. Those outside the Los Angeles area had to place a long distance call in order to hear the adult messages (Sable Communications of Communications, Inc. v. FCC, 1989).

Sable brought suit in 1988 in District Court seeking declaratory and injunctive relief against enforcement of the recently amended § 223 (b). Sable argued the amendment was unconstitutional under the First and Fourteenth Amendments. The District Court denied Sable's request for a preliminary injunction against enforcement of the statute's ban on obscene telephone messages, discarding the argument that the statute was unconstitutional because it created a national standard of obscenity. On the other hand, the District Court struck down the indecent speech provision, holding that in this respect, the statute was overbroad and unconstitutional and that this outcome was consistent with *Pacifica* (Sable Communications of Communications, Inc. v. FCC, 1989, p. 119).

Congress made its first effort to address dial-a-porn when it added a subsection 223(b) to the 1934 Communications Act – predecessor to the amendment at issue in this case, related directly to sexually-oriented commercial telephone messages – and wanted to restrict the access by minors to dial-a-porn. The FCC first promulgated rules and regulations that "would have established a defense to message providers operating only between the hours of 9 p.m. and 8 a.m. Eastern time, and to providers requiring payment by credit card before transmission of the dial-a-porn message" (Sable Communications of Communications, Inc. v. FCC, 1989, p. 120). In *Carlin Communications, Inc*. v. *FCC*, (1984) *(Carlin I)*, the Court of Appeals for the Second Circuit set aside the time channeling regulations and remanded to the FCC the examination of other alternatives, concluding that the operating hours requirement was "both overinclusive and underinclusive" because it denied access to adults between certain hours, but not to children who can easily pick up a private or public telephone and call dial-a-porn during the remaining hours. The Court of Appeals did not address the constitutionality of the underlying legislation (Sable Communications of Communications, Inc. v. FCC, 1989).

In 1985, the FCC promulgated new regulations that continued to permit credit card payment as a defense to prosecution. However, instead of time restrictions, the Commission added a defense based on the use of access codes. So, it would be a defense to prosecution under § 223(b) if the defendant, before transmission of the message, restricted customer access by requiring either payment via credit card or authorization by access or identification. The regulations required each dial-a-porn vendor to develop an identification code database and implementation scheme. Callers would be required to provide an access number for identification (or a credit card) before receiving the

message (Sable Communications of Communications, Inc. v. FCC, 1989, p. 121). The access code would be received through the mail after the message provider reviewed the application and concluded through a written age ascertainment procedure that the applicant was at least 18 years of age. The Commission rejected a proposal for "exchange blocking," which would block or screen telephone numbers at the customer's premises or at the telephone company offices.

In *Carlin Communications, Inc*. v. *FCC*, *(Carlin II)*, the Court of Appeals set aside the new regulations because of the FCC's failure sufficiently to consider customer premises blocking. Again, the constitutionality of the fundamental legislation was not addressed (Sable Communications of Communications, Inc. v. FCC, 1989, p. 122).

Then, the FCC promulgated a third set of rules and regulations. Again, these new regulations rejected customer premises blocking but added to the prior defenses of credit card payment and access code use a third defense – message scrambling. Under the message scrambling system, message providers would scramble the message making it unintelligible without the use of a descrambler, which would only be sold to adults. In *Carlin Communications, Inc*. v. *FCC*, *(Carlin III)* (1988), the Court of Appeals for the Second Circuit held that the new regulations, which made access codes, along with credit card payments and scrambled messages, defenses to prosecution under § 223(b) for dial-a-porn providers, were supported by the evidence, had been properly arrived at, and were a "feasible and effective way to serve" the compelling state interest in protecting minors, but the Court directed the FCC to reopen proceedings if a less restrictive technology became available (Sable Communications of Communications, Inc. v. FCC, 1989, p. 122). So, in April, 1988, Congress amended § 223(b) of the 1934 act to prohibit indecent

as well as obscene interstate commercial telephone communications directed to any person regardless of age.

The Supreme Court, in a 6 – 3 decision, affirmed the decision of the U. S. District Court for the Central District of California. The majority found that § 223(b) was not a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages. Concurring, Justice Scalia wrote, "I note that while we hold the Constitution prevents Congress from banning indecent speech in this fashion, we do not hold that the Constitution requires public utilities to carry it" (Sable Communications of Communications, Inc. v. FCC, 1989, p. 133).

***U. S. v. Playboy Entertainment Group, Inc.* (2000)**

Playboy Entertainment Group owns and produces programs for adult television networks, including Playboy Television and Spice. Playboy transmits its programming to cable television operators, who retransmit the programming to their subscribers, either through monthly subscriptions to premium channels or on a "pay-per-view" basis. Cable operators transmit Playboy's signal, like other premium channel signals, in scrambled form. The subscribers are provided, by cable operators, with a converter or de-scrambler (U. S. v. Playboy Entertainment Group, Inc., 2000).

Section 505 of the Telecommunications Act of 1996 (Pub. L. 104-104) requires cable television operators who provide channels dedicated to sexually-oriented programming to either fully scramble or fully block those channels or to limit the transmission to hours when children are unlikely to be viewing – between the hours of 10 p.m. and 6 a.m. The purpose of § 505 was to shield children from hearing or seeing images resulting from

signal bleed. Section 505 is found in Title V of the Telecommunications Act of 1996, which is known as the Communications Decency Act of 1996 (CDA). Most cable operators, in an effort to comply with the statute, adopted the time channeling approach. Playboy Entertainment Group, Inc., challenged the statute as unnecessarily restrictive content-based legislation that violated the First Amendment. The District Court, in March 1998, held a full trial and found that § 505 violated the First Amendment. The Supreme Court affirmed (U. S. v. Playboy Entertainment Group, Inc., 2000).

Writing for the majority, which included Justices Kennedy, Stevens, Souter, Thomas, and Ginsburg, Justice Kennedy discussed two essential points concerning the speech at issue:

> First, we shall assume that many adults themselves would find the material highly offensive, and when we consider the further circumstance that the material comes unwanted into homes where children might see or hear it against parental wishes or consent, there are legitimate reasons for regulating it. Second, all parties bring the case to us on the premise that Playboy's programming has First Amendment protection (p. 811).

The speech at issue is defined by its content. Since the statute at issue is a content-based restriction, it can stand only if it survives strict scrutiny and is narrowly tailored to promote a compelling government interest. Justice Kennedy wrote, "As we consider a content-based regulation, the answer should be clear: The standard is strict scrutiny. This case involves speech alone, and even where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative" (p. 813). The Court used *Sable* as

an example, "In *Sable Communications*, for instance, the feasibility of a technological approach to controlling minors' access to 'dial-a-porn' messages required invalidation of a complete statutory ban on the medium" (p. 814). The Court also referred to the *Reno* case, "And, while mentioned only in passing, the mere possibility that user-based Internet screening software would 'soon be widely available' was relevant to our rejection of an overbroad restriction of indecent cyberspeech" (p. 814). Justice Kennedy pointed out that both *Sable* and *Reno* arose in different context and noted the affirmative steps necessary to acquire access to indecent material via the media at issue. It was also noted that under a voluntary blocking regime, even with adequate notice, some children would be exposed to signal bleed (p. 826).

Dissenting, Justices Scalia and Breyer, point out that § 505 was designed to reach the kind of speech Playboy promotes: "Playboy itself illustrates the type of business § 505 is designed to reach" (p. 833). Both Justices agree that Playboy was definitely marketing sex.

In a separate dissenting opinion, Chief Justice Rehnquist and Justices Breyer, O'Connor, and Scalia found the statute carefully tailored to respect viewer preference. The dissenters said that the statutory scheme reflects more than a Congressional effort to control incomplete scrambling. The scrambling was intended to prohibit nonsubscribers from viewing and hearing material on a subscription-only channel, and since signal bleeding would contradict the intent, Congress decided to act. The dissenters also found that the statute placed a burden on adult channel speech, not <u>all</u> speech, by requiring cable operators to either use better scrambling technology or to broadcast only between 10 p.m. and 6 a.m. The dissenters believed that this case concerned only the regulation of

commercial actors who broadcast nearly 100 percent sexually explicit material. The dissenters wrote, "The channels do not broadcast more than trivial amounts of more serious material such as birth control information, artistic images, or the visual equivalents of classical or serious literature. This case, therefore, does not present the kind of narrow tailoring concerns seen in other cases" (p. 839).

Summary

The chapter opened with a discussion of broadcast policy and various viewpoints on policy. Policy is complex and controversial, and its role is often disputed. Many argued that rationales for broadcast regulation, such as scarcity, are no longer justified; therefore, content regulations should be eliminated (Pool, 1983; Fowler & Brenner,1982; Samoriski, Huffman, & Trauth, 1997). Others, such as former FCC Chair Reed Hundt and special interest groups like ACT, believe in regulation and find it especially important in protecting children from harmful material on broadcast radio and television. Protecting children from harmful material is part of broadcasters' public interest responsibility.

This chapter presents a history of indecency regulation and relevant case law that shaped current policy – the *Pacifica* decision and the ACT cases. The Court's ruling in Pacifica established that indecent speech is a protected form of speech and can be channeled as a less restrictive means to censorship. The ACT cases established the current safe harbor rules, an example of channeling indecent speech to times of the day when children are less likely to be in the audience. The safe harbor time is currently 10

Table 1. Timeline of Indecency Regulation and Case Law

Statute/Case	Key Result
Radio Act of 1927	Created the FRC and established the PICON standard
Communications Act of 1934	Replaced the FRC with the FCC
FCC v. Pacifica Foundation (1978)	FCC has authority to regulate indecent material; introduced "channeling"
ACT v. FCC (1988) [ACT I]	Channeled indecent material between the hours of 12 a. m. and 6 a. m.
ACT v. FCC (1991) [ACT II]	Struck down 24-hour ban of indecent material
ACT v. FCC (1993)	Struck down 12 a. m. to 6 a. m. ban safe harbor
ACT v. FCC (1995) [ACT III]	Established current safe harbor – 10 p.m. to 6 a. m.
Telecommunications Act of 1996	Rewrite of the 1934 Act; mandated the use of V-Chip technology

p.m. to 6 a.m. Table 1 presents a timeline of indecency regulation and case law. It provides a visual summary of indecency regulation and case law.

Finally, recent issues of indecency on broadcast radio and television are discussed. These instances present the background on which proposed regulation is set. With many radio personalities and television performances under fire by the FCC for allegations of indecency outside the safe harbor hours, Congress has threatened to raise fines via new legislation.

Broadcasting is not the only media under Congress' watchful eye. Congress has also proposed statutes curbing indecent content on the Internet. The next chapter centers on the Internet, particularly proposed legislation and case law related to those statutes.

CHAPTER 4 - THE INTERNET

While the previous chapter focused on policy regarding indecent content on broadcast radio and television, this chapter centers on policy regarding indecent content on the Internet. The chapter opens with a history of the Internet. Issues of content regulation are also discussed. Though content regulation has been attempted, it has failed to pass constitutional court review. This chapter explores attempts at legislation along with the relevant case law. Proposed legislation includes the *Communication Decency Act of 1996* (CDA) and the *Child Online Protection Act* (COPA). These two statutes did not pass constitutional muster and were struck down by the Supreme Court. Legislation such as the *Children's Internet Protection Act* (CIPA) and the *Dot Kids Implementation and Efficiency Act of 2002* are also discussed. Case law related to this legislation – *Reno v. ACLU* (1997) [CDA], *ACLU v. Reno* (2000) [COPA], *Ashcroft v. ACLU* (2002) [COPA], *Ashcroft v. ACLU* (2004) [COPA], and *U. S. v. American Library Association* (2003) [CIPA] – is also explored and discussed. A deeper look into the Court's rationale and dissenting opinions will be included in the next chapter. These cases were chosen because they challenged the statutes on grounds of First Amendment violations. All statutes, except for *Dot Kids*, included in this chapter were challenged in the Supreme Court, but only one survived constitutional scrutiny.

History and Development

The first recorded description of social interactions through networking was a series of memos written by J. C. R. Licklider of MIT in 1962 discussing his concept of "Galactic

Network." Licklider saw a globally interconnected set of computers through which everyone could quickly and easily access data and programs from any site. Licklider was the first head of the computer research program at DARPA (Leiner, et al., 2004).

Computer communication networks, today, are based on a technology called *packet switching*. *Packet switching*, which arose from DARPA-sponsored research in the 1960s, is fundamentally different from the technology that was then employed by the telephone system ("circuit switching") or by the military messaging system ("message switching"). The first experiments were conducted around 1966. Shortly thereafter, similar work began at the National Physical Laboratory in the UK (Kennedy & Zallaps, 1999). In 1968, DARPA, headed by Licklider, developed a communication system based on a set of small, interconnected computers it called "Interface Message Processors" (IMPs). This system developed by DARPA was called the ARPANET. In September 1969, the first switch was installed at UCLA, and the first host computer was connected (Leiner, et al., 1997). By the end of 1969, three more IMPs or switches were in place at UC-Santa Barbara, the Stanford Research Institute at Stanford University, and the University of Utah. As the 1960s ended, this interconnection of computer processing and telecommunications facilities gave birth to the Internet (Oxman, 1999). The networking technology was further refined and developed in a cooperation of several research groups during the 1970s (Lundh, 2001). The ARPANET grew into the Internet based on the idea that there would be multiple independent networks. (Leiner, et al., 2004). In 1972, electronic mail was introduced. A member of the Bolt, Beranek and Newman (BBN) computer firm wrote the basic email message send-and-read software. The software was motivated by ARPANET developers' need for an easy and quick coordination

mechanism (Leiner, et al., 1997). This led to BBN's launching of Telenet, the first commercial packet net, in 1975.

Several research efforts headed by DARPA scientists Robert Kahn and Vincent Cerf developed Transmission Control Protocol/Internet Protocol (TCP/IP). TCP was to provide all the Internet's transport and forwarding services while IP would provide addressing and forwarding of individual packets. DARPA funded three efforts to implement TCP – at Stanford, BBN, and University College London. This was the beginning of long-term experimentation and development of Internet concepts. Widespread development of local-area networks (LANs), PCs, and workstations in the 1980s allowed the young Internet to grow (Leiner, et al., 2004). By 1985, the Internet was established as a technology supporting a broad community of researchers and developers. It was beginning to be used by other communities for daily computer communications (Leiner, et al., 1997). The Internet began to grow beyond its primary research roots to include a broad user community and increased commercial activity, and it continues to grow. As Internet technology evolves, new applications such as Internet telephone and Internet television will eventually become common services in many homes in America (Leiner, et al., 2004). It is not safe to assume that the Internet has finished growing and developing. Although a network in name and geography, the Internet is a creature of the computer, and it will continue to change and grow at the speed of the computer industry.

Regulatory History and the FCC

Beginning in the 1970s, telecommunications policy began to shift away from the established pattern of regulatory separation. Technological changes such as advances in computer, optical fibers, and wireless communications made competition in the telecommunications industry more efficient. Also, advocates of "deregulation" emerged in key governmental positions, enabling them to make policy changes (Zarkin, 2003).

By the mid-1960s, the computer and data processing industries challenged the established pattern of regulation separation. The technological integration of computers and telecommunications made it difficult to distinguish the two. A T & T (American Telephone and Telegraph Co.) was eager to expand into other technology-based areas, but a 1956 consent decree barred them from engaging in any business other than telephone service (Stone, 1989).

In 1966, the FCC began a formal inquiry [*First Computer Inquiry*] into the use of computer-based services lines. The Commission acknowledged the reality of powerful computers running communications networks and communications networks over which humans interacted with very powerful computers. The FCC saw computer services as a disruptive technology for they were substitute services for traditional communications. Computer services were also dependent upon the underlying communications network (Cannon, 2003). The Commission sought information on technological advances in the computer industry, asking commentators to discuss the innovation. The Commission also asked if the policies and objectives of the 1934 Communications Act would best be served by allowing computer services to develop in a free competitive market, rather than subjecting them to government regulation (In the Matter of Regulatory and Policy

Problems Presented by the Interdependence of Computer and Communication Services and Facilities, 1966). A final decision was issued in March 1971. In that decision, the FCC noted the significant effect the opening of the Computer Inquiry had on the development of competition and the reduction of prices in the common carrier marketplaces. The Commission also recognized that the inquiry was particularly important because the data processing industry was growing into an important force in the economy. Concerning potential regulation, the FCC concluded that the public interest would be not served by regulation of data processing services (First Computer Inquiry, 1971). The problems that the Commission faced and addressed then parallel issues of today, for the term "convergence" was used to describe the new hybrid service. The new service was referred to as a hybrid because computer processing was involved in both pure communications and data processing (Cannon, 2003).

During and after the *First Computer Inquiry*, the market changed: computers became smarter, the price of computer processing units (CPUs) dropped, and microcomputers made their debut. The FCC also took note of the introduction of packet-switched networks such as Telenet (Cannon, 2003). The Commission launched another computer inquiry, *Computer II*, in the 1970s which focused on the need to develop a feasible definition of regulated telecommunications services and unregulated data services. The Commission did not know how to classify different sets of computers. The Commission created categories of "basic" and "enhanced" services. "Basic service," which referred to common carriers such as telephone service, was defined by the FCC as common carrier of a pure "transmission capacity for the movement of information" (In the Matter of

Amendment of Section 64.702 of the Commission's Rules and Regulations, 1980, Computer II). The Commission defined "enhanced services" as

> "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information" (Computer II, 1980).

Voice messaging, protocol processing, alarm monitoring, electronic publishing and Internet access are present day examples of enhanced services (Oxman, 1999).

The next computer inquiry, *Computer III*, in 1985, focused on establishing a deregulatory means of ensuring that common carriers and non-common carriers alike would compete fairly in the market for data services. Under *Computer III*, the Commission determined that it could achieve the goals of preventing anti-competitive behavior without requiring the obligation of a separate subsidiary (Amendment Section 64.702 of the Commission's Rules and Regulations, 1986). Following the Bell system breakup in 1984, structural separation of enhanced service offerings was extended to the newly formed Regional Bell Operating Companies (Zarkin, 2003).

The Commission, via the *Computer Inquiries*, established categories for services and definitions of those services when the Telecommunications Act of 1996 introduced new terminology that did not include basic or enhanced services. The 1996 act used terms such as "telecommunications," "telecommunications service," and "information service." So, the Commission concluded that all enhanced services are information services, although not all information services are enhanced services. The explanation was rooted

in the physical network: enhanced services were not provisioned over common carries; information services were provisioned over telecommunications (Cannon, 2003). To adapt to the new conceptual framework, the FCC adopted a layered model of regulation. The layered model generally divides communications policy into four layers: physical network, logical network, applications and services, and content. The physical network layer refers to issues like common carrier regulation, spectrum policy, and cable franchises while the logical layer refers to issues such as open access peering. The content layer deals with such issues as intellectual property, gambling, taxation, and libel, just to name to a few (Werbach, 2000). The Commission saw the layered approach as a clear segregation between basic and enhanced services: basic is never enhanced and enhanced is never basic (Cannon, 2003). Also, with passage of the 1996 act, the Bell Operating Companies were allowed to furnish telemessaging, electronic publishing, and alarm monitoring services (Stone, 1989).

The Computer Inquiries created policy that promoted economic and technological expansion. The Commission resisted imposing traditional common carrier regulation on new services. Cannon (2003) and Pool (1990) said that there is a tendency of regulators to automatically impose legacy regulation on new services that seem similar to traditional services. So, where does this leave the Internet and its content? There is an ongoing debate about the role of government versus self-regulation in the Internet. Nachbar (2000) said that the government is a better sponsor for Internet content regulation than the private sector due to competition issues. Edick (1998) said that the government should regulate content on the Internet only to the extent that it is regulated in other media. Keiser (1998) wrote that the Internet needs to be regulated in an effort to protect children

from harmful material. Lemly (2000) found that self-regulation is a deceptive concept actually indicating a complete lack of regulation. Cody (1999) argued that the time has come for the government to leave citizens alone. Blumenfeld (1998) called for the industry to begin regulating itself before the government steps in. Epstein and Trancer (1997) found that because existing laws and lawmaking methods are inadequate, self-regulation is the best answer. Kappel (1999) wrote that Congress should not delegate regulatory power to any agency that will inhibit the expansion of the Internet as a forum for economic growth and development. Most of these arguments are against regulation of any kind on the Internet. Some feel that the Internet can regulate itself better than any legislative action and that the government should not have any power to regulate the Internet. The most logical approach would be a marketplace approach. The public should decide what they want from the Internet. A discussion of legislative action and judicial reaction to content regulation on the Internet is provided later in this chapter.

There are different views on whether to regulate or not to regulate, but most can agree that the Internet is a unique medium consisting of different communities of users, each holding different beliefs about what behavior and terminology is acceptable (Hersh, 2001). People interact with the Internet differently than other regulated media. On the Internet, a child must make a conscious effort to interact with someone, unlike radio or television, with which a child can flip a switch to be inundated with information. Unlike dial-a-porn telephone services, children are generally encouraged by schools and parents to interact with the Internet. This interaction would be difficult to regulate because it would be like trying to regulate whom children can speak with on the playground.

The uniqueness of the Internet presents new problems for existing obscenity and indecency laws. For instance, it is not clear how the First Amendment doctrines focusing on the characteristics of communications media will apply to the Internet, how the *Miller* test's "community standard" apply to a communication technology lacking geographical borders, and how to establish liability when anyone can create or alter an Internet image (Price, 1997).

Regulating Indecent Content on the Internet

The level of First Amendment protection given to speech typically depends on the nature of the speech involved. In the case of electronic media, the allowable extent of government regulation usually hinges on the medium of communication, as discussed in the previous chapter.

With the number of children using the Internet on the rise, concerns for their online safety continue to grow. This concern has primarily focused on issues of children's privacy, their access to indecent and obscene material, and their safety from predators (McAfee, 2003).

The subject of sex on the Internet and World Wide Web was discussed in the early 1990s. But after the *Georgetown Law Review* published an article on the subject in 1995, the discussions intensified (Rimm, 1995). The law review article was based on a Carnegie-Mellon study that concluded that the exchange of sexually related images was one of the largest recreational applications by Internet users. The Carnegie-Mellon 18-month study found more than 900,000 explicit photos, stories, and films on the Usenet.

The ease of access made parents and several legislators, mainly Senators James Exon and Slade Gordon, concerned enough to lobby for a "decency act" (Elmer-DeWitt, 1995).

Senator Exon began his crusade for a decency act by unveiling his infamous "blue book," which was a blue folder that contained a collection of pornography downloaded from the Internet. Exon left the folder on his Senate floor desk so that everyone could observe the "material" that was accessible to every youngster in America (Cannon, 1996). Senators Exon and Gordon introduced the Exon-Gordon bill, which resembled the indecency provisions adopted as part of the Communications Decency Act (CDA). The Exon-Gordon bill was accepted by the Senate and the indecency provisions of the Exon-Gordon bill were adopted as part of the CDA, which passed both houses of Congress on February 1, 1996 (Conference Report on S.652, Telecommunications Act of 1996, 1996).

The Communications Decency Act of 1996 (CDA)

In 1996, Congress passed the first major overhaul of federal communications legislation since 1934, The Telecommunications Act of 1996 (Telecom Act). Title V of the 1996 act was the Communications Decency Act (CDA), which arose from concern over children's access to obscene and indecent material via computer. Provisions 223(a) and 223(d) of the CDA criminally prohibit:

> (1) the knowing transmission, by means of a telecommunications device, of "obscene or indecent" communications to any recipient under 18 years of age (223(a)); and (2) the knowing use of an interactive computer service to send to a specific person or persons under 18 years of age, or to display in a manner available to a person under 18 years of age (223(d)), communications that, in context, depict or describe, in terms

"patently offensive" as measured by contemporary community standards, sexual or excretory activities or organs. Violators of the CDA face penalties including up to two years in prison for each violation. However, the CDA provides affirmative defenses, with respect to those who (1) take good faith, reasonable, effective, and appropriate actions to restrict access by minors to the prohibited communications; or (2) restrict such access by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number or code (The Telecom Act, 1996).

Shortly after the President signed the 1996 Telecom Act, two separate actions were filed in the United States District Court for the Eastern District of Pennsylvania. In each, multiple plaintiffs - including organizations and individuals who were involved with the computer or communications industries, the publication or posting of materials on the Internet, and citizen groups - challenged the constitutionality of the provisions 223(a) and 223(d). The two actions were consolidated, and a three-judge District Court convened, pursuant to an expedited review provision of the CDA. After an evidentiary hearing, the District Court, ruling that the provisions were unconstitutional, granted the plaintiffs' motions for preliminary injunction against enforcement of the provisions (Reno v. ACLU, 1997, p. 861).

***Reno v. American Civil Liberties Union* (1997)**

The CDA of 1996 (part of the Telecom Act of 1996) prohibited the transmission of indecent and patently offensive materials to minors over the Internet. Special interest groups and computer groups challenged the constitutionality of these provisions on First

Amendment grounds. These groups argued that the inability of Internet users and providers to verify the age of recipients effectively prevented them from engaging in indecent speech (protected by the First Amendment). At issue in this case was the constitutionality of two statutory provisions [223(a) and 223(d)] enacted to protect minors from "indecent" and "patently offensive" communications on the Internet (p. 849).

A special three-judge district court made extensive findings of fact that described the character and the dimensions of the Internet, the availability of sexually explicit material in that medium, and the problems confronting age verification for recipients of Internet communications. The lower court ruled that the CDA provisions violated the First Amendment and in a 7 – 2 vote, the Supreme Court upheld that decision (Reno v. ACLU, 1997).

Child Online Protection Act (COPA)

In response to the Court's decision concerning the CDA, Congress passed another general Internet content regulation law – the Child Online Protection Act (COPA). COPA was enacted into law on October 21, 1998. It was both narrower and broader than the CDA: COPA applied only to "commercial purposes" and targeted pornography on the World Wide Web by prohibiting material that is harmful to minors. The law says,

> whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material

> that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both. (Child Online Protection Act, 1998)

Drawing on the three-part test for obscenity set forth in *Miller v. California* (1973), the statute defines "material that is harmful to minors" as

> Any communication, picture, image, graphic image file, article, recording, writing, or other matter that is obscene or that (1) the average person, applying contemporary community standards would find, taking the material as a whole and with respect to minors, is designed to appeal or pander to the prurient interest; (2) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and (3) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors (Ashcroft v. ACLU, 2002, p. 570).

A month before COPA was scheduled to go into effect, a group of organizations filed suit against the United States Attorney General in the United States District Court for the Eastern District of Pennsylvania to challenge the statute's validity under the First Amendment. The organizations alleged a fear of prosecution under COPA on the ground that some sexually oriented material on the organizations' website, although valuable for adults, could be construed as "harmful to minors" in some communities (p. 571). For example, the material on OBGYN.net, a plaintiff in this suit, could easily be deemed harmful to minors in some communities though its material has true informational value (Rogers & Oder, 1998).

***American Civil Liberties Union v. Reno* (2000)**

At issue in *ACLU v. Reno* (2000) was COPA's constitutionality. COPA was designed to protect minors from harmful materials, as measured by contemporary community standards, being knowingly posted on the World Wide Web for commercial purposes. The appellate court said the appeal "presents a conflict between one of society's most cherished rights – freedom of expression – and one of the government's most profound obligations – the protection of minors" (p. 165).

The appellate court upheld the District Court's grant of a preliminary injunction due to the likelihood that the ACLU's attack on the Act's constitutionality would succeed on its merits. The court said that due to the peculiar, geography-free nature of cyberspace, COPA's community standards test would essentially require every web communication to abide by the most restrictive community's standards (ACLU v. Reno, 2000).

The appellate court was forced to acknowledge that, currently, "due to technological limitations, there may be no other means by which harmful material on the Web may be constitutionally restricted, although, in light of rapid developing technological advances, what may now be impossible to regulate constitutionally may, in the not-too-distant future, become feasible" (p. 166).

Ashcroft and American Civil Liberties Union

As noted earlier, COPA was Congress' attempt to rewrite the CDA. COPA did not appear to suffer from the same flaw (as does the CDA) because it applied to significantly less material than the CDA did and defined the *harmful to minors* material restricted by the statute in a manner parallel to the *Miller* definition of obscenity. The appellate court

upheld the lower court's decision to grant an injunction against the enforcement of COPA. The following two cases focus on the COPA statute and its battle with the Supreme Court.

Ashcroft v. American Civil Liberties Union (2002)

The District Court concluded that the organizations had established a likelihood of success on the merits and granted their motion for a preliminary injunction barring the Federal Government from enforcing COPA until the merits of the organizations' claims could be adjudicated (ACLU v. Reno, 1999). The United States Court of Appeals for the Third Circuit affirmed the District Court's decision, reasoning that COPA's use of "contemporary community standards" to identify material that was harmful to minors rendered COPA substantially overbroad (ACLU v. Reno, 2000). On appeal, a three-judge panel from the Third Circuit agreed that COPA violated the First Amendment but it did so on different grounds: the government cannot constitutionally apply "contemporary community standards" in cyberspace. The government appealed to the United States Supreme Court, which granted certiorari on May 21, 2001 (Ashcroft v. ACLU, 2002).

At issue in this case was whether the government's reliance on "contemporary community standards" to determine whether material on the World Wide Web is "harmful to minors" violates the First Amendment. In an 8 – 1 decision, the Court held that it did not. It was held that COPA's reliance on community standards to identify material that was harmful to minors did not, by itself, render COPA facially overbroad.

In May 2002, the Supreme Court remanded the *Ashcroft* case back to the Third Circuit Court of Appeals. And, again, the Circuit Court deemed COPA unconstitutional, holding

that COPA was substantially overbroad and not narrowly tailored to serve a compelling government interest. The Circuit Court concluded that COPA placed "significant burdens on Web publishers' communication of speech that is constitutionally protected as to adults… In so doing, COPA encroaches upon a significant amount of protected speech beyond that which the Government may target constitutionally in preventing children's exposure to material that is obscene for minors" (ACLU v. Ashcroft, 2003, p. 267). In October 2003, the Supreme Court agreed to revisit the COPA case.

Ashcroft v. American Civil Liberties Union (2004)

In *Ashcroft v. American Civil Liberties Union* (2004), at issue was whether the Third Circuit was correct to affirm a ruling by the District Court that enforcement of COPA should be prohibited because the statute likely violated the First Amendment (p. 2788). In a 5 - 4 decision, the Supreme Court held that the Third Circuit was correct to affirm the decision of the District Court to prohibit the enforcement of COPA because it violates the First Amendment. The District Court considered filtering and blocking software as a less restrictive alternative to COPA. The District Court's primary reason for granting the preliminary injunction was the proposal by the plaintiffs that filters are a less restrictive alternative to the statute, and the government had not shown it would disprove the plaintiffs' contention at trial. The Supreme Court found that the government had not shown that there are no "less restrictive alternatives" to COPA, and that there is a potential for extraordinary harm and a serious chill upon protected speech if the law goes into effect. Thus, they found that blocking and filtering software is a less restrictive means of curbing children's access to harmful material on the Internet.

Dissenting, Chief Justice Rehnquist and Justices Breyer, Scalia, and O'Connor said that COPA's definitions limit the material it regulates to material that is not protected by the First Amendment, namely obscene material. The dissenting justices mentioned that the only significant difference between COPA and the Miller definition of obscenity was addition of the words "with respect to minors." They said that the addition of those words to a definition that would otherwise cover only obscenity slightly expands the scope of COPA. In sum, the dissenters noted that COPA only imposes a modest extra burden on adult access to indecent material, perhaps imposing a similar burden on access to some protected borderline obscene material as well (Ashcroft v. ACLU, 2004).

Ashcroft (2004) was not the first time the Supreme Court addressed the filtering and blocking software issue. As will be mentioned later in the chapter, filtering and blocking software was at the heart of the Children's Internet Protection Act (CIPA) and *U. S. v. American Library Association* (2003), addressed only a year before the latest COPA decision.

Internet filtering and blocking software allows the Internet user to filter or block unwanted content they may encounter on the Internet. Though they are not 100% effective, if properly used, filters can function adequately. Greenfield, Rickwood, and Tran (2001) note three approaches to filtering content on the Internet: inclusion filtering, exclusion filtering, and content examination.

Inclusion filtering permits access only to a relatively small number of sites that are known to be "acceptable" and block access to the rest of the Internet. Greenfield, Rickwood, and Tran (2001) call inclusion filtering the "guilty until proven innocent" approach to Internet filtering. Inclusion filtering works on the premise of "white lists."

White lists are a list of sites that are put together after the Internet is searched. After an extensive search, lists are made of sites that meet a product vendor or someone's criteria of acceptability. Access to any other Internet content is blocked. This type of filtering can be 100% effective. One drawback of inclusion filtering is the very size of the Internet – too much content could be blocked by default. One publicly available inclusion list is *Yahooligans* [www.yahooligans.com]. *Yahooligans* contains 3,000 web addresses, which represents a very small part of the entire World Wide Web.

While inclusion filtering relies on white lists, exclusion filtering is based on "black lists" or "blocking lists." Blocking lists are comprised of known objectionable sites and is a more commonly used form of filtering. Greenfield, Rickwood, and Tran (2001) call exclusion filtering the "innocent until proven guilty" approach. It allows access to the entire Internet. However, one drawback is that exclusion filtering can include unacceptable content if those sites and content have yet to be classified by the product vendor. Also, vendors cannot guarantee that their users will not come across unacceptable or undesirable content.

Finally, Greenfield, Rickwood, and Tran (2001) describe content examination or content filtering as an approach that allows access to the entire Internet. Yet, content must be examined before getting to the user. Common forms of content filtering include key word filtering, phrase filtering, profile filtering, and image analysis filtering. Content that fails to meet acceptability tests will be blocked. Though content filtering is appealing because it classifies incoming content as it arrives, it does face one problem – accurately determining whether content should be allowed through is a difficult computing task.

Children's Internet Protection Act (CIPA)

The Children's Internet Protection Act [CIPA] (2000) was enacted by Congress to address concerns about access to the Internet and other information in schools and libraries. CIPA required schools to adopt a policy to monitor online activities of minors. Also, it required schools and libraries to adopt policies addressing: (1) access by minors to inappropriate matter; (2) the safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications; (3) unauthorized access; (4) unauthorized disclosure, use, and dissemination of personal information regarding minors; and (5) restricting minors' access to material harmful to them. CIPA did not require the tracking of Internet use by adults or minors. Finally, under CIPA, schools and libraries would not receive the discounts offered by the "E-Rate" program (telephone discounts that make Internet access more affordable to schools and libraries) unless they certify that they have certain Internet safety measures in place. These measures include a way to block or filter pictures that are obscene and contain child pornography (Children's Internet Protection Act of 2000).

But, on May 31, 2002, the CIPA was ruled unconstitutional in a unanimous vote by a federal court in Philadelphia. The three-judge panel held that the statute is unconstitutional because the mandated use of blocking or filtering technology on all computers will result in blocked access to substantial amounts of constitutionally-protected speech. The American Library Association, the ACLU, and other organizations that had concerns about the broader issues of censorship and the freedom to access information applauded the Court's ruling. As a means to protect children, the Court held that less restrictive means do exist. The Court found that public libraries can – and many

do – use the following less restrictive alternatives: filters offered as a choice for parents to use for their own children at the public library, education and Internet training courses, enforcement of Internet use policies, and placement of terminals, use of privacy screens or utilization of recessed monitors (*U. S. v. American Library Association*, 2003).

An appeal was filed (*U. S. v. American Library Association*) and the U. S. Supreme Court announced on November 12, 2002, that it would decide if public libraries can be forced to install software blocking sexually explicit websites (Batchelor, 2002).

***U. S. v. American Library Association* (2003)**

In June 2003, the Court upheld CIPA in a 6 – 3 decision, deciding not only was it constitutional for public libraries to install filtering software, but if libraries did not comply, they would lose funding. In an opinion written by Chief Justice Rehnquist, the Court held that (1) Internet access in public libraries was neither a traditional nor a designated public forum; (2) forum analysis and precise judicial scrutiny were incompatible with public libraries' expansive discretion to consider content in making collection decisions; (3) any concerns over filtering software's alleged tendency to erroneously "overblock" access to constitutionally-protected speech were dispelled by the ease with which library patrons could disable the filtering software; (4) Congress could reasonably impose limitations on its Internet assistance program because public libraries normally excluded pornographic material from their collections; (5) filters did not violate the First Amendment rights of library patrons and (6) CIPA was a suitable exercise of Congress' spending power and did not impose an unconstitutional condition on public

libraries that received federal assistance for Internet access (U.S. v. American Library Association, 2003).

Justices Stevens, Souter, and Ginsburg dissented. They thought that CIPA operated as a blunt nationwide restraint on adult access to a massive amount of valuable information that individual librarians cannot possibly review. Justices Souter and Ginsburg viewed CIPA as an unconstitutional condition on the government's subsidies to local libraries for providing access to the Internet. The justices also found CIPA's blocking rule invalid in the exercise of Congressional spending power, as the act mandated action by recipient libraries that would have violated the First Amendment's guarantee of free speech if the libraries had taken that action entirely on their own (U.S. v. American Library Association, 2003).

Dot Kids Implementation and Efficiency Act of 2002

In yet another effort to keep children safe online, Congress crafted the *Dot Kids Implementation and Efficiency Act of 2002.* This bill establishes a children's section of the Internet, similar to a children's section of the library, where children will be safe from pornography, pedophiles, and violence. The act calls for a new, second-level Internet domain within the United States country code domain. It defines "minors" as children under 13 and "suitable to minors" as material that is "not psychologically or intellectually inappropriate for minors and serves (i) the educational, information, intellectual, or cognitive needs of minors; or (ii) the social, emotional or entertainment needs of minors" (McAfee, 2003, p. 213). The Dot Kids Act entrusts the administration of the *kids.us* domain to the registry selected by the National Telecommunications and Information

Administration (NTIA) to operate and maintain the U. S. country code. The Department of Commerce awarded a contract for the management of the U. S. country code to NeuStar, Inc. (McAfee, 2003).

NeuStar, as required under the Dot Kids Act, published specific guidelines for content and for the anticipated structure and design for *kids.us*. The guidelines for the new domain outline five existing standards that will be applied to *kids.us*: (1) compliance with existing laws, regulations, relevant voluntary standards; (2) indecency standards for the airwaves; (3) the Children's Television Act of 1990 educational broadcasting requirements; (4) a privacy standard in compliance with COPPA[3]; and (5) compliance with the advertising standards set by the Children's Advertising Unit (McAfee, 2003, p. 215). The Dot Kids Act was signed into law by President Bush on December 4, 2002.

Summary

Controlling indecent speech on the Internet has been on Congress' agenda for nearly a decade, since the Telecom Act of 1996. It has been battled out in the Supreme Court since 1997 – a long eight-year battle. The Supreme Court struck down the first proposed statute, the CDA, and blocked enforcement of the second proposed statute, COPA. And with the Court remanding the COPA issue via the 2004 *Ashcroft* case back to the lower court, the issue has yet to be resolved. CIPA was Congress' third attempt to regulate access to indecent speech online and the only statute to pass constitutional review. *Dot Kids* (*kids.us*) was signed into law nearly three years ago, and it has not been challenged

[3] Children's Online Privacy Protection Act (COPPA) was designed to protect the privacy of children who use the Internet. COPPA also required web sites to collect a credit card number or other proof of age before allowing Internet users to view material deemed "harmful to minors."

in court, perhaps because it does not restrict or censor speech but channels some to a different area of the Internet. Table 2 on the following page presents a timeline of indecency regulation and case law. It provides a visual summary of indecency regulation and related case law.

At the heart of these statutes is the government's compelling interest in protecting children from harmful material on the Internet. The Supreme Court agrees that Congress should protect children from such content on the Internet but that protection should fall within the scope of the First Amendment. In other words, the statutes need to be carefully written and very precise so they do not fall prey to vagueness or overbreadth arguments. However, content regulation on the Internet is hardly realistic. There are no physical, geographic boundaries in cyberspace. Imposing a national community standard could hinder the rights of adults. If the Supreme Court has to adhere to the most conservative communities, then those standards would be determined by the lowest common denominator – a frightening thought for many First Amendment theorists.

Table 2. Timeline of Indecency Regulation on the Internet

Statute/Case	Key Result
Telecommunications Act of 1996	Established the CDA
Communications Decency Act (CDA)	Prohibited transmission of obscene or indecent communications to minors
Reno v. ACLU (1997)	Supreme Court found the CDA unconstitutional and struck it down
Child Online Protection Act (COPA)	Applied only to "commercial purposes" and targeted pornography
ACLU v. Reno (2000)	Appellate court granted an injunction against enforcement of COPA
Ashcroft v. ACLU (2002)	Supreme Court struck down COPA and remanded the case
Dot Kids Implementation and Efficiency Act of 2002	Established a children's sections of the Internet: *kids.us*
Children's Internet Protection Act (CIPA)	Required schools and public libraries to install filters to protect children from harmful material online
U. S. v. American Library Association (2003)	Supreme Court upheld CIPA
Ashcroft v. ACLU (2004)	Supreme Court again struck down COPA and remanded the case

CHAPTER 5 – RESULTS & ANALYSIS

This chapter presents the findings of the research and an analysis of the results. To recap, the research questions focus on (1) the government's public interest arguments that contribute to indecency regulation on broadcast radio and television and the Internet; (2) arguments that have been used successfully or accepted by the courts; (3) approaches that have been consistently used or applied; (4) equally applicable arguments to broadcast and the Internet; and (5) the direction broadcast and Internet policy should take with developing technology.

RQ 1: How do the federal government's public interest arguments contribute to indecency regulation on broadcast radio and television and the Internet?

By law, broadcasters' use of public airwaves must serve the public. Congress charged the FCC with the responsibility of implementing and enforcing the public interest requirement of the Communications Act of 1934. Broadcasters are to serve the public interest by providing local issue-oriented programming and public service announcements, enhancing democracy, promoting diversity, protecting consumer privacy, and enriching and protecting children. One way the federal government has tried to protect children is by implementing laws, rules, and regulations on broadcast content in an effort to protect children from indecent content on the airwaves.

In *FCC* v. *Pacifica* (1978), the Supreme Court upheld an FCC ruling that a broadcast containing several words that referred to excretory or sexual activities or organs and repetitive and deliberate use of those words during an afternoon broadcast when children

are in the audience was patently offensive and therefore indecent but not obscene. The FCC found power to regulate indecent broadcasts in two statutes: 18 USCS § 1464, which states: "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," and 47 U.S.C. §303, which requires the Commission to encourage the larger and more effective use of radio in the public interest. The Commission argued that it relied on its power to regulate in the public interest under 47 U.S.C. 303 and that it intended to clarify the standards which would be utilized to consider the number of growing complaints about indecent content on the airwaves. *Pacifica's* "Seven Dirty Words" effectively became the FCC's yardstick for indecency, and broadcasts after 10 p. m. were considered inactionable. A discussion of why the Court accepted the FCC's public interest argument is provided in the next section.

After *Pacifica,* rules for radio broadcasters that were deemed unnecessary were eliminated. The FCC, under the leadership of Mark Fowler, emphasized reliance on the marketplace rather than government regulation (Watkins, 1987). The FCC reinterpreted the public interest standard under the marketplace approach, where regulation is seen as necessary only when the marketplace evidently fails to protect the public interest In short, Fowler thought that the public's interest should define the public interest (Fowler & Brenner, 1982). In terms of indecency regulation on the airwaves, the FCC used the actual definition affirmed by the Supreme Court instead of limiting its enforcement efforts to the *Pacifica* "seven dirty words" (Wise, 1996). The new marketplace approach to content regulation of broadcast was challenged in the court system.

Action for Children's Television challenged several FCC rules in the D.C. Circuit Court of Appeals which aided in shaping indecency policy. After *Pacifica*, the FCC formally adopted a policy that prohibited the airing of indecent material before 10 p. m.

The time period from 10 p.m. to 6 a. m. was considered a safe harbor for broadcast indecency and was a means of channeling indecent content to the times of day when children are less likely to be in the audience. The government argued that a channeling rule would promote the government's interest in promoting parental supervision of children's listening and viewing habits without excessively intruding upon the licensee's range of discretion or the fare available for mature viewers and listeners and even children whose parents do not want them sheltered from indecent speech. But when the safe harbor was then changed to midnight in an effort to further limit indecent speech on the airwaves, the change was found to be unconstitutional by the D. C. Circuit Court (ACT v. FCC, 1988). Though the government, and later the courts, found the concept of channeling in the public interest, it was difficult to find a concrete time frame or safe harbor period on which on the parties – the FCC, ACT, and the courts – could agree.

Congress later mandated that the Commission adopt a total ban on indecent speech on the airwaves. The government asserted that a total ban on indecent speech was the only way to support the government's compelling interest in protecting children from broadcast indecency. The D. C. Circuit Court rejected Congress' public interest argument and the 24-hour ban was found to be unconstitutional because it was not narrowly tailored to serve the government's compelling interest in protecting children from indecent material (ACT v. FCC, 1991). So, Congress then ordered the FCC to institute a safe harbor policy from 10 p. m. to 6 a. m. for public broadcasting stations that go off the

air at or before midnight and a midnight to 6 a. m. policy for all radio and television stations. The government's interest in aiding parents supervise their children has been recognized as sufficiently important to justify restrictions on First Amendment activities (ACT v. FCC, 1993). The Circuit Court in *ACT v. FCC* (1993), vacated the order since it was not narrowly tailored to serve the compelling interest. But the government did not give up its efforts to channel indecent speech as means of protecting children from broadcast indecency. On June 30, 1995, the D. C. Circuit Court found the midnight portion of the policy unconstitutional and directed the Commission to revise the safe harbor from 10 p. m. to 6 a. m. because the court wanted the government to implement a uniform standard, not two different standards for commercial and non-commercial stations. The FCC could constitutionally extend the ban on indecent speech until midnight if the ban was applicable to all broadcasts. Finally, a constitutionally acceptable safe harbor time was in place.

In 2004, a performance during the half-time program of the Super Bowl sparked a record number of complaints as well as proposed legislation. The FCC found that the performance, which was outside the safe harbor, was indecent. Both houses of Congress have gotten involved with proposed legislation aiming at the pocketbooks of media corporations in an effort to curb indecent content on the airwaves outside the safe harbor time. The House introduced *The Broadcast Decency Enforcement Act of 2005*, which would increase penalties for indecency violations by broadcasters. The government seems to believe that the only way they can get broadcasters to clean up their airwaves is through their wallet. FCC Commissioner Copps has repeatedly stated that fines that amount to the "cost of doing business" are ineffective, and higher fines are needed to

clean up the airwaves. Such high fines could lead to a chilling effect. Stations would be scared to air valuable content for adults for fear of high fines. The government serves the public interest by protecting children and by protecting the First Amendment rights of adults. With indecency regulation, the government must balance the interests of the First Amendment with the need to protect children.

The government has a compelling interest in protecting children from harmful material on both the airwaves and the Internet. Broadcasters are to protect children as part of their public interest obligations. The Internet does not have a government mandated public interest requirement as broadcasters do, but Congress does work to serve the public and the public's interests. So by attempting to regulate indecent content on the Internet in effort to protect children, Congress feels as though they are serving the public.

Congress has repeatedly tried to regulate indecent content on the Internet for nearly a decade and the courts have repeatedly struck down most of those statutes as First Amendment violations. The government's first attempt at regulating indecent content in an effort to protect children from harmful material on the Internet and World Wide Web was in 1996 with the Communications Decency Act (CDA). Two provisions of the CDA were struck down in *Reno v. ACLU* (1997) in a 7 – 2 decision. In short, the Supreme Court found the government's arguments to be overbroad. The government's arguments were logical but the implementation of the CDA put too much speech at risk of being restricted and First Amendment rights of adults would be hindered. The Court admitted to repeated recognition of the government's interest in protecting children from harmful material. The Court said, "Regardless of the strength of the government's interest in

protecting children, the level of discourse reaching a mailbox cannot be limited to that which would be suitable for a sandbox" (Reno v. ACLU, 1997, p. 875).

In response to the Court's decision in *Reno*, Congress enacted the Child Online Protection Act (COPA). COPA attempted to target pornography on the World Wide Web by prohibiting material that is *harmful to minors*. The government's definition of *harmful to minors* was problematic because valuable and educational material that contained some sexually-oriented material would be prohibited. COPA differed from the CDA in three ways. First, COPA applied only to material on the World Wide Web while the CDA included all communications over the Internet as a whole, including, for example, e-mail messages. Second, COPA covered only communications made for "commercial purposes." And third, while the CDA prohibited indecent and patently offensive communications, COPA restricted only the narrower category of "material that is harmful to minors." After the CDA, Congress did try to tailor COPA according to the Supreme Court's decision in *Reno,* but implementing the statute would not serve the public interest because COPA still intruded upon too much protected speech. Like the CDA, COPA was struck down by the Supreme Court in *Ashcroft v. ACLU* (2002). COPA was found unconstitutional in an 8 – 1 decision and the Supreme Court remanded the case to the Third Circuit Court of Appeals, and once again COPA was found unconstitutional.

The Supreme Court agreed to hear the case again during its 2003-2004 term. The Third Circuit went beyond its original community standards examination, holding that COPA was substantially overbroad and not narrowly tailored to serve a compelling government interest. At issue in *Ashcroft v. ACLU* (2004) was whether the Third Circuit was correct to affirm a ruling by the District Court that enforcement of COPA should be

prohibited because the statute violates the First Amendment. In a 5 - 4 decision, the Supreme Court held that the Third Circuit was correct to affirm the decision of the District Court to prohibit the enforcement of COPA because it violates the First Amendment (p. 9). The Supreme Court valued the Internet as a forum for the public to exchange ideas openly and freely. Content regulation such as indecency restrictions on the Internet would not be in the public interest, as it would infringe on the First Amendment rights of adults. The government must find a balance between the rights of adults and the protection of children.

The only government attempt at regulating indecent content on the Internet to survive constitutional scrutiny was the Children's Internet Protection Act (CIPA). Congress enacted CIPA to address concerns about access in schools and libraries to the Internet and other information. The government argued that when libraries block pornographic material from their computers, they are only declining to put on computer screens the same content they have traditionally excluded from their shelves. CIPA was not a ban on speech. Arguing on the government's behalf in *U. S. v. American Library Association* (2003), Solicitor General Theodore Olsen said that libraries were simply exercising their discretion as to the content they will contain. The government said that most libraries exclude pornographic material from their bookshelves because they find it inappropriate to include. CIPA extends this ban to its computer terminals, but patrons can have librarians dismantle the filters. As mentioned earlier, the government serves the public interest by protecting children and by protecting the First Amendment rights of adults and it must balance the interests of the First Amendment with the need to protect children. CIPA is a good example of this kind of balance. First, CIPA protects children from

indecent material on the Internet in libraries by mandating filters on library computers. Second, CIPA does not overblock adult access to speech because adults can have librarians dismantle the filters. The First Amendment rights of adults are not violated. Adults are not confined to material that is only suitable for children. CIPA was challenged and upheld by a 6 – 3 decision in *U. S. v. American Library Association* (2003).

In 2002, Congress enacted the *Dot Kids Implementation and Efficiency Act of 2002*, which establishes a children's section of the Internet, similar to a children's section of the library, where children will be safe from pornography, pedophiles, and violence. It calls a new second-level Internet domain – *kids.us*. It is similar to the channeling approach used by broadcasters in that it "channels" decent content suitable for children to the new Internet domain. The statute provides a new Internet domain but it does not mandate that publishers to use it, though it encourages it.

The government's arguments to protect children from indecent content on broadcasting and the Internet began as broad rules, regulations, and legislation that were narrowed down by the courts resulting in a less restrictive regulatory climate. The current broadcast policy on indecent speech took years to construct as many rules and regulations were challenged by individuals or interest groups in the courts. While the courts are not involved in the recent issues and problems of indecent radio and television broadcasts discussed in Chapter 3, if the Broadcast Decency Enforcement Act of 2005 is signed into law, it will probably be challenged in the courts. Congress would have to justify the huge increase of indecency fines and how they came up with the figures. Congress would also have to prove at the time of trial that higher fines actually curb

indecency violations. Finally, the effectiveness of the consent decrees between the FCC and three media giants [Clear Channel, Emmis, and Viacom] have yet to be measured. Only time will tell if the consent decrees would help broadcasters better serve their public interest obligations and deter further indecency violations.

The government, despite its constitutional losses in the courts, has continued its efforts to push for legislation of indecent content on the Internet. The only issue to be resolved concerning indecent content on the Internet is CIPA. COPA remains in legal limbo for it is now in the lower courts for reconsideration.

Currently, *Kids.us* remains intact. No individual or group has challenged the law in the courts. *Kids.us* is different from other legislation centering on indecent content on the Internet because it does not mandate that website publishers or operators register on the new domain or move their content to kids.us. Publishing on that area of the Internet is voluntary. The *kids.us* domain represents a new way of thinking about Internet content and online safety for children. It is a proactive model for it is new webspace dedicated specifically to content appropriate for children. *Kids.us* is a tool offered, not mandated, by the government as a less restrictive means of content regulation on the Internet in effort to serve the public and protect children and the rights of adults. The statute simply offers an alternative to mandated regulation.

Summary

The government's public interest arguments contributed to indecency regulation on broadcast and the Internet in several ways. First, the public interest arguments in *Pacifica* established that there were certain words that are not allowed on broadcast,

seven in particular. Later, the Commission became more active in indecency enforcement and primarily focused on protecting children from it. Even though the FCC considered indecent broadcasts after 10 p. m. permissible, it then believed that there was still a reasonable risk of children in the audience after 10 p. m.

Second, public interest arguments led to an established safe harbor. The FCC argued that it was in the public interest that children be protected from indecent content on the airwaves but without infringing upon the First Amendment rights of adults. After an eight year battle in the courts, a concrete safe harbor time was established – 10 p. m. to 6 a. m. This time frame remains in effect today.

Third, public interest arguments led to the use of filters as a less restrictive means of protecting children from harmful material on the Internet. Congressional attempts at regulating indecent content on the Internet date back to 1996. After the CDA was struck down in 1997, Congress enacted COPA. Congress had a strong interest in protecting children from harmful material on the Internet. CIPA was a way to partially fulfill that interest. Filters and blocking software were the focal point of the CIPA statute. Congress enacted CIPA as a way to protect children from indecent content on the Internet. Congress' intention was to protect children, not ban speech or infringe on the First Amendment rights of adults. The statute is limited to public libraries and schools. The statute was upheld by the Supreme Court because it was narrowly tailored and less restrictive; so libraries are now mandated to install and use filtering or blocking software on their computer terminals.

Finally, Congressional arguments for protecting children from indecent or harmful material on the Internet have been repeatedly struck down by the Supreme Court.

Though Congress must regulate for the public good, it must do so without infringing upon the rights of adults. The Court recognizes the Internet as a public forum. It supports its uniqueness and wishes to foster growth, rather than impose content-based regulatory measures that could have a chilling effect. COPA remains in litigation. For now, the Internet is free from government regulation of indecent content.

Whether it is the government's interest or in the public's interest to protect children from indecent content on broadcast radio and television and the Internet, the common denominator is an interest to protect children from indecent content; and in an effort to promote that interest, the government has proposed many rules, regulations and statutes. However, few have survived constitutional scrutiny by the courts. RQ 2 elaborates on what arguments were accepted by the courts and which approaches were consistently used or applied.

RQ 2a: Which arguments have been used successfully or accepted by the courts?

Only those arguments that are narrowly tailored and present the least restrictive means of content control have been accepted by the courts; which amounts to very few successful arguments. RQ 1 examined the how government's public interest arguments contribute to indecency regulation and found that even though the many arguments seemed to be in the best interest of children, few passed constitutional muster; but the government continued their efforts to protect children.

The victories for the government were *Pacifica, ACT III, ACT IV,* and *U. S.* v. *American Library Association*. In these cases, the courts accepted the government's public interest and marketplace arguments.

Pacifica was a narrow ruling. The government's efforts in presenting a clear guideline of indecent speech were successful, as were the arguments of channeling indecent content to hours when children are less likely to be in the audience. The FCC argued that the monologue at issue was patently offensive and should be regulated, but not prohibited. The FCC argued for channeling indecent speech. It also noted that channeling indecent speech to times when children are less likely to be in the audience did not violate the First Amendment. Channeling indecent speech was not censorship.

The Court showed that concerns over children were central to the decision and validated the concept of "channeling" - the broadcast of indecent speech only during times of the day when children are less likely to be in the audience - as a means of protecting children from indecent speech.

The Court stated two reasons why the Constitution does allow for some content-based regulations in broadcast radio and television:

> (1) The broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwave confront the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder; and (2) Broadcasting is uniquely accessible to children, even those too young to read. The ease with which children may obtain access to broadcast material, coupled with concerns recognized in *Ginsberg,* amply justify special treatment of indecent broadcasting (Federal Communications Commission v. Pacifica Foundation, 1978, p. 748 – 749).

The Court held that the Commission's approach to regulating broadcast content was correct and constitutional, stating that the order was "issued in a specific factual context" (p. 742). The dissenters in *Pacifica* expressed the view that the Commission's order regarding the broadcast of the monologue was not authorized, since 18 USCS 1464 prohibited only obscene speech (p. 778).

In sum, the Supreme Court found that the Commission's action was adjudication and that it did not profess to engage in formal rulemaking or in the promulgation of any regulations. Issues of censorship were raised by *Pacifica* but the Court said that the ban does not deny the Commission the power to review content of completed broadcasts. Finally, the Court agreed with the FCC in labeling the broadcast indecent and that the Commission's order did not violate the First Amendment.

The government's arguments in *ACT v. FCC* (1995) [*ACT III]* and *ACT v. FCC* (1995) [*ACT IV*] dealt with protecting children from indecent content on broadcast radio and television, specifically the safe harbor time frame and indecency enforcement. In *ACT III*, the government and the court finally compromised and agreed on a constitutionally sound safe harbor time – 10 p. m. to 6 a. m. The court also took a more expansive position, rather than emphasizing the narrow First Amendment view of *Pacifica*. The court said that the government has no general interest in protecting adults because the official suppression of constitutionally protected speech contradicts the fundamental principle of the First Amendment 'that debate on public issues should be uninhibited, robust, and wide-open" (ACT v. FCC, 1995). At issue in *ACT IV* was the Commission's power to impose forfeitures and the indecency-enforcement scheme. The FCC argued that Section 503(a) of the Communications Act of 1934 empowers the

Commission to impose forfeitures for the violation of an FCC order or regulation. The court found both issues to be constitutional. However, the court did acknowledge that the FCC's practices could give rise to some constitutional problems but since ACT failed to show that the Commission's administration of the statute is unconstitutional, the court ruled in favor of the Commission. The FCC essentially won the case on a technicality.

Of the three statutes Congress proposed to regulate indecent content on the Internet, only one survived constitutional muster – Children's Internet Protection Act (CIPA). As noted earlier, CIPA was enacted to address concerns about access in schools and libraries to the Internet and other information. Congress' intention was to protect children from the availability of Internet pornography in public libraries. If libraries chose not to install CIPA's mandated Internet filters, they could lose federal money. Congress helps public libraries provide their patrons with Internet access by offering federal assistance. However, with so much pornography on the Internet, much of which is easily obtained, Congress wanted to protect children from such content. The government wanted to apply the same standard libraries use on their bookshelves to library computers. The government argued in *U. S. v. American Library Association* (2003) that if pornography was deemed inappropriate for a library's bookshelf, then it should be deemed inappropriate for its computer screens. The Supreme Court bought the government's arguments and held CIPA constitutional. Moreover, the Court found Congress' threat to cut off funds to those libraries who did not install filters within their spending power and that it did not impose an unconstitutional condition on public libraries that received federal assistance for Internet access.

Contrary to CIPA, the CDA and COPA did not pass constitutional muster. Congress' arguments were struck down by the Supreme Court. The Supreme Court stuck down the CDA with 7 – 2 vote in *Reno v. ACLU* (1997). COPA was stuck down twice by the Supreme Court: *Ashcroft v. ACLU* (2002) with an 8 – 1 decision and *Ashcroft v. ACLU* (2004) with a 5 – 4 decision.

The Supreme Court agreed to revisit COPA two years after their initial decision in *Ashcroft v. ACLU* (2002). Though COPA was struck down again, the Court's ruling was narrower, a 5 – 4 vote, than the 8 – 1 vote in 2002. The decision in *Ashcroft* (2004) was surprising because it seemed to contradict the CIPA (Children's Internet Protection Act) decision, upheld a year earlier by the Supreme Court. The government argued in *Ashcroft* that filtering software was not a less restrictive means of protecting children from harmful content on the Internet. Filtering software was at the heart of the CIPA case; but only in public libraries so CIPA's application was more limited than COPA. Justice Breyer strongly dissented in *Ashcroft* (2004) but voted with the majority in CIPA (2003). In fact, in CIPA Breyer said, "No clearly superior or better-fitting alternative to Internet software filters had been presented" (U. S. v. American Library Association, 2003, p. 219). Breyer said that Internet filters were a less restrictive means promoting the government's compelling interest of protecting children while not imposing on the First Amendment rights of adults; contradictory to his dissent in *Ashcroft* 2004. In *Ashcroft 2004*, the justices mentioned the filtering and blocking software as an alternative, but had still had reservations about the effectiveness; therefore, remanding the case.

Table 3 on the following page breaks down the Justices' opinions in the CDA, COPA, and CIPA cases.

Table 3. Justices' Opinions.

	CDA ('97) [struck down]		COPA ('02) [struck down]		COPA ('04) [struck down]		CIPA ('03) [upheld]	
	M	D	M	D	M	D	M	D
Rehnquist		x	x			x	x	
O'Connor		x	x			x	x	
Stevens	x			x	x			x
Souter	x		x		x			x
Scalia	x		x			x	x	
Kennedy	x		x		x		x	
Thomas	x		x		x		x	
Breyer	x		x			x	x	
Ginsburg	x		x		x			x

As Table 3 illustrates, most justices who favored filtering as a less restrictive means of regulating indecent speech in CIPA, voted against filtering in COPA the following year. The Court recognized that CIPA was limited to public libraries and schools while COPA encompassed a more broad application.

Summary

Few of the government's arguments were accepted by the courts. Statutes such as COPA and the CDA did not survive constitutional scrutiny because they were found to be overbroad – too much speech would be banned. The CDA failed because Congress failed to define the term "indecent" and the phrase "in context, depict or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." This uncertainty undermined the likelihood that the CDA was carefully tailored to Congress' goal of protecting minors from potentially harmful materials on the Internet. COPA adequately defined terms but the statute restricted too much speech from adults, jeopardizing their First Amendment rights.

The CDA and COPA were not narrowly tailored to serve the government's interest nor did they implement the least restrictive means to serve the government's compelling interest in protecting children. The D. C. Circuit, in the *ACT* cases, pointed out that viewers and listeners have controls that can be exercised without turning to the government. The courts accepted the government's public interest arguments for indecency regulation on broadcast and the Internet. Results of RQ 2b further explain and support this claim. The FCC's arguments in *Pacifica* were accepted by the Supreme Court because the content at issue could be accessed by children and the medium that

carried it was invasive. The Court was influenced by the distinct characteristic of broadcasting as well as the expertise of the FCC and the narrow scope of its order.

In sum, arguments that were narrowly tailored and presented the least restrictive means of content control were accepted by the courts, which amounted to very few successful arguments.

RQ 2b: Which approach is consistently used or applied?

Based on the answer to RQ 2a, it appears that the approach that is consistently used or applied is more of a public interest approach. In *Pacifica*, the government set clear guidelines as to specific words, seven words in particular, that are not to be said over the airwaves. The FCC and the Court agreed that banning those words from the airwaves during the times of day when children are likely to be in the audience was constitutional and in the public interest. The court also added that channeling indecent content to times of day when children are less likely to be in the audience was constitutional and not a form of censorship. As far as the seven dirty words that are not to be broadcast, that is a government intervention but since other indecent content, not those particular words, is allowed after 10 p. m., there is some compromise.

Channeling indecent speech was also at the center of *ACT v. FCC* (1995) [*ACT III*]. The government went back and forth between 10 p.m. and midnight as its starting hour of the safe harbor. In *ACT III*, the court and the FCC agreed on a 10 p. m. safe harbor start time. The government did lose its effort to further restrict indecent speech by reducing the safe harbor to only six hours on commercial stations, but agreed to the eight hour safe

harbor and the FCC has not tinkered with it since 1995. The 10 p. m. to 6 a. m. safe harbor remains in effect today.

The Children's Internet Protection Act (CIPA) was the only statute aimed at controlling access to indecent content on the Internet to survive constitutional scrutiny. In *U. S. v American Library Association* (2003), the Supreme Court upheld CIPA and accepted Internet filtering as the least restrictive means to serve the government's compelling interest in protecting children from indecent material on the Internet. The filters can be disabled by librarians if patrons ask them to do so; therefore, the First Amendment rights of adults are not violated. Adults also have other arenas of access besides libraries.

Summary

The arguments that seem to be accepted by the courts and that are most consistently used or applied resemble a public interest approach to content regulation. There is some government regulation involved, such as channeling and filtering, so the arguments lean towards the public interest approach. Public interest theory suggests that regulation is implemented when the marketplace fails to correct marketplace practices, as in the cases of channeling and filtering [as mandated by CIPA]. The Internet, on the other hand, falls between the public interest and marketplace approaches. For this dissertation, "marketplace approach" refers to the economic aspect of marketplace of ideas which emphasizes efficiency, consumer satisfaction, and competition. The guiding principles for regulators should be promoting competition and maximizing consumer welfare (Napoli, 1999; Fowler & Brenner, 1982).

The Supreme Court upheld CIPA but twice struck down COPA. CIPA mandates that public libraries and schools install filters or blocking software as a means of protecting children from harmful content on the Internet, such as indecent speech. CIPA is the only content regulation that survived the Supreme Court because it is narrower in its application than COPA. The Supreme Court recognized that filtering and blocking software is available to consumers. Mandating indecency regulation on the Internet by the government is too restrictive. Too much speech would be restricted and the First Amendment rights of adults would be compromised. COPA was struck down twice and is still being debated in the lower courts. Currently, access to indecent content on the Internet in public arenas is unregulated. For now, consumers are the ultimate regulators. In sum, the CIPA statute was upheld by the Supreme Court so there is some regulation of indecent content on the Internet, but the COPA statute was struck down twice by the Supreme Court, leaving indecent content on the Internet unregulated.

RQ 3: Are the arguments equally applicable to broadcast radio and television and the Internet?

As RQ 2a and RQ 2b found, the courts accepted those regulatory arguments that suggest the least restrictive means of protecting children from indecent content on broadcast radio, television, and the Internet. Content regulation on the Internet tends to lean towards the marketplace approach, with the exception of CIPA. For example, the stringent regulatory measures suggested by the CDA and COPA did not pass constitutional muster for those statutes suffered from overbreadth. The amount of speech included in the CDA and COPA was more than what was needed to promote the

government's interest in protecting children from harmful material on the Internet. CIPA, on the other hand, was accepted by the Court. CIPA offered and mandated filtering software as a means of blocking out or control harmful material and since the filters could be disabled if patrons asked librarians to do so; the control of content was put in the hands of the consumer, not the government. The application of CIPA was also limited to public libraries and schools.

Broadcast radio and television are subjected to more content regulation than the Internet. The courts accepted those arguments for broadcast that followed the public interest approach. The FCC fought for a more restrictive safe harbor that allowed indecent material for only six hours per day on commercial stations and two hours per day for non-commercial stations that ended their broadcast day at midnight; but, the courts mandated the Commission adopt a uniform safe harbor for both commercial and non-commercial stations. The courts found that allowing indecent material from 10 p. m. to 6 a. m. - the uniform safe harbor - would not jeopardize the public interest, nor would it infringe upon the First Amendment rights of broadcasters.

To answer the question of whether the arguments are equally applicable to broadcasting and the Internet, the answer is yes and no. The courts accepted arguments for broadcasting that resembled a public interest approach but for the Internet, accepted arguments that included public interest and marketplace approaches. There is a component of both approaches in the current regulatory scheme for the Internet.

One argument that is equally applicable to broadcast radio and television and the Internet is the prohibition of blanket content-based restrictions of speech in an effort to protect children from indecent content. The Supreme Court struck down the CDA and

COPA because the statutes were overbroad. The First Amendment rights of adults would have been violated under the two statutes. The Circuit Court stuck down a 24-hour ban of indecent content on broadcast radio and television. The court said that indecent material qualifies for First Amendment protection regardless of merit. The court also noted that even though such material may have a negative impact on children, adults still have a right to access it.

Another argument with equally applicability is channeling. Channeling has been accepted by the courts as a less restrictive means of indecency regulation on both broadcast and the Internet. The courts accepted the government's public interest arguments and upheld channeling as a means to protect children from indecent content. The courts also noted that channeling does not infringe upon the rights of adults to indecent content online or over the airwaves. Before technological advances such as the Internet, filtering software, and the V-Chip, the government could only apply channeling to broadcast radio and television. But now, the Internet and the V-Chip offer new means of channeling as a way to protect children from indecent content. CIPA and *kids.us* are examples of channeling on the Internet. CIPA mandates Internet filters on computers in libraries and schools so that indecent content is channeled away from children. *Kids.us* is webspace created for child-friendly content. Content that is deemed appropriate for children can be channeled to *kids.us*, though it not a government mandate. The V-Chip is also form of channeling. The V-Chip allows parents to channel indecent content away from children.

Summary

There is a component of both the public interest and marketplace approaches in the current regulatory scheme of the Internet. While most indecency regulation on the Internet exhibits a marketplace approach, CDA and COPA, the passage of CIPA implements a public interest component. The *kids.us* domain represents a proactive approach to legislation is more of a marketplace approach to regulation than mandated regulation.

Broadcast radio and television are regulated via the public interest approach. Channeling provides some leeway for indecent content on the airwaves. The eight-hour safe harbor offers a mild compromise to previous suggestions of a 24-hour ban and six-hour ban of indecent content over the airwaves. Future regulatory approaches for both broadcast radio and television should take more of a marketplace approach. The government should utilize technology, such as the V-Chip and Internet filters as a means of channeling in order to protect children from indecent content on the airwaves and online, rather than impose further regulation.

RQ 4: What direction should broadcast and Internet policy take with developing technology?

In response to the changing technological landscape, Congress passed the Telecommunications Act of 1996. A basic modernization and reconstruction of the regulatory framework of mass media was needed due to the convergence of telecommunications, computing, and traditional media in a digital world. Part of Telecommunications Act of 1996 was V-Chip technology - a receiver-based blocking

technology. The V-Chip provision was added by Congress as an effort to deal with violence and sex on broadcast television by providing parents with the information and ability to make informed viewing decisions for their families The V-Chip fulfills the requirements of Section 551 of the 1996 Act which requires the FCC to determine whether video programming distributors "(1) have established acceptable 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 and; (2) have agreed voluntarily to broadcast signals that contain such ratings" (Commission Finds Industry Video Programming Rating System Acceptable, 1998, p. 1).

Technology also played a role in the consent decree with Viacom, Inc. and Infinity Radio, Inc. in late 2004. Technological means of controlling indecent material over the air during a live broadcast were part of the agreement. Per the consent decree,

> Viacom will purchase and install, for use in connection with its owned television stations and the CBS and UPN Television Networks, delay systems to be used in a reasonable, good faith effort to edit potentially problematic live programming. Viacom will use these delay mechanisms in a reasonable good faith effort to delete material in violation of the Indecency Laws from such live programming.
>
> Viacom will purchase and install audio delay equipment, and institute independent editorial controls, at its owned radio stations that air live programming to edit potentially problematic live programming. Viacom will use these delay mechanisms and editors in a reasonable good faith effort to delete material in violation of the Indecency Laws from such programming. (In the Matter of Viacom, Inc, 9 June, 2004, p.7).

The use of time delays in broadcasts was also part of the Consent Decree between the FCC and Clear Channel Communications, Inc. issued in June, 2004.

In April 2001, the Commission issued a policy statement – *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*. Then Commissioner Harold Furchtgott-Roth issued a separate statement discussing the developing technology: "Today, the video marketplace is rife with an abundance of programming, distributed by several types of content providers" (p. 22). He also wrote, "In my judgment, as alternative sources of programming and distribution increase, broadcast content restrictions must be eliminated." He concluded with the following: "Technology, especially digital communications, has advanced to the point where broadcast deregulation is not only warranted, but long overdue" (p. 23). The literature in Chapter 3 revealed that some Commissioners favor a less restrictive approach to content regulation by using technology such as parental control filters and the V-Chip.

The Supreme Court addressed technology in the *Reno* and *Ashcroft* cases and the CIPA case. In the *Reno v. ACLU* (1997), the issue of technology came up in the form of discussions concerning age-verification of web site users via credit cards. The Court said that the burden of using a credit card number or even an adult password, would absolutely bar adults who do not have a credit card from accessing any blocked material. Furthermore, the Supreme Court acknowledged that at the time, existing technology "did not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying adults" (p. 876). The Court did

not find an effective manner to determine the age of a user who is accessing material or information via e-mail, newsgroups, or chat rooms (Reno v. ACLU, 1997).

In *ACLU v. Reno* (2000), the appellate court, in affirming the District Court's decision to issue a preliminary injunction against COPA, recognized that, at the time, due to technological limitations, there might not be other means by which harmful material on the Internet and World Wide Web be constitutionally restricted. In light of rapidly developing technology, what may be once nearly impossible to constitutionally regulate, may in the near future, become feasible.

Technological means of protecting children from harmful material on the Internet and World Wide Web was also discussed at length in the *ACLU v. Ashcroft* (2003). The appellate court examined the use of blocking and filtering software as a less restrictive alternative. The district court, as did the appellate court, noted that blocking and filtering technology may not be perfect, but it appeared to be a logical and at the very least, as effective as the COPA statute.

On March 2, 2004, the Supreme Court, once again, heard arguments concerning COPA. The Court noted the changes in the technological landscape since the first COPA case, *ACLU v. Reno* (1999). The Court said,

> Since the passage of COPA, Congress has enacted additional laws regulating the Internet in an attempt to protect minors. For example, it has enacted a prohibition on misleading Internet domain names, in order to prevent Web site owners from disguising pornographic Web sites in a way likely to cause uninterested persons to visit them. It has also passed a statute creating a "Dot Kids" second-level Internet

domain, the content of which is restricted to that which is fit for minors under the age of 13. (Ashcroft v. ACLU, 2004, p. 2790)

In *Ashcroft v. ACLU (*2004), the Court supported filters as a less restrictive means than the statute at issue. The Court said that promoting the use of filters, because they do not condemn as criminal a category of speech, nearly eliminates or at least diminishes the potential chilling effect. In addition, the Court said that filters may be more effective than COPA. For instance, filters can be applied to all forms of online communications, like e-mail, not just those communications available via the Web. The Commission on Child Online Protection, a blue-ribbon commission enacted by Congress in that COPA statute, confirmed that filtering software may very well be more effective than COPA. The Commission found that filters are more effective than age-verification requirements. The Supreme Court pointed out that the government appointed commission concluded the opposite of the government's argument – the COPA statute was favored over filter and blocking software. Finally, the Court noted that the factual record did not reflect the current technological reality and that was a serious flaw in any case involving the Internet, because "the technology of the Internet evolves at a rapid pace" (p. 2794). The Court acknowledged that five years had passed since COPA was first argued and technology had since changed greatly. The case was remanded with instructions for the District Court to take account of the changed legal landscape and supplement the factual record to reflect current technological realities (Ashcroft v. ACLU, 2004).

Filtering software was at the heart of the CIPA statute and the Supreme Court case, *U. S. v. American Library Association, Inc.* (2003). In a 6 – 3 decision, the Supreme Court upheld CIPA, a federal law enacted to address concerns about access in schools and

libraries to the Internet and other information. The Court said that any concerns over filtering and blocking software's alleged tendency to wrongly overblock access constitutionally protected speech were dismissed by the ease with which library patrons could have the software disabled. Hence, public libraries' use of Internet filtering software does not violate their patron's First Amendment rights.

Future regulatory approaches for both broadcast and the Internet should take more of a marketplace approach. The government should use current technology, such as the V-Chip and Internet filtering and blocking software, as a means to protect children from indecent content on the airwaves and the Internet, rather than impose further regulation. This alternate approach to indecency regulation is more of a marketplace approach to regulation. It implements receiver-based content regulation – the V-Chip and Internet blocking and filtering software. This technology allows for the consumer to make their own content choices, not the government. However, this study is not suggesting that current regulations and legislation restricting indecent content on the airwaves be repealed, nor is it suggesting that content regulation be imposed on the Internet. It is simply suggesting a different approach to proposed or future regulation.

For instance, allowing the "seven dirty words" on broadcast radio and television would not be realistic. The social and political fallout would be insurmountable. The public outrage would at the very least, equal the fallout from the halftime program of the 2004 Super Bowl. Congress and the FCC would have to take some kind of action, which could be more restrictive, to soothe the public, as they did after the Super Bowl performance by calling for increased fines. In chapter 3, the literature revealed that though those seven words are not allowed on the airwaves, radio personalities have

created other words or instances that the FCC found just as indecent. Complaints increased and fines increased. Ultimately, many of the complaints were addressed in consent decrees.

One drawback to the receiver-based content regulatory approach is that it has not been applied to radio. V-Chip or filtering technology has yet to be applied to radio. Yet, ironically, the literature review revealed that the FCC investigated and took action against more radio stations and radio programs than television stations. Many of the radio programs at issue were morning and afternoon drive programs – the times of day when many people are in their cars commuting to and from work. These programs also fell outside the safe harbor period. Three corporations, who owned and operated numerous stations that were fined for violating indecency law, entered into consent decrees with the FCC as means of resolving the matters – Clear Channel Communications, Inc., Emmis Communications Corporation and Viacom, Inc. Per these agreements, the three corporations admitted to airing indecent material outside the safe harbor period, agreed to implement compliance plans in an effort to prevent the broadcast of indecent material, and consented to conducting obscenity and indecency training. The agreements were made in 2004, so the effectiveness or impact on the radio industry cannot yet be measured; but if successful, then radio stations could alleviate threats or further, more restrictive legislation from the government.

Summary

The government should realize that technology, especially receiver-based content regulation like the V-Chip and Internet filters, may provide a means of channeling

indecent material away from children. The V-Chip allows parents, not the government, to decide what content is appropriate for their children and therefore program the V-Chip accordingly. Likewise, Internet filters and blocking software provide a means of channeling indecent material away from children.

It appears that the Supreme Court is beginning to recognize that technology can help protect children from harmful material on the Internet. Technology was a major issue in the last two cases decided by the Court concerning content-based restrictions on the Internet – CIPA (2003) and COPA (2004). Even though the Court remanded the last COPA case, it did note that several years had passed since the first COPA case and that technology had advanced considerably and content-based regulation may be too restrictive. The Court recognized that technological advances could thwart off indecency regulation on the Internet and protect the First Amendment rights of adults.

On the broadcast front, the FCC seems willing to use technology as a means of curbing indecent content on the airwaves. The Commission entered into Consent Decrees with three major media corporations that incorporated delay-system technology as a means of curbing indecency during live performances. Time will tell whether or not technological advances will effectively curb indecency on the airwaves and in turn, alleviate further government intervention.

Congress also recognized impact of technology on indecency regulation when it passed the V-Chip provision of the Telecom Act and introduced Internet filters in CIPA. Though the V-Chip provision and CIPA are government mandates, they are a less restrictive means of protecting children from harmful material on broadcast and the Internet. Receiver-based content regulation such as the V-Chip and Internet filters do

not restrict more speech than necessary for it is controlled by the consumer. Consumers can turn them on and off as they wish. The government does not mandate that the V-Chip be programmed or that Internet filters cannot be disabled. The mandate is that the technology be available to consumers.

The government should allow technology to play a bigger part to further their interest in protecting children from indecent material and protecting the First Amendment rights of adults. Receiver-based content regulation such as the V-Chip and Internet filters provide a balance between the competing interests of protecting children from indecent material and the First Amendment rights of adults.

CHAPTER 6 – CONCLUSION

The purpose of this dissertation was to analyze indecency policy and identify valid arguments and approaches from which one can find a viable approach to future content regulation for both broadcast media and the Internet. As discussed in Chapter 1, broadcast media and the Internet are both under scrutiny by the federal government for increased content regulation of indecent speech. Their First Amendments rights are threatened.

The dissertation found that the marketplace approach to indecency regulation has so far prevailed on the Internet in that there is no regulation of indecent content or access to such content on the Internet, with the exception of CIPA. With emerging technologies such as Internet filters and V-Chips, further government regulation of indecent content on the Internet or on broadcast television and radio would be not be useful. A receiver-based content control approach proposed in the dissertation suggests that the marketplace approach to content regulation would better serve the public interest because the public's interest would be defined by the public itself.

For nearly a decade, Congress has attempted to impose content-based regulations on the Internet via the CDA, COPA, and CIPA. Only CIPA survived constitutional scrutiny. CIPA is the closest the courts have come to content regulation on the Internet. The result of the CIPA case was unexpected, as the Supreme Court has struck down other content-based statutes related to the Internet – *Reno v. ACLU* (1997), *Ashcroft v. ACLU* (2002) and *Ashcroft v. ACLU* (2004). The government has taken some proactive measures of legislation with statutes such as The *Dot Kids Implementation and Efficiency Act of 2002*,

which has yet to be challenged in court. This piece of legislation creates a new domain, *kids.us*, for Internet content that is suitable for children, yet it does not mandate action. Whether or not an Internet publisher chooses to put their web site on *kids.us* is strictly voluntary. The government has simply created a new place for children on the Internet, a form of channeling, and a tool for parental monitoring. Congress must pass laws that are in the public interest, and *Kids.us* adds to the public interest by providing a safe area on the Internet and World Wide Web for children.

The private sector has also come to the aid of protecting children by providing filtering software and parental controls. Internet Service Providers are currently installing parental controls or filters. In addition to parental controls and filters, American Online (AOL) provides specialized environment for kids: AOL KOL for children 12 and under, AOL RED for teens aged 13 – 15, and AOL RED Plus for 16 and 17 year-olds. These services are included in regular accounts at no extra cost. MSN Premium 9 offers a special kid-oriented content in addition to parental controls and filtering options. Parents can limit downloads and set approved IM and e-mail contents. EarthLink Parental Controls allows parents to create profiles and designate whether the child fit into one of the following categories: Young Child (age 8 and under), Preteen (9 – 11 years old), or Teen (ages 12 and older). There is an approved list for each category where the children can safely surf (Munro, 2004). These services have become a huge marketing tool in advertising campaigns, which can be a major selling point. If these types of controls are placed into the hardware instead of the software, then the filter should operate as the V-chip does on recently manufactured television sets- with an

on/off switch. The Supreme Court has said that these methods are less intrusive than proposed legislation.

Recently, the Internet's primary oversight body, The Internet Corporation for Assigned Names and Numbers (ICANN), approved a plan to create a new "xxx" address. Adult-oriented sites may be able to buy the "xxx" address as early as fall 2005 (Net group approves new "xxx' web addresses, 2005). This new domain could further the government's and parents' interest in protecting children from online smut, if adult sites voluntarily adopt the new suffix. Like *kids.us*, "xxx" is a proactive approach to regulation. Adult sites are not mandated to adopt the suffix. The "xxx" suffix will also help filtering software work more effectively by blocking access to those sites. This new domain offers another way of channeling indecent material away from children.

While the Supreme Court has struck down several content-based regulations, the FCC seems to be tightening its reign. The tight reign of the FCC's regulatory actions towards indecent speech on broadcast television and radio has produced a "chilling effect." Since the FCC's crackdown on popular radio personalities such as Howard Stern and Mancow Muller of *Mancow in the Morning* and the Commission's threat to increase fines since the 2004 Super Bowl halftime program, stations across America have been "scared straight." Forms of self-censorship have occurred. For instance, Clear Channel Communications announced in early 2004 that it was initiating a responsible broadcasting initiative that included a zero-tolerance policy for indecent content. Clear Channel faced numerous fines over the years for broadcasting indecent content outside the hours of 10 p.m. and 6 a.m. (Clear Channel nixes Howard Stern, 8, April, 2004). That zero-tolerance policy became part of the Consent Decree with the FCC (In the matter of Clear Channel

Communications, Inc., 2004). Classic rock radio stations, for fear of being on the FCC's hit-list, omitted songs like Elton John's "The Bitch is Back" and the Rolling Stones' "Bitch" from their playlists (Steinberg, 10, May 2004). More recently, is the decision by several ABC affiliates in Alabama, Georgia, Iowa, Massachusetts, North Carolina, Ohio, South Carolina, and West Virginia not to air the World War II film, *Saving Private Ryan,* for fear of running afoul the FCC (ABC affiliates pulling 'Private Ryan,' 11, November 2004).

Fear has undoubtedly affected the airwaves. The push for more indecency regulation has led to calls for indecency restrictions on other media such as cable television and satellite television and radio. Recently, Congress has proposed that cable and satellite television and radio be subjected to the same indecency regulations as their broadcast counterparts. Though no formal bill has been introduced, the mere talk of such regulation has sparked debate. At the 2005 National Association of Broadcasters convention, President and CEO Eddie Fritts, speaking during the opening ceremony, said that if Congress decides to further regulate broadcasters for indecency, then cable, satellite television, and satellite radio should not get a free pass (Shields, 2005). The National Cable and Telecommunications Association (NTCA) said any such legislation would face an uphill battle in court because cable subscribers can block programming they do not want seen in their homes (Armas, 2005). On June 1, 2005, the NTCA launched a $250 million dollar public service campaign educating consumers about parental control (New 'take control, it's easy.' public service announcements alert consumers to parental controls, 2005).

It appears that fear is affecting the marketplace. Some may think broadcasters are overreacting; but with the current content regulatory climate centering on indecent speech, they are only responding. The FCC and Congress have taken a reactive approach to regulation. True, they must respond to complaints; but online filing on their website makes it very easy for the same groups or people to file numerous complaints. For instance, the Parents Television Council (PTC) has capitalized on the ease of online complaint filing. A recent estimate by the FCC showed that the PTC was responsible for 99.8% of indecency complaints in 2003 and 99.9% of indecency complaints unrelated to 2004 Super Bowl (Shields, 2004b). The FCC relies on complaints to initiate its indecency proceedings so this kind of online activism by such groups, could lead to an overstatement of the problem.

In June 2004, a Paragon Media Strategies survey revealed that most people are more concerned with indecency on the Internet than on broadcast radio and television. Of those surveyed, 51% named the Internet as the medium with the most indecency followed by television (35%), and radio (6%). Americans deemed indecent material to be "sexual content" and "nudity" (both 70%), followed by "adult language" (66%), and violence (63%) (Survey: Internet, TV More Indecent than Radio, 2004). This survey suggests that Americans are nearly as concerned with violence as they are about other indecent content. Paragon Media Strategies CEO Mike Henry said that the recent discourse about indecency in media has reminded the American people of the power and influence of media, and their individual responsibility to control the content they are exposed to by media (Survey: Internet, TV More Indecent than Radio, 2004).

The proposed regulatory approach focusing on receiver-based content control of indecent speech, gives more power to the consumers and less power to the government. More regulation is not the solution. Ultimately the solution to indecency programming on broadcast radio and television lies with the public, not policymakers. The same premise holds for indecent content on the Internet. Government regulation is not the answer. The Supreme Court thought that Internet filters and blocking software were adequate enough for public libraries and schools. So, for all practical purposes, one can assume that filters and blocking software should be adequate enough for private homes.

The Internet community has consistently shunned government attempts to regulate content on the Internet. The regulation that the government has proposed for the Internet would destroy much of the Internet's value, not just by limiting the freedom of Internet participants to express themselves, but also by trying to impose a particular regulating structure on the entire Internet.

In conclusion, it seems that the most constitutionally sound approach to future indecency regulation on broadcast media and the Internet is the marketplace approach. For broadcast radio and television, the marketplace approach would allow the public to decide the public interest. For the Internet, the marketplace approach would be the least restrictive means of serving the government's compelling interest of protecting children from harmful material. If the private sector can handle these issues, there is no need for government intervention.

Policy Recommendations/Considerations

Based on the results of the dissertation, the following policies for future regulation of indecent speech on broadcast radio and television and the Internet are recommended. The dissertation found that the marketplace approach would be the most constitutionally sound regulatory approach. However, the most important determiner of policy at this point is time. The government should wait and see how well internet filters work since the passage and implementation of CIPA. CIPA is still a fairly new law; so it is too early to determine its affect on indecent content on the Internet and its effectiveness in protecting children from such material. Filters were a major discussion point among the Supreme Court justices in *Ashcroft 2004*. The justices seemed split on the idea of using filters as a means of protecting children from indecent content on the Internet. Ashcroft 2004 was remanded so COPA remains in limbo. The lower courts should consider filtering or blocking software as an alternative to legislation.

Congress probably will not abandon its fight against indecency and will continue to push for higher indecency fines for broadcasters. The consent decrees signed by Emmis, Viacom, and Clear Channel are still in their infancy. They were just signed in 2004. All three media giants agreed to implement policies aimed at deterring further indecency violations; but it will take time before success or failure can be measured. Congress should step back and wait to see how those consent decrees affect the industry. They should take more time in regarding television and indecency regulation. The television networks are airing public service announcements promoting the use of the V-Chip and other kinds of parental controls. According to studies, the use of the V-Chip is up among parents but the figures are still low. Congress and the FCC should allow more time for

this technology to be adopted by the masses, and allow the private sector to provide and development these technologies more effectively.

Suggestions for Further Research

Based on the study in the dissertation, future research can expand the data to include lower courts. Also, because a definitive decision on COPA has yet to be reached, the data pool from the study remains dynamic and mutable. This allows the researcher to continue compiling data to re-evaluate and re-analyze. This study could be replicated on an international level by examining case law and policies centering on indecent speech on broadcast media and the Internet outside the United States.

The FCC should issue its mandated biennial regulatory review for 2004 in the coming weeks. It would be useful to learn if the Commission deemed any regulations unnecessary or needing modification. Also, it would be interesting to see how the FCC currently defines "public interest."

A quantitative phase could be added to the study. A survey of station managers' thoughts and reactions to the current regulatory climate could provide insight into the industry's point of view. Another qualitative phase could also enhance the study. In-depth interviews with station managers would be useful as a tool to gain further insight.

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