

# Handcuffing the Morality Police: Can the FCC Constitutionally Regulate Indecency on Satellite Radio?

JESSICA E. ELLIOTT<sup>†</sup>

## I. INTRODUCTION

On October 6, 2004, radio shock jock Howard Stern announced that he would be leaving his syndicated morning talk show with Infinity Broadcasting to begin broadcasting on Sirius Satellite Radio.<sup>1</sup> Stern's decision meant that he would be leaving a regular audience of twelve million people each morning for a population of 600,000 listeners at the time of the jump.<sup>2</sup> Although the deal was financially lucrative for Stern, with Sirius agreeing to pay \$100 million per year for five years in addition to all salary and production costs of the show, the money was not his primary motivation for making the switch.<sup>3</sup> Stern's main objective was to escape the oversight of the Federal Communications Commission (FCC).<sup>4</sup> Stern cited the FCC's recent crackdown on indecency as the biggest reason for his switch, explaining that "when we do best-of shows and replay some of the material we've done in years past, there is sometimes 50 percent to 60 percent of it that we can't use."<sup>5</sup>

Howard Stern has been a favorite target of the FCC—costing Viacom a share of \$1.75 million in June 2004 and \$3.5 million in November 2004<sup>6</sup>—and he is not the only one who fears it. In February 2004, Janet Jackson experienced a "wardrobe malfunction" during her half-time performance at the Super Bowl in which her breast and nipple were exposed to the entire television viewing audience for a split second.<sup>7</sup> As a result, Viacom was fined \$550,000.<sup>8</sup> That incident led to what some have called "an indecency crusade [that] has unleashed a wave of self-censorship on American television unrivaled since the McCarthy era."<sup>9</sup> The FCC fined nearly 100

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<sup>†</sup> Juris Doctor candidate, University of Connecticut School of Law, 2006.

<sup>1</sup> Bill Carter & Jeff Leeds, *Howard Stern Signs Rich Deal in Jump to Satellite Radio*, N.Y. TIMES, Oct. 7, 2004, at A1.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Jennifer S. Lee, *Bill to Raise Indecency Fines Is Reintroduced*, N.Y. TIMES, Oct. 9, 2004, at C3; *Viacom Fined \$3.5 Million for Indecency*, N.Y. TIMES, Nov. 24, 2004, at C5.

<sup>7</sup> *Complaints Against Various Licensees Regarding Their Broadcast of the Superbowl XXXVIII*, 19 F.C.C.R. 19230, 19231 (2004).

<sup>8</sup> *Id.* at 19230.

<sup>9</sup> Frank Rich, *The Year of Living Indecently*, N.Y. TIMES, Feb. 6, 2005, at A21.

Fox stations \$7000 apiece for airing an episode of “Married by America” that featured strippers at a bachelor party.<sup>10</sup> Furthermore, there is concrete evidence that this flurry of fines has caused broadcast speech to be chilled. In November 2004, sixty-six ABC affiliates refused to broadcast a Veteran’s Day showing of the Academy Award-winning film *Saving Private Ryan* out of fear that sexually charged language of soldiers in combat might violate indecency standards.<sup>11</sup> However, the FCC later ruled that the film would not violate indecency standards because of its context.<sup>12</sup>

It is not just the FCC that has taken up the cause of strict enforcement of morality standards. Attorney General Alberto Gonzales has proclaimed that a “crackdown” of obscenity is the number four priority for his Justice Department.<sup>13</sup> Congress has also become active in enforcing indecency standards, moving to increase the penalties for violating the standards. On October 8, 2004 a congressional conference committee reintroduced a compromise proposal that would allow the FCC to fine a station a maximum of \$500,000 per violation, up from a maximum of \$32,500, with a limit of \$3 million per twenty-four hour period for each corporation.<sup>14</sup> Furthermore, the compromise would have subjected performers—not just broadcasters—to fines.<sup>15</sup> The Senate considered a similar measure in September 2005 that would have increased fines and allowed the FCC to revoke the licenses of repeat offenders.<sup>16</sup>

The furor over indecency has not been directed only at broadcasters. Senator John Breaux (D-La.) proposed an amendment to the bill raising indecency fines that would have extended the indecency rules to cable television.<sup>17</sup> The Chairman of the Senate Commerce Committee, Senator Ted Stevens (R-Ala.), announced that he wants to extend the FCC’s authority to regulate indecency on cable and satellite television and radio that currently operates outside the government’s control.<sup>18</sup> Stevens expressed his belief to the National Association of Broadcasters that the Supreme Court would require cable to adhere to broadcast indecency

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<sup>10</sup> Complaints Against Various Licensees Regarding Their Broad. of the Fox Telev. Network Program “Married by America” on Apr. 7, 2003, 19 F.C.C.Rcd. 20191 (2004).

<sup>11</sup> Frank Rich, *Bono’s New Casualty: ‘Private Ryan,’* N.Y. TIMES, Nov. 21, 2004, § 2, at 1.

<sup>12</sup> John Files, *Approving Private Ryan,* N.Y. TIMES, Mar. 2, 2005, at E2.

<sup>13</sup> Eric Lichtblau, *Gonzales Lays out His Priorities at Justice Dep’t,* N.Y. TIMES, Mar. 1, 2005, at A14.

<sup>14</sup> Jennifer S. Lee, *Bill to Raise Indecency Fines Is Reintroduced,* N.Y. TIMES, Oct. 9, 2004, at C3.

<sup>15</sup> *Id.*

<sup>16</sup> Natalie Angier, *G#%!Y Golly; Almost Before We Spoke We Swore,* N.Y. TIMES, Sept. 20, 2005, at F1.

<sup>17</sup> Frank Ahrens, *Senator Bids to Extend Indecency Rules to Cable,* WASH. POST, Mar. 2, 2005, at E01.

<sup>18</sup> *Id.*

standards.<sup>19</sup> Broadcasters have been one of the most vocal groups in support of cable and satellite regulations, arguing that the current regime results in an unfair playing field with producers and directors of edgier material opting for cable and satellite.<sup>20</sup> However, the constitutionality of applying broadcast standards to cable and satellite remains in question. It is a question that will need to be answered as both the popularity of satellite radio and the push for strict policing of indecent content grow.

Part II of this note will review the history of indecency regulation. It will look at the role the FCC plays in policing the airwaves and regulating the content of broadcasts. The section will then examine the development of indecency regulation under a First Amendment analysis beginning with broadcast and moving on to cable transmission. Part III of this note will analyze the possibility of indecency regulation for satellite radio. It will first examine the technology behind satellite radio and explore the current regulations affecting satellite radio. The section will proceed to apply the indecency doctrines established for broadcast to satellite radio to determine whether any indecency regulation of satellite radio would violate the First Amendment in light of unique characteristics of satellite technology. Finally, this note will argue that industry self-regulation should be undertaken to weaken the FCC's ability to regulate under the First Amendment. Some level of self-policing could weaken the government's ability to narrowly tailor further FCC regulations and allow the industry more freedom in what it broadcasts.

## II. HISTORY OF INDECENCY REGULATION

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."<sup>21</sup> However, the United States Supreme Court has allowed Congress to place restrictions on certain types of speech including obscene and indecent speech. Congress has entrusted the FCC with the authority to enforce laws governing obscene and indecent speech over the airwaves. But Congress and the FCC do not have carte blanche to prohibit indecent speech because content-based regulations raise significant First Amendment concerns. The government enjoys the most authority in regulating broadcast media, but the authority to prohibit indecent speech begins to wane in other audio and visual media and almost disappears in print media. The Supreme Court first allowed the government more authority to regulate the content of broadcasts than the written press in *Red Lion Broadcasting Co. v. FCC*,

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> U.S. CONST. amend. I. The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. U.S. CONST. amend. XIV; see *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

holding that in light of the scarcity of broadcasting frequencies, the government could require a licensee, as a fiduciary, to adhere to certain content obligations.<sup>22</sup> However, the “scarcity of frequencies” reasoning has been largely abandoned in indecency analysis in favor of analyzing the danger to children posed by indecent programming.

*A. The Federal Communications Commission: The Regulatory Agency*

The FCC was established by the Communications Act of 1934 as a U.S. government agency independent of the Executive Branch and directly responsible to Congress.<sup>23</sup> The FCC regulates television, radio, wire, satellite, and cable in all of the fifty states and U.S. territories.<sup>24</sup> The FCC is responsible for enforcing rules passed by Congress.<sup>25</sup> Title 18 of the United States Code, section 1464, prohibits the utterance of “any obscene, indecent, or profane language by means of radio communication.”<sup>26</sup> Furthermore, Title 47, section 303(g) requires the Commission to “encourage the larger and more effective use of radio in the public interest.”<sup>27</sup> As will be examined more fully below, the FCC has instituted rules prohibiting the broadcasting of indecent material between 6:00 a.m. and 10:00 p.m. FCC decisions also prohibit the broadcasting of profane material between 6:00 a.m. and 10:00 p.m. The FCC is restrained not only by the First Amendment, but also by section 326 of the Communications Act, which prohibits the FCC from censoring program material or interfering with broadcasters’ free speech rights.<sup>28</sup>

The FCC has authority to issue civil monetary penalties, revoke a license, or deny a renewal application for violations of its regulations.<sup>29</sup> In addition, those found in violation of federal indecency laws, if convicted in a federal district court, are subject to criminal fines and/or imprisonment for not more than two years.<sup>30</sup> Enforcement actions are triggered by a member of the public filing a complaint with the FCC.<sup>31</sup>

FCC staff reviews each complaint and if it appears that a violation may have occurred, the staff will commence an

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<sup>22</sup> *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

<sup>23</sup> About the FCC, Fed. Comm. Comm’n, <http://www.fcc.gov/aboutus.html> (last visited Feb. 20, 2006).

<sup>24</sup> *Id.*

<sup>25</sup> Fed. Commc’ns. Comm’n, Regulation of Obscenity, Indecency and Profanity, <http://www.fcc.gov/eb/oip/Welcome.html> (last visited Feb. 20, 2006).

<sup>26</sup> 18 U.S.C. § 1464 (2000).

<sup>27</sup> 47 U.S.C. § 303(g) (2000).

<sup>28</sup> 47 U.S.C. § 326 (2000).

<sup>29</sup> 47 U.S.C. §§ 307, 308, 312(a), 312(b), 503(b)(1)(E) (2000).

<sup>30</sup> 47 U.S.C. § 503(b) (2000).

<sup>31</sup> Fed. Comm’n’s. Comm’n, Complaint Procedure, <http://www.fcc.gov/eb/oip/process.html> (last visited Feb. 20, 2006) [hereinafter Complaint Procedure].

investigation, which may include sending a Letter of Inquiry . . . to the broadcast station. If the description of the material contained in the complaint is not sufficient to determine whether a violation of the statute or FCC rules regarding indecent, obscene, and profane material may have occurred, FCC staff will send the complainant a dismissal letter explaining the deficiencies in the complaint and how to have it reinstated.<sup>32</sup>

In such a case, the complainant has the option of re-filing the complaint with additional information, filing a petition for reconsideration, or filing an application for review (i.e., an appeal) to the full Commission.<sup>33</sup>

If the facts and information contained in a complaint suggest that a violation of the statute or FCC rules regarding indecency, obscenity, and profane material did not occur, FCC staff will send the complainant a letter denying the complaint, or the FCC may deny the complaint by public order.<sup>34</sup> In either situation, the complainant has the option of filing a petition for reconsideration or, if the decision is a staff action, an application for review (appeal) to the full Commission.<sup>35</sup> If the FCC determines that the complained-of material was indecent, profane, and/or obscene, it may issue a Notice of Apparent Liability, which is a preliminary finding that the law or the Commission's rules have been violated.<sup>36</sup> Subsequently, this preliminary finding may be confirmed, reduced, or rescinded when the FCC issues a Forfeiture Order.<sup>37</sup> There is a five-year statute of limitations on forfeiture proceedings preventing the government from filing a civil action after indecent material is aired.<sup>38</sup>

#### B. *Indecency Regulation of Broadcast Media*

The FCC enjoys a great deal of discretion in regulating the broadcast media. Beginning with *FCC v. Pacifica* in 1978, the Court has allowed the FCC to implement rules and regulations designed to protect children from indecent material which, although not obscene, is still inappropriate for young audiences. It is in the broadcast medium where the indecency doctrine has developed, and it remains as a starting point in evaluating indecency controls of programming in other media.

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Complaint Procedure, *supra* note 31.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See 28 U.S.C. § 2462 (2000).

### 1. FCC v. Pacifica

In *FCC v. Pacifica*, the United States Supreme Court decided the issue of whether the Federal Communications Commission has any power to regulate a radio broadcast that is indecent but not obscene.<sup>39</sup> The case arose after a New York radio station broadcast a recording of George Carlin's "Filthy Words" monologue at about two o'clock on a Tuesday afternoon.<sup>40</sup> In the monologue, Carlin gives his thoughts about "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever."<sup>41</sup> He then listed those words and drew many laughs from the audience by repeating them "over and over again in a variety of colloquialisms."<sup>42</sup> A few weeks after the broadcast, a man, who had heard the broadcast while driving with his young son in the car, complained to the FCC.<sup>43</sup>

The Commission forwarded the complaint to the station for comment and Pacifica responded that the monologue was played during a program about society's attitudes toward language and that listeners were warned that it would include offensive language.<sup>44</sup> The Commission issued a declaratory order holding that Pacifica could have been the subject of sanctions but did not actually impose such sanctions.<sup>45</sup> The Commission intended to clarify what standards it would apply to complaints about indecent speech and advanced several reasons for treating broadcast speech differently from other forms of expression.<sup>46</sup> These four important considerations were:

(1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest.<sup>47</sup>

The Commission was especially concerned with the use of radios by children, stating "the most troublesome part of this problem has to do with the exposure of children to language which most parents regard as

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<sup>39</sup> 438 U.S. 726, 729 (1978).

<sup>40</sup> *Id.* at 729-30.

<sup>41</sup> *Id.* at 729.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 730.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 731.

<sup>47</sup> *Id.* at 731 n.2 (internal citations omitted).

inappropriate for them to hear.”<sup>48</sup>

The Court of Appeals for the District of Columbia Circuit reversed the order and the Supreme Court granted certiorari.<sup>49</sup> *Pacifica* raised two constitutional challenges to the Commission’s order: (1) that the Commission’s construction of the statutory language of 47 U.S.C. § 326 and 18 U.S.C. § 1464 broadly encompassed so much constitutionally protected speech that reversal was required even if its broadcast of the monologue was not itself protected by the First Amendment; and (2) since the broadcast was not obscene, it was protected under the First Amendment.<sup>50</sup> The Supreme Court disagreed with both of these arguments, holding that an indecent broadcast did not enjoy an absolute First Amendment protection.<sup>51</sup>

As to the first argument, the Court held that it could decide only whether the Commission had the authority to regulate a specific broadcast, taking into account the context in which it was aired.<sup>52</sup> In its order, the Commission had defined indecent as “intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience.”<sup>53</sup> The Court found that although the order may cause some broadcasters to censor themselves, the Commission’s definition of indecency would only discourage the broadcasting of “patently offensive references to excretory and sexual organs and activities,” and this speech is only at the border of First Amendment concern.<sup>54</sup>

The Court also rejected the argument that the First Amendment forbids the censorship of any material that is not obscene.<sup>55</sup> The Court acknowledged that the words of the monologue were indeed speech that was regulated based on its content.<sup>56</sup> The Court found that both content and context are important to a First Amendment analysis of any speech regulation.<sup>57</sup> It then analogized indecent speech to obscene speech since they both offend for the same reasons and are not an essential contribution to the marketplace of ideas.<sup>58</sup> Although the indecent speech does not enjoy an absolute Constitutional privilege, it is still important to look at the

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<sup>48</sup> *In re Citizen’s Complaint Against Pacifica Found.*, 56 F.C.C.2d 94, 98 (1975).

<sup>49</sup> *Pacifica*, 438 U.S. at 733–34.

<sup>50</sup> *Id.* at 742.

<sup>51</sup> *Id.* at 742–51.

<sup>52</sup> *Id.* at 742–43.

<sup>53</sup> *Citizen’s Complaint Against Pacifica Found.*, 56 F.C.C.2d, at 98.

<sup>54</sup> *Pacifica*, 438 U.S. at 743.

<sup>55</sup> *Id.* at 754.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 746.

context of the speech to see if it enjoys any First Amendment protections.<sup>59</sup>

The Court focused on two contextual justifications for upholding the order mirroring those offered by the Commission's order. First, broadcast media plays a "uniquely pervasive presence in the lives of all Americans."<sup>60</sup> Broadcast media has the ability to access audiences in public and in their homes.<sup>61</sup> Furthermore, the audience is constantly tuning in and out, making prior warnings that the content may be offensive inadequate to protect the nonconsenting listener.<sup>62</sup> The second contextual justification for upholding the Commission's order was that "broadcasting is uniquely accessible to children, even those too young to read."<sup>63</sup> The Court emphasized that the government has a compelling interest in the "well-being of its youth" and in supporting "parents' claim to authority in their own household."<sup>64</sup> It was important to the Court that "children may obtain access to broadcast material."<sup>65</sup>

## 2. Action for Children's Television v. FCC

Following *Pacifica*, the FCC instituted "safe harbor" provisions which classified certain hours of every day in which indecent material could not be broadcast. Congress passed the Telecommunications Act of 1992<sup>66</sup> in which section 16(a) required the FCC to prohibit the broadcasting of indecent programming between 6:00 a.m. and 10:00 p.m. on any station that goes off the air at midnight, and between 6:00 a.m. and midnight for all other stations.<sup>67</sup> In response, the FCC issued regulations implementing section 16(a).<sup>68</sup> A group of broadcasters, authors, program suppliers, listeners, and viewers petitioned for judicial review of the regulations before the United States Court of Appeals for the District of Columbia.<sup>69</sup> The broadcasters challenged the constitutionality of the regulations, arguing that they violated the First Amendment because "they impose[d] restrictions on indecent broadcasts that are not narrowly tailored to further the Government's interest."<sup>70</sup>

In analyzing the constitutional claim, the court relied heavily on the Supreme Court's reasoning in *Sable Communications of California, Inc. v.*

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<sup>59</sup> *Id.* at 747–48.

<sup>60</sup> *Id.* at 748.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 749.

<sup>64</sup> *Id.* (citing *Ginsberg v. New York*, 390 U.S. 629, 639–40 (1968)).

<sup>65</sup> *Id.* at 750.

<sup>66</sup> Public Telecommunications Act of 1992, Pub. L. No. 102–356, 106 Stat. 949 (1992).

<sup>67</sup> 47 U.S.C. § 303 (1992).

<sup>68</sup> 47 C.F.R. § 73.3999 (1994).

<sup>69</sup> *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995).

<sup>70</sup> *Id.* at 659.



FCC.<sup>71</sup> In *Sable*, the Court announced that “[s]exual expression which is indecent but not obscene is protected by the First Amendment.”<sup>72</sup> It qualified that right in *Sable* by stating that the government can “regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.”<sup>73</sup> The *Sable* Court required that content regulation be subject to a strict scrutiny analysis in which the regulation will survive if the “Government’s ends are compelling [and its] means [are] carefully tailored to achieve those ends.”<sup>74</sup>

In *Action for Children’s Television v. FCC*, the Court of Appeals applied the strict scrutiny analysis to the safe harbor provisions and found that the government did have a compelling interest and that the regulations were indeed narrowly tailored to further that interest.<sup>75</sup> The court began its analysis by reiterating that radio and television broadcasts “may properly be subject to different—and often more restrictive—regulation than is permissible for other media under the First Amendment” because of the unique characteristics emphasized in *Pacifica*.<sup>76</sup> The court also noted that “[u]nlike cable subscribers, who are offered such options as ‘pay-per-view’ channels, broadcast audiences have no choice but to ‘subscribe’ to the entire output of traditional broadcasters.”<sup>77</sup> It found traditional broadcast to be “manifestly different from a situation where a recipient seeks and is willing to pay for the communication.”<sup>78</sup>

The Commission emphasized three compelling government interests as justifications for regulating broadcast indecency: (1) support for parental supervision of children; (2) a concern for children’s wellbeing; and (3) the protection of the home against intrusion by offensive broadcasts.<sup>79</sup> The Court found that the first two justifications were sufficient and declined to address the third.<sup>80</sup> It emphasized the government’s interest in helping parents to promote their children’s well-being and to support those parents in the household by restricting offensive speech inside the home.<sup>81</sup> The Court pointed to studies described by the FCC that showed the pervasiveness of radios and televisions in children’s homes and

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<sup>71</sup> 492 U.S. 115 (1989). In *Sable*, the Court addressed the constitutionality of a statute that imposed a ban on obscene and indecent interstate commercial telephone messages. *Id.* at 117.

<sup>72</sup> *Id.* at 126.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> 58 F.3d 654, 656 (D.C. Cir. 1995).

<sup>76</sup> *Id.* at 660.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* (internal citations omitted).

<sup>79</sup> *Id.* at 660–61.

<sup>80</sup> *Id.* at 661.

<sup>81</sup> *Id.*

bedrooms.<sup>82</sup> Furthermore, the Court pointed out that “parents who wish to expose their children to the most graphic depictions of sexual acts will have no difficulty in doing so through the use of subscription and pay-per-view cable channels, delayed-access viewing using VCR equipment and the rental or purchase of readily available audio and video cassettes.”<sup>83</sup> The court then looked at whether the regulations constituted the least-restrictive means to further the articulated interest.<sup>84</sup> The court held that “[a]lthough the restrictions burden the rights of many adults, it seems entirely appropriate that the marginal convenience of some adults be made to yield to the imperative needs of the young,”<sup>85</sup> and it decided that the safe-harbor was narrowly tailored to serve the compelling interest of protecting children from indecent material.<sup>86</sup>

### C. *Indecency Regulation of Cable*

The courts have been much less willing to uphold regulations of cable television than for broadcast media. The interesting intersection between the two is when cable providers include local programming as part of their menu of stations. In that case, the First Amendment analysis changes literally as a viewer changes channels. The Supreme Court has declined to extend *Pacifica* to cable or any other medium but broadcast. It took a step in that direction in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC* in a highly fractured plurality decision.<sup>87</sup> However, the Court then stepped away from that stance in *United States v. Playboy Entertainment Group*,<sup>88</sup> where it signaled an intent to treat cable differently than broadcast for indecency regulations.

#### 1. *Denver Area Educational Telecommunications Consortium v. FCC*

In *Denver*, the Court addressed First Amendment challenges to three statutory provisions that sought to regulate the broadcasting of “patently offensive” sex-related material on cable television.<sup>89</sup> Two of the

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 663.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 667.

<sup>86</sup> *Id.*

<sup>87</sup> *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996).

<sup>88</sup> *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000).

<sup>89</sup> *Denver*, 518 U.S. at 732. The statutory provisions at issue were part of the Cable Television Consumer Protection and Competition Act of 1992. 106 Stat. 1486, §§ 10(a), 10(b), and 10(c), 47 U.S.C. §§ 532(h), and 532(j). Sections 10(a) and 10(c) permit a cable system operator to prohibit the broadcasting of programming that the operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner over leased access channels and public, educational or government channels. Section 10(b) requires cable system operators to segregate certain patently offensive programming and to place it on a single blocked channel unless the viewer requests access in advance and in writing. *Denver*, 518 U.S. at 732–33.

provisions allowed a cable system operator to prohibit material that he reasonably believed to be indecent and the other required operators to segregate “patently offensive” material and to place it on a single channel that would not be available to viewers without their express advance request for access.<sup>90</sup> The provisions applied to leased access channels and public, educational, or government channels.<sup>91</sup>

In regards to the first provision, a plurality of the Court ruled that the permissive regulation allowing operators to block programming over leased channels did not violate the First Amendment.<sup>92</sup> The plurality analyzed the provision by scrutinizing whether it “properly address[ed] an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech.”<sup>93</sup> The compelling interest asserted by the government was the protection of children from “exposure to patently offensive depictions of sex.”<sup>94</sup> The Court found that the regulation was properly tailored to meet this goal, applying a balancing of interests between the need for protection of children and the interest of increasing availability of avenues of expression to programmers.<sup>95</sup> The Court analogized this situation with the one in *Pacifica*, finding that all of the *Pacifica* factors were present: accessibility to children, pervasiveness, intrusion into the home, and the ineffectiveness of warnings.<sup>96</sup> The Court made no distinction between cable as a paid service and broadcast as a free service. The Court found that not only was cable television easily accessible to children, it might be more accessible than broadcast because of the popularity of cable subscription.<sup>97</sup> Furthermore, the danger of random exposure to indecent material was increased because of the tendency for viewers to sample more channels while watching cable television.<sup>98</sup> Finally, the Court emphasized the availability to adults of programming on tapes or in theaters.<sup>99</sup>

The second statutory provision at issue differed in that it required operators to restrict speech by segregating and blocking indecent programming appearing on leased channels.<sup>100</sup> The Court found that this provision did violate the First Amendment because it failed to “satisfy [the] Court’s formulations of the First Amendment’s ‘strictest’ as well as

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<sup>90</sup> *Denver*, 518 U.S. at 732–33.

<sup>91</sup> *Id.* at 732.

<sup>92</sup> *Id.* at 733.

<sup>93</sup> *Id.* at 743.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 744–45.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 745.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 733, 755.

its somewhat less ‘strict’ requirements.”<sup>101</sup> In using this language, the Court declined to decide whether *Pacifica* applied some lesser standard of review where indecent speech is at issue in other mediums.<sup>102</sup> However, in his dissent, Justice Thomas went so far as to say that “[t]he *Red Lion* standard does not apply to cable television”<sup>103</sup> and that the Court has drawn closer to the conclusion that “cable operators should enjoy the same First Amendment rights as the non-broadcast media.”<sup>104</sup>

The Court cited several factors guiding its determination that the segregate-and-block provision was not the least restrictive means available for protecting children from indecent material on leased channels. First, Congress had used other means to protect children from similar content on non-leased channels.<sup>105</sup> Second, cable operators are required to block any or all programs on any channel at the request of subscribers.<sup>106</sup> And finally, manufacturers would be required in the future to equip televisions with a “V-chip” that can identify and block indecent programming.<sup>107</sup> The Court stated that the government’s concerns could be addressed with informational requirements, easily accessible blocking technology, coding systems, and lockboxes.<sup>108</sup>

## 2. United States v. Playboy Entertainment Group

After only a few years, the Court seemingly abandoned its conclusion in *Denver* that the *Pacifica* factors apply to cable television. In *United States v. Playboy Entertainment Group, Inc.*, the Court addressed the constitutionality of a statute that required cable operators either to scramble sexually explicit channels in full or limit programming on such channels to the safe-harbor hours.<sup>109</sup> These requirements were put in place because of the danger that children would be exposed to hearing and seeing sexually explicit images due to signal bleed on scrambled channels.<sup>110</sup> Since most of the programmers opted for the safe-harbor option, no houses in the service area could receive that type of programming during the safe-harbor hours even if they wanted to.<sup>111</sup> Furthermore, the Court noted that because “30 to 50% of all adult programming is viewed by households prior to 10 p.m., the result was a significant restriction of communication, with a

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<sup>101</sup> *Id.* at 755.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 815 (Thomas, J., dissenting).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 756.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 759.

<sup>109</sup> *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000).

<sup>110</sup> *Id.* at 806.

<sup>111</sup> *Id.*

corresponding reduction in Playboy's revenues."<sup>112</sup> The Court held that the statute violated the First Amendment because the government failed to prove that the statutory requirements were the least restrictive means for addressing the issue of protecting children from indecent programming.<sup>113</sup>

The Court found the statute to be a content-based regulation because the statute was "not justified without reference to the content of the regulated speech" and "focuse[d] *only* on the content of the speech and the direct impact that speech has on its listeners."<sup>114</sup> Because the regulation was content-based, the Court applied strict scrutiny analysis, requiring the government to show that the regulation is narrowly tailored to promote its stated compelling interest.<sup>115</sup> Furthermore, there must not be a less restrictive alternative available to the government.<sup>116</sup> The Court expressly repudiated the application of any lesser standard of scrutiny, distinguishing broadcast from cable based on cable systems' "capacity to block unwanted channels on a household-by-household basis."<sup>117</sup> Notably, the Court did not apply any of the *Pacifica* factors to cable as it did in *Denver*. This blocking ability was not only less restrictive,<sup>118</sup> but also nullified the *Pacifica* concern that "traditional First Amendment scrutiny would deprive the Government of all authority to address this sort of problem."<sup>119</sup> This is because selective blocking gives support to "parental [control] without affecting the First Amendment rights of both speakers and willing listeners."<sup>120</sup> Moreover, there were other less restrictive "market-based solutions" to addressing the concern over child access to indecent material such as "programmable televisions, VCR's [sic], and mapping systems [which could] . . . eliminate signal bleed . . ."<sup>121</sup> This departure from the reasoning set forth in *Denver*, a highly fractured ruling, signals the Court's unease in applying the *Pacifica* indecency analysis outside the broadcast paradigm.

### III. REGULATION OF SATELLITE RADIO

The FCC stated in December 2004 that satellite radio is not subject to FCC indecency controls.<sup>122</sup> However, the flight of programs like Howard Stern's to satellite radio has prompted calls from Congress, the public, and

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<sup>112</sup> *Id.* at 809 (internal citations omitted).

<sup>113</sup> *Id.* at 811–25.

<sup>114</sup> *Id.* at 811 (internal citations omitted).

<sup>115</sup> *Id.* at 813.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 815.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 821.

<sup>122</sup> Letter from Kenneth Ferree to Mt. Wilson FM Broad. Inc., 19 F.C.C.R. 24069 (Dec. 15, 2004).

broadcasters to extend the indecency controls to all media, including satellite.<sup>123</sup> Since “[e]ach medium of expression . . . may present its own problems,”<sup>124</sup> the development of new standards has been necessary in accompanying the development of new technologies over which speech is communicated to the public. It seems almost inevitable that political pressure will lead Congress and the FCC to develop indecency controls for satellite radio. Therefore, the Court will need to develop a standard by which to evaluate indecency regulations of satellite radio. Satellite radio is one area of media where the FCC may not be able to break the constitutional barrier to regulation. The technology of satellite radio, its restricted access, and the ability for voluntary programming controls create significant barriers to not only the government’s ability to state the traditional compelling interest of protecting children, but also to its ability to narrowly tailor a regulatory regime for the medium.

#### A. *The History and Growth of Satellite Radio*

Satellite radio is one of the newest and fastest growing forms of media offering programming available to a wide audience. In 1992, the FCC allocated a spectrum in the “S” band (2.3 GHz) for nationwide broadcasting of satellite-based Digital Audio Radio Service (DARS).<sup>125</sup> In 1997, the FCC granted licenses to two of four companies that applied for them.<sup>126</sup> CD Radio (now Sirius Satellite Radio) and American Mobile Radio (now XM Satellite Radio) paid more than \$80 million each to use space in the S-band for digital satellite transmission.<sup>127</sup>

Satellite’s customer total has reached over five million in less than four years of operation and is expected to surpass eight million by the end of 2005.<sup>128</sup> Both Sirius and XM have aggressively marketed their product to automobile owners and, in turn, car companies. Honda and General Motors have signed agreements to use XM radios in their cars,<sup>129</sup> and Sirius has inked similar deals with companies such as Ford, Dodge, BMW, Mercedes Benz, and Nissan.<sup>130</sup> Additionally, customers can now purchase portable receivers available at many electronic retail stores.<sup>131</sup> This rapid

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<sup>123</sup> Ahrens, *supra* note 17.

<sup>124</sup> *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

<sup>125</sup> Kevin Bonsor, *How Satellite Radio Works*, available at <http://www.howstuffworks.com/satellite-radio.htm/printable> (last visited Mar. 3, 2006).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Lorne Manly, *As Satellite Radio Takes Off, It Is Altering the Airwaves*, N.Y. TIMES, Apr. 5, 2005, at A1.

<sup>129</sup> Bonsor, *supra* note 125.

<sup>130</sup> SiriusAutomotive Partners, <http://www.sirius.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=Gateway&cid=1066857398286>, (last visited Dec. 15, 2005).

<sup>131</sup> Bonsor, *supra* note 125.

growth is helping satellite radio to establish itself as an alternative to the rapidly conglomerating broadcast media.

*B. The Technology Behind Satellite Radio*

The technology behind satellite radio is important to understand when narrowly tailoring an indecency regulatory scheme for it. Each medium presents its own unique technological background to any court analysis. This technology includes how the signal is transmitted through the broadcast network as well as features of the radio receivers that allow consumers to manage the programming they receive. The two satellite radio companies, XM and Sirius, organize their broadcasting network differently. They each use three components that are essential for satellite radio: satellites, ground repeaters, and radio receivers.<sup>132</sup> Despite the different organization of the broadcasting networks, both companies offer online subscriptions and similar features allowing their customers to manage their listening preferences.

XM Radio operates two satellites named “Rock” and “Roll,” placed in parallel geostationary orbit, one at 85 degrees west longitude, and the other at 115 degrees west longitude.<sup>133</sup> Geostationary earth orbit (GEO) is the type of orbit most commonly used for communications satellites. The first XM satellite, “Rock,” was launched on March 18, 2001, with “Roll” following on May 8.<sup>134</sup> XM Radio also has a third satellite ready to be launched in case one of the two orbiting satellites fails.<sup>135</sup> “XM Radio’s ground station transmits a signal to its two GEO satellites, which bounce the signals back down to radio receivers on the ground.”<sup>136</sup> In areas where structures can block the satellite signal, especially in urban areas, “XM’s broadcasting system is supplemented by ground transmitters.”<sup>137</sup> Each receiver contains a proprietary chipset.<sup>138</sup> The signal is then beamed to a small antenna in the receiver.<sup>139</sup>

Sirius does not use GEO satellites, instead opting for three SS/L-1300 satellites that form an inclined elliptical satellite constellation.<sup>140</sup> “A fourth satellite will remain on the ground, ready to be launched if any of the three active satellites encounter transmission problems.”<sup>141</sup> Sirius programs are beamed to one of the three Sirius satellites, which then transmit the signal

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

to the ground, where the radio receiver picks up one of the channels within the signal.<sup>142</sup> “Signals are also . . . beamed to ground repeaters for listeners in urban areas where the satellite signal can be interrupted.”<sup>143</sup> The Sirius receiver includes a receiver module and an antenna module which picks up signals from the ground repeaters or the satellite, amplifies the signal, and filters out any interference.<sup>144</sup> “The signal is then passed on to the receiver module.”<sup>145</sup>

XM radio receivers are programmed to receive and unscramble the digital data signal, which contains up to 100 channels of digital audio.<sup>146</sup> “In addition to the encoded sound, the signal contains additional information about the broadcast. The song title, artist[,] and genre of music are all displayed on the radio.”<sup>147</sup> Subscribers pay a monthly fee for each receiver that they wish to use.<sup>148</sup> XM has taken steps to allow for parental control over the programming available to each receiver by allowing for selective blocking of channels with a request by the subscriber.<sup>149</sup> However, channel blocking is not available for the online service.<sup>150</sup> Furthermore, “[c]hannels with a high frequency of explicit language are indicated on the channel line-up and on the receiver channel display with an ‘XL.’”<sup>151</sup> Additionally, XM’s terms and conditions require parents to exercise discretionary control over what their children may listen to.<sup>152</sup>

Sirius offers car radios and home entertainment systems, as well as car and home kits for portable use and an online service.<sup>153</sup> Inside the receiver module is a chipset consisting of eight chips which convert the signals

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> XM Radio, Frequently Asked Questions, [http://www.xmradio.com/faq/faq\\_list\\_servlet.jsp?section\\_id=4&section\\_main=XM%20Satellite%20Radio#](http://www.xmradio.com/faq/faq_list_servlet.jsp?section_id=4&section_main=XM%20Satellite%20Radio#).

<sup>149</sup> XM Radio, XM Satellite Radio Customer Agreements, [http://www.xmradio.com/get\\_xm/customer\\_service.html](http://www.xmradio.com/get_xm/customer_service.html). Section 1(g) of the contract states,

Channel Blocking and Monitoring. Some programming may include explicit language. Channels with a high frequency of explicit language are indicated on your channel line-up and on the channel display with an “XL.” It is your responsibility to impose listening restrictions that you consider appropriate on others. Please contact our Listener Care Center 1-800-XM-RADIO (1-800-967-2346), or visit our website XMRADIO.com for information on channel blocking. The Online Service is designed to appeal to a broad audience, and some programming may include explicit language. Channel blocking is not available with the Online Service; therefore it is your responsibility to impose listening restrictions that you consider appropriate on others.

*Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Bonsor, *supra* note 125.



from 2.3 gigahertz (GHz) to a lower intermediate frequency.<sup>154</sup> Sirius also offers an adapter that allows conventional car radios to receive satellite signals.<sup>155</sup> As with XM, Sirius subscribers pay a monthly fee for each separate receiver that they wish to use.<sup>156</sup> Sirius also offers options for channel blocking, but does not designate channels with a high frequency of adult programming.<sup>157</sup> Sirius also contractually warns parents that some channels contain programming inappropriate for children and obligates them to impose listening restrictions on their children if they do not wish them to hear indecent programming.<sup>158</sup>

### C. Applying the Indecency Doctrine to Satellite Radio

Given the tremendous growth and popularity of Satellite Radio and the coinciding political movement to strictly regulate content not only in broadcasts but also in other media, the Supreme Court is going to have to decide whether all media can be regulated in the same manner or if some are entitled to more freedom in their programming content than broadcast. The Court faces the option of applying a *Pacifica*-type analysis and allowing the government to justify controls under some lower level of scrutiny than is afforded print media or applying a *Playboy*-type analysis where satellite radio is afforded the same or nearly the same First Amendment protections as print media. Satellite radio features many market-based features allowing parental control over child access to programming. Furthermore, if broadcast standards were to apply to satellite radio given this extraordinary amount of control, it is hard to imagine any forum which makes speech widely available to the public that can escape the government's morality controls.

#### 1. The *Pacifica* Analysis

The first option available to courts weighing the constitutionality of indecency regulations would be to apply the lower level of scrutiny that is

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> Sirius Satellite Radio, Frequently Asked Questions, <http://www.sirius.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=Page&cid=1018209032792>.

<sup>157</sup> Sirius Satellite Radio, Terms and Conditions, <http://www.sirius.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=Page&cid=1019257316747>. The Terms and Conditions states in section 1(e):

Parental Control. Some programming may include explicit language. It is your responsibility to impose listening restrictions that you consider appropriate on your family members and guests as you feel appropriate. We are not responsible for content that you or anyone else may find inappropriate. Please contact Customer Care to discuss options for channel blocking.

*Id.*

<sup>158</sup> *Id.*

applied to broadcast indecency as was done in *Denver*.<sup>159</sup> In that type of analysis a court would weigh the *Pacifica* factors as applied to satellite radio: pervasiveness of the medium, invasiveness into the home, accessibility to children, and the capability of properly warning listeners as to the nature of the program's content. Even under this analysis, it seems unlikely that a court would uphold many restrictions imposed on satellite radio. Satellite has unique characteristics that do not fit neatly into the *Pacifica* paradigm.

Satellite radio is not nearly as pervasive as broadcast. The satellite radio audience is still smaller than ten million customers as opposed to the unlimited audience available to broadcasters. As satellite radio continues to grow in popularity, it may be considered by the courts to be more pervasive. The Supreme Court, in *ACT*, has already noted that the rising popularity of cable has made it at least as pervasive as broadcast if not more. This type of reasoning ignores the fact that the growing cable or satellite audiences could be a result of a majority of the population wanting access to indecent programming that is not available via broadcast. This possibility should be considered by a court when evaluating the importance of the pervasiveness of a medium of speech.

The idea of speech "invading" the home is undermined in any subscription service. Broadcast is beamed into the home without any positive action on behalf of the home's owners other than turning on the television. However, in order to gain access to satellite programming, customers must actively subscribe to a satellite radio service. The subscription service is more analogous to an invitation into the home rather than an invasion. It is unclear if the Court would consider the subscription an invitation. The Supreme Court seemed to suggest in *Denver* that the fact that cable is a paid service does not undermine the *Pacifica* analysis by omitting any reference to that fact. However, in *ACT*, the court emphasized that broadcast was "manifestly different from a situation where a recipient seeks and is willing to pay for the communication."<sup>160</sup> Furthermore, satellite radio seems to fit nicely into the category of alternatives suggested in *ACT*. It is more like a pay-per-view service than traditional broadcasting.

The accessibility of satellite radio to children depends entirely on the amount of control parents choose to exert over their subscription service. Unlike in broadcast and cable where a child can listen to programming from any radio or television station in the home, satellite programming is only available through special satellite receivers. Not only must parents purchase these receivers and choose to give one to their children, but they

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<sup>159</sup> See *supra* Parts II.B.1, II.C.1.

<sup>160</sup> *Action for Children's Television v. FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995).

must actively pay for an additional subscription for each active receiver. It is each parent's choice whether to place a receiver in his or her child's bedroom or anywhere other than his or her own vehicle. Therefore, a parent can exercise exclusive control over the receiver and prevent children from listening to indecent content.

XM radio offers an effective solution to the problem of listeners not having adequate notice as to the content of a program. In broadcast, listeners may inadvertently be subject to indecent speech as they change channels on their radios and televisions. Prior warnings are ineffective at warning these listeners who cannot know if a program is indecent until the indecency is uttered. XM has moved toward solving this problem by identifying offensive content on the receiver display. When a listener changes to a station that is airing offensive content, he will be immediately warned on the display that he may not want to stay on that channel. Furthermore, the identifier "XL" is simple and easily identifiable at first glance, negating the need to closely examine the receiver to gain adequate notice.

The application of these four factors to satellite radio demonstrates that the government would have a difficult time comparing the danger to children of indecent programming on satellite radio to the same danger in broadcast. However, the outcome is far from certain if a court chooses to apply a lower level of scrutiny. The Supreme Court has never found the interest of protecting children less than compelling in the indecency context. Some Supreme Court Justices see indecent programming as having little value and therefore deserving of little protection as seen in *Pacifica*. Depending upon the composition of the Court, those Justices favoring a more conservative, family-friendly outcome may stretch the *Pacifica* reasoning to justify indecency restrictions on satellite radio.

## 2. *The Playboy Analysis*

The second approach available to the courts is to apply a *Playboy*-type analysis.<sup>161</sup> Under that analysis, the Court would apply the strict scrutiny standard that is applicable to all content-based regulations and would be closer to the standard applied to print media. The Court would require that any restriction imposed by the government be the least restrictive alternative available to meet the goal of protecting children from indecent content. Furthermore, the Court would distinguish satellite from broadcast based on both its ability to selectively block channels and the market based controls that satellite radio offers to parents seeking to prevent their children's access to offensive programming.

In *Playboy*, the Court distinguished cable from broadcast based on the

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<sup>161</sup> See *supra* Part II.C.2.

availability of selective blocking of channels offering indecent content. Both satellite radio companies offer the same option, only not under direction from Congress. Furthermore, both satellite companies currently offer less restrictive options for protecting children from indecent content. As noted above, XM radio clearly demarcates offensive programming through an indicator on the receiver display. Both companies warn their customers that some programming may be indecent and contractually leave discretion to parents to exercise control over their children's listening habits. In addition to the already offered alternatives, there are other options available for regulating children's access which are less restrictive impositions on the speakers' and willing listeners' rights than mandatory safe-harbor provisions that restrict access to all listeners for certain time periods each day.

### 3. *Should Indecency Standards Apply to Satellite Radio?*

In analyzing indecency restrictions on satellite radio, courts may also consider other factors which weigh against the constitutionality of indecency regulation. These factors do not fit into a previously articulated analysis, but represent important interests relevant to the constitutionality of content regulation of satellite radio. These interests include maintaining a forum which allows willing listeners unlimited access to offensive and indecent material, requiring some level of parental responsibility, and creating competition for broadcast networks that have largely consolidated into a few large conglomerates.

Courts should consider the interest of maintaining some forum that allows for those wishing to have unlimited access to "indecent" material. Maintaining satellite radio as that forum would leave a choice for those that want to protect their children from the content. If a customer wants access, he or she can subscribe, much like the pay-per-view option available for cable; however, if protecting children is the overriding concern for parents, they can choose not to subscribe and enjoy the indecency controls regulating broadcast. This idea of choice is important in balancing the interests of those who do not have children and, therefore, do not face the danger of their children being exposed to sexually offensive content. Furthermore, allowing satellite radio to remain as an unregulated forum for indecent speech puts the burden on those wishing to gain access to that speech, rather than on families wanting protection, by way of the subscription fee.

Courts should also consider the importance of requiring some minimum level of parental control. The rest of the public should not be reduced to listening to child-friendly content in the name of the government's interest in fortifying parental control. The government has repeatedly stated its interest is in strengthening parental control and yet the courts have seemed to move toward allowing the government to supplant

that control. It is not the government's role to make morality decisions for all children in place of their parents. In fact, the public has an interest in leaving that decision to parents rather than having it overridden by a small number of politicians' morality views. Satellite radio currently offers or has the capability of offering enough control to parents which makes the government's interference unnecessary.

Finally, the public has an interest creating more competition for broadcast networks after consolidation. There are relatively few speakers in the world of broadcast since the FCC relaxed the media ownership rules. Broadcasters object to indecency regulations not applying to cable and satellite on the ground that the situation furthers unfair competition. However, broadcasters seem to be asking to have it both ways. They choose to operate as a public trustee under their broadcast licenses in return for access to an unlimited audience. However, now they want satellite and cable companies to adhere to the same restrictions without enjoying the same benefits. Given the added benefits they receive as broadcasters, it is fair to subject them to regulations that satellite companies do not have. The decision to operate as a broadcaster or as a cable or satellite service provider represents a tradeoff and each speaker can weigh the benefits of each medium choosing which one to invest in.

#### *D. Industry Self-Regulation as the Appropriate Response*

As noted above, the satellite radio industry can take certain steps which would weaken the FCC's ability to regulate indecent programming available to subscribers. Many of the options are ones that the cable industry has already employed. These options include rating programs, informational campaigns, increased selective blocking technology, and offering a la carte or family-friendly subscriptions. By offering these alternatives, the industry can take control in asserting the least-restrictive measures needed to adequately protect children from indecent and offensive content on its stations.

The satellite industry should agree to rate all programs and include the rating on screen so that it is readily apparent for listeners when they tune in whether content is appropriate for children. XM has already taken the initial step in this direction by including the "XL" on the receiver display for offensive content. At a minimum, this option should be offered by Sirius with both companies including the added feature of an audio warning, such as a series of beeps, which would signal the possibility of indecent content. Ideally, however, the companies would go even further and adopt a system that is similar to the one employed by the cable industry. Most cable television programs carry a content rating that is

applied by networks and producers.<sup>162</sup> These ratings should be readily apparent on the receiver display and also accompanied by an audio warning so that parents can immediately judge whether the program would be appropriate for their children.

Another step that the satellite industry should take is to advertise and make clear the ability to block certain channels. The satellite radio companies should develop technology similar to the V-chip in television sets which allows parents to selectively block programs based on their ratings. Although both companies offer the ability to block an entire channel, this option does not allow parents to protect against the possibility of offensive content on a channel that does not regularly feature such content. Selective blocking negates the necessity of blocking an entire channel because of the content of only one program on that channel. The courts have already found blocking capability to be a significant way to weaken the government's ability to regulate, and strengthening the blocking technology would only weaken the FCC's authority even more.

The satellite industry should also institute a public informational campaign emphasizing the options available to subscribers who do not wish to have offensive programming available through their subscriptions. The cable industry has instituted a similar program which has been highly successful.<sup>163</sup> The cable industry has partnered with national parent groups and worked to inform parents of their ability to control programming on the television.<sup>164</sup> This campaign has included television commercials, brochures, and websites dedicated to informing parents of this important information.<sup>165</sup> The satellite industry should follow this lead and seek to befriend the groups that would tend to criticize its programming.

The final and perhaps most controversial action that the satellite industry could take to weaken the government's ability to regulate indecent content would be to offer package deals with sets of channels grouped to

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<sup>162</sup> National Cable and Telecommunications Association, *Cable Industry Efforts to Empower Television Viewers: Choice, Control and Education* (2004), [http://www.ncta.com/pdf\\_files/whitepapers/TVControl.pdf](http://www.ncta.com/pdf_files/whitepapers/TVControl.pdf).

The guidelines are divided into ratings categories for programs designed for children: TV-Y (All Children) and TV-Y7 (Directed to Older Children – age 7 and older); and categories for programs designed for the entire audience: TV-G (General Audience), TV-PG (Parental Guidance Suggested), TV-14 (Parents Strongly Cautioned – may be unsuitable for children under 14) and TV-MA (Mature Audience Only – may be unsuitable for children under 17). The TV Parental Guidelines combine information about the age appropriateness of a program with specific information, where appropriate, about the content of the program (i.e., “V” for violence, “S” for sexual content, “D” for suggestive dialogue, and “L” for strong language).

*Id.* at 5.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

target audiences including family-friendly and adult packages. There has been a significant public debate on this issue in the recent past with the FCC flip-flopping as to the feasibility of a la carte programming requirements for cable and satellite providers.<sup>166</sup> This option would offer subscribers more choices to reject certain programming. The two options would be to allow subscribers to select, a la carte, each station they wish to receive, or offer family-friendly packages available at a premium. The cable industry has opposed the first option arguing that it is economically unfeasible because the subscription prices would be pushed up since some stations subsidize others.<sup>167</sup> Moreover, requiring all subscribers to select a la carte each channel they wish to receive burdens all listeners to keep notice of any new channels they wish to subscribe to. That burden would be disproportional in light of the blocking technology available to those subscribers wanting indecency-free programming. Given these results, the better of the two options seems to be the second in which the satellite companies could offer a family-friendly package of channels. In this scenario, the company would require some stations to be free of indecent or offensive programming, package those stations together, and offer subscribers the choice of receiving the full menu of channels or only the family-friendly ones. The satellite radio companies could charge a higher fee for the family-friendly package in order to recoup expenses incurred in offering the package. Thus the burden will be placed on those in the minority of the listening audience who want access to a limited range of channels, rather than the majority of satellite listeners who may wish full access to all content while still satisfying the need to protect children from offensive content.

#### IV. CONCLUSION

The satellite industry will surely face governmental attempts to regulate its content and police its airwaves for indecency. Any such action will force an important First Amendment battle that will ultimately decide how the courts will weigh the interests of protecting children against the interests of speakers and willing listeners of content. Howard Stern had one regret about leaving the broadcast medium, stating that “[m]y day in court never came. If we had gone to court, all of this would have been moot. None of the show would have been found indecent and we could do real broadcasting.”<sup>168</sup> If certain members of Congress or the broadcast contingent gets its way, Mr. Stern may very well enjoy his day in court and vindicate his program and his First Amendment rights.

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<sup>166</sup> *F.C.C. Chief Prods Pay TV To Help Combat Indecency*, N.Y. TIMES, Nov. 30, 2005, at C3.

<sup>167</sup> *Id.*

<sup>168</sup> Mark Peyser & Nicki Gostin, *True Blue Howard*, NEWSWEEK, Dec. 12, 2005.