INSIDE ENTERTAINMENT & MEDIA LAW
THE Hollywood REPORTER, ESQ.
September 26, 2006

Indecency regulation: Is Internet video next?

Pacifica may be applied to online entertainment

BY KENNETH FERREE

FORUM
Analysis and insight from the community

While cases regarding the lawfulness of the FCC's ferocious new war on broadcast indecency wind through the courts, conventional wisdom holds that the briars of government content regulation are unlikely to be placed upon subscription-based cable and satellite services, and that they never will apply to Internet video offerings. Sadly, this might be an instance of conventional thinkers whistling past the graveyard.

Although the legal case for importing the broadcast indecency rules to other platforms might be weak, in the current political environment, it is not inconceivable that it will be tested. Those who care deeply about the First Amendment and the freedom to consume media content of their choice without bowdlerization can only hope that it will pass that test.

PACIFICA: ORIGIN OF THE PROBLEM

We take it now as an article of faith that the FCC might (and, some insist, should) regulate decency on broadcast radio and television. That was not always the case. Certainly, it has long been a violation of federal law to broadcast "any obscene, indecent or profane language by means of radio communication." But not until *FCC v. Pacifica,* when the Supreme Court in 1978 "unstitch(ed) the warp and woof of First Amendment law," as Justice Brennan noted in his dissent, was the federal indecency statute accepted as covering anything more than obscene speech. That is, until *Pacifica* the FCC could not restrict otherwise protected speech unless it could be characterized as "indecent." In that sense, *Pacifica* was strikingly original, and stunningly flawed.

Perhaps recognizing the enervating potential of its holding for the cherished principles of the First Amendment, the *Pacifica* Court attempted to narrow its decision by limiting it to the broadcast platform. In order to do so, it focused on three factors that it believed distinguished broadcasting from other media.

First, the Court noted that broadcasters have traditionally been afforded lesser First Amendment protection than other speakers. This lower level of protection, in turn, rested on a notion held over from the early days of broadcasting known as the scarcity doctrine. Put simply, the scarcity doctrine holds that, because the broadcast spectrum is scarce, i.e., there are more speakers than the spectrum can accommodate, more intrusive government regulation is warranted.

Second, the Court reasoned that broadcast radio and television have a uniquely pervasive presence in the lives of all Americans.

Third, the court attempted to distinguish the broadcast medium from others by suggesting that broadcasting is uniquely accessible to children.

SCARCITY DOCTRINE DISCREDITED

Many legal scholars now agree with U.S. Circuit Judge Harry Edwards, who wrote almost 20 years ago that "*Pacifica* is a flawed decision, at least when one considers it in light of enlightened economic theory, technological advancements, and subsequent case law." The fact is, even if true in 1978, the supposedly distinguishing factors cited by the Court to separate broadcasting from other media simply no longer apply.

Crusaders who would protect wholesome American youth from nipple slips and curse words on broadcast television are now in the process of organizing cookie-cutter complaint campaigns about cable shows and pushing legislation to extend the reach of the indecency prohibition.

To begin with, the very basis for affording broadcasters a lower level of First Amendment protection — the so-called scarcity doctrine — has long since been discredited. All economic goods are scarce; that fact does not distinguish broadcasting from other media, nor does it justify government regulation of speech. Indeed, the Supreme Court seems in more recent cases to have recognized the vacuity of the scarcity rationale, though it has shown no willingness to dismantle the body of broadcasting case law that has been built upon it.

More fundamentally, one can hardly maintain today that broadcast media is more pervasive or more accessible to children than other forms of delivered media. Indeed, there is a certain irony to the new-found energy the FCC has devoted to the regulation of broadcast indecency when, in many ways, that ship has sailed. By elementary school, many children have largely abandoned broadcast television for subscription video services and the Internet. Spend a few minutes on any teen social networking or gaming site and you'll stop worrying about what kids might see on broadcast television.

Nonetheless, as is evident from the foregoing, the problem with attacking *Pacifica* is that one ends up chipping at

See **FORUM** *on page 9*

ABOUT THE AUTHOR

Kenneth Ferree is a partner in the entertainment, media and communications practice group in the Washington office of Sheppard Mullin Richter and Hampton, where he leads the firm's FCC and communications practice. He previously served as the FCC's media bureau chief.

Reprinted with permission from The Hollywood Reporter, Esq.

Continued from page 8—

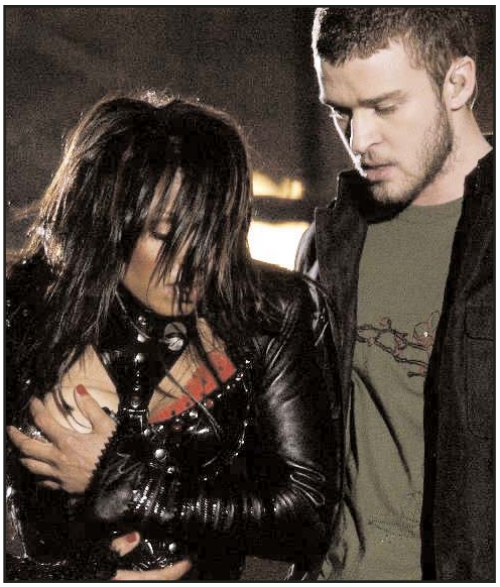
the supposed features of the decision that were intended to cabin it — namely, to protect other speakers from potential government regulation of fully protected but indecent speech. But there is no helping it: As the wall that separates broadcasting from other electronic media crumbles under the weight of technological advances and thoughtful analysis, what was once a purposely narrow decision becomes potentially much more sweeping in its application.

The problem with *Pacifica* was not that its effort to distinguish broadcasting from other media was weak in 1978 (and completely laughable today), but that it was wrong to ever allow government regulation of fully protected speech.

OF PEASANTS AND PITCHFORKS

Perhaps the picture is not so bleak. After all, the courts already have concluded that *Pacifica* does not reach beyond the broadcast medium. But those decisions rest largely on the distinctions between broadcasting and other media identified in *Pacifica* itself — the precise underpinnings that no longer are coherent or defensible. Thus, the cage that the *Pacifica* court cobbled together so that it could safely experiment with a kind of First Amendment Frankenstein's monster has collapsed, while the monster itself remains potentially viable.

Most people in the media business are coming to terms with the realization that, over the next few years, consumer behavior vis-à-vis electronic media is likely to change dramatically. One-third of all broadband users will be watching video online by 2010, and sales of mobile video players will grow to 5 million units by the end of next year.



What will be the Internet's Janet Jackson event?

And make no mistake about it: The Grundyists who have been fanning the flames of the FCC's broadcast indecency crackdown are thinking about how they might sunder the creature's shackles and unleash it on villagers throughout the electronic media landscape.

Crusaders who would protect wholesome American youth from nipple slips and curse words on broadcast television are now in the process of organizing cookie-cutter complaint campaigns about cable shows and pushing legislation to extend the reach of the indecency prohibition.

Will Internet video be next? As a commercial matter, most people in the media business are coming to terms with the realization that, over the next few years, consumer behavior vis-à-vis electronic media is likely to change dramatically. One-third of all broadband users will be watching video online by 2010, and sales of mobile video players will grow to 5 million units by the end of next year.

The other side of that coin, however, is that regulation is likely to follow the eyeballs. Many of the current regulatory requirements that apply to broadcast television and radio, and which increasingly are being imported to subscription video services, represent fundamental value choices and will not be easily abandoned in a new-media world.

Closed captioning requirements, for example, reflect a societal decision that the hearing-impaired should not be foreclosed from experiencing delivered video programming. Will it surprise anyone, then, if Congress or the FCC were to attempt to impose closed captioning requirements on new video platforms? The same might be said of emergency-alert requirements or the particular rules that apply to children's programming.

A LOOMING SHOWDOWN?

The efforts of policy makers to create transcendent regulatory requirements as technology evolves inevitably will lead to a legal showdown of sorts: How far will the courts allow the government to go when it comes to regulating speech on these emerging video platforms?

We are not, of course, writing on a blank slate here. In *ACLU v. Reno,* the Supreme Court was very protective of (at least) Internet speech. But that decision should not be read as an invitation to complacency. Even in *Reno,* the Court distinguished the differential treatment of broadcasting on the basis of its history of regulation by the FCC and, again, on the lower level of protection broadcasting traditionally has been afforded (even citing, again, the discredited scarcity rationale).

As noted above, however, and most troubling, it is far from clear that these bases alone are enough to contain the justification for intrusive government "decency" regulation. However pervasive broadcasting was in the 1970s, it is almost surely the case that Internet-based TV will be equally pervasive in 2010.

And if, because of languid parental supervision, children need protection from broadcast programming, it may be said that children need protection from unsupervised Internet use. (Again, we're not dealing with protecting kids from access to hardcore sites but merely sites that contain plain old "indecency" of the kind to which the FCC would object — the display of a loose breast or an utterance of the word "shit.")

So what, then, is left of *Reno?* Only the odd notion that the historical regulation of broadcasting somehow justifies differential treatment. That is, because broadcasting was regulated in the past, it always shall be, while otherwise indistinguishable services shall go unregulated simply because they are too new to have been historically regulated.

That seems a thin reed on which to base this important, but increasingly tenuous, distinction between broadcasting and all other forms of electronic media.

Keep those pitchforks cleaned and polished. ◁