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The Law and Economics of the FCC's Decency Standard

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By:

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Paper Abstract

The broadcasting industry is one of the most public and most scrutinized industries in America. Television and radio networks allow for the mass communication of programming simultaneously across the country. All of this is regulated by the Federal Communications Commission ("FCC"), a federal agency that claims among its powers, the ability to determine what content is and is not "decent" for public consumption.

With the proliferation of cable and satellite distribution of programming, however, the broadcast networks have encountered more and more pressure to push the limits of the FCC’s edicts. With more choices than ever, does it still make sense to regulate the content of over-the-air broadcasting? Can the market regulate content better than the government?

This paper will argue that the regulation of broadcast networks is outdated and that these businesses could provide greater value to the public without the shackles of the FCC’s decency requirements. This paper will focus specifically on the television context for simplicity, though many of the same issues will be applicable to radio as well.
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I. Introduction to FCC Decency Regulations

The Federal Communications Commission ("FCC") was established as an agency of the United States government by the Communications Act of 1934. The FCC has been empowered by Congress to promulgate decency regulations for the content of over-the-air broadcasts, as well as to enforce those regulations by levying fines on violators. Congress has forbidden the FCC from using this power to engage in censorship.

Significantly, the FCC first exercised the authority to sanction indecent speech in 1975, finding a George Carlin monologue to be unsuitable for broadcast consumption. The monologue, aired at 2:00 in the afternoon, was filled with expletives, lasting 12 minutes. The FCC did not immediately sanction the radio station for that broadcast, but instead used the decision as a clarification and warning for the future.

The definition of "indecent" used by the FCC in these proceedings is ultimately a very hazy one. At times it seems that decency depends on whether or not children are in the audience. As the FCC wrote about George Carlin’s monologue:
[T]he concept of 'indecent' is 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. Obnoxious, gutter language describing these matters has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions, and we believe that such words are indecent within the meaning of the statute and have no place on radio when children are in the audience. viii

Essentially, the concept of indecency to the FCC is based on both the content of the message (whether or not it is “sexual” or “excretory”) and the presumption of minors in the audience. The FCC later noted that this case was “intended to address only the particular facts of the Carlin monologue as broadcast,” ix and left open the possibility of an exception for some live event broadcasts. x

The Supreme Court has stated that broadcasting is given the most limited First Amendment protection, out of all the forms of communication. xi This is because broadcasting is “uniquely pervasive in the lives of all Americans.” xii In short, the FCC’s
determinations regarding decency are not heavily scrutinized by the courts.

The Supreme Court heard oral arguments earlier in this term in *FCC v. Fox Television Stations*. The Court was asked in that case to determine whether imposing liability for fleeting expletives broadcast during a live awards ceremony is “arbitrary and capricious” under the Administrative Procedure Act, based on the FCC’s prior policy of acceptance of fleeting expletives. The Court ultimately ruled that it was neither arbitrary nor capricious, relying on the FCC’s acknowledgement that it was changing the rule, and the judgment that the new rule is permissible under relevant statutes. Furthermore the Court found that the FCC’s decision not to issue a fine precludes any claims that the change in policy was arbitrarily punitive. The Court did not address the Constitutionality of the FCC regulations, as the matter was not reviewable on appeal, but left the matter open for lower courts to consider either on remand or in future cases.

With the threat of fines becoming more common, broadcasters are asking for clearer indecency guidelines. A rigid set of rules would certainly provide a framework allowing broadcasters the ability to prevent liability for indecency. However, with over 85% of American households connected to either Cable or satellite television, perhaps it is time to rethink “indecency” altogether.
II. The Television Industry

a. Network Television

Commercial television began in the U.S. after the 1939 World’s Fair, and stations expanded throughout the country during the 40s and 50s. Borrowing a model from the radio business at the time, television networks were formed by the broadcasters to create and promote uniform content that would be distributed across the country. The broadcast network model has remained largely unchanged from that point.

When the FCC imposes a fine under its decency standards, the fine is charged to the individual stations (the licensee) that transmitted the signal. The network will usually own one or more of their affiliate stations, and therefore be affected by the fine directly.

Networks will rarely own all of their affiliate stations, however, and will franchise out their brand and programming to independent affiliates in most markets. This allows most of the regional stations within the network some local control over the programming. While there is usually a requirement that the affiliate grant the network certain hours for its programming, there have been times when certain affiliates, with knowledge of their market, have opted not to air particular programming (or alter the scheduling).

b. Cable Television
Cable television, which had initially been developed in the 1940s as a means of providing television reception in rural and mountainous areas, began to grow in popularity beginning in the 1960s. In 1972 cable television began to offer premium channels when they launched Home Box Office (“HBO”), which has gone on to become the world’s largest pay channel. By the end of the 1970s, nearly 16 million households subscribed to the service.

Today, there are hundreds of channels available via cable or satellite television, both “Basic” cable channels that are included with any subscription, as well as pay channels like HBO or Showtime. Cable customers also receive their local over-the-air channels through the cable service. As of 2005, the cable television advertising bureau estimated that 84% of all homes with a television were cable subscribers.

III. Content-based Regulation of Broadcasting

The FCC has long-regulated the content of broadcasters using the public airwaves. The FCC does not, however, claim the power to regulate subscription-based services like cable and satellite television. Despite cable television’s pervasiveness, the FCC’s decency rules only apply to the free over-the-air broadcasts on television networks and independent stations.
The power to regulate and fine broadcasters for airing indecent content is derived from a statutory grant of authority. This does not, however, include a power to censor the content; rather, statute specifically bars any rules being promulgated that interfere with the right of free speech. The Court has noted that the First Amendment does not protect obscene speech because it is “offensive to contemporary moral standards.” Indecent speech is protected by the first amendment, but to a lesser degree than ‘decent’ speech, and when children are likely in the audience, airing such content may be subject to sanctions.

For a decade after the decision in *FCC v. Pacifica Found.*, the FCC regulated in a conservative manner, in order to avoid creating a First Amendment conflict. Sanctions for “fleeting” expletives were not levied during this time. The FCC created a policy that to be indecent, speech “must involve more than the isolated use of an offensive word.”

This “fleeting expletive” exception disappeared in 2004, however, when a broadcaster was fined for allowing musician Bono’s fleeting expletive to air during a live broadcast. The FCC reversed its position on fleeting expletives, and instead declared, “the F-word, [and] any use of that word or a variation, in any context, inherently has a sexual connotation,” and is therefore “patently offensive under contemporary community standards.”
Currently the standard for determining whether programming is indecent is based on a two-part test. Indecent content (1) describes or depicts sexual or excretory organs or activities, and (2) is “patently offensive as measured by contemporary community standards for the broadcast medium.” To be deemed “patently offensive” the FCC considers three principle factors, including “(1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length [such descriptions]; (3) whether the material appears to pander or is used to titillate, or . . . [is] presented for its shock value.” Certain words, including “fuck” and “shit” are now considered to be presumptively indecent by the FCC, even when used fleetingly or without sexual connotation. This presumptive-indecency was developed, in part, to explain the move toward liability for fleeting expletives.

Prior to the Infinity Broadcasting reconsideration order, the FCC generally had observed a bright line rule that the hours between 10:00pm and 6:00am would be a safe harbor for indecent content. This was because it was presumed that children would not be in the audience during that timeslot. In Infinity Broadcasting, however the FCC rejected that bright line and stated that penalties would depend “on the available data for that market,” and whether there is a reasonable risk of children being in the audience.” Later, Congress would direct the FCC to enforce their decency standards on a 24-hour per day basis,
banning all over-the-air broadcasts that contain indecent material (a directive that was later abolished by the courts). The first amendment exception for indecent content is limited by the reasonable public policy concerns of the government.

In *Fox TV Stations, Inc. vs. FCC*, the Second Circuit found that the FCC’s changes in policy were in violation of the Administrative procedure Act. They found that there was no reasonable explanation for the policy change, and that the explanation given by the FCC had no rational connection to the application of FCC policies. The second circuit was, however, recently overturned by the Supreme Court, which ruled that the FCC’s new regulations were neither arbitrary nor capricious, but declined to rule on the first amendment claims because they were not at issue in the lower courts. As it stands, the policy of fining broadcasters for the airing of fleeting expletives remains both legitimate and enforceable in the eyes of the Court.

In 2006, “The Broadcast Decency Enforcement Act” was signed into law. This act increased the maximum fine that the FCC can impose on broadcasters for violations of indecency regulations. This represented a ten-fold increase in fines above the previous limit of $32,500.

The rationale underlying the content-based regulation of broadcasters, as introduced in *Pacifica*, is the pervasiveness of broadcast media in the lives of all Americans. The Supreme Court has greatly limited the First Amendment protection
available to broadcasters when indecent content is concerned, because broadcasting is “uniquely pervasive in the lives of all Americans.” The Court in Pacifica noted that despite the fact that indecent language is speech under the First Amendment, there is no constitutional bar against any government regulation of the content of speech. Quoting Schenk v. United States, the Court noted that, “[t]he 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 they will bring about the substantive evils that Congress has a right to prevent.

Prior to Pacifica, Congress’ right to regulate “fighting words,” libel, obscenity, and may “pay heed to the ‘commonsense differences’ between commercial speech and other varieties,” has been recognized by the Court. Indecent content is viewed by the Court to be not essential to “any exposition of ideas, and of such slight social value as a step to truth,” that any benefit can be outweighed by a “social interest in order and morality.” Under the First Amendment, different mediums have been given different levels of protection and since Red Lion Broadcasting Co. v. FCC broadcasters have been subject to a lesser degree of protection than most other mediums.

This lesser protection is due to broadcasting’s pervasive nature, which confronts the viewer not publicly, but in the privacy of their home. Warnings aired prior to indecent content do not warn the viewer who tunes in after the warning,
nor can changing the channel or turning off the television “undo” the confrontation with indecency. Furthermore, the accessibility of broadcasting to young children justifies regulation under Pacifica, because of a government interest in promoting the well-being of the nation’s youth.

The Court has declined to extend this relaxed scrutiny to cable television, despite the fact that it is arguably as “pervasive and invasive” as it’s broadcast counterpart. A large majority of American households are subscribers to either cable or satellite television services, which may work to erode the Court’s rationale in Pacifica.

Among the reasons why the Court has rejected content-based regulation of indecent programming is the availability of channel-blocking by request of an individual subscriber. If a parent were to find MTV’s content too objectionable for their children’s consumption, access to the station may be removed from their cable plan by request. Similar technology is available for broadcast television as well, through the application of a V-Chip, which has built into every television larger than 13 inches since January 1, 2000, and is available as a set-top box as well. This feature allows consumers to block programming based on a rating system established by the National Association of Broadcasters, the National Cable Television Association and the Motion Picture Association of America.

IV. Unregulated Cable Television Content
Basic cable programming remains outside the reaches of FCC sanctions, however, it is hardly a wasteland of obscene programming during the daytime or primetime programming blocks. A study of television content during 1998-1999 by the Center for Media and Public Affairs found that while basic cable programs averaged 8 incidents of “off-color” language per hour, broadcast programs averaged 11 incidents.\textsuperscript{lxxix} When offensive language is used, cable networks obscured the words with a beep 25% of the time, compared to 4.4% by broadcast television.\textsuperscript{lx} The use of profanity is highest on broadcast networks during the first hour of primetime, while cable networks utilized scripted profanity most often after 10:00pm.\textsuperscript{lxxi}

Admittedly, studies have found that cable networks overall make greater use of “offensive language.”\textsuperscript{lxxxii} The standard for how language is categorized as offensive for these studies is determined by the researchers’ discretion,\textsuperscript{lxxxiii} and may include language that the FCC would not find at fault.\textsuperscript{lxxxiv} Due to the number of available cable networks, studies such as the one published by Kaye and Sapolsky in the Journal of Broadcasting & Electronic Media, will often times select a small subset of cable networks to include in their study.\textsuperscript{lxxv} While Kaye and Sapolsky found that cable programs contained just over 1.5 times as many “curse words” as broadcast,\textsuperscript{lxxvi} however the data showed that a single network (MTV) was responsible for most of the difference.\textsuperscript{lxxvii}
The hit Comedy Central show “South Park” serves as an example of the cable industry self-regulating. Admittedly “South Park” is a show that “pushes the limits of good taste further,” than other cartoons. The show immediately became one of the highest-rated on the cable network, setting records for viewership, and becoming a cash cow. Comedy Central, nonetheless opted to air the show late in the evening (after 10:00pm), and gave the show a TV-MA rating in order to reduce its exposure to a young audience. Despite the raunchy nature and constant bleeped profanity of its first season, the producers claim that the 3.6 million viewers who tuned in did not register any complaints.

Despite the lack of FCC decency regulations, almost every cable network employs some form of review to it’s programming. Deciding what can go on the air and when is a major component of the editorial process of any media outlet. Cable television doesn’t hold itself to these standards out of their own goodwill either. These networks apply standards that are carefully calculated to attract and maintain the specific audience that they (and their advertisers) target.

a. Subscription channels

A distinction must be made, however, between basic cable and pay channels, such as HBO. Basic cable networks are provided without additional charge to cable subscribers. The network makes a small fee per subscriber, but derives much of its revenue from
the sale of advertisements during its shows.\textsuperscript{xcii} Pay channels on the other hand derive the majority of their revenue from the sale of subscriptions to the channel.\textsuperscript{xciii} Basic cable reaches a broader audience because of its lower price, while subscription fees necessarily limit pay channel audiences.\textsuperscript{xciv}

Pay channel programming, often uncensored, tends to be more graphic and indecent than the content found on basic cable.\textsuperscript{xcv} Depending on the market for the channel, these subscription services range from unedited movies to hardcore pornography. Many of the larger subscription channels, like HBO and Showtime, have begun to produce original programming, usually containing highly violent or sexual content.

Since the content of pay channels is normally scrambled, they are unavailable to households that do not choose to receive them.\textsuperscript{xcvi} An attempt to regulate scrambled channels was rejected by the Court in \textit{U.S. v. Playboy Entertainment Group},\textsuperscript{xcvii} where Congress had created legislation that sought to deal with the issue of “signal bleed” (where some video and audio of a scrambled broadcast are partially available to a non-subscriber) by requiring that these channels (if carrying indecent content) be made unavailable during hours that children might have access to them.\textsuperscript{xcviii} The Court held that this constituted a content-based regulation, and struck it down as being in violation of the First Amendment.\textsuperscript{xcix} When viewed in light of \textit{Pacifica} and other cases where regulation of broadcast decency standards were upheld, it
is obvious that *Playboy* is a judicial recognition of a higher standard applied to regulation of speech when applied to subscription-based services.

V. Law and Economics of TV Regulation

a. Live programming vs. delay

One of the most obvious and immediate effects of the FCC’s recent policy shifts in regulating decency of content is in the area of live broadcasting. Liability for fleeting expletives, for example, will highly discourage broadcasters from carrying any events live.

Airing a program, such as the Grammy Awards on a live broadcast simply requires the on-site production crew to send their signal directly out to affiliate stations who air it immediately as they receive it from a satellite. The cost of airing live programming however is increased when a delay has to be introduced to the broadcast. This delay requires additional equipment as well as staff to be tasked with cutting the audio or video feed when the broadcast contains indecent content.

Nonetheless, the FCC’s current position on fleeting expletives and other brief and accidental indecency has forced broadcasters to employ this more costly option. Broadcasters have no real way to control the speech of a celebrity accepting an award, and yet with the recent increases in fines and changes in policy, the content-based regulation has created an incentive to
air programming on a short tape delay and avoid the risk of a large fine. This is despite a recent study that has shown that parents are less concerned with these incidents than with scripted sex and violence in the early evening hours.\textsuperscript{ci}

\textbf{b. A problem of public choice?}

It has also been suggested that the FCC decency regulations have a tendency to chill the first amendment speech of broadcasters. This chilling effect not only chills indecent speech, but also may cause a conservative approach to speech in general.\textsuperscript{cii}

In 2004, sixty-six ABC television affiliates declined to air an unedited broadcast of the movie Saving Private Ryan on Veteran’s Day, due to numerous expletives uttered during the course of the movie.\textsuperscript{ciii} The film had previously aired on broadcast television in both 2001 and 2002 without sanction.\textsuperscript{ciiv} The FCC later issued an order that clarified that repetitive use of expletives in the context of Saving Private Ryan was distinguishable from their fleeting use in a live broadcast because the movie was an artistic work.\textsuperscript{cv}

The FCC has a division dedicated to accepting complaints relating to their decency standards, and investigating the complaints. They have an administrative “court” that hears “cases” based on these complaints and issues opinions, which can then be appealed through the federal court system.
In 2005, the FCC received 233,531 indecency complaints,\textsuperscript{cv} 488 radio programs were the subject of complaints, along with 707 broadcast television and 355 cable television programs.\textsuperscript{cvii} Although 1550 programs that received complaints in 2005, not a single one was found to be in violation of law or FCC rules that year.\textsuperscript{cviii} In fact, since 1993, only one year (2004) saw more than seven programs receive a notice of apparent liability or a fine.\textsuperscript{cix}

The interest group known as the Parents Television Council ("PTC") initiated 99.8\% of all broadcast indecency complaints filed in 2003 and 99.9\% of those filed in 2004. Freedom of Information Act requests regarding a particular program that aired in 2004 showed that "of about 6,500 complaints filed against stations that received fines, all but three appeared to originate as computer-generated form letters."\textsuperscript{cx} While the number of complaints filed has increased recently, the number of Americans who believe that the entertainment industry needs more regulation of sex and violence has decreased.\textsuperscript{cxi}

Due to the regulatory scheme employed by the FCC, the changing rules and standards for indecency in broadcasting have been greatly influenced by a relatively small group of people. This leads to a regulatory scheme that is unrepresentative of the actual social climate it is meant to reflect. How else can we explain regulation becoming stricter while survey data
demonstrates that in general the population has adopted a more lenient attitude toward indecent content?

FCC regulation of broadcast content is, in this way, illustrative of one of the problems faced in public choice theory. Allowing special interests to have such a great impact on media content is a classic example of a government failure, where the government adopts an inefficient policy.\textsuperscript{cxii} The delegation of decision-making power to the single person modifies the set of rights in existence, even prior to the onset of any imposed governmental action. Government failure results from the technical demands to optimize regulation, incompetence in the public sector, and political decision-makers creating policies that are consistent with their private goals rather than with an efficient allocation of resources.\textsuperscript{cxiii} Since the majority of the cost of these regulations is borne by the broadcasters, in the form of monetary fines, however, there is little incentive for consumer groups to form and counter the pressure groups.

As Ronald Coase noted, "There is no fundamental difference between [between the market for goods and the market for ideas], and in deciding on public policy with regard to them, we need to take into account the same considerations."\textsuperscript{cxiv} While Coase recognized that information should be treated differently than tangible goods under the law, he nonetheless argued, "we should use the same approach for all markets when deciding on public policy."\textsuperscript{cxv}
Of course, it can be argued that the broadcasters themselves are capable of lobbying to counter the PTC and other such organizations. Surely they are far more capable of organizing than the public at-large. Broadcasters do, in fact, challenge the FCC’s determinations of liability for indecent content, but there remains little incentive for ABC affiliates to come to the defense of Fox stations facing a large fine. Fox will make the required expenditures to defend itself, and ABC and its affiliates will follow whatever rule is handed down by the FCC when the proceedings end. The one exception to this may be FCC v. Fox Television Stations, where the increased cost of complying with new regulations has lead a number of broadcasters to file amici briefs in support of Fox. However, where the regulation will not cause the entire industry to incur significant additional expenditures, the incentive to challenge it falls solely on the affected broadcasters.

Professor Daniel Farber argues that information has many of the attributes of a public good, leading it to be “undervalued by both the market and the political system.” The benefits of information cannot be restricted to particular purchasers, therefore creating positive externalities by imputing its benefit on third parties. Individuals are incentivized to become “free riders” because they are able to enjoy the benefits of the information without contributing to its creation.
Farber believes that content-based restrictions on speech limit the range of content available. Consumers who have a high level of demand for the restricted speech will be unable to obtain it, while low-demand consumers of the non-restricted programming will have no trouble obtaining it; a process that limits consumer choice.

Even if speech can be categorized and valued based on its content, “economic linkages may make it difficult to regulate "low-value" speech without reducing the availability of "high-value" speech.” Farber notes that in many cases the low-value speech may serve to subsidize the dissemination of more valuable speech. To promote the creation of high-value content, therefore we must also protect the creation and dissemination of “frivolous entertainment” (though the entertainment component may be a consumer good rather than a public good). Broadcasters have an incentive to combine the two types of content to reduce the problem of free riders. It would seem that much like the negative externalities produced by other industries, it may also be more efficient to allow some “spillover” effects to occur in the broadcast decency context as well.

It is difficult to organize television viewers to fight proposed regulations on decency because of the tendency of individual consumers to free ride on the efforts of others. The positive benefits of “better information” will not necessarily be apparent to the consumers, which only exacerbates
the problem. In fact, any large and diffuse group will run into this challenge, having their opinions and preferences “shouted over” in the regulatory process by smaller and more well organized groups like the PTC. Gary Becker notes that as the numbers of a group rise, the costs of producing political pressure are increased because the incentive for free riding and shirking by members of the group also increases with size. Smaller groups like PTC are better able to control these effects and operate more efficiently.

The Coase Theorem would suggest that the right to control broadcast content should belong to the party that is more willing to pay for that right. In this case, while the pressure groups are able to exert a considerable amount of control under the current system, they may nonetheless attribute less value to the regulatory power than broadcasters themselves. The cost of exerting pressure for PTC, for example, are likely relatively low, beside the base organizational costs, they operate through providing form letters to their constituents to send to the FCC. Broadcasters however, face a much higher cost when they are fined for their content, not to mention the increased costs of preventing fleeting expletives and other compliance activities. As Fox TV Stations seems to indicate, broadcasters have a strong interest in spending money to avoid at least the costs of compliance with certain decency standards. In fact, broadcasters face greater competition from unregulated cable and satellite channels the dead weight costs of decency regulations
will inevitably rise, making it more onerous for the broadcast outlets to compete.\textsuperscript{cx\textsuperscript{iii}}

This problem was likely instigated in part by the political interests of the controlling administration. President George W. Bush had a strong conservative-Christian constituency,\textsuperscript{cx\textsuperscript{iv}} sharing many of the same regulatory interests as the PTC. President Bush’s appointees at the FCC were likely to have given more credence to the complaints received from these groups because of their importance to the administration’s supporters. It remains to be seen how the Obama administration will handle indecency regulations. While they may not overturn them, it is likely that an administration that is not seeking the political favor of groups such as the PTC will not be as active in enforcing these regulations as the previous. Nonetheless, unless action is taken to reverse them, the regulations will remain on the books, even if unenforced.

\textbf{VI. Self-Regulation}

Despite potential skepticism towards the idea of the broadcasting industry self-regulating it is possible. Furthermore, under a system of self-regulation, it is likely that the broadcast content would better represent the changing and developing cultural norms of modern society. The structure of the broadcast network lends itself to some beneficial forms of “internal” content regulation, while the basic cable industry can
further inform our understanding of how decency matters would be handled in-house.

**a. Affiliate broadcasters and regionalism**

Different regions have different levels of tolerance for indecent speech. Broadcasting, unlike cable and satellite, is much more of a regional marketplace because of the structure of affiliate stations. Broadcast networks distribute their programming through affiliate stations that enter into a contract where they agree to broadcast the parent network’s programming.\(^{cxxxv}\) Typically the network will fill around 60% to 70% of the affiliate’s schedule and the affiliate will receive compensation from the network for this time.\(^{cxxxvi}\)

Network affiliates have a strong incentive to air network programming because high production value and ratings combined with low cost to the affiliate.\(^{cxxxvii}\) Nonetheless, rules established in the 1940s, require affiliated stations to approve all network programming that they air.\(^{cxxxviii}\) Over the years, affiliates have used these rules to reject controversial programming, whether it contained indecent material as defined by the FCC or not.\(^{cxxxix}\)

The FCC-provided incentive to avoid an immediate fine for indecent content is surely a consideration in choosing to preempt network programming, but affiliates who opt out of this programming are usually in the minority.\(^{cxl}\) Broadcasters are wary,
however, of how the network programming will be accepted by the viewers within their region.\textsuperscript{cxli} While offensive or indecent programming may receive high ratings and result in increases in advertising dollars for an affiliate in some markets, in others it may lead to protests and boycotts, not only losing ratings in the affected timeslot, but also during affiliate’s locally produced programming (such as the local news).

Clearly, there is an incentive among regional affiliates to cater to the sensibilities of the people who reside in their broadcast footprint. Local advertising values will decline if a station is unable to attract viewers or becomes a liability to the brand of the advertiser. Around 60% of an affiliate’s revenues come from their locally originated programming, rather than from the parent network,\textsuperscript{cxlii} so establishing good faith within the community is likely more important to the affiliate than pleasing their network.

b. Why do Cable Networks Self-Regulate?

The extent to which cable television self-regulates is obviously central to this paper, while each channel monitors it’s content to a different degree; all stations have some standard to which they hold their content. Much of this is based on the target demographic of each channel, the requirements of the advertisers, and the desire to maximize profits.

i. Ratings, Advertisers and Public Image
Advertisers are one of the most powerful forces in the universe of a broadcast or basic cable channel. While pay channels can support their operation through subscription fees, basic cable and broadcast television rely upon advertising sales to provide revenue to the business. Most basic cable channels receive around 5 to 10 cents per cable household, but ultimately they derive half or more of their total revenue from the sale of national or regional advertising.

Although it is anecdotal in nature, an example of the power of advertisers in regulating broadcast content is the demise of Don Imus. In 2007 Don Imus referred to members of the Rutgers University women’s basketball team as “nappy-headed ho’s,” setting off a firestorm of outrage. These comments ultimately lead his show “Imus in the Morning” to be cancelled on both broadcast radio and basic cable. Outrage in itself wasn’t enough to cause the cancellation; in fact, the show was initially only given a two-week suspension in response to widespread protests. Thos protests, however rang far louder in the ears of major advertisers, who pulled their advertising dollars out of the show, leading to it’s cancellation after an eleven-year run. The language used was no less offensive than a fleeting expletive, the level of public outrage would lead you to believe it was vastly more offensive, but nonetheless the FCC did not take action to sanction the broadcasters who aired Imus’ show. In the case of the Don Imus show, advertisers were able to
regulate the airing of hate-speech on television and radio, even when the FCC could not.

Don Imus has since returned to the radio (albeit on a different station), with a new show airing during the morning commute. While a roster of advertisers was available to the new show, the prices they paid were not nearly as high as those that Imus had previously commanded. While advertisers seemed willing to pay to reach what promised to be a sizeable audience, none were willing to pay the same premiums as they had paid for his previous show, and some were hesitant to sponsor the new show again right away. Some sponsors of the old “Imus in the Morning” program opted not to return and sponsor the new show at any price. The new show is closely scrutinized, and any further offensive outbursts would likely kill Imus’ career entirely.

What the Imus incident illustrates, is the role of advertisers in any advertising-driven medium. Sponsors of these shows fear that their companies and products will become associated with the content that they support, and lose business because of public outrage. Depending on the market the advertiser is attempting to reach, they may have differing thresholds for offensive content, but even so, advertisers may not be willing to pay top dollar for programming that runs the risk of offending the very people they seek to turn into customers.

Broadcasters both target and reach broader markets than cable networks. Advertisers on CBS, NBC, ABC, and Fox, are
attempting to reach broader audiences and will likely have a lower threshold for indecent content than those who advertise on more narrowly targeted cable networks. After the 2004 Super Bowl, which is famous for the half-time show that ended with a “wardrobe malfunction” that exposed Janet Jackson’s right breast to one of the largest live television audiences in the world, advertisers made their concerns known to the NFL and to CBS.\textsuperscript{clv}

Though the prices paid for advertising during subsequent Super Bowls did not decrease,\textsuperscript{clvi} The NFL has hired a new producer for its half-time shows since then, and content is more closely scrutinized.\textsuperscript{clvii} AOL, the sponsor of the “wardrobe malfunction” half-time show received compensation from the NFL for the effect that the incident had on their public image.\textsuperscript{clviii} The NFL now works closely with league sponsors to ensure a family-friendly Super Bowl.\textsuperscript{clix}

At the advent of television, there were fewer broadcast networks all competing for the same median viewer.\textsuperscript{clx} These networks, in seeking a broad audience, sought to appeal to as many viewers as possible, and to offend no one.\textsuperscript{clxi} There is little incentive in a broad-market to risk alienating viewers.\textsuperscript{clxii} Advertisers generally seek the same goals as these broadcasters. They pay a premium to reach a mass market, and expect that the programming that is aired will attract a large audience,\textsuperscript{clxiii} without alienating or offending viewers. Other advertisers may spend to reach a specific niche market, their goal being to gain
exposure among a large portion of a very specific demographic (while still hoping not to alienate or offend that group, that demographic may not be alienated by the same types of content as a larger group or different demographic).

In a competitive setting, a network’s revenues per hour are driven by the number of viewers watching television during each time period as well as the cost of advertising in other media. The value of advertising is connected to the number of viewers per hour, and can be determined by the price of equivalent advertising messages in alternative media. Advertisers of “social goods” like beer, pizza, and wine, tend to value the larger audiences of popular shows because it conveys a particular message about their product (that other people know about the product). Advertisers also tend to position their products in relation to cultural values. Advertisers in the late 1980s considered gay men a “high-risk” group, and attempts were made by many mainstream products to avoid media targeted at that market. Public polling conducted in the 1990s showed changing social attitudes towards homosexuality, however, and mainstream advertising dollars began to flow into media targeting and depicting homosexuals. Advertisers are certainly conscious of the social climate around them, and their purchases will normally reflect that climate, making the highest-value programming that which will appeal to the advertiser’s demands to be socially accepted.
ii. Trademarks, branding, and consumer choice.

In almost every industry, branding is used to differentiate different providers of similar products. From the Chiquita sticker on your banana peel to the Dell or Apple logo on your computer, almost every item available to consumers legally is branded in some way. Most companies will establish trademark protections for their names and logos to allow them to build value in their brand, and customers will therefore be able to identify the source of their product and know of its quality or character immediately. It is important, however, to build the value of a brand by ensuring that it is only applied to products that represent a consistent level of quality.

Television is in no way immune to branding. The station logo is omni-present on most channels, and even when it is not, the viewer is certainly assured that some portion of the station’s time will be devoted to reminding you which network you are watching, often through advertisements for the network’s own shows. On cable and other digital broadcasting there are channel guides that constantly inform the viewer what channel and show they are currently watching. Establishing a strong brand reputation would allow a broadcaster to drive viewers to tune in for their programming on a more regular basis.

Both cable and broadcast networks utilize branding to define their product to viewers as well as advertisers. Many cable networks have a very specific focus; Comedy Central focuses
on comedy, while the History Channel focuses on educational programs about history. Other networks are less focused, but still have clear target demographics; MTV, for example, has a variety of programming, all targeted at a teenage through twenty-something demographic.

Broadcast networks generally cater to a much broader market, but have nonetheless begun to adopt brand characteristics that allow them to target more specific demographics. The CW is attempting to attract the same youthful demographic as MTV. Beyond simply scheduling programming targeted to interest a young audience they have adopted slogans and music designed to appeal to that audience as well. The larger broadcast networks have also attempted to define their brand through programming. Fox has made efforts to schedule “edgy” and “irreverent” shows, developing a counterculture image that effectively reaches the 18-49 year-old demographic. ABC has been cultivating a brand for “light, female-targeted dramas.”

Networks also create branded blocks of programming. NBC created the “Must See TV” block of sitcoms, while ABC had the youth/family-oriented “TGIF” block. On cable stations branded programming blocks are also common, such as the “Nick at Night” block on Nickelodeon. This allows a station to brand just a portion of their schedule. A network like Nickelodeon is able to rebrand itself at night, when it’s primary demographic is not
usually in the audience. ABC is able to signal that their Friday night programming is family-friendly.

The value of a brand or trademark comes from consistent quality. Brands are “sign posts for the viewer and a successful brand incorporates comfort, originality and awareness of how one fits into the overall media environment.”

Branding is only a valuable tool when the promoter of that brand also maintains some level of consistent quality. Producing a consistent product allows customers to develop an awareness of the brand, thus lowering the search costs of finding the exact product they want. When they fail to produce consistency, the brands will no longer act to reduce search costs for consumers and will essentially have the same cost to them as obtaining an unbranded product. In a marketplace so drenched with programming options, it is well recognized that most television viewers only regularly watch about a dozen channels that they will default to. Channels that possess a well-defined brand are more likely to become part of a viewer’s repertoire than those that do not.

Creating a strong brand identity in broadcasting allows the broadcaster to tap into subsets of the larger market of television viewers. Once a brand identity has been adopted by a channel the costs involved in changing that brand increase. For example, for the Family Channel to convert into a source for indecent adult-oriented programming, it would require that they
alienate the base of viewers that has already been developed and start anew as a valueless brand seeking to build value among a new set of consumers. clxxxix This makes it unlikely that a profitable operation would suddenly change the qualities that defined their brand.

A consistent brand builds equity over time, in the form of a differential response by the consumers and other stakeholders in the company. cxci Rebranding is a very strong, formal signal to these stakeholders that something has changed. cxci A recent study has shown that media companies are among the least likely to go through rebranding. cxcii Like in other industries, the decision to rebrand in the media is a strategic one, allowing the network to foster a new image or distance itself from a negative reputation. cxciii

Once a brand is established, consumers will build a set of associations about the brand. cxxiv Comedy Central might become associated in consumer’s minds with edgy comedies like South Park or Chappelle Show or perhaps they might be associated with a general raunchiness that pervades many of their popular programs. These associations are often either brand attributes and benefits or some representation of a consumer’s experience with the brand. cxcv The broadcaster or cable network will seek to produce associations in their own brand that are appealing to their target audience.
Viewers who want family-friendly programming will add the channels that provide that programming to their repertoire, while those who want edgy and irreverent content targeted at an adult audience, will likely limit their repertoire to Fox, Comedy Central and similar stations. In the modern age of broadcasting, where almost 90% of households receive television service from cable or satellite, and where DTV is being quickly made the only standard in broadcasting, the recognition of branding and ability to seek out channels that suit the viewer’s sensibilities is only becoming simpler.

VII. CONCLUSION

The broadcast industry is one that is subject to the watchful eye of FCC regulators. Unlike the print or digital media, broadcasters have far less control over the content of their own output. Broadcasters are facing ever-increasing competition from the cable and satellite industries, while being required to play by a stricter rulebook.

It would seem that the market would pull those seeking a broad audience toward a standard of decency that most viewers would find appropriate. While indecent content is surely shocking, it also results in viewer complaints, loss of sponsorship and a less marketable product. The current television market is far more fragmented than in the past, with seven broadcast networks competing with cable and satellite channels, there is less incentive to attack the median. Broad-market
programming, like the Super Bowl will continue to cater to the median, while the indecency-threshold for most programming will shift to the levels preferred (or accepted) by it’s target demographic.

The topic of fleeting indecency in live programming, touched upon earlier in the paper, is not entirely resolved through advertiser pressure or branding. Though certain aspects of branding may weigh into a consumer’s decision to view a live broadcast on certain networks. Fox, for example, has refused to air the Super Bowl with a seven second delay,\textsuperscript{cxcvi} while a network with a more conservative brand identity might have. If advertisers do not put much pressure on broadcasters to institute delays into live programming, it is likely because they do not view fleeting indecency to be damaging to their brand (perhaps rightfully so, given the minimal concern parents show toward these incidents\textsuperscript{cxcvi}).

With the FCC or without, the mass-market broadcast medium is not likely to become a 24-hour ‘Girls Gone Wild’ loop, but rather will likely remain rather similar to what we see under FCC supervision. Despite the efforts at branding made by the broadcast networks, the major broadcasters are still targeting a “mass undifferentiated audience,”\textsuperscript{cxcviii} and therefore face the same challenges as they have in the past: appealing to the largest audience possible while offending no one.
Under the current regulatory scheme, the broadcaster is forced to ask three questions before deciding what programs to put on the air: “What do my viewers want to see?” “What do the advertisers want to put their names on?” and “What will the FCC let me get away with?” Broadcasters have a wealth of demographic studies and data, normally providing clear answers to the first two questions. The answer to the third question, however, is becoming increasingly harder and more expensive to determine.

* The author is a 2010 J.D. candidate at Emory University School of Law. Thanks to Professor Paul Rubin for his input and advice during the writing process.

4 Fox TV Stations, Inc. v. FCC, 489 F.3d 444, 447 (2d Cir. 2007), rev’d, No. 07-582, 2009 U.S. Lexis 3297 (US April 28, 2009) (citing Citizen’s Complaint Against Pacifica Found. Station WBAI(FM), N.Y., N.Y., 56 F.C.C.2d 94 (FCC 1975)); This bit is popularly referred to as “Seven words you can’t say on TV.”
5 Id.
6 Pacifica Found., 56 F.C.C.2d at 99.
7 Fox TV Stations, supra note 4, at 447.
8 WBAI(FM), 56 F.C.C.2d at 98 (quoted by Fox TV Stations, supra note 4).
9 Id.
10 Id.
12 Id.
14 Fox TV Stations, supra note 13, at *19; see also Fox TV Stations, supra note 4, at 454.
15 Fox TV Stations, supra note 13, at *26-27.
16 Id. at *29.
17 Id. at *47.
18 Id. at *48.
xx Id. at 1
xxiii Frank Ahrens, Fox Refuses to Pay FCC Indecency Fine, Washington Post (DC), March 25, 2008, at D01 (noting that the FCC fine was levied on the 169 Fox-owned and affiliate stations, but not the network).
xxiv Id.
xxvi In re Network Affiliated Stations Alliance (NASA), 23 FCC Rcd 13610, 13612-13613 (FCC 2008)[hereinafter NASA] (recognizing the right of affiliate stations to control their airwaves and refuse network programming).
xxviii Id.
xxix Id.
xxx Id.
xxxi Id.
xxs Id.; See also DirecTV, Bringing Entertainment Closer to Home, http://www.directv.com/DTVAPP/packProg/localChannels.jsp?assetId=900018 (last visited April 21, 2009) (DirecTV claims to offer local channels in more than 94% of households).
xxsii Id.
xxsv Id.
xxsviii Pacifica Found., supra note 11, at 745 (citing Roth v. United States, 354 U.S. 476 (1957)); Despite the dubious nature of the statement, when it comes to broadcasting, you are not free to speak in a manner that might be offensive to contemporary moral standards. This of course begs the question: are you protected if your speech is intended to criticize the contemporary moral standards that it offends?
xl Id.
xii Id.
xiii Id.

Id. at 386-387.

Id. at 394.

Id. at 398-399.

See In the Matter of Infinity Broadcasting Corporation, 3 F.C.C.R. 930 (1987)

Andrew Smith, supra note 46, at 392.

Id. (internal quotes omitted).

Id. at 393 (citing Action for Children's Television v. FCC, 58 F.3d 654, 658 (D.C. Cir. 1995)); Despite Congress’ attempt to ban indecency from the public airwaves, the FCC is once again observing a safe-harbor between 10:00pm and 6:00am. Federal Communications Commission, FCC Consumer Facts: Obscene Indecent and Profane Broadcasts, http://www.fcc.gov/cgb/consumerfacts(obscene.html (last visited April 6, 2009).

Fox TV Stations, supra note 4; see also Fox TV Stations, supra note 13.

Fox TV Stations, supra note 4, at 458

Id.

Fox TV Stations, supra note 13, at *26-27.

Id. at *48.


Id.

See Pacifica Found., supra note 11, at 748.

Id. at 748-749.

Id. at 744.

Id. at 745 (citing Schenck v. United States, 249 U.S. 47, 51 (U.S. 1919)).

Id. at 745.

Id. at 746 (quoting Chaplinsky v. N.H., 315 U.S. 568, 572 (1942)).


Pacifica Found., supra note 11, at 749.

Id.

Id.

Id.

Id.


Id.


Kaye & Sapolsky, supra note 19, at 3.

Id. at 12

Id. at 12

Id. at 12

Id. at 6-7

In the case of the study done by Kaye & Sapolsky, one of the words that would trigger their 'count' was "testicles," a word that operates as a technical term for a body part and is likely to be used on medical reality and fiction programming in a non-offensive manner. Kaye & Sapolsky, supra note 19, at 6.

Id. (noting that the study used only the seven highest-rated cable networks).

Id. at 12

Id. at 13

Melanie McFarland, Those Darn Kids! The Small Fry of 'South Park' Say Things You Wouldn't Expect, and Comedy Central is Cashing In, Seattle Times, Nov. 11, 1997, at E1, available at 1997 WLNR 1458532

Id.


McFarland, supra note 88.

Harold L. Vogel, Entertainment Industry Economics 312 (2007).

Id.

Id.

See Kaye & Sapolsky, supra note 19, at 3


Id.

Id. at 806

Id. at 827 (holding that the regulation violated the First Amendment because it was not the least restrictive means for addressing a real problem)

See Brief for California Broadcasters Assoc., et al. as Amici Curiae Supporting Respondent at 2, Fox TV Stations, supra note 13 (No. 07-582), 2007 U.S. Briefs 582.


Worsham, supra note 41, at 406 (noting that the Second Circuit agreed that the FCC's ruling in Fox TV Stations had a chilling effect on free speech and required broadcasters to "steer far wider of the unlawful zone.")


Worsham, supra note 41, at 407.

Id.; see also Id. at n.2 ("An NAL may relate to a complaint for a previous year")

Id.; See also Id. at n.4 (noting that the NAL amounts in 2004 include a number of sizeable fines from prior years.)

Worsham, supra note 41, at 396.

Id. at 409 (citing Jeffrey M. Jones, Most Americans offended by Sex and Violence on Television, Gallup.com (Feb. 12, 2004), http://www.gallup.com/poll/10588/Most-Americans-Offended-Sex-Violence-Television.aspx. (showing 83% in 1995 believed that the industry should make a serious effort and 75% believed the same in 2004)).

See Sam Peltzman, George Stigler’s Contribution to the Economic Analysis of Regulation, 101 J. Pol. Econ. 818, 823 (1993)(“More generally, the political equilibrium in Stigler’s model is one in which cohesive minorities tax diffuse majorities”).


Id. at 693 (citing R.H. Coase, The Market for Goods and the Market for Ideas, 64 Am. Econ. Rev. 384, 389 (1974)).

Id.

Fox TV Stations, supra note 13.


Id. at 558-559.

Id. at 557.

Id. at 557.

Id. at 582

See Id. at 582 n. 119 ("For example, if Playboy carries valuable articles, the availability of those articles might be restricted if Playboy's use of nude photographs were banned. The centerfold may cross-subsidize the articles").

Id. at 582.

Id. at 582.

See Rushton, supra note 113, at 699 ("Legal commentary has recognized Coase's point that simply allowing some spillover effects to occur would be more efficient than efforts to correct them").

Id. at 560.

Id.


Id. at 342.


In Fox TV Stations, Fox was appealing from an FCC decision that did not impose any fine, but put broadcasters on warning of future fines. Fox TV Stations, supra note 4.
Becker, supra note 129, at 340.

Frank Pellegrini, So Far, No Cabinet Calamities, http://www.time.com/time/nation/article/0,8599,92745,00.html (last viewed April 21, 2009) (“Bush has still got to feed the social-conservative monkey”).


Id.

Vogel, supra note 92, at 186.

See Richard Campbell, et al., Media and Culture 187 (2009); See also 47 C.F.R. 73.658(e) (Prohibiting affiliate agreements that hinder a broadcast licensee’s ability to reject network programming); NASA, supra note 26, at 13612-13613.


Shapiro, supra note 139; Rolling Stone, supra note 139 (Out of hundreds of affiliates, only a small number in each case chose not to air the network programming).

Shapiro, supra note 139; Rolling Stone, supra note 139 (Local affiliates usually cite regional concerns as their reasoning for preemption).

See Gershon, supra note 135, at 31.

Vogel, supra note 92, at 210.

See generally Ron Harris, Imus’ Rants Killed Ad Base, Experts Say; Talk Show’s Sponsors Swayed by Maligned Women, Minorities, Pittsburgh Post-Gazette, April 15, 2007, at A-13.

Id.

Id.

Id.

Id.

Jim Puzzanghera, FCC’s hands tied on airwaves; Activists are urging the agency to fine stations over Don Imus’ racially offensive remarks. But that poses free speech problems, experts say, L.A. Times, April 14, 2007, at Cl.

Steve McClellan, Imus Returns, But New Show May Be Tough Sell, AdWeek, Nov. 12, 2007

Id.

Id. (General Motors and Chef’s Diet were quoted saying that they would evaluate the program before making a decision).
Advertisers Consider Pulling Out Next Year, St. Louis Post-Dispatch (MO), Feb. 9, 2004, at D9

The Nation; After ’04 Fiasco, Super Bowl Wants to Avoid Going Offsides; ’Wardrobe malfunction’ fallout spurs an effort to strike a better balance between tawdry, tame., L.A. Times, Feb. 4, 2005, at Al

Bruce Horovitz, NFL strives to ensure superclean Super Bowl, USA Today, Jan. 21, 2005, at 1A

Id.

Kristin L. Rakowski, Branding as an Antidote to Indecency Regulation, 16 UCLA Ent. L. Rev. 1, 28 (2009)

Id.

Id.

Anthony Bianco, The Vanishing Mass Market, Business Week Online, July 12, 2004, http://www.aimsworldwide.com/vanishing_mass_market.pdf (accessed April 19, 2009) (even while network television ratings dropped over 40%, advertising revenues rose fivefold); see also Harlan M. Blake and Jack A. Blum, Network Television Rate Practices: A case Study in the Failure of Social Control of Price Discrimination, 74 Yale L. J. 1339, 1346 (1965) (“A television program with a high rating is likely to be more ‘efficient’ in that it will attract a larger number of viewers per dollar outlay.”).

Id.

Robert W. Crandall, FCC Regulation, Monopsony, and Network Television Program Costs, 3 Bell J. Econ. & Mgmt. Sci. 483, 486 (1972). It should be noted, of course, that this article was written before the creation of a number of the national networks or the widespread availability of cable and satellite programming.

Id.


Id. at 64. Advertisers even pulled over a million dollars in advertising from the ABC series “Thirtysomething” because an episode depicted a homosexual couple in bed. Id.

Id. at 64.


Id.

Id. at 27.

Id. at 35

Id. at 35-36. Some stations have also handed out beer cups with a CW logo on them at concerts attended by their young audience. Id. (citing Allison Romano, CW Paints the Town (and Skin) Green; Stations Use Guerrilla Marketing to Promote New Network, Broad. & Cable, Aug. 28, 2006, at 24).

Id. at 36-37.

Id. at 37.


Rakowski, *supra* note 160

Id. at 27 (citing Robert V. Bellamy, Jr. & Paul J. Traudt, *Television Branding as Promotion, in Research in Media Promotion* 127, 132 (Susan Tyler Eastman ed., 2000)).

Landes & Posner, *supra* note 181, at 270 (“A similar argument shows that a firm with a valuable trademark would be reluctant to lower the quality of its brand because it would suffer a capital loss on its investment in the trademark”)

Laurent Muzellec and Mary Lambkin, *Corporate Rebranding: destroying, transferring or creating brand equity?*, 40 Euro. J. Marketing 803, 804 (2006) (“Changing the brand name potentially nullifies those years of effort and can seriously damage or even destroy the equity of the brand.”); see also Id. at 807 (“For a new name to be launched, however, the old name has to be abandoned, an action likely to nullify years of branding effort in terms of creating awareness.”)

Id. at 807.

Id. at 807 (Table I).

Id. at 811; Channels like TNN and Odyssey have been rebranded (becoming Spike TV and the Hallmark Channel, respectively) when it was apparent that their programming wasn’t working. See Allison Romano, *What’s In A Name? Court TV May Want to Investigate That*, 133 Broadcasting and Cable 14, Aug. 18, 2003, available at 2003 WLNR 8809836.


Id.

