2 Standards 1 Cup: How Geotargeting Will End the Battle Between National and Local Obscenity Standards

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ABSTRACT

The First Amendment guarantees the right to free speech—but that protection is not absolute. Some forms of speech are banned from being distributed or even owned in the privacy of one’s home, such as child pornography. Other forms of speech are only partially banned—for example, obscene speech is allowed if expressed privately, but can be criminally punished if expressed in public. In contrast, erotic speech is nearly fully protected by the First Amendment.

The line between obscenity and eroticism is hard to pinpoint, and varies from community to community. For most works, the process of analyzing whether it is obscene includes asking whether the content violates the community standards of the local geographic area where the material was published. Thus, for most media, publishers of potentially obscene content must choose the communities into which they publish, or face criminal charges from the least tolerant communities. But for online media, the Supreme Court remains undecided whether the obscenity analysis uses the same local community standard. The Court’s doubts stem from the Internet’s global reach and lack of control over who receives free online content. For example, if nationally available online obscenity is judged using the same legal standard as in other traditional media, any local community offended by the content has the power of a heckler’s veto to make the publisher liable for distributing obscenity.

This Article proposes the use of a new online technology as a means of resolving the question of whether local community standards should be used to judge online content. Called geotargeting, the technology creates borders on the previously borderless Internet, which allows publishers to specifically target geographically localized communities, thereby excluding areas where the material might lead to criminal charges. This new power to publish borderline obscene materials only to selected communities drastically reduces the constitutional concerns of applying traditional obscenity law to online content.
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I. INTRODUCTION: “2 GIRLS 1 CUP” AND THE LINE BETWEEN LEGAL EROTICISM AND ILLEGAL OBSCENITY

Indecency, vulgarity, obscenity—these are strictly confined to man; he invented them. Among the higher animals there is no trace of them.¹

Mark Twain

Generally, most mildly erotic material can be publicly published, given certain restrictions. For example, publishing erotic videos of a female’s nude breasts and buttocks does not amount to criminal sanctions in any jurisdiction as long as basic guidelines of age, location, or time are met.² On the other hand, obscene material is criminally outlawed from ever being published in public. Muddying the waters is the fact that there is no clear or consistent boundary between erotic and obscene material. Many jurisdictions agree that distributing material showing violent and depraved acts may involve criminal sanctions for violations of obscenity law.³ But jurisdictions differ about whether it is illegal to distribute

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² Erznoznik v. City of Jacksonville, 422 U.S. 205, 206, 213–14 (1975) (allowing a nude film to be broadcast where the public may see it, even considering the risk to children, traffic, or offended persons); see Jenkins v. Georgia, 418 U.S. 153 (1974) (holding that mere nudity is not obscenity).

³ See, e.g., United States v. Extreme Assoc., 431 F.3d 150, 151 (3d Cir. 2005), cert. denied 547 U.S. 1143 (2006) (finding the publishers of murder/rape pornography videos guilty of distributing obscenity online); see also Brief for the United States at 7 n.2, United States v. Extreme Assoc., 431 F.3d 150 (3d Cir. 2005) (No. 05-1555), 2005 WL 6104849 at *7 n.2 (describing the videos upon which the obscenity charges against Extreme Associates were based, including porn films that were intended only for sexual
material that is merely gross.\textsuperscript{4} Such non-violent videos depicting sickening (but ultimately non-violent) acts may or may not be obscene—it all depends on who defines obscenity.

For example, consider the online distribution of the scatologically themed Brazilian video “2 Girls 1 Cup,” a viral video that rose in popularity in 2007. It depicts two women eating excrement and vomiting it into each other’s open mouths for the sexual gratification of the viewers.\textsuperscript{5} Soon after its online release, viewers began recording and posting their reactions while watching the video.\textsuperscript{6} The viewers’ shocked reactions to the “scat-porn” became so popular that references to the “2 Girls 1 Cup” video began to appear in advertisements,\textsuperscript{7} movies and television shows,\textsuperscript{8} video

\begin{footnotesize}
\begin{enumerate}
\item Michael Agger. \textit{2 Girls 1 Cup 0 Shame}, SLATE.COM (last updated Jan. 31, 2008, 4:20 PM) \url{http://www.slate.com/id/2182833/} (follow the “click here” hyperlink; then follow each of the “≥” hyperlinks on each of the six slides); Femia, supra note 4.
\item Heidi Blake, \textit{Coca-Cola Accused of Using Porn to Target Children on Facebook}, TELEGRAPH.CO.UK (July 19, 2010, 7:30 AM), \url{http://www.telegraph.co.uk/technology/facebook/7897706/Coca-Cola-accused-of-using-porn-to-target-children-on-Facebook.html} (reporting how references to “2 Girls 1 Cup” were used by Coca-Cola’s ad agency in an online marketing campaign for Dr. Pepper); Vikram Dodd, \textit{Coca-Cola Forced to Pull Facebook Promotion After Porn References}, GUARDIAN.CO.UK (July 18, 2010, 6:51 PM), \url{http://www.guardian.co.uk/business/2010/jul/18/coca-cola-facebook-promotion-porn} (reporting that Coca-Cola’s use of references to “2 Girls 1 Cup” encouraged a 14-year-old British girl to search online for the scat-porn video); Ken Wheaton & Emily Bryson York, \textit{Quizzes: We Did Not Hop on Poop-Porn Bandwagon}, ADAGE.COM (May 19, 2009, 4:10 PM), \url{http://adage.com/adages/post?article_id=136753} (reporting on the advertisement run by Playboy in which two bikini-clad women perform the similar actions as those shown in “2 Girls 1 Cup” while sharing a sandwich, which many viewers mistook as a Quizno’s advertisement).
\item \textit{Family Guy: Back to the Woods} (FOX Television broadcast Apr. 13, 2008), excerpt available at \url{http://www.youtube.com/watch?v=pNCEP0RakIU}; \textit{SUPERHERO MOVIE} (Dimension Films 2008), excerpt available at \url{http://www.youtube.com/watch?v=Y_eGRaazmb8t=3m52s}.
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games,⁹ online humor sites,¹⁰ and even tee-shirts.¹¹ “2 Girls 1 Cup” has been commented on by a number of entertainers,¹² and has garnered media attention from such well-known sources as Slate,¹³ VH1,¹⁴ and Esquire.¹⁵ The “2 Girls 1 Cup” video remains available online.¹⁶

In contrast, the traditional media distribution of very similar scatologically-themed videos has generated criminal sanctions.¹⁷ For example, Mr. Danilo Simoes Croce, a Brazilian citizen living in Florida, was indicted for the distribution of hardcopy videos with titles such as “Toilet Man 6,” “Bukkake 3,” “Scat Pleasures,” and “Scat and Fist

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¹² John Mayer, 2 Guys 1 Cup, JOHNMAYER.COM (Nov. 7, 2007) http://www.johnmayer.com/blog/permalink/1560 (showing John Mayer’s parody of “2 Girls 1 Cup,” in which he and a friend eat a cup of Pinkberry frozen yogurt); Joe Rogan, Joe Rogan Watches 2 Girls 1 Cup and BME Pain Olympics, YOUTUBE.COM (Nov. 14, 2007) http://www.youtube.com/watch?v=ZhevNN1BDnQ#t=0m30s (showing former host of Fear Factor Joe Rogan’s reaction to the 2 Girls 1 Cup Video, in which he gags, looks away, and nearly leaves the room); A.J. Jacobs, The 9:10 to Crazyland, ESQUIRE.COM (Mar. 17, 2008, 2:40 PM) http://www.esquire.com/features/george-clooney-2-girls-1-cup-0408-3 (detailing an interview with George Clooney in which an Esquire.com reporter shows the “2 Girls 1 Cup” video to Mr. Clooney, who gags, leaves the room, and later compares watching the video to “the rodeo—[you have to] see how long you can last”).

¹³ Agger, supra note 6.


¹⁵ Jacobs, supra note 12.

¹⁶ See supra note 5.

¹⁷ See Brief for the United States, supra note 3, at 7 n.2 (describing the hardcopy videos that led to obscenity charges against Extreme Associates, including drinking body fluids); see Indictment at 2–4, United States v. Isaacs, 2008 WL 4346780 (C.D. Cal. 2008) (No. 2:07-CR-00732), 2007 WL 5238823 (detailing videos leading to obscenity charges against Mr. Ira Isaacs, including titles such as “Hollywood Scat Amateurs No. 7,” and “Laurie’s Toilet Show”).
Fucking 2.” 18 The videos displayed paraphilic acts of coprolagnia, urolagnia, and vomerophilia, very similar to those depicted in “2 Girls 1 Cup,” 23 Mr. Croce pled guilty to the obscenity charges. 24 However, soon after Mr. Croce returned home to Brazil, his company produced and distributed the “2 Girls 1 Cup” trailer video, and to date, it appears no one has been charged for its distribution. 25

So why are some videos considered illegal when distributed via

19 AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, at Sexual and Gender Identity Disorders, Paraphilias, Diagnostic Features (Michael B. First ed., 4th ed. 2000) (defining the sexual disorder of paraphilia as, “recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) nonhuman objects, 2) the suffering or humiliation of oneself or one’s partner, or 3) children or other nonconsenting persons . . . .” ) [hereinafter DSM-IV]; Joel S. Milner et al., Paraphilia Not Otherwise Specified: Psychology and Theory, in SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT 384–85 (2008) (defining paraphilia and describing its first use by psychologists as a “replacement for the legal term ‘perversion’”).
20 WEBSTER’S NEW INTERNATIONAL DICTIONARY, UNABRIDGED 588 (William A. Nielson et al. eds., 2d ed. 1934) [hereinafter WEBSTER’S DICTIONARY] (“Sexual excitement produced by contact with feces.”); see Milner, supra note 19, at 395; see also DSM-IV, supra note 19, at 302.9 Paraphilias Not Otherwise Specified (listing “coprophilia (feces)” as a form of sexual disorder).
21 WEBSTER’S DICTIONARY, supra note 20, at 2805 (“Sex excitement associated with urination.”); see Milner, supra note 19, at 395 (defining urophilia and urolagnia in their various forms); see also DSM-IV, supra note 19, at 302.9 Paraphilias Not Otherwise Specified (listing “urophilia (urine)” as a form of sexual disorder).
22 Milner, supra note 19, at 398 (stating vomerophilia is the “paraphilic focus on the regurgitation process” in which another individual is vomited on for sexual gratification).
23 Compare supra note 5 with supra note 18.
24 Corrected Judgment In a Criminal Case at 1–3, United States v. Croce, No. 6:06-cr-00182-GAP-DAB (M.D. Fla. Sep 5, 2006), ECF No. 108 (ordering Mr. Croce to forfeit $98,000 in profits from the distribution of the films, and sentencing him to time-served plus three years of unsupervised release, provided he leave the United States and not return).
25 Both the short video “2 Girls 1 Cup” and the full-length video from which “2 Girls 1 Cup” is excerpted are available for online purchase anywhere in the United States. See supra note 5. This is in contrast to the websites that originally hosted the other scat-porn videos upon which Mr. Croce’s obscenity charges were based. See Criminal Complaint, supra note 18, at 3; see, e.g., http://www.dragonfilms.com.br/ (last visited Feb. 5, 2011) (showing the site no longer exists). It is also in contrast to websites where such obscene content was successfully prosecuted. See United States v. Little, 365 F. App’x 159, 169 (11th Cir. 2010); see, e.g., http://www.max hardcore.com (last visited Feb. 5, 2011) (showing a website that has been forfeited to the U.S. Government pursuant to an obscenity conviction).
traditional media, but are tolerated when distributed online? The answer is linked to the confusion about how obscenity law relates to the Internet. For most media, jurors draw upon local community standards to determine if a work appeals to an unwholesome sexual desire and is so patently offensive that it should be criminal to distribute the work.\textsuperscript{26} This “local community standard” is used to judge works that are published through traditional media such as books, mailings, radio shows, television broadcasts, and telephone messages.\textsuperscript{27} For example, if a publisher broadcasts an obscene film over the television, at trial a juror will apply the community standards of the juror’s local geographic area.\textsuperscript{28}

However, for works distributed online, it is unclear whether local community standards should be used, and opposing viewpoints exist on how obscenity should be judged online. A recent pair of cases has highlighted how courts have split over online obscenity.\textsuperscript{29} The Ninth Circuit recently held that because posting content onto the Internet makes the content available nation-wide, jurors should judge the work using nation-wide standards for obscenity, rather than limiting themselves to the standards of the local community in which the jurors live.\textsuperscript{30} Under that approach, a juror using a nationalized standard could protect an obscene work that the local community would have otherwise banned (or even ban a work that the local community would have otherwise tolerated). On the other hand, the Eleventh Circuit held that when judging whether an online work is obscene, jurors should apply a local community standard as defined by a small area around the place where the work was downloaded (similar to the standard used in all other media).\textsuperscript{31} Under that standard, a producer of potentially obscene material in Hollywood who makes his content available online could be charged with obscenity in Florida; and the jury would disregard whether the work would have been tolerated in Hollywood, applying only local, Floridian community standards.

Choosing one standard over the other reaches into the very heart of free speech on the Internet: if local community standards are used, Internet publishers who make their material available world-wide can be charged

\textsuperscript{26} This is just one prong of the test for obscenity. See infra Part II.A; see also Miller v. California, 413 U.S. 15, 24 (1973). The other prongs are whether the material is patently offensive or has value other than sexual excitation. Id. Those additional aspects of obscenity are beyond the scope of this Article.

\textsuperscript{27} See infra Part II.A.

\textsuperscript{28} See infra Part II.A.

\textsuperscript{29} See infra Parts II.B, III.

\textsuperscript{30} United States v. Kilbride, 584 F.3d 1240, 1254 (9th Cir. 2009); see infra Part III.A.

\textsuperscript{31} Little, 365 F. App’x. at 162–64; see infra Part III.B.
for distributing obscene material just because someone downloads the obscene work in a community where the work is not tolerated.\textsuperscript{32} However, if national standards are used, some communities could be forced to tolerate works they consider to be obscene material, while other communities could be required to punish the distribution of works they consider to be free speech.\textsuperscript{33} The stakes are high because under present circumstances, the application of either standard will impact someone’s use of media online.

The Internet’s power to reach everyone without regard to geographic area has paralyzed the Supreme Court’s decision about whether local standards should be applied to Internet obscenity cases.\textsuperscript{34} In the older forms of media, the Court has already addressed whether local or national community standards should apply, and it decided local standards were the more reasonable approach.\textsuperscript{35} Although it noted problems of chilled speech under either standard, the Court felt that the local standard was less chilling because geographic controls associated with each medium allowed publishers of potentially obscene material to tailor their messages based on the targeted communities.\textsuperscript{36} But the Internet is different—there are no controls over where the content is distributed, leading to ambivalence among Court Justices about whether a national or local standard approach should be used when judging online content.\textsuperscript{37}

Enter, geotargeting: a new means by which online publishers have the power to control where their content can be downloaded.\textsuperscript{38} This advance in technology heralds the resolution of the debate over whether local community standards should be applied to the Internet because publishers will be able to tailor their messages to the communities into which they wish to distribute their content, just as they have in all the other media. The Court lamented that publishers of online content had no

\textsuperscript{32} See Matthew Towns, Note, \textit{The Community Standards of Utah and the Amish Country Rule the World Wide Web}, 68 Mo. L. Rev. 735, 740–43 (2003) (explaining how under a local standard online speech would be chilled by giving the least-tolerant community a heckler’s veto); \textit{see also infra} note 135 and accompanying text.


\textsuperscript{34} \textit{See infra} Part II.

\textsuperscript{35} \textit{See infra} Part II.A.

\textsuperscript{36} \textit{See infra} Part II.A.

\textsuperscript{37} \textit{See infra} Part II.B.

\textsuperscript{38} \textit{See infra} Part IV.
control over where their material was downloaded. 39 Geotargeting is the online tool that promises to be the white knight that can rescue obscenity law from its current paralysis over what to do with the Internet.

Section II of this Article will provide a background of obscenity law and how the Supreme Court is undecided about whether local community standards should be used for obscenity on the Internet. Section III will then detail how two lower courts have split over online obscenity, including a discussion of the rationale behind the national and local obscenity standards. Section IV will analyze why geotargeting technology makes applying local standards to the Internet more reasonable than applying national standards, and will propose a modified local standard that can be applied to online obscenity. Section V will conclude with a prediction of the use of geotargeting technology, and how the Court can return to applying local obscenity standards on the Internet.

II. BACKGROUND: A PRIMER ON PRURIENCE

Sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interests. 40

Justice William J. Brennan, Jr.

Obscenity is not protected speech. Under the First Amendment to the Constitution, “Congress shall make no law . . . abridging the freedom of speech . . . .” 41 The strong language used in the First Amendment seems to imply that freedom of speech covers every kind of speech or expression. However, “it is well understood that the right of free speech is not absolute at all times and under all circumstances.” 42 Certain kinds of speech may be classified as illegal, and a person may be punished for publishing such speech. 43 “These include the lewd and obscene. . . . [S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and

39 See infra, notes 90 & 113 and accompanying text.
40 Roth v. United States, 354 U.S. 476, 487 (1957); cf. Webster’s Dictionary, supra note 20, at 1996 (defining prurient as “uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings”).
41 U.S. CONST. amend. I.
43 See Roth v. United States, 354 U.S. 476, 485 (1957) (“We hold that obscenity is not within the area of constitutionally protected speech or press.”); see 18 U.S.C. §§ 1460–70 (criminalizing the distribution of obscene material).
morality.” Obscenity law’s foundations seem clear enough, but the application of legal standards to obscenity has a long and troubled history. After a number of iterations, the Court finally settled on a definition in the case of Miller v. California.

Part II.A will discuss the Miller test for obscenity, how the Court decided to allow each local area to determine obscenity (rather than impose a national standard) and how the local community standard for obscenity was extended to nearly every form of communication. Part II.B will then discuss the Court’s fragmented decision in Ashcroft v. ACLU and how the Internet’s independence from real-world geography caused the Court to doubt whether local community standards should extend to online content.

A. Miller and the Precedent for Local Community Standards: Why the Court Agrees it is All About Location, Location, Location

In Miller, the Court set out three criteria to decide whether or not a publication is protected free speech or is unprotected obscenity. One of the criteria asks “whether the average person, applying contemporary community standards” would find that the alleged obscene material appeals to an unwholesome sexual interest. In Miller, the Court explained that the local community into which a work had been published defines community standards. Thus the recipient community, represented by jurors in a trial, is the judge of when speech leaves the protection of the First Amendment and becomes obscene. The Court analyzed whether it would be better to impose a uniform national standard,

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46 Miller, 413 U.S. at 24.
47 Id. (“The basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards would find that the work . . . appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct . . . ; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”) (internal quotation marks and citations omitted).
48 Id.
49 Id. at 30–34.
50 Id. at 30–34.
but ultimately rejected this formulation.\textsuperscript{51} The Court felt that community standards “are essentially questions of fact, and our Nation is simply too big and diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. . . . [T]o structure obscenity proceedings around evidence of a national ‘community standard’ would be an exercise in futility.”\textsuperscript{52} The Court determined a national community standard was “unreasonable” because “[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept the depiction of conduct found tolerable in Las Vegas, or New York City. . . . [D]iversity is not to be strangled by the absolutism of imposed uniformity.”\textsuperscript{53}

Because the facts in \textit{Miller} dealt with the mass mailing of allegedly obscene printed material, the Court signaled that local community standards are used when examining obscenity in print media.\textsuperscript{54} However, because the Court said “differences in the characteristics of new media justify differences in the First Amendment standards applied to them,”\textsuperscript{55} publishers challenged the use of the \textit{Miller} criteria in other media. Twice the Supreme Court firmly reiterated that for traditional media, the local community standard for obscenity the proper standard.\textsuperscript{56} The Court has noted that even though a local standard approach might dissuade the publication of otherwise protected materials (because the publisher “would be unwilling to risk criminal conviction by testing variations in standards from place to place”\textsuperscript{57}), the Court concluded the local standard best balanced the advantages and disadvantages associated with using either standard. By using local standards, publishers could tailor their messages

\textsuperscript{51} \textit{Id.}
\textsuperscript{52} \textit{Id.} at 30.
\textsuperscript{53} \textit{Id.} at 32–33.
\textsuperscript{54} \textit{Id.} at 16–18.
\textsuperscript{56} \textit{See Hamling v. United States}, 418 U.S. 87, 104, 106 (1974) (stating “[a] juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination,” and holding “that a federal obscenity case may be tried on local community standards.”); \textit{Sable Commc’n of Cal.}, Inc. v. FCC, 492 U.S. 115, 124–25 (1989) (involving obscenity charges against a “dial-a-porn” operator, and stating “[t]here is no constitutional barrier under \textit{Miller} to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others.”).
\textsuperscript{57} \textit{Miller}, 413 U.S. at 34 (quoting \textit{Jacobellis v. Ohio}, 378 U.S. 184, 194–95 (1964)).
by controlling where geographically their messages would be published.\textsuperscript{58} Thus, for communications by mail, telephone, radio, and television, obscenity is determined using a local standard that is tied to the geographic space where the work was received.\textsuperscript{59}

\textbf{B. Ashcroft and the Web Gone Wild: How the Lack of Geographic Controls Made the Court Doubt the Applicability of Local Community Standards to the Internet}

\textit{Miller} established “local community standards” as the appropriate gauge for determining obscenity in traditional mediums of communication. But when the Internet emerged as a new medium divorced from real-world geography, extending obscenity law’s use of local community standards became problematic. Online content was available nationwide, and the Court became concerned that using local community standards might chill free speech.\textsuperscript{60}

\textit{Ashcroft v. ACLU [Ashcroft I]} is the most recent decision in which the Supreme Court raises the question of whether local standards apply to online content.\textsuperscript{61} In 1998, Congress, alarmed by the rise in obscenity and indecency on the Internet, and fearing easy access by minors, passed the Child Online Protection Act (COPA).\textsuperscript{62} COPA copied the \textit{Miller} criteria

\textsuperscript{58} See \textit{Hamling}, 418 U.S. at 106 (“The fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity.”); \textit{see Sable}, 492 U.S. at 125–26 (“If Sable's audience is comprised of different communities with different local standards, Sable ultimately bears the burden of complying with the prohibition on obscene messages.”).

\textsuperscript{59} While there is some nuance to the definition of the geographic contours of the local community, the Court has held that the community standards are informed by the geographic space where the obscene material was received. \textit{See Jenkins v. Georgia}, 418 U.S. 153, 157 (1974) (holding that “States have considerable latitude” in framing the geographic contours of the community, ranging from leaving the boundary undefined, or defining the local community using precise boundaries); \textit{see, e.g.}, \textit{Kaplan v. California}, 413 U.S. 115, 121 (1974) (allowing the community standards to be defined by the geographic limits of the State of California).

\textsuperscript{60} \textit{See Reno v. American Civil Liberties Union}, 521 U.S. 844, 877–88 (1997) (expressing concern that using “community standards” when regulating online content could cause it to “be judged by the standards of the community most likely to be offended by the message”);

\textsuperscript{61} \textit{Ashcroft v. ACLU}, 535 U.S. 564 (2002) [hereinafter \textit{Ashcroft I}].

\textsuperscript{62} 47 U.S.C. § 231 (2010) (criminalizing the distribution of obscene material to minors); \textit{see also George B. Delta & Jeffrey H. Matsuura, Law of the Internet §
nearly verbatim to define what online material would be prohibited by the Act, including “applying contemporary community standards” to determine whether material appealed to the prurient interest.\footnote{47 U.S.C. § 231(6) (2010).} Unfortunately, because COPA tried to apply the \textit{Miller} criterion of local community standards to the Internet, a number of Justices were concerned that applying local standards would chill speech on a medium where content was inherently national.\footnote{\textit{Ashcroft I}, 535 U.S. at 587 (O’Connor, J., concurring in part and concurring in the judgment) (using a local community standard “would potentially suppress an inordinate amount of expression”); \textit{Id.} at 590 (Breyer, J., concurring in part and concurring in the judgment) (using a local community standard “would provide the most puritan of communities with a heckler’s veto affecting the rest of the Nation”); \textit{Id.} at 594–96 (Kennedy, J., with whom Souter, J., & Ginsburg, J., join, concurring in the judgment) (using a local community standard could lead web publishers to avoid using the Internet because they cannot control who receives their content); \textit{Id.} at 612 (Stevens, J., dissenting) (using local community standards would remove all online speech that was intolerable to the least-tolerant community).} Thus, \textit{Ashcroft I} fragmented into at least five distinct opinions, with no clear consensus on whether local, national, or some other form of community standards should be used for the new online medium in which geographic control was nonexistent.\footnote{\textit{See infra} notes 66–89; \textit{see generally} Ronald P. Reid, Case Note, \textit{Ashcroft v. American Civil Liberties Union}, 7 JONES L. REV. 95, 103-11 (2003).}

The plurality opinion\footnote{\textit{Ashcroft}, 535 U.S. at 566–86 (Thomas, J., plurality opinion).} (fully endorsed by Justices Thomas, Scalia, and Rehnquist, and joined in part by Justices O’Connor and Breyer) noted that while there was no requirement that the community standards had to be tied to some precise geography, it was inevitable that a juror will draw upon his local community to determine if a work is obscene.\footnote{\textit{Id.} at 576–77 (“[C]ommunity standards need not be defined by reference to precise geographic area. . . . Absent geographic specification, a juror applying community standards will inevitably draw upon personal knowledge of the community or vicinage from which he comes.”) (citations and internal quotations omitted).} The plurality further noted that the unique characteristics associated with the Internet did not justify adopting a different approach to obscenity, and posited that the continued application of a local standard to the Internet was tolerable.\footnote{\textit{Id.} at 583 (“While Justice Kennedy and Justice Stevens question the applicability of this Court’s community standards jurisprudence to the Internet, we do not believe that the medium’s ‘unique characteristics’ justify adopting a different approach than that set forth in \textit{Hamling} and \textit{Sable} [i.e. using local community standards].”).} Recognizing the need for some consensus, Justices Thomas, Scalia, and Rehnquist conceded their position and merely ended
the plurality opinion by stating that, “[t]he scope of our decision today is quite limited. We hold only that COPA’s reliance on community standards to identify [obscene material] does not by itself render the statute [unconstitutional].” 69 Thus, COPA was not struck down for its use of local standards, but instead was remanded to the lower court with instructions to determine if there were other reasons that made COPA unconstitutional. 70

In a separate opinion that concurred in part and concurred in the judgment, 71 Justice O’Connor felt compelled to write her own opinion to “express [her] own views on the constitutionality and desirability of adopting a national standard for obscenity regulation on the Internet.” 72 She said that if a local standard is used, it would chill too much speech, “effectively forc[ing] all speakers on the Web to abide by the most puritan community’s standards.” 73 Given an Internet publisher’s “inability to control the geographic location of their audience,” it was too much to ask them to bear the burden of trying to control where their speech was received, and would “potentially suppress an inordinate amount of expression.” 74 Thus, she opined that a national standard would be less chilling for Internet speech. However, O’Connor concluded by noting that although she wished the Court would “explicitly adopt[] a national standard for defining obscenity on the Internet,” 75 she agreed with the plurality that under all the circumstances of the case, local standards alone were not sufficient to invalidate COPA. 76

In a contrasting opinion concurring in part and concurring the judgment, 77 Justice Breyer argued that Congress had never intended for COPA to apply a local standard, but instead intended to apply a “nationally uniform adult-based standard” to content on the Internet. 78 He argued that although a juror might inevitably use his own local standards

69 Id. at 585 (emphasis in the original). Eight Justices agreed with the decision to not overrule COPA on the use of local community standards, and the various opinions reiterated the narrowness of their agreement. See id. at 576 (Thomas, J., plurality opinion) (“[W]e do not think it prudent to engage in speculation [about community standards] and deciding this case does not require us to do so.”); Id. at 596 (Kennedy, J. concurring in the judgment) (“In any event, we need not decide whether [COPA] invokes local or national community standards to conclude that vacatur and remand are in order.”).

70 Id. at 586.
71 Id. at 586–89 (O’Connor, J., concurring in part and concurring in judgment).
72 Id. at 586.
73 Id. at 577.
74 Id. at 587.
75 Id. at 589.
76 Id.
77 Id. at 589–91 (Breyer, J., concurring in part and concurring in judgment).
78 Id. at 591.
to judge obscenity, such variations would be minor and would not invalidate a national standard. But, notwithstanding his advocacy of a national standard, Justice Breyer conceded that the use of local standards was tolerable and was not enough to invalidate COPA.

In a fourth opinion, Justices Kennedy, Souter, and Ginsburg expressed their own concerns about both the national and local standards. They agreed with the plurality that local standards are sometimes appropriate; however, they were also concerned that the unique characteristics of the Internet may “justify differences in the First Amendment standards applied to [the Internet].” The three justices noted that applying a local standard in prior media was tolerable because publishers were able to target their audience geographically. But, for the Internet, using a local standard with inevitable variation among the nation’s communities presented a “particular burden on Internet speech.” Nevertheless, the three justices could not decide which standard was appropriate in this case, and merely concurred in the judgment.

In the fifth and final opinion, Justice Stevens provided the only dissent. Justice Stevens reasoned that because Internet publishers have no control over where their content is distributed, the Internet so radically different from traditional media that using community standards as defined by the Miller leads to overbreadth in any application. Stevens principally disagreed with the plurality’s acceptance of local standards for the Internet; but, he also criticized Justice Kennedy’s opinion. Although Justice Stevens conceded that obscene “hard-core pornography . . . does not belong on the Internet,” he nevertheless felt that “applying community standards to the Internet will restrict a substantial amount of protected speech,” because the “sorting mechanism [present in other geographically linked media] does not exist in cyberspace.” Justice Stevens does not propose some other standard or criterion for obscenity on the Internet—he merely disagrees using community standards as detailed by any of the other Justices.

\(\text{Id. at } 589.\)
\(\text{Id. at } 591–602 \text{ (Kennedy, J., concurring in judgment).}\)
\(\text{Id. at } 594.\)
\(\text{Id. at } 595–97.\)
\(\text{Id. at } 597.\)
\(\text{Id. at } 602–12 \text{ (Stevens, J., dissenting).}\)
\(\text{Id. at } 605–06.\)
\(\text{Id. at } 605–06, 609–11.\)
\(\text{Id. at } 611–12.\)
\(\text{See id. at } 602–12.\)
It is notable that each opinion, and thus every Justice of the Court, lamented the fact that online technology lacked the same geographic controls available in all other media.90

Ashcroft I thus provides little guidance about how to determine obscenity online—leaving lower courts with the unenviable task of interpreting Ashcroft I to decide which community standard, if any, should apply to the Internet. Since eight Justices concurred in the judgment, the most that can be said is that using local standards does not automatically condemn Internet regulation as unconstitutional.91 But, knowing that the use of local standards to regulate the Internet might not be unconstitutional does not provide clear guidance about whether the Court should use local standards for Internet obscenity.

III. RECENT DEVELOPMENTS: SPLITTING THE CIRCUITS

Obscenity is what happens to shock some elderly and ignorant magistrate.92

Bertrand Russell

Because of the Supreme Court’s vague, noncommittal punt in Ashcroft I, lower courts had to grapple with Internet obscenity cases without the clarion guidance of whether a local, or national community standards apply. Two recent Federal Courts of Appeals decisions stand on opposite side of this issue, and highlight the main theories behind the arguments for applying one standard over the other.93

A. The Ninth Circuit: Kilbride and the National Community Standard

90 See id. at 575, 568, 577, 580-82, 583, 587, 590, 595-596, 605-606. Ashcroft I wasn’t the first time the Court wished the Internet had more geographic controls. See Reno v. ACLU, 521 U.S. 844, 890 (1997).

91 See Ashcroft v. ACLU, 542 U.S. 656, 664 (2004) (stating the “holding [in Ashcroft I was] that the community-standards language did not, standing alone, make the statute unconstitutionally overbroad.”) [hereinafter Ashcroft II]. In Ashcroft II, the Court found that COPA was unconstitutional, but only on the grounds that the statute’s language was overbroad, with little discussion of whether local community standards tied to geography should or should not be used for Internet obscenity cases. See 542 U.S. at 664–70 (2004).


93 See United States v. Kilbride, 584 F.3d 1240 (9th Cir. 2009); see United States v. Little, 365 F. App’x 159 (11th Cir. 2010).
In October 2009, the Ninth Circuit “squarely turned its back” on the long-standing local community standard used in all other forms of media. In United States v. Kilbride the circuit ruled that national community standards should be applied to the Internet because the Internet was so completely devoid of geographic controls.

The defendants (Jeffrey Kilbride and James Schaffer) began advertising borderline-obscene porn via email in 2003. The defendants earned a commission every time an email recipient used links in his or her email to access and pay for online content. The emails contained more than mere links—they also had extremely graphic images of fisting and anilingus, which compelled over 662,000 people who received the messages to complain to the Federal Trade Commission. The two men were charged with distributing obscene material in violation of Federal obscenity law. At trial, the jury was told it could use the community standards of “society at large, or people in general,” and that the community they “should consider . . . is not defined by a precise geographic area.” The jury found the two men guilty of distributing obscenity, and they were sentenced to approximately five years of jail-time.

The defendants appealed, arguing that the jury instructions were prejudicial and plainly erroneous. They reasoned that because they had no control over where their email spam would be downloaded, a national standard should apply. Thus, the defendants argued the jury instructions were erroneous and prejudicial because they failed to adequately inform the jury that when using community standards to judge obscenity, the jury

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96 Kilbride, 584 F.3d at 1250–55.

97 Kilbride, 584 F.3d at 1244–45.

98 Id.


100 Kilbride, 584 F.3d at 1245.

101 Id.

102 Id. at 1248.

103 See id. at 1245.

104 Id. at 1247.
should consider *nothing less* than the nation-wide community.\(^{105}\) The Ninth Circuit agreed with the porn-spammers that a national standard should apply to Internet obscenity cases, but at the same time, held that the jury instructions were not plainly erroneous under a national community standard.\(^{106}\)

The Ninth Circuit arrived at this decision by first interpreting what it considered to be the holding of *Ashcroft I*.\(^{107}\) The court employed the *Marks* Rule, which says that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”\(^{108}\) Thus, the Ninth Circuit examined the five fragmented opinions of *Ashcroft I*, and by overlapping the various concurrences, concluded that the narrowest grounds upon which a holding could be based was that “while application of a national community standard would not or may not create constitutional concern, application of local community standards likely would.”\(^{109}\)

Notwithstanding the conclusion that national standards should be applied to Internet obscenity cases, the court upheld the defendants’ convictions because the jury instructions had been adequate.\(^{110}\) The Ninth Circuit reasoned that plain error is found only when the case law is “clear and obvious,” and the district court fails to follow that clear and obvious precedent.\(^{111}\) But, because the case law was not clear and had required the Ninth Circuit to divine a holding from *Ashcroft I*, the district court had not committed clear and obvious error by giving jury instructions requiring less than a national standard for judging online obscenity.\(^{112}\)

It is noteworthy that the *Kilbride* court lamented that online publishers aren’t able to tailor their message for specific geographic areas like they can in traditional media.\(^{113}\)

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\(^{105}\) See Appellants’ Joint Opening Brief at 33-40, United States v. Kilbride, 584 F.3d 1240 (9th Cir. 2008) (No. 07-10528), 2008 WL 4127267.

\(^{106}\) *Kilbride*, 584 F.3d at 1254-55.

\(^{107}\) *Id.* at 1252-55.

\(^{108}\) *Id.* at 1253-54 (quoting *Marks* v. United States, 430 U.S. 188, 193 (1976)) (internal quotations omitted).

\(^{109}\) *Id.* at 1254.

\(^{110}\) *Id.* at 1255.

\(^{111}\) *Id.*

\(^{112}\) *Id.* at 1255.

\(^{113}\) *Id.* at 1250–51.
B. The Eleventh Circuit: Little and the Local Community Standard

In contrast to the Ninth Circuit, the Eleventh Circuit in United States v. Little concluded the opposite: local standards should apply to Internet obscenity cases.\(^{114}\) Interestingly, the Eleventh Circuit marked this circuit-splitting opinion to remain unpublished.\(^{115}\)

Defendant Paul Little, a.k.a. Max Hardcore, moved to California and began producing pornographic films in the early 1990s.\(^{116}\) Mr. Little’s pornography pushed the boundaries of decency, and his self-described “vile and crazy”\(^{117}\) videos garnered negative attention both inside and outside the porn industry,\(^{118}\) including the attention of the Federal government. In 2007, the Department of Justice conducted an investigation into the content on Mr. Little’s website,\(^{119}\) after which it indicted Mr. Little for distributing obscenity.\(^{120}\) One mild description of the videos stated they portrayed, “abusive sexual acts between adult males and females dressed to look and act like minor children,” including, “simulated rape, slapping, gagging, vomiting, and anal and vaginal fisting.”\(^{121}\)

After indictment, Mr. Little moved to dismiss the case because it had relied on a local community standard, arguing that after Ashcroft I local

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\(^{114}\) United States v. Little, 365 F. App’x 159, 166 (11th Cir. 2010).

\(^{115}\) See generally id.


\(^{117}\) Steve C., Interview with Legendary Adult Director Max Hardcore, FOUNDRYMUSIC.COM (July 20, 2005), http://www.foundrymusic.com/bands/displayinterview.cfm?id=130.

\(^{118}\) Peter S. Scholtes, Devil in the Flesh, CITYPAGES.COM (Jan 14, 1998), http://www.citypages.com/1998-01-14/arts/devil-in-the-flesh/1 (“Hardcore is among the most hated men in the [porn] industry. He’s rumored to have put several actresses in the hospital, and most starlets refuse to work with him.”).

\(^{119}\) Order at 1, United States v. Little, No. 8:07-cr-00170-SCB-TBM (M.D. Fla. Jan 16, 2008), ECF No. 64, 2008 WL 151875.

\(^{120}\) Indictment, United States v. Little, No. 8:07-cr-00170-SCB-TBM (M.D. Fla. May 17, 2007), ECF No. 1, 2007 WL 4401063.

\(^{121}\) Government’s Response and Memorandum to Defendants’ Motion to Dismiss at 2, United States v. Little, No. 8:07-cr-00170-SCB-TBM (M.D. Fla. Jan. 4, 2008), ECF No. 63, 2007 WL 2809549 (internal quotations omitted); see also Susannah Breslin, To the Max, THE REVERSE COWGIRL (Oct. 6, 2008, 8:53 PM), http://reversecowgirlblog.blogspot.com/2008/10/to-max.html (describing Hardcore’s videos in which “women are verbally and physically degraded in an unprecedented myriad of ways,” which “[e]ven for the most jaded porn watcher, Little’s oeuvre is over the top. Watching Little’s work is less like watching a porn movie than it is akin to witnessing a vivisection.”).
standards cannot constitutionally be applied to Internet obscenity. The trial court dismissed the motion to dismiss, holding that local standards still applied to the Internet. At trial the district judge noted “it would be very difficult for the jury to sit through five of these [videos],” and after viewing some of the videos the jury passed a note to the judge begging that the jury view only a few clips. Mr. Little was convicted of all ten counts of violating federal obscenity law, was sentenced to almost four years in prison, three years of probation, and was fined over $80,000.

On appeal Mr. Little argued that it was error to deny his motion to dismiss the indictment. Mr. Little asserted that local community standards should not apply to the Internet because he had no power to control the geographical areas into which his videos were published. The Eleventh Circuit summarily rejected this argument in four short sentences. The court noted that three months earlier the Ninth Circuit in Kilbride had interpreted the holding in Ashcroft I “in such a way as to mandate a national community standard for Internet-based material.” However, the Eleventh Circuit “decline[d] to follow the reasoning of Kilbride,” stating that the portions of Ashcroft I “that advocated a national community standard were dicta, not the ruling of the court.” Thus, the Eleventh Circuit concluded that using local community standards under Miller “remains the standard by which the Supreme Court has directed us to judge obscenity, on the Internet and elsewhere.” Thus, the Eleventh Circuit upheld Mr. Little’s conviction. However, due to a sentencing enhancement error, the case was remanded to the district court for resentencing.

122 Defendants Max World Ent. Inc. and Paul Little’s Motion to Dismiss Indictment at 19–21 8:07-cr-00170-SCB-TBM (M.D. Fla. Oct. 24, 2007), ECF No. 56, 2007 WL 4401064; see also Order supra note 119, at 2.
123 Order supra note 119, at 2.
124 Clay Calvert, Judicial Erosion of Protection for Defendants in Obscenity Prosecutions?: When Courts Say, Literally, Enough is Enough and When Internet Availability Does Not Mean Acceptance, 1 HARV. J. OF SPORTS & ENT. L. 7, 22 (2010); see Clerk’s Minutes—General at 1, United States v. Little, No. 8:07-cr-00170-SCB-TBM (M.D. Fla. May 29, 2008), ECF No. 127 (“Playing of the dvds continued in open court. . . . A note is sent to the Judge by one of the jurors. . . . Viewing of the dvds continues.”)
125 United States v. Little, 365 F. App’x 159, 161 (11th Cir. 2010).
126 Brief Of Defendants-Appellants Paul F. Little and Max World Ent., Inc. at 13–17, United States v. Little, 365 F. App’x 159 (11th Cir. 2010) (No. 08-15964), 2009 WL 506653.
127 Little, 365 F. App’x at 164.
128 Id. at 164 & 164 n.10.
129 Id.
130 Id. at 169.
It is noteworthy that the Little court, like the Kilbride court and the Supreme Court, lamented that online publishers have no means to tailor their message like they can in traditional media.\textsuperscript{131}

The Kilbride and Little decisions illustrate how reasonable people can interpret the Ashcroft I decision and logically arrive at contrasting conclusions, and how the lack of Supreme Court direction over which standard should be used for online obscenity cases could lead to even more splits among the circuits.

IV. AVAILABLE AT AN INTERNET NEAR YOU: GEOTARGETING

\textit{This is our most desperate hour. Help me, [geotargeting]. You're my only hope.}\textsuperscript{132}

Princess Leia Organa

Reasonable people may debate about whether a local or national standard should apply to the Internet. But a recent technological development will end the debate, and provide the Court with a good reason to apply local community standards for online content just as it has done for all other media. While there are already a number of reasons why the Court should apply local community standards to the Internet (such as incorrect attempts to interpret Ashcroft I as advocating national standards,\textsuperscript{133} the impossibility of administering a national standard,\textsuperscript{134} and

\begin{footnotesize}
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\item \textsuperscript{131} Id. at 1250–51.
\item \textsuperscript{132} STAR WARS: EPISODE IV—A NEW HOPE (LucasFilm and Twentieth Century Fox 1977).
\item \textsuperscript{133} The Court explicitly stated that no other holding should be extrapolated from the Ashcroft I decision. See supra note 69 and accompanying text. Moreover, the Ninth Court erroneously applied the Marks Rule. Compare supra note 96 (explaining how Kilbride's use of the Marks Rule on the Ashcroft I opinion was incorrect because it disregarded prior Supreme Court precedent and failed to apply correct interpretive principles), with Nichols v. United States, 511 U.S. 738, 745–46 (1994) (signaling that the Marks inquiry should not be pursued to the “utmost logical possibility . . . .”), and Linda Novak, Note, The Precedential Value of Supreme Court Plurality Decisions, 80 Col. L. Rev. 756, 763 (1980) (explaining that although the Marks Rule can be used in some cases, “[m]ore often, however, there is no clear and explicit agreement on the reasoning supporting the result; instead, two essentially distinct rationales are proposed, and the overlap, if any, is merely implicit.”), and Evan H. Carminker, Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking, 73 Tex. L. Rev. 1, 15 (1994) (“[T]here may not be a single dispositional rule endorsed by a majority of the judges. Instead, the disposition may be supported only by an individual or plurality opinion combined with one or more opinions concurring in the judgment. In such event, according to the conventional model, the case establishes no precedential rule. Rather, a decision establishes a legal rule with precedential status only if a majority of judges
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the greater chilling effects of a national standard\textsuperscript{135}, the most important reason is that the Internet has recently developed a technology (called geotargeting) that allows online publishers to control where their content is received. The conflict between local and national standards for online obscenity springs from the idea that there were no intrinsic geographic controls similar to those in other traditional media; but geotargeting resolves the issue by giving online publishers the same power they have in all other media to target their audience.

This section will give a short history of geotargeting, will explain how online geotargeting provides publishers of prurience the power to target particular geographic areas, and will conclude with a proposal for a modified local standard that can be used for online obscenity.

\textbf{A. The History and Ever Expanding Use of Geotargeting On the Internet}

Many assume that it would be impossible to link active users of the

\textsuperscript{134} Another reason is that using a national standard would prove impossible to administer in court proceedings. \textit{Compare} Miller v. California, 413 U.S. 15, 30 (1973) (stating that in order to create a record of \textit{what} the national standard is, which is “essentially a question[] of fact,” it would necessitate asking a trier-of-fact to plumb the depths of the nation’s opinion which would amount to “an exercise in futility”), \textit{with} Hamling v. United States, 418 U.S. 87, 105 (1974) (analyzing the “difficulty of formulating uniform national standards” and concluding “[n]othing in the First Amendment requires that a jury must consider hypothetical and unascertainable ‘national standards’ when attempting to determine whether certain materials are obscene as a matter of fact.”) (internal quotations omitted), and Jacobellis v. State of Ohio, 378 U.S. 184, 201 (1964) (Warren, Chief J., dissenting) (“I believe that there is no provable ‘national standard’ and perhaps there should be none. At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one.”).

\textsuperscript{135} Using a local standard provides the least-tolerant community with veto power on a nation-wide medium chilling the speech of the most tolerant of speakers; in contrast a national standard forces obscene content on unwilling communities while it prevents tolerant communities from being able to publish prurient content they find tolerable. \textit{See supra} notes 52–53 and accompanying text; \textit{compare} Matthew Towns, Note, \textit{The Community Standards of Utah and the Amish Country Rule the World Wide Web}, 68 Mo. L. REV. 735, 740–43 (2003) (explaining how under a local standard online speech would be chilled by giving the least-tolerant community a heckler’s veto), \textit{with} John V. Edwards, Note, \textit{Obscenity in the Age Of Direct Broadcast Satellite: A Final Burial for Stanley v. Georgia(?), a National Obscenity Standard, and Other Miscellany}, 33 WM. & MARY L. REV. 949, 992 (1992) (explaining that a national standard “compromis[es] the interests of both the least tolerant and the most tolerant communities”).
Since the Internet was first created, users were required to register with a central database, linking each user to a real-world name, mailing address, telephone number, and network mailbox. That database tracked the real-world locations of users until the 1990s, when, in the interest of creating competitive balance, registration with the database was deregulated and additional registrars were permitted to assign Internet domain names. As more registrars were allowed, the database grew more complex and less transparent, leading many to believe that the Internet’s decentralized design and global reach made it technologically impossible to connect to real-world geography.

But recently, technological advances are recreating real-world borders on the previously borderless Internet making it much easier to connect each Internet user to a real-world location. One sophisticated
method uses Internet Protocol (IP) addresses associated with each domain registry to track the location of users. Typically a geo-location company “maps” all the domains and their associated IP addresses to their real-world locations and stores that large amount of information into a private database. When a user access a certain website, his or her originating IP address can be compared to the records in the database, giving an educated guess about the access-seeker’s location. Online advertisers and publishers of all types currently use geotargeting because it gives them the power to show customized messages to geographically defined audiences, which maximizes advertising dollars and provides hyper-local responses to online queries.

Thus, geo-location companies help advertisers or other Internet publishers quickly and efficiently locate their audience through such information as a visitor’s country, region, city, latitude, longitude, zip code, time zone, area code, local weather, and more. There are websites that provide free, easy-to-use geolocation software that is 99.5% accurate on a country level, and 80% accurate at the city level, allowing website designers to create customized lists that block as many (or as few) BBC’s prevents non-U.K. users from accessing some of its online content using geotargeting).

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Svantesson, supra note 136 at 109-10. There are also less sophisticated (but arguably equally valuable) geolocation methods. Id. at 120-31. See also Matthew Nelson, Utah’s Trademark Protection Act: Over-Reaching Unconstitutional Protectionism or Decisive Clarifying Legislation?, 2007 UTAH L. REV. 1199, 1214.

Svantesson, supra note 136, at 110. Id.

See Bob Tedeschi, Borderless is Out, N.Y. Times, Apr. 2, 2001, at C.10; see e.g., Google.com, http://www.google.com/support/webmasters/bin/answer.py?hl=en&answer=62399 (last visited Feb. 5, 2011) (describing how webmasters can use Google’s geotargeting tools to increase their exposure to users in a specific geographic area).

Svantesson, supra note 136, at 110. See id. at 110 n.40 (listing eight popular geolocation companies); Demo, GEOBYTES.COM, http://www.geobytes.com/demo.htm (last updated Aug. 29, 2006) (providing a less-than-classy, but very informative, demonstration of the information available using geolocation software, as well as how easy it is to use geolocation software). Since Mr. Svantesson’s article, additional companies have entered and dominated the market, such MaxMind who offers the robust and regularly updated GeoIP Database. See MaxMind’s IP Intelligence Solution, MAXMIND.COM, http://www.maxmind.com/app/ip-locate (last visited Feb. 5, 2011); cf. Randall Munroe, GeoIP, XKCD.COM, http://xkcd.com/713 (last visited Feb. 5, 2011) (providing a humorous spin on how the GeoIP database is used to assist Internet advertisers target their audience).

countries or cities as they wish from accessing a website’s online content.148

B. How Geotargeting Gives Online Publishers the Power to Target Their Audience by Geography, Just as in Other Media

As noted in Miller, Ashcroft I, Little, and Killbride, courts have often lamented the fact that, web publishers do not have the ability to control the geographic scope of the recipients of their communications, implying that if online publishers could control the geographic scope of their postings, the Court would be more willing to impose local community standards on the Internet, just as it has imposed local standards on previous media.149 Geolocation provides the Court with the answer. Purveyors of prurient publications can presently employ powerful tools to publish their products into predetermined precincts. And although not fully capable of granular targeting particular streets or houses, geotargeting is capable of targeting particular cities and zip codes, and is constantly improving.150

Some commentators have postulated that geolocation software may already be accurate enough for legal purposes.151 There may be ways to fool geolocation software,152 but for the first time since Ashcroft I, it is possible for web publishers such as Paul Little (a.k.a. Max Hardcore) to freely publish online content into those communities tolerant of violent and extreme pornography, and avoid publishing in communities that find such content obscene. Already, at least one foreign country and one state

148 IPINFODB supra note 147 (follow the “Block IP by Country” hyperlink).
149 See supra note 90 and accompanying text.
150 See Blyth, supra note 141; Digital Element Finding Demand for Granular IP Targeting Says Co-Founder Friedman, AdEXHANGER.COM (Aug. 20, 2009, 10:07 AM), http://www.adexchanger.com/online-advertising/digital-element-rob-friedman-ip-targeting (stating that early applications of IP targeting were only able to target countries, recent developments are making targeting as granular as cities or even zip codes possible, creating a “hyperlocal” experience); see, e.g., Bamba Gueye et al., Constraint-Based Geolocation of Internet Hosts, 14 IEEE/ACM TRANSACTIONS ON NETWORKING 1219 (2006), available at http://www.slac.stanford.edu/comp/net/wan-mon/tulip (search for “December 2006”; then follow the “Constraint-Based Geolocation of Internet Hosts” link on that line; then follow the full-text “Pdf” link) (detailing a new approach that improves upon traditional landmark-based geolocation techniques by using multiple landmarks to triangulate Internet hosts).
151 Svantesson, supra note 136.
152 See Nelson, supra note 142, at 1214–15; King, supra note 140, at 71–72.
legislature have turned to geolocation to regulate online content.\footnote{Jason Krause, *It’s Location, Location . . .*, ABA JOURNAL, Jan. 2005, at 18, available at 91-Jan A.B.A. J. 18 (Westlaw) (reporting that France and Pennsylvania have considered using geolocation to enforce local laws).}

C. A Proposal to Use Local Community Standards to Gauge Online Obscenity, Justified by Geotargeting

As the fusion of geography with the Internet becomes more and more complete, the Court will be able to comfortably apply the reasoning it applied in all other forms of media. Specifically, instead of a national standard that is hard to determine, and imposes too many burdens on free speech, a local standard should be used to determine obscenity on the Internet. As noted in *Miller*, using local standards is preferable to using national standards because Internet publishers will now have the ability to control the geographic areas where they want to publish, giving them the ability to publish online without risking the heckler’s veto wielded by the most conservative of communities.

One dilemma associated with allowing the use of local standards on the Internet is how the Court will deal with “eavesdroppers.” In other words, when a user in an area where the publisher did not intend to publish uses spoofing or proxy methods to work-around the geolocation software and downloads the obscene material in a jurisdiction that the publisher did not intend to have his material distributed. In such cases, a mere modification of the *Miller* criteria would absolve the publisher of criminal liability. Instead of requiring all downloads to attach liability to the publishers, only those downloads that were (1) intended for that geographic area, or (2) explicitly or implicitly encouraged by the publisher could give rise to liability. Thus, the publisher is only liable when he directs his work at an area, or through his actions or expressions deliberately manipulates someone into downloading his content into a restricted geographic area. In contrast, if the recipient purposely circumvents the publisher’s attempts to target an area, such as through proxies or mirrors, then the publisher cannot have foreseen or prepared for that and cannot be liable since he never intended to enter that area. In essence, a publisher whose material was unilaterally taken into an unintended jurisdiction by a third party could not be held liable for distributing obscenity because that state or region would not have jurisdiction over the publisher.\footnote{Svantesson, supra note 136 at 104–04.}

This provides local communities some degree of autonomy and
control over what online content will be allowed in their communities (just as they currently have in traditional media), and avoids the uniformity of a national standard which would force conservative communities to protect otherwise obscene works. And more importantly, it allows the expression of free speech of borderline obscene material in communities where it is tolerated, preventing the most prudish community from exercising a heckler’s veto power over the Internet.

This Article proposes a new online standard that requires online obscenity to be judged by local community standards. Thus, online publishers would need to target their audience (using geotargeting), which is the same requirement as in the other traditional media. The one exception to this rule is that if the recipient takes affirmative steps to circumvent the geotargeting controls, the publisher would not be liable so long as he did not encourage circumvention. This prevents the Court from going down a medium specific path and instead uses the same standard for all media. The exception could be similarly applied to any medium, be it mail, telephone, or radio (and possibly even future media).

VI. CONCLUSION

*Obscenity, which is ever blasphemy against the divine beauty in life—is a monster for which the corruption of society forever brings forth new food, which it devours in secret.*

Percy Bysshe Shelley

The law governing online obscenity is at a crossroads. For many years, in the traditional media, obscenity law used the standards of the local community in which an allegedly obscene work had been published, requiring publishers of such extreme content to target only the most tolerant of communities. But the Internet’s global reach and open infrastructure caused the Court to doubt the applicability of obscenity law to online content, causing lower courts to split over whether the same local standards should be used (such as the Eleventh Circuit in *Little*), or whether a new national standard for obscenity should be used (such as the Ninth Circuit in *Kilbride*). Geotargeting technology provides the answer to the conundrum, giving publishers the same power to target audiences as they had in the traditional media, thereby giving the Court reason to reapply local standards to all content, be it traditional or online media.

This all begs the question: if geotargeting is such a neat solution for the community standards debate, when will the Court address the issue? It likely won’t be through Kilbride or Little, because both cases were decided on harmless error grounds. But, eventually the Court will once again be asked which standard should be used for online content. And as geotargeting technology continues to improve and be used more widely, the Court will have a great reason to resolve the issue in favor of using local standards to determine obscenity on the Internet. Ultimately, in the battle between the two standards, there can be only one (cup).


157 Cf. HIGHLANDER, (Thorn EMI Screen Ent. & Highlander Prod. Ltd. 1986), trailer available at http://www.youtube.com/watch?v=kq4SqgxlK0&hd=1&#t=1m53s (last visited Feb. 5, 2011); see also supra note 5.