

CDT and PFF Urge Courts to Rein in the FCC

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Last week, the Center for Democracy and Technology (CDT) and Adam Thierer of the Progress and Freedom Foundation (PFF) filed friend-of-the-court briefs in two federal appellate cases before the Second and Third Circuits challenging Federal Communications Commission (FCC) broadcast indecency rulings as threats to freedom of speech.

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(1) CDT and PFF Urge Courts to Rein in the FCC

Last week, the Center for Democracy and Technology (CDT) and Adam Thierer of the Progress and Freedom Foundation (PFF) filed friend-of-the-court briefs in two federal appellate cases before the Second and Third Circuits challenging Federal Communications Commission (FCC) broadcast indecency rulings as threats to freedom of speech.

In recent years, the FCC has grossly expanded its regulation of "indecent" but otherwise legal speech on television and radio. CDT and PFF in their amicus briefs urged the courts to overturn the Commission's rulings because they violate the First Amendment. The groups also encouraged the courts to rein in the FCC given that technological convergence coupled with the increased availability of user-empowerment tools are undermining the Commission's authority to regulate indecent speech.

The Second Circuit case concerns the FCC's conclusion that the use of certain expletives on various TV shows was "indecent." The Third Circuit case relates to the Commission's unprecedented \$550,000 fine against CBS for Janet Jackson's infamous "wardrobe malfunction" during the 2004 Super Bowl halftime show.

- [2nd Circuit Brief](#) [5]
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(2) FCC's Indecency Authority Based on Archaic Assumptions

The Supreme Court narrowly upheld the FCC's authority to regulate indecent speech on television and radio in the 1978 case *FCC v. Pacifica Foundation*. The FCC had taken action against a radio station that aired comedian George Carlin's "Filthy Words" monologue in which he repeated seven expletives over and over making fun of society's attitude toward these words. The Commission invoked a federal statute (18 U.S.C. 1464) that makes it a crime to utter "any obscene, indecent, or profane language by means of radio communication."

The Supreme Court held that while "indecent" but not "obscene" speech -- i.e., speech that may be offensive but does not have prurient appeal -- is protected by the First Amendment, the FCC may nevertheless regulate it when delivered via broadcast without offending the Constitution. The Court

noted that the broadcast medium is uniquely "pervasive" or "invasive" and is "uniquely accessible to children, even those too young to read." Justice Souter later explained in *Denver Area Educational Telecommunications Consortium, Inc., v. FCC* (1996) that the FCC's regulatory authority depends on broadcast being "difficult or impossible to control without immediate supervision."

In contrast to *Pacifica*, the Supreme Court held in 1996 that the justifications for regulating broadcast do not apply to the Internet. In *Reno v. ACLU*, the Court struck down the Communications Decency Act, which, among other things, prohibited the knowing transmission of "indecent" messages to children under 18. The Court held that Congress did not have authority to criminalize indecent speech because "the Internet is not as 'invasive' as radio or television."

The FCC makes indecency determinations based on what is "patently offensive as measured by contemporary community standards for the broadcast medium." This "community standards" approach is loosely based on that taken in the seminal case *Miller v. California* (1973) that addressed the First Amendment's application to obscenity. In that case, the Supreme Court contemplated the use of some objective, representative evidence of "community standards," such as a survey of what material is actually available in a given community. However, when technology allows families to set their own "household standards," the legitimacy of the "community standards" approach is placed in doubt.

(3) Innovation Undermines FCC's Authority to Regulate Speech

Over the past few years, the FCC has radically expanded its enforcement of broadcast indecency. The Commission has been particularly active in regulating television content. Citing a claimed increase in viewer complaints, the Commission asserts that it has a broad public mandate to boost its enforcement efforts. Former FCC Chairman Michael Powell publicly stated in 2004 that the agency was motivated "to sharpen [its] enforcement blade" because of the "rise in the number of complaints at the Commission," and that "the increase in the Commission's enforcement efforts in this area is a direct response to the increase in public complaints."

CDT and PFF pointed out in their amicus briefs, however, that the FCC has manipulated and mischaracterized the complaint data. Namely, the Commission changed its complaint counting methodology in two significant ways, and failed to be transparent about these changes. First, during the summer of 2003, the FCC apparently began counting identically worded form letters and computer-generated electronic complaints as individual complaints, rather than counting them as a single complaint. Second, during early 2004, the FCC began counting individual indecency complaints multiple times; thus, a single complaint sent to multiple Commission divisions or offices is now counted more than once. Additionally, the vast majority of television indecency complaints received by the FCC in recent years have been generated by a single pro-regulatory advocacy group.

CDT and PFF argued in their amicus briefs that the FCC violated the First Amendment by utterly failing to provide any objective, representative evidence of what is in fact "patently offensive" according to "contemporary community standards for the broadcast medium." Instead, the FCC essentially relies on the subjective opinion of the five commissioners: the Commission admits to simply relying on its own "collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups, and ordinary citizens." And to the extent that the FCC looks to the asserted increase in television indecency complaints as evidence of "community standards," CDT and PFF argued that this is improper in light of the numbers manipulation by the Commission itself and the fact that almost all the complaints were generated by a single advocacy group.

CDT and PFF also encouraged the Second and Third Circuits to take advantage of this opportunity to rein in the FCC given that technological innovation is rapidly undermining the Commission's constitutional authority to regulate indecent speech. The groups pointed out that adults and children alike are increasingly accessing video and audio content on the Internet, through cable and satellite operators, as well as DVD and video game purchases and rentals. "Broadcast" itself is rapidly converging with new media, such that network programming is available via cable and satellite subscriptions, and entire episodes of popular television shows can be watched on the ABC, CBS, NBC

and Fox websites. In this era of technological convergence, the *Reno v. ACLU* hands-off approach to "indecent" speech will increasingly apply, rather than the censoring approach narrowly upheld in *Pacifica*.

Additionally, technological innovation has led to the development of more - and more effective - user empowerment tools. The "V-Chip" has been installed in all 13-inch or larger televisions manufactured since 2000 and allows for the blocking of broadcast content based on a ratings system. Cable and satellite set-top boxes, personal video recorders like TiVo, and Internet filtering software and other "parental control" features offered by ISPs allow parents, teachers, and other caregivers to better control what content children access. In cases like *Reno v. ACLU* and *United States v. Playboy Entertainment Group, Inc.* (2000), the Supreme Court strongly endorsed technology as a viable alternative to government regulation of speech.

In light of these technological advancements, CDT and PFF urged the Second and Third Circuits not to sanction the expansion of the FCC's broadcast indecency regulation. As "broadcast" becomes easier and easier to control, the FCC's constitutional authority to regulate protected albeit indecent speech increasingly withers.

(4) CDT Continues Fight for Freedom of Speech in the Digital Age

CDT will continue to monitor FCC actions that threaten freedom of speech, and will weigh in with administrative comments and amicus briefs whenever appropriate. Policy makers and advocates must be vigilant to ensure that speech continues to flourish in this age of rapid technological innovation.

Information about CDT's and PFF's efforts in this area can be found at <http://www.cdt.org/speech/> [7] and <http://www.pff.org/cdmf> [8].

- [FCC](#)

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