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THE SPECTER OF PERVASIVENESS

Pacifica, *New Media, and Freedom of Speech*

BY JONATHAN D. WALLACE

Executive Summary

Under the legal doctrine of pervasiveness, media such as television and radio get much less protection from censorship than do print media. The Supreme Court should reject the pervasiveness doctrine as a dangerously broad and vague excuse for speech regulation. If the doctrine applies to any medium, it could arguably apply to all media. The pervasiveness doctrine thus threatens to curtail the First Amendment's protection of freedom of speech.

The pervasiveness doctrine relies on a crabbed view of individual responsibility and property rights. We invite the broadcast media into our homes and alone bear the responsibility for controlling our children's access. The pervasiveness doctrine wrongly puts such choices in the hands of politicians and bureaucrats.

Technological advances threaten to lead to wider applications of the pervasiveness doctrine. As the Internet expands into one-to-many voice or video communications, courts might decide to treat it as the legal equivalent of pervasive radio or TV broadcasts.

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Introduction

In 1978 the Supreme Court introduced a new rationale for regulation of broadcast media: the "pervasiveness" doctrine.[1] The court upheld Federal Communications Commission regulation of indecent radio broadcasts on the grounds that they threaten to enter homes when children might be listening. Five years later, communications scholar Ithiel de Sola Pool commented that authorities could use the pervasiveness doctrine to justify "quite radical censorship."[2] His comments proved prescient. In 1996 Congress passed the Communications Decency Act[3] to restrict indecent speech on the Internet; moreover, the executive branch urged two federal courts to uphold the constitutionality of the CDA. Both branches of government relied on the rationale that the Internet, like the radio, pervades households.

Yet the logic of pervasiveness could apply to cable television, the Internet, and even the print media. If such logic applies to <u>any</u> medium, it could apply to <u>all</u> media. In this way, the pervasiveness doctrine threatens to curtail severely the First Amendment's protection of freedom of speech. The Supreme Court should dispel this specter of censorship by rejecting the pervasiveness doctrine as a dangerously broad and vague excuse for regulating speech.

At its root, the pervasiveness doctrine relies on a stunted view of individual responsibility and property rights. As consumers, we invite the broadcast media into our homes; they do not walk in of their own accord. The same holds true of books, newspapers, and computers with Internet connections. In each case, we have the right to choose the medium and the responsibility for controlling our children's access to it. But the pervasiveness doctrine snatches from families the responsibility for making such choices and gives it to politicians and bureaucrats.

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Pacifica

On October 30, 1973, about 2:00 p.m., a Pacifica network radio station in New York broadcast a recording of comedian George Carlin joking about "the words you couldn't say on the public airwaves, the ones you definitely wouldn't say, ever."[4] A few weeks later, the FCC received a letter from a man who complained that he had tuned into the station while driving with his son; both were exposed to Carlin's wordplay. In response, the FCC issued a declaratory order saying that although it could impose formal sanctions, it would merely file the order for reference in case there were further complaints against the station.[5]

In FCC v. Pacifica Foundation, Pacifica sued the FCC, alleging that the agency's letter and the regulations on indecent speech under which it was issued violated the First Amendment. The Supreme Court upheld the FCC action on the grounds that

> the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.[6]

The Court's introduction of pervasiveness baffled many commentators, who questioned why the justices had needlessly invoked a new and unknown justification for the regulation of broadcasting. "This aberrant approach," de Sola Pool wrote in 1983, "could be used to justify quite radical censorship."[7] Since the Supreme Court had first upheld the Communications Act of 1934, FCC regulation of broadcast media had always been based on the doctrine of "spectrum scarcity."[8] In fact, for almost 20 years after Pacifica, jurists and commentators understood that the Court had not intended pervasiveness to justify regulation of speech in media that were not scarce.[9] Accordingly, the fragmented Pacifica five-to-four decision--involving several separate opinions and barely carrying a majority of the Court--applied only to radio and television, the two scarce media.

Note that the FCC order had relied on four arguments for disapproving the Carlin broadcast: the FCC stated that "children have access to radios and in many cases are unsupervised by parents"; that radio receivers are in the home, "a place where people's privacy interest is entitled to extra deference"; that offensive broadcasts may surprise unconsenting adults; and that "there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest."[10] Strangely, the justices commented on the first three arguments but were completely silent on spectrum scarcity, the former linchpin of broadcast speech regulation.

In ACLU v. Reno, the 1997 case that held the CDA unconstitutional, Judge Stewart Dalzell summarized the arguments for limiting the pervasiveness doctrine to broadcast media. "Time has not been kind to the Pacifica decision. Later cases have eroded its reach, and the Supreme Court has repeatedly instructed against over-reading the rationale of its holding," he wrote.[11] After probing the meaning of pervasiveness and its application to other media, Judge Dalzell concluded that the concept has no meaning outside the broadcast context.[12] He relied on a 1994 Supreme Court case, Turner v. FCC, in which the Court concluded that cable is not like broadcast because it "does not suffer from the inherent limitation that characterizes the broadcast medium," namely scarcity.[13]

Judge Dalzell assumed, though wrongly, that by holding in Turner that cable was not scarce, the Court signaled that it would not regard cable as pervasive. He argued that cable and broadcast are equally pervasive.[14] If a child turns on a TV set and is surprised by a pornographic film, it is not relevant whether the image entered the house through broadcast waves or a cable. Whereas the pro-CDA forces used this same argument to support the proposition that cable--and much else--should be regulated, Judge Dalzell reached the opposite conclusion. The Supreme Court declined to apply full broadcast-style regulation to cable, he found; that is, in the absence of spectrum scarcity, pervasiveness is not a distinct basis for regulation.

Nevertheless, in the same month in which the ACLU v. Reno opinion issued, the Supreme Court undermined Judge Dalzell's argument.

Cable Television: How Pervasive?

The 1996 case of Denver Area Educational Telecommunications Consortium v. FCC dealt with the constitutionality of a federal law requiring cable providers to prohibit indecent programming on certain public access or leased access channels or, alternatively, to "reverse block" such programming (that is, withhold it absent a viewer's written request).[15] A majority of the Court upheld as constitutional under the First Amendment the section of the law permitting cable providers to prohibit indecent programs on leased access channels. The Court regarded as unconstitutional the same grant of permission regarding public access channels, as well as the reverse blocking provision.

In deciding Denver, many of the justices referred to Pacifica's pervasiveness language as the source of Congress's authority to regulate indecent programming on cable. Justice Stephen Breyer, writing for the plurality, approvingly summarized Pacifica's finding that "'the broadcast media have established a uniquely pervasive presence in the lives of all Americans,'" and that "'patently offensive, indecent material . . . confronts the citizen, not only in public, but also in the privacy of the home,' generally without sufficient prior warning to allow the recipient to avert his or her eyes or ears."[16]

Justice Breyer went on to relate those findings to cable. "All these factors are present here. Cable television broadcasting," he wrote, "is as 'accessible to children' as over-the-air broadcasting, if not more so."[17] Cable television, including public access, has "'established a uniquely pervasive presence in the lives of all Americans.'"[18]

In Denver, the Court discounted its finding in Turner that cable does not suffer the spectrum scarcity that traditionally justified the regulation of broadcasts. Although cable's lack of scarcity clarified the must-carry rules at issue in Turner, "it has little to do with a case that involves the effects of television viewing on children."[19] The Denver plurality regarded cable and broadcast as quite similar in terms of "how pervasive and intrusive that programming is."[20]

Justice John Paul Stevens agreed in a concurring opinion. He held that the legislation considered was designed,

not to suppress a certain form of expression disfavored by the government, but rather "to protect children from sexually explicit programming on a pervasive medium."[21] A few lines later, he repeated: "Although indecent speech is protected by the First Amendment, the Government may have a compelling interest in protecting children from indecent speech on such a pervasive medium."[22]

Justice David Souter's separate concurrence likewise cited the Court's forgiving standard of review, set forth in Pacifica, for regulating pervasive speech. He approvingly noted that the restrictions on indecent speech at issue in Pacifica did not effect a complete ban but instead regulated broadcasts that were "easily available to children," due to their being "readily received in the household and difficult or impossible to control without immediate supervision."[23] As did Justice Breyer, Justice Souter distinguished Turner on the grounds that although cable may differ from broadcasting with respect to access requirements, the characteristics of radio that render broadcast indecency threatening--"its intrusion into the house and accessibility to children"--likewise afflict cable television.[24]

Justice Sandra Day O'Connor concurred on the constitutionality of the language regarding leased access channels but dissented from the portions of the plurality opinion holding the public access language unconstitutional. Here, too, the alleged pervasiveness of cable made all the difference. "Cable television, like broadcast television, is a medium that is uniquely accessible to children," she argued, "and of course, children have equally easy access to public access channels as to leased access channels." [25]

Even Justice Anthony Kennedy, joined by Justice Ginsburg, dissenting, did not repudiate Pacifica's pervasiveness doctrine as applied to cable. He acknowledged that cable "can bring indecent expression into the home of every cable subscriber, where children spend astounding amounts of time watching television."[26] Although tacitly acknowledging that the pervasiveness of a medium supports a compelling government interest in regulating it, Justice Kennedy denied that the statutory provisions considered were narrowly enough tailored to withstand scrutiny.[27]

Only Justice Clarence Thomas, joined in his dissent by Chief Justice William Rehnquist and Justice Antonin Scalia, discredited the relevance of the pervasiveness doctrine.

Justice Thomas would have upheld all three statutory sections under review, relying on the theory that cable providers own their networks no less than bookstores own their shelves. All private parties merit equal standing under the First Amendment, and each should have complete discretion to decide what expressions to offer the public. Justice Thomas made the Denver case's most straightforward declaration of principle: "The text of the First Amendment makes no distinction between print, broadcast, and cable media."[28]

Justice Thomas alone seemed to believe that the Court had failed to pursue the implications its 1994 Turner holding:

> In Turner, by adopting much of the print paradigm . . . we adopted with it a considerable body of precedent that governs the respective First Amendment rights of competing speakers. In Red Lion [a case relying on spectrum scarcity], we had legitimized consideration of the public interest and emphasized the rights of viewers, at least in the abstract. Under that view, "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." . . . After Turner, however, that view can no longer be given any credence in the cable context. It is the operator's right that is preeminent.[29]

If cable is indeed like print, then the pervasiveness doctrine should apply to neither or both. Justice Thomas's simple but powerful comparison undermines any basis for classifying one medium as pervasive and the other as not.

The Court again supported the applicability of Pacifica to cable in March 1997 when, without issuing an opinion, it upheld the decision of the three-judge court in Playboy Entertainment Group v. U.S.[30] Arguing under the burden of very unsympathetic facts, Playboy sued to invalidate a CDA provision requiring cable providers to scramble indecent premium channels completely. In many areas with older technology, such channels resist scrambling and every few minutes the picture straightens out, to give a partial view of an indecent image. In some areas, the audio signal completely defies scrambling, leaving what the three-judge panel called "orgiastic moans and groans" audible even when the images are not visible.[31] The cable industry calls the availability of partial signals to nonsubscribers "signal bleed."[32] Playboy argued that requiring upgraded scrambling

technology would prevent many providers from offering such premium services at all. The statute offered another alternative: instead of complete scrambling, cable providers could provide indecent channels between the hours of 10 p.m. and 6 a.m.[33]

The panel denied Playboy a preliminary injunction against enforcing the statute, finding that signal bleed indeed exposed children "to sights and sounds from sexually explicit programming" before their parents could do anything about it.[34] The judges noted acerbically that "no evidence was presented of any consumer desire to receive 'signal bleed.' Moreover, plaintiffs make no claim that 'signal bleed' itself is constitutionally protected."[35]

Though it could have chosen narrower grounds for deciding the case, the three-judge panel chose the pervasiveness doctrine as its rationale for denying relief to Playboy. It concluded that there was no evidence that "the public interest is served by permitting signal bleed to invade nonsubscribers' homes, particularly in view of our interest in protecting children from a pervasive medium which transmits sexually explicit sounds and images."[36] The panel relied on Denver, noting that "the Supreme Court in its consideration of freedom of speech under the First Amendment has recognized the need to protect children from sexually explicit material, particularly in the context of a pervasive medium."[37] The judges concluded, "We wholeheartedly agree with the plurality's finding in Denver that cable television is now 'uniquely pervasive.'"[38]

Though the three-judge panel finished hearing evidence and arguments in May 1996, it decided to delay its decision until after the Supreme Court decided Denver. Whereas Denver turned on Congress's authority to authorize third parties to ban speech, Playboy confronted the censorship issue more directly. That is, it involved a law that directly regulated speech. The Supreme Court subsequently affirmed the Playboy decision, strongly implying that it thought the court below had read Denver correctly.

Denver and Playboy together support the proposition that, using pervasiveness as its rationale, Congress can apply almost any sort of regulation, short of an outright ban, to indecent programming on cable television. The definition of indecency used in Pacifica, later embodied in FCC regulations, and at issue in the Playboy case, happens

to be the same one Congress tried to apply to the Internet.

The Internet: Not Pervasive

Proponents of the CDA deliberately adopted the definition of indecency that the FCC and the courts had refined over many years. Many advocates of the proposition that Congress could regulate Internet indecency argued that the Internet, like broadcast television, is pervasive. As Sen. Dan Coats (R-Ind.) remarked during the June 1995 debate on the CDA, "The Internet is like taking a porn shop and putting it in the bedroom of your children and then saying, 'Do not look.'"[39]

It seems that the CDA's supporters were a bit ahead of their time. The Supreme Court had not yet decided Denver, so it remained unclear whether Pacifica could apply to cable television, let alone to the Internet. At the CDA trial, the government experts attempted to apply the pervasiveness doctrine to the Internet by using key words such as "Little Women" and "Snow White" to demonstrate the dangers of letting children surf the Internet.[40]

The three-judge panel in ACLU v. Reno understood the considerable influence that Pacifica had on their case. If Pacifica did not apply to cable television, it could not imaginably apply to the Internet, a medium much less like television. On the other hand, the pervasiveness doctrine, if freed from spectrum scarcity, might roam like a specter across all media, electronic and traditional. In his concurring opinion, Judge Dalzell held that Pacifica could not possibly be construed to apply to the Internet--because, as he wrongly thought, Turner had made clear that the Supreme Court would not extend Pacifica to cable. In his view, the Court, in Pacifica and more recent cases, had clearly evinced an intention to limit the pervasiveness doctrine to scarce broadcast media.[41] He characterized Pacifica as a decision "addressing the proper fit between broadcasting and the First Amendment,"[42] and noted that the government's argument "also assumes that what is good for broadcasting is good for the Internet."[43]

Judge Dalzell found decisive the Supreme Court's refusal to apply broadcast rules to cable in Turner. "Turner's holding confirms beyond doubt that the holding in Pacifica arose out of the scarcity rationale unique to the underlying

technology of broadcasting, and not out of the end product that the viewer watches."[44] Poignantly, in light of the subsequent Denver opinion, Judge Dalzell affirmed that there is no difference between cable and broadcast. "From the viewer's perspective, cable and broadcast television are identical. . . . Whether one receives a signal through an antenna or through a dedicated wire, the end result is just television in either case."[45] He believed that by "declining to extend broadcast's scarcity rationale for cable, the Supreme Court also limited Pacifica, the holding of which flows directly from that rationale."[46] His conclusion was that "time has not been kind to the Pacifica decision. Later cases have eroded its reach, and the Supreme Court has repeatedly instructed against overreading the rationale of its holding."[47]

Judge Dalzell wisely saw fit to make a second argument (though he apparently regarded it as unimportant; he relegated it to a footnote). Even if Pacifica applied to non-scarce media, the Internet could not be considered pervasive because it was more complicated to access than television was:

> I note here, too, that we have found as a fact that operation of a computer is not as simple as turning on a television, and that the assaultive nature of television . . . is quite absent in Internet use. . . . The use of warnings and headings, for example, will normally shield users from immediate entry into a sexually explicit Web site or newsgroup message. . . . The Government may well be right that sexually explicit content is just a few clicks of a mouse away from the user, but there is an immense legal significance to those few clicks.[48]

A month after the decision in ACLU v. Reno was issued, a three-judge panel in the Southern District of New York decided Shea v. Reno,[49] a companion case involving the CDA. The Supreme Court had issued its Denver opinion in the interim. The Shea panel carefully distinguished Denver along the same lines as Judge Dalzell's footnote, noting that "it takes several affirmative steps for a user to gain access to material through an interactive communications service. Indecent content on the Internet ordinarily does not assault a user without warning. . . ."[50]

In late June 1997, the Supreme Court issued its long-awaited decision in ACLU v. Reno.[51] The justices unanimously adopted the argument from Judge Dalzell's footnote and from the Shea case, holding that the Internet is not pervasive. Quoting the district court opinion, the Court noted that "the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial."[52] Using a slightly different vocabulary to address the pervasiveness doctrine, the Court added that "the Internet is not as 'invasive' as radio or television."[53]

The Pervasiveness of Pervasiveness

The law's trajectory from Pacifica to the CDA well illustrated the civil libertarians' dire predictions of the slippery slope. In Pacifica, the Court felt particularly at ease with the fact that it was reviewing an administrative sanction, one not even involving a fine (though the Court indicated that it might reach a different result in reviewing a criminal statute).[54] Yet the pervasiveness doctrine the Court introduced under such comfortable circumstances resurfaced in arguments for the CDA, a criminal statute creating new felonies for indecent communication on the Internet. The Pacifica radio station had received a critical letter in its FCC file; a defendant convicted under the CDA would face fines and up to two years in prison.[55]

Pacifica created a monster and Denver let it out of the cage. Ultimately, any medium could qualify as pervasive. Given the aim of a communications medium to communicate, all purveyors of media want to pervade the environments of their audiences. So far, the Supreme Court has limited the pervasiveness doctrine to only the most personal of spaces, such as the home.[56] But each year we consume more media within the home and fewer outside it. Books, newspapers, magazines, radio, television, cable, and the Internet now all enter the home. Certainly a child is as likely to flip through a parent's copy of the magazine Playboy as to find an indecent show on cable. Even the Bible, which pervades American households, contains many explicit scenes, as Justice Brennan wittily pointed out in a footnote to Pacifica.[57] The case cited by the FCC and Pacifica as precedent for the pervasiveness doctrine applied to a citizen's right not to receive intrusive U.S. mail.[58]

The Court would have done better not to create the pervasiveness doctrine. It did not need the doctrine for Pacifica; spectrum scarcity would have provided a sufficient rationale under the Court's broadcast precedents. (Although the scarcity doctrine itself seems shaky, that issue lies outside the scope of this paper.) By freeing the pervasiveness doctrine from the scarcity rationale in Denver, the Court went down an intellectually muddled and dangerous road. Why do several clicks of the remote control necessary to turn on the cable-equipped television and to switch channels differ profoundly from the mouse clicks required to search the Internet? Would it not be easier to stumble on indecent scenes in a book than to find them on cable? If so, how can we justify the legal distinction between print and cable, and on what grounds?

Although in Reno v. ACLU the Supreme Court appears to have dropped an iron gate in front of the ravening Pacifica monster, the case may not mark the last appearance of the pervasiveness doctrine--not even where the Internet is concerned. What happens when the Internet becomes a predominant platform for delivering of broadcastlike one-to-many voice or video communications, through streaming applications such as Real Audio or CuSeeMe? Will courts treat such programming as protected Internet content under ACLU v. Reno or as pervasive broadcasting under Pacifica and Denver?

At its root, the pervasiveness doctrine denigrates property rights, personal freedom, and individual responsibility. Each media source--be it a book, television, cable box, or computer connected to the Internet--constitutes an article of privately controlled property. None of those inanimate objects can force its way into a house. Rather, each of us has the right to bring certain media sources into our homes. Congruently, we each must bear the responsibility for how our media choices affect our children. Notwithstanding the fact that opportunistic politicians have embraced "family values" as a ploy for increasing state power, families can develop and express their values only by freely exercising the right to choose among a variety of media sources and messages. The pervasiveness doctrine has already excused the violation of free speech and property rights in broadcast and cable media. Courts must stop this pernicious and slippery doctrine before it roams any further.

Conclusion

Given its decision in ACLU v. Reno that the Internet is not a pervasive medium, the Supreme Court should at the first opportunity reconsider Denver, Pacifica, and the appropriateness of the pervasiveness doctrine. Any other approach would encourage censorship to spread to the Internet, other electronic media, and even print media. The Court should guarantee that the principles of property rights and individual responsibility pervade our lives and stop worrying whether the media do.

Notes

1. FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

2. Ithiel de Sola Pool, Technologies of Freedom (Cambridge, Mass.: Harvard University Press, 1983), p. 134.

3. Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 133-43 (1996) codified in relevant part at 47 U.S.C.A. § 223(a)-(e) (1997).

4. Pacifica at 729.

5. Ibid. The FCC noted that, in the event of further complaints, its sanctions might include revoking Pacifica's license, issuing a cease and desist order, or imposing fines. Ibid. at 730 n. 1.

6. Pacifica at 748 (citation omitted).

7. De Sola Pool, p. 134.

8. The "spectrum scarcity" doctrine excuses government intervention in broadcasting content on grounds that the electromagnetic spectrum can support only a limited number of broadcasters. According to this doctrine, the government must allocate frequencies to avoid a cacophony of interfering signals and license broadcasters to ensure that they use scarce public airwaves for the common good. The FCC thus questions whether licensees have broadcast indecent or other impermissible speech. The Supreme Court's most recent summary of the spectrum scarcity doctrine is Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375-77 (1969). De Sola Pool believed, as does this author, that government intervention in broadcast content has made it substantially less

free than printed media--a topic beyond the present discussion. De Sola Pool, p. 108.

9. See, for example, Judge Stewart Dalzell's concurring opinion in ACLU v. Reno, 929 F. Supp. 824 (E.D.Pa., 1996), affirmed, __ U.S. __, 117 S. Ct. 2329, 1997 U.S. LEXIS 4037 (1997).

10. Pacifica at 731.

11. ACLU v. Reno at 875.

12. Ibid. at 876-77.

13. Turner Broadcasting Systems, Inc. v. FCC, 512 U.S. 622 (1994), affirmed, __ U.S. __, 117 S. Ct. 1174 (1997). Turner subsequently proved to be something of a Supreme Court "fake-out." Despite the vague but glowing language in the initial opinion about the differences between cable and broadcast, the Court upheld the must-carry rules in issue when the case wended its way back up to the Court in 1997. Somewhat paradoxically, the subsequent opinion upheld the must-carry rules not on a finding that they would prevent overcrowding of the scarce broadcast spectrum, but rather on the grounds that they would keep the airwaves well populated with television stations that would, without the rules, face bankruptcy. To complete this inversion of the scarcity doctrine, the Turner Court in 1997 found that the must-carry rules would not unduly burden cable providers because their nonbroadcast networks provided ample bandwidth for carrying the signals of their broadcast competitors.

14. ACLU v. Reno at 876.

15. Denver Area Educational Telecommunications Consortium v. FCC, __U.S. __, 116 S. Ct. 2374 (1996).

16. Ibid. at 2386, quoting Pacifica at 748.

17. Denver at 2386, quoting Pacifica at 749.

18. Ibid., quoting Pacifica at 748.

19. Denver at 2388. In fact, the Court later held the must-carry rules constitutional despite--or perhaps due to--the lack of scarcity. See Turner Broadcasting Systems.

20. Denver at 2388.

21. Ibid. at 2399.

22. Ibid. at 2400.

23. Ibid. at 2401.

24. Ibid. at 2402.

25. Ibid. at 2403.

26. Ibid. at 2415.

27. Ibid. at 2416-17.

28. Ibid. at 2419.

29. Ibid. at 2421, quoting Red Lion Broadcasting Co. at 367, 390. However, Justice Thomas's reliance on Turner Broadcasting Systems' sweeping statements of principle may have been premature, given the Court's later affirmance of the must-carry rules when it revisited Turner Broadcasting Systems in 1997.

30. Playboy Entertainment Group v. U.S., 945 F. Supp. 772 (D. Del., 1996), decision en banc affirmed, 117 S. Ct. 1309 (1997) (mem.).

31. Ibid. at 779.

32. Ibid. at 778.

33. Ibid. at 780.

34. Ibid at 778.

35. Ibid at 779.

36. Ibid. at 783.

37. Ibid. at 785-86.

38. Ibid. at 787.

39. Congressional Record (June 14, 1995) 141, S8333.

40. Shea on Behalf of American Reporter v. Reno, 930 F. Supp., 916, 930-31 (S.D.N.Y., 1996).

41. ACLU v. Reno at 876.

42. Ibid. at 874.

43. Ibid.

44. Ibid. at 876.

45. Ibid.

46. Ibid.

47. Ibid. at 875.

48. Ibid. at 876 n. 19 (citations omitted).

49. Shea on Behalf of American Reporter.

50. Ibid. at 940.

51. ACLU v. Reno.

52. 1997 U.S. LEXIS, at *20, quoting Shea on Behalf of American Reporter at 845.

53. 1997 U.S. LEXIS, at *43 (1997). The Court relied on Sable Communications of Cal. v. FCC, 492 U.S., 115, 127-28 (1989), in which it invalidated a ban on indecent telephone communications, noting that "the dial-it medium requires the listener to take affirmative steps to receive the communication."

54. Pacifica at 750.

55. Communications Decency Act, § 223(a), (d).

56. Even though the dispute in Pacifica arose from a broadcast allegedly received on a car radio, the Court's holding addressed only the home. The Court went so far as to note that "[o]utside the home, the balance between the offensive speaker and the unwilling listener may sometimes tip in favor of the speaker. . . ." Pacifica at 749 n. 27. At least one lower court case has gone further, however, and suggested applying the pervasiveness doctrine to a university classroom. See Martin v. Parrish, 805 F.2d 583, 586 (5th Cir. 1986).

57. Pacifica at 771 n. 5 (Brennan, J., dissenting).

58. Rowan v. U.S. Post Office Dept., 397 U.S. 728 (1970).

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