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Silencing *Fox*: The Chilling Effect of the FCC's Indecent Speech Policy

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SILENCING *FOX*: THE CHILLING EFFECT OF THE FCC'S INDECENT SPEECH POLICY

Abstract: On July 13, 2010, the U.S. Court of Appeals for the Second Circuit in *Fox Television Stations, Inc. v. FCC* struck down the FCC's indecent speech policy, reasoning that the policy was unconstitutionally vague. The Second Circuit's decision has been viewed as a victory for broadcasters and others who thought the FCC's indecent speech policy suppressed constitutionally protected speech. This Comment argues that the decision in *Fox* was correct and appropriately set the stage for the Supreme Court to overturn a seemingly outdated precedent set in the Court's 1978 decision, *FCC v. Pacifica Foundation*.

Introduction

In its July 13, 2010 decision in *Fox Television Stations, Inc. v. FCC*, the U.S. Court of Appeals for the Second Circuit struck down the Federal Communications Commission's (FCC) indecent speech policy as unconstitutionally vague, signaling a huge win for broadcasters and others who thought the FCC's policy suppressed constitutionally protected speech.[1] The vagueness of the policy guidelines, the Second Circuit reasoned, created a chilling effect that extended beyond the fleeting expletives—single, unexpected uses of expletives—the FCC had intended to regulate.[2]

Fox is an important case in the development of First Amendment speech law.[3] As a result of the court's opinion, if the FCC wants to use its regulatory powers against indecent speech, it must now revise its policy such that broadcasters have a clear understanding of what type of speech will, in fact, be deemed indecent.[4] Also, in noting that the media landscape has changed since the landmark 1978 U.S. Supreme Court case *FCC v. Pacifica Foundation*—and questioning whether the level of scrutiny currently placed on the restrictions on broadcast speech is appropriate—the Second Circuit set the stage for the Supreme Court to overturn its seemingly outdated precedent in *Pacifica*.[5]

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[1] *See* 613 F.3d 317, 319 (2d Cir. 2010).

[2] *See id.*

[3] *See id.*

[4] *See id.* at 319–23.

[5] *Id.* at 326–27 (discussing the changes in the media landscape since FCC v. Pacifica Found., 438 U.S. 726 (1978)). In *Pacifica*, the Supreme Court ruled that the FCC could, in

Part I of this Comment examines the parameters of the FCC's regulatory powers, with an emphasis on how various courts addressed challenges to the FCC's application of such powers prior to *Fox*.[6] Part II examines how the Second Circuit reached its decision in *Fox*, focusing on the court's analysis of the FCC's approach to determining which words or expressions are patently offensive.[7] Finally, Part III argues that, in reaching its decision in *Fox*, the Second Circuit appropriately ensured that constitutionally protected speech would no longer be suppressed, and laid the groundwork for the Supreme Court to overturn *Pacifica*.[8]

I. Determining the FCC's Parameters

The FCC began regulating broadcast speech in 1948 when 18 U.S.C. § 1464 was incorporated into the criminal code.[9] Section 1464 states that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."[10] Although the passage of the Communications Act Amendments of 1960 authorized the FCC to impose fines for violations of § 1464,[11] it was not until 1975 that the FCC first used its authority to regulate speech it ruled indecent.[12] In that year, the FCC brought forfeiture proceedings against the Pacifica Foundation, the broadcaster responsible for airing George Carlin's "Filthy Words" monologue, in which the comedian intentionally repeated several expletives.[13]

In those proceedings, the FCC defined indecent speech as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a rea-

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the specific context of that case, restrict indecent speech not meeting the definition of obscenity. 438 U.S. at 744. In its decision, the Court, relying on what it described as the pervasive nature of broadcast media as well as its accessibility to children, noted that restrictions on broadcast speech should be subject to a lower level of scrutiny than other forms of media. *Id.* at 748–49.

[6] *See infra* notes 9–46 and accompanying text.

[7] *See infra* notes 47–75 and accompanying text.

[8] *See infra* notes 76–105 and accompanying text.

[9] *See* Act of June 25, 1948, Pub. L. No. 80-772, ch. 645, § 1464, 62 Stat. 683, 769.

[10] 18 U.S.C. § 1464 (2006).

[11] *See* Act of Sept. 13, 1960, Pub. L. No. 86-752, § 7(a), 74 Stat. 889, 894 (codified at 47 U.S.C.A. § 503(b)(1)(D) (West 2001 & Supp. 2010)).

[12] Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 320 (2d Cir. 2010).

[13] Citizen's Complaint Against Pacifica Found. Station WBAI (FM), 56 F.C.C. 2d 94, 95 (1975).

sonable risk that children may be in the audience."[14] The U.S. Court of Appeals for the D.C. Circuit, upon granting Pacifica's petition for review, ruled that the definition was vague and overly broad, and implied that the FCC's policy could lead to censorship of constitutionally protected speech.[15] The FCC appealed, leading to the landmark 1978 Supreme Court decision in *FCC v. Pacifica Foundation*.[16]

In *Pacifica*, the Supreme Court reversed, ruling that the FCC could impose a fine in the particular context presented in the case.[17] In its decision, the Court deliberately distinguished broadcast media from other forms of communication.[18] First, the Court noted that broadcast media should receive limited First Amendment protection because, unlike other forms of communication, broadcast media have a "pervasive presence in the lives of all Americans."[19] Second, the nature of broadcast television made it "uniquely accessible to children," even those who could not yet read.[20] The Court emphasized the narrowness of its holding, however, noting that it did not address whether fleeting expletives were regulable.[21]

For many years after *Pacifica*, the FCC's policy was to apply its enforcement powers only against broadcasters airing the seven specific words in the Carlin monologue that the agency deemed indecent.[22] In 1987, however, the FCC concluded that its policy, although easily enforceable, could no longer be justified.[23] Instead, the FCC adopted a more contextual approach and abandoned its policy of focusing on a set list of words.[24]

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[14] *Id.* at 98.

[15] FCC v. Pacifica Found., 556 F.2d 9, 16–18 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978).

[16] 438 U.S. at 734.

[17] *Id.* at 750–51.

[18] *Id.* at 748–49.

[19] *Id.* at 748.

[20] *Id.* at 749.

[21] *See id.* at 750; *id.* at 760–61 (Powell, J., concurring).

[22] *See Fox*, 613 F.3d at 321. *See generally* Michael Kaneb, Note, *Neither Realistic Nor Constitutionally Sound: The Problem of the FCC's Community Standard for Broadcast Indecency Determinations*, 49 B.C. L. Rev. 1081, 1105 (2008) (highlighting the FCC's narrow indecency policy in the decade after *Pacifica*).

[23] Infinity Broad. Corp., 3 F.C.C.R. 930, 930 (1987). The FCC concluded that although enforcement was easier under the old policy, "it could lead to anomalous results that could not be justified." *Id.* It worried that broadcasters would simply avoid certain words and thus get around the true purpose behind the policy—keeping patently offensive language out of broadcast speech. *Id.*

[24] *Id.* at 934.

In order to provide broadcasters with guidance regarding its enforcement policies, the FCC released a policy statement in 2001 explaining that an indecency finding involves two determinations: (1) whether the material in question describes or depicts "sexual or excretory organs or activities"; and (2) whether the broadcast is "patently offensive as measured by contemporary community standards for the broadcast medium."[25] The statement also reiterated the long-standing policy that fleeting expletives were per se not indecent.[26]

In 2004, however, the FCC changed its fleeting expletives policy.[27] Following the 2003 Golden Globe Awards, where the musician Bono exclaimed "[t]his is really, really, fucking brilliant" after receiving an award, several complaints were filed with the FCC.[28] In response to the complaints, the FCC explained in a declaratory order, known as the Golden Globe Awards Order, that it found the word "fuck" to be "one of the most vulgar, graphic, and explicit descriptions of sexual activity in the English language" and, as a result, found the fleeting manner of its use irrelevant.[29] The FCC was no longer willing to view fleeting expletives as per se not indecent.[30] This change laid the groundwork for *Fox*.[31]

The first step toward *Fox* took place when several parties, including NBC Universal, Inc., filed petitions before the FCC asking the agency to reconsider its new, broader enforcement policy.[32] While these petitions were pending, the FCC released another declaratory order, the Omni-

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[25] *In re* Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7999, 8002 (2001). In this policy statement, the FCC highlighted three factors it would take into consideration when determining whether a broadcast was patently offensive: (1) "the explicitness or graphic nature of the description or depiction"; (2) "whether the material dwells on or repeats at length the description or depiction"; and (3) "whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value." *Id.* at 8003.

[26] *Id.* at 8008–09.

[27] *See In re* Complaints Against Various Broadcast Licensees Regarding the Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4975, 4979 (2004).

[28] *Id.* at 4975, 4976 n.4.

[29] *Id.* at 4979.

[30] *Id.* While the FCC was broadening its enforcement policy, Congress amended 47 U.S.C. § 503(b)(2)(C)(iii), to set the maximum fine permitted by the FCC to $325,000, thereby greatly increasing the stakes for broadcasting indecent material. *See* 47 U.S.C.A. § 503(b)(2)(C)(iii) (West 2001 & Supp. 2010).

[31] *See* 613 F.3d at 322–23.

[32] *See id.* at 323.

bus Order, in which it reaffirmed its new policy.[33] The Omnibus Order found several broadcasts indecent and profane under the Golden Globe Awards standard as a result of fleeting expletives.[34] For example, during the 2002 Billboard Music Awards, the singer Cher accepted an award and declared, "People have been telling me I'm on the way out every year, right? So fuck 'em."[35] During the 2003 Billboard Music Awards, Nicole Richie, when discussing her TV show *The Simple Life*, remarked, "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple."[36] By deeming these broadcasts indecent, the FCC reaffirmed its policy of finding any use of the word "fuck" to be presumptively indecent and broadened its policy by applying the same finding to any use of the word "shit."[37]

Although the FCC issued a third declaratory order, the Remand Order, in November 2006, in which it reversed its findings regarding a few shows, it upheld its earlier decision that the 2002 and 2003 Billboard Music Awards were indecent.[38] After the Remand Order was issued, the petitioners asked the U.S. Court of Appeals for the Second Circuit for review.[39] The Second Circuit held that the FCC's indecent speech policy was arbitrary and capricious under the Administrative Procedure Act, as the FCC had not adequately explained the reasoning behind changing its fleeting expletives policy.[40] As a result, the court did not need to reach the constitutional issues presented.[41]

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[33] *See In re* Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005, 21 F.C.C.R. 2664, 2669 (2006).

[34] *Id.* at 2690–93, 2696–99.

[35] *Id.* at 2690.

[36] *Id.* at 2692–93 n.164. Similarly, a broadcast of the television show *NYPD Blue* was declared indecent as a result of the use of the word "bullshit," and a broadcast of the television show *The Early Show* was deemed indecent as a result of a guest using the word "bullshitter" during a broadcast. *Id.* at 2696–99.

[37] *Id.* at 2691, 2699–2700.

[38] *In re* Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005, 21 F.C.C.R. 13299, 13299 (2006). In the Remand Order, the FCC noted that any distinction made between expletives and descriptions or depictions of sexual or excretory functions does not make sense as the offensive nature comes from the underlying meaning of the words and descriptions. *Id.* at 13308. An important caveat included by the FCC in the Remand Order was the declaration that expletives "integral" to an artistic work or taking place during a "bona fide" news interview might not violate the indecency standard—though the FCC was quick to clarify that there was no outright news exemption. *See id.* at 13327.

[39] *See* Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 446 (2d Cir. 2007), *rev'd*, 129 S. Ct. 1800 (2009).

[40] *See id.* at 447.

[41] *See id.*

The Supreme Court reversed the Second Circuit's ruling, holding that the FCC's fleeting expletives policy was not arbitrary and capricious.[42] Further, like the Second Circuit, the Supreme Court did not reach the constitutional issues in the case, noting that it would go against normal procedures to address such issues without a lower court opinion.[43] As such, the Supreme Court remanded the case to the Second Circuit to determine whether the FCC's indecent speech policy violated the First Amendment.[44]

On remand, the Second Circuit focused primarily on the constitutionality of the FCC's indecency guidelines.[45] The court ultimately determined that the guidelines had a chilling effect on speech and struck down the guidelines as unconstitutionally vague.[46]

II. The Second Circuit's Rationale

At the heart of *Fox* lies the FCC's indecent speech policy.[47] The petitioners argued that the FCC's guidelines were so vague that they as broadcasters could not possibly determine what would be deemed indecent by the FCC.[48] The FCC, in response, argued that its policy and subsequent decisions provided sufficient notice as to what would be considered indecent.[49] The Second Circuit ultimately struck down the FCC's guidelines, noting that disallowing all patently offensive references to sexual or excretory organs or activities without providing broadcasters with appropriate guidelines as to what constitutes "patently offensive" references effectively chills speech.[50]

Recognizing that it was bound by the 1978 U.S. Supreme Court decision in *FCC v. Pacifica*, the court in *Fox* limited its holding to the vagueness issue but nonetheless indicated its dissatisfaction with the continued viability of the *Pacifica* rationale.[51] Although indecent speech

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[42] 129 S. Ct. at 1819. The Court reasoned that the FCC could logically conclude that as a result of the increasing presence of foul language and the abrasive nature of other forms of media, a tighter regulation of broadcast speech was proper as such regulation would provide a safe environment for children. *Id.*

[43] *Id.*

[44] *Id.*

[45] *Fox*, 613 F.3d at 319.

[46] *Id.*

[47] *See* 613 F.3d 317, 319 (2d Cir. 2010).

[48] *See id.* at 328.

[49] *Id.* at 330.

[50] *Id.* at 319, 335.

[51] *See id.* at 320–21.

normally gets full First Amendment protection,[52] the Supreme Court has treated broadcast radio and television differently than other forms of communication in its application of the First Amendment.[53] The Supreme Court generally applies strict scrutiny to content-based restrictions; broadcast speech, however, is subject to a type of intermediate scrutiny.[54] Although the court in *Fox* indicated it would like to move away from the *Pacifica* decision applying lower-level scrutiny to broadcast speech, it also acknowledged that it could not upset Supreme Court precedent.[55] As such, the Second Circuit only dealt with whether the FCC's indecent speech policy was unconstitutionally vague.[56]

Any regulation that threatens to infringe upon constitutionally protected rights will generally be subject to some form of vagueness test.[57] Ensuring that a law is not vague serves two key purposes.[58] First, it ensures that individuals are given fair notice of what is and is not prohibited.[59] This is critical in the context of broadcast speech: if broadcasters are not clear on whether they will be fined for broadcasting certain content, there could be a chilling effect on free speech.[60] Second, it eliminates the potential for inconsistent and discriminatory enforcement.[61]

In reaching its decision that the FCC's indecent speech guidelines were unconstitutionally vague, the court in *Fox* focused on the FCC's approach to determining which words or expressions were patently offensive.[62] Although the FCC pointed to the factors it considered in determining whether something was patently offensive, the Second Circuit was not satisfied with the FCC's description of how it applied those factors.[63] In explaining why one word used in an *NYPD Blue* episode was patently offensive and another word was not, for example, the FCC sim-

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[52] *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 701 (1977) ("[W]here obscenity is not involved, . . . the fact that protected speech may be offensive to some does not justify its suppression.").

[53] *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1961) ("Although broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to them." (internal citation omitted)).

[54] *See Fox*, 613 F.3d at 325–26.

[55] *See id.* at 326–27 (discussing the changes in the media landscape since *Pacifica*).

[56] *Id.* at 327.

[57] *See* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

[58] *See Fox*, 613 F.3d at 328.

[59] *Id.*

[60] *See id.*

[61] *Id.*

[62] *See id.* at 330.

[63] *See id.*

ply stated that the patently offensive word was graphic and explicit—one of the identified factors—whereas the other word was not.[64] Such a reliance on a factor without greater explanation of its application, the court reasoned, did not provide broadcasters with sufficient guidance on what would be considered patently offensive in the future.[65]

The Second Circuit also dismissed the FCC's argument that it needed to employ a flexible standard in order to react to an ever-changing media landscape.[66] The Second Circuit interpreted this argument as the FCC admitting that it could not anticipate what would be considered indecent under its policy.[67] When the enforcing body cannot determine what will be indecent, the court reasoned, there is no way for broadcasters to be able to do so either.[68] Without any certainty of how the policy would be implemented, it would be difficult, if not impossible, to comply with it.[69]

The FCC also argued that its contextual approach—as opposed to an approach that targets a set of pre-identified words and only fines broadcasters who use those words in their programming—was the type of approach consistent with the Supreme Court's *Pacifica* decision.[70] Although the court in *Fox* acknowledged the *Pacifica* Court's emphasizing the importance of context in its decision, the Second Circuit explained that this emphasis only served to indicate the limited scope of the holding.[71] In order to pass constitutional muster, the *Fox* court stated, the FCC's guidelines must still set out clear standards with which to judge the particular contexts.[72]

The Second Circuit also characterized the FCC's presumptive prohibition on the words "fuck" and "shit"—as well as the stated exceptions to the prohibition—as riddled with vagueness issues.[73] The FCC's policy at the time of *Fox* was to find the use of either word, or any variant of either word, as indecent unless it took place during a "bona fide" news interview or if the use was essential to the nature of an artistic or

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[64] *Fox*, 613 F.3d at 330. The FCC determined that the use of the word "bullshit" in the episode was patently offensive, whereas the use of the words "dick" and "dickhead" was not. *Id.*

[65] *See id.*

[66] *Id.* at 331.

[67] *See id.*

[68] *See id.*

[69] *See id.* at 330.

[70] *Fox*, 613 F.3d at 333.

[71] *Id.*

[72] *See id.*

[73] *See id.* at 331.

educational work.[74] The FCC's application of these exceptions was seemingly inconsistent, the court reasoned, and, as such, these exceptions once again provided less-than-clear guidelines to broadcasters as to what would be deemed indecent.[75]

III. The Effects of *Fox*: Protected Speech Is Truly Protected

In declaring the FCC's indecent speech guidelines unconstitutionally vague, the Second Circuit appropriately ensured that broadcasts including speech protected by the First Amendment will no longer be suppressed.[76] The FCC's vague guidelines promoted self-censorship and, due to a lack of adequate guidance as to what would be deemed indecent, in effect promoted the suppression of protected speech.[77] In *Fox*, the court identified several broadcasters who chose to not air certain programs, as they were not sure whether certain dialogue in the programs would be found indecent.[78] Furthermore, such vague guidelines gave the FCC the opportunity to suppress particular points of view through applying the guidelines inconsistently.[79] Had the FCC applied its indecent speech policy to suppress content in a discriminatory manner, such actions would have been a clear violation the First Amendment.[80]

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[74] *Id.*

[75] *See id.* at 332. The court noted that the FCC found the use of the word "bullshitter" on CBS's *The Early Show* "shocking and gratuitous" largely because it occurred during a news interview, yet later reversed itself specifically because it occurred during a "bona fide" news interview. *Id.*

[76] *See* Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 335 (2d Cir. 2010).

[77] *See id.*

[78] *Id.* at 334. For example, several broadcasters chose not to air *9/11*, an award-winning documentary on the September 11th World Trade Center attack, as they were not sure whether dialogue between firefighters included in the documentary—which included expletives—would be considered indecent. *Id.* Given the FCC's policy, the broadcasters had no way of knowing whether they would be fined and, as a result, opted to avoid the potential heavy fine. *Id.*

[79] *Id.* at 332.

[80] *See id.* at 333. Although there are no examples where this type of action definitely took place, the court pointed to the FCC's seemingly different treatments of the movie *Saving Private Ryan* and the documentary *The Blues* to highlight the potential for such action. *Id.* Both broadcasts had the words "fuck" and "shit" used in them, yet the FCC applied the "artistic necessity" exception to *Saving Private Ryan* and not to *The Blues*. *Id.* There is something inherently puzzling, the court reasoned, in concluding that the use of such words was necessary to depict the realism of fictional acts in a fictional movie, yet such words were not necessary to depict the realism of interviews with people involved in a documentary. *Id.*

The FCC's guidelines also forced broadcasters to face similar issues with live broadcasts.[81] The simple decision facing broadcasters under the FCC's policy was to run the risk of being fined by the FCC on the off chance that a fleeting expletive would be muttered, or to give up live broadcasts altogether and chill speech that would otherwise have aired.[82] A perfect screening or delay system is virtually impossible.[83] As such, even a careful screening of presenters would not keep award winners from using fleeting expletives.[84] When vague standards are in place, broadcasters are less willing to risk airing content over which they do not have complete control, even if the odds of airing content the FCC will object to are slim.[85]

The FCC's guidelines suppressed news programming as well.[86] As the FCC made clear, the "bona fide" news exception was not an absolute exception, but rather an exception applied in the FCC's discretion.[87] As such, it was impossible to know when the FCC would levy fines against news programs.[88] This resulted in numerous instances where broadcasters chose to avoid inviting certain guests on programs and dropped coverage of live events in an effort to avoid being fined by the FCC.[89] Were such a policy to remain in place, such instances would inevitably multiply.[90] This chilling effect clearly threatens speech protected by the First Amendment and encapsulates why the Second Circuit ruled appropriately.[91]

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[81] *Id.* at 334.

[82] *See Fox*, 613 F.3d at 334.

[83] *Id.* At the 2003 Billboard Music Awards, for example, Fox had a delay system in place and had approved the scripts used by the presenters, but Nicole Richie went off script and used three expletives, only the first of which was bleeped out of the broadcast. *Id.* Such precautions did not make Fox immune to the occurrence of fleeting expletives. *Id.*

[84] *See id.*

[85] *See id.*

[86] *Id.*

[87] *Id.*

[88] *See Fox*, 613 F.3d at 334–35.

[89] *Id.* For example, a local news station in Vermont refused to air a political debate because one of the local politicians involved had previously used expletives during a broadcast. *Id.* Additionally, several Phoenix television stations cut away from live coverage of a memorial service for a deceased service member because of language used by the decedent's family to express grief. *Id.* at 335.

[90] *See id.* at 334.

[91] *See* Aurele Danoff, *"Raised Eyebrows" Over Satellite Radio: Has* Pacifica *Met Its Match?*, 34 Pepp. L. Rev. 743, 772 (2002); Kurt Hunt, *The FCC Complaint Process and "Increasing Public Unease": Toward an Apolitical Broadcast Indecency Regime*, 14 Mich. Telecomm. & Tech. L. Rev. 223, 235 (2007).

By highlighting the changing media landscape, the Second Circuit also laid the groundwork for the Supreme Court to overturn its precedent set in the 1978 case *FCC v. Pacifica Foundation*.[92] In *Pacifica*, the Supreme Court distinguished broadcast television from other forms of media due, in large part, to its uniquely pervasive presence.[93] Broadcast television today simply does not have the uniquely pervasive presence that it did in 1975.[94] At the time of *Pacifica*, cable television was just starting out.[95] Today, approximately 98.5 million households subscribe to a cable or satellite service and, for those households, the distinction between broadcast and non-broadcast channels is insignificant.[96] Further, social networking sites such as YouTube and Facebook have become quite pervasive, allowing access to videos, movies, and broadcast television programs with a simple click of a button.[97] The Internet was in its infancy and such websites were still decades from existence at the time of *Pacifica*.[98]

In *Pacifica*, the Supreme Court also distinguished broadcast television from other forms of media due to its unique accessibility to children.[99] With today's technology, however, there are ways to shield children from broadcast television programs containing indecent speech.[100] As the court observed in *Fox*, every television sold in the United States since 2000 that is thirteen inches or longer contains a v-chip, a technological device that allows parents to block television programs based on a rating system.[101] This played a key role in the Supreme Court's decision in 2000 in *United States v. Playboy Entertainment Group*.[102] There, the Court noted that targeted blocking technology allows parents to monitor what children watch without affecting the First Amendment interests of willing listeners.[103] Using the same logic, parents can now monitor what is available for their kids to watch, thereby negating the concern

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[92] *See id.* at 325–27 (discussing the changes in the media landscape since FCC v. Pacifica Found., 438 U.S. 726 (1978)).

[93] *Pacifica*, 438 U.S. at 748.

[94] *Fox*, 613 F.3d at 326–27.

[95] *Id.* at 326.

[96] *In re* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 24 F.C.C.R. 542, 546 (2009).

[97] Olufunmilayo B. Arewa, *YouTube, UGC, and Digital Music: Competing Business and Cultural Models in the Internet Age*, 104 Nw. U. L. Rev. 431, 431–32 (2010).

[98] *Id.*

[99] *Pacifica*, 438 U.S. at 749.

[100] *See Fox*, 613 F.3d at 326.

[101] *Id.*

[102] *See* 529 U.S. 803, 815 (2000).

[103] *See id.*

that broadcast television is uniquely accessible to children.[104] As a result of the changing media landscape, the concern about broadcast television's unique presence in the home seems to be outdated and irrelevant, thereby making it time for the Supreme Court to reconsider the precedent set in *Pacifica*.[105]

Conclusion

In *Fox*, the Second Circuit struck down the FCC's indecent speech policy for the second time, this time basing its decision on the unconstitutionally vague nature of the policy. The Second Circuit appropriately recognized that under the policy, broadcasters are forced to guess how the FCC's policy will be applied, and ultimately must run the risk of chilling protected speech. The Second Circuit also suggested that the lower level of scrutiny applied to broadcast television may no longer be appropriate, setting up the potential for the Supreme Court to revisit *Pacifica*.

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[104] *See Fox*, 613 F.3d at 326.
[105] *See id.* at 327.