Communication Law Review
Volume 9, Issue 2

Protecting "Signal Bleed" as Freedom of Speech: An Analysis of *United States et al* v. *Playboy Entertainment Group, Inc.*

Elizabeth Hatfield, Texas A&M University[1]

ABSTRACT

Signal bleed, a common phenomenon through the first two analog decades of cable programming, came under fire when programmers of indecent content were targeted as part of the 1996 Telecommunication Act. The act required cable programmers transmitting indecent content to either reduce their programming to the hours of 10 p.m. to 6 a.m. or make expensive updates to their technology. The metaphorical phrase "signal bleed" described content that viewers could still see on channels to which they did not subscribe or want to receive. In the case of *United States et al* v. *Playboy Entertainment Group, Inc.,* the Supreme Court evaluated whether the 1996 Act's changes were fair or whether they placed an unfair economic burden on "sexually explicit" programmers. Additionally, because the new rules effectively placed a limitation on programmers' freedom of speech, central to the case became the importance of considering whether the new law violated constitutional rights and whether that speech should be protected. This paper provides a thorough analysis of all aspects of *United States et al* v. *Playboy Entertainment Group, Inc.*(2000): the oral arguments, the written opinions of the Supreme Court, the media's coverage and the outside parties who voiced their concerns and opinions in the form of amicus briefs. Ultimately the decision went to Playboy and protecting, even indecent, speech. This notable ruling offered the first clear definition for the treatment of cable as a unique medium – separating it from the stricter rules that govern broadcast television. Additionally, though the case set a regulatory standard for cable, it also highlighted the fickle nature of technology and the challenge for regulators working to keep up with the fast pace of change. As digital television's implementation begins across broadcast television today – only just over a decade later – issues of "signal bleed" no longer exist.

INTRODUCTION

On February 8, 1996, President Bill Clinton signed the Telecommunications Act of 1996 ("the Act") into law. Now, thirteen years later, the Act still impacts the communications industry, most recently in the transition from analog to digital broadcast television in June 2009. The first major communications law in over 60 years, the goal of the Act was to update prior legislation in a world where technology had changed dramatically. When the 1934 Communications Act was created, issues of prominence included telephony and radio broadcasting. By 1996, "communications" covered a much larger and more complicated territory. With the 1996 Act, Congress attempted its first regulation of the Internet, a still new and developing technology. Certainly the massive nature of such a task was dominating and important. But in the process, several other controversial pieces of legislation became part of the Act.

A number of legal cases questioned the constitutionality of portions of the 1996 Act. These include *Denver Area Education Telecommunications Consortium, Inc.* v. *FCC* (1996), *Reno* v. *American Civil Liberties Union* (1997), and *United States et al* v. *Playboy Entertainment Group, Inc.* (2000). Playboy Entertainment Group's case remains overshadowed by the other, higher

1 Elizabeth Hatfield (elizabethhatfield@gmail.com or ehatfield@tamu.edu) is a doctoral student at Texas A&M University.

profile cases targeting portions of the 1996 Act, yet its implications for legislation had important consequences. Addressed in this case were two key areas of communications law: the regulation of television and freedom of speech. This article focuses on the void in legal and communications literature examining the case, and presents a detailed analysis of the case proceedings to highlight the importance of *United States* v. *Playboy Entertainment Group* as a precedent for the treatment of cable as a medium of communication and the reiteration of protecting speech.

Playboy's case focused on §505 of the Act that placed special requirements on cable programmers with content that was nearly 100% sexually explicit or indecent. This legislation aimed to protect children from potential harm that may result from "signal bleed," a phenomenon that can occur with cable. Though signal bleed is not an issue with digital cable, analog cable channels used scrambling devices to distort images and sound so that nonsubscribers would not receive them. Periodically, the scrambled images and sounds on these channels could be seen and heard in their original form. Congress voted unanimously in support of §505. Immediately after President Clinton approved the Act, Playboy Entertainment Group requested a temporary injunction of the law, claiming an unnecessary restriction of their right to the freedom of speech. Over the course of four years the case made its way through the courts, eventually reaching the Supreme Court[2,3]. Central to the case was the question: Does the Telecommunications Act of 1996, and more specifically §505, violate Playboy Entertainment Group's First Amendment right to the freedom of speech?

The protected right to freedom of speech in the United States offers citizens a great liberty, even when many may argue that the speech in question is of little value. In the case of *United States et al* v. *Playboy Entertainment Group, Inc.* ("*Playboy*"), restrictions on indecent speech portrayed on cable channels were questioned. Because the case involved children, many outsiders took an interest in the case – framing it as a "good" versus "evil" matchup that could seriously harm America's youth. As the Media Institute writes in its amicus brief, "If the choice is presented as one between Playboy and children, Playboy is overwhelmingly likely to lose, even though there is no real danger to, or benefit for, children."[4] The case placed core American values in opposition: the freedom of speech and American Constitutional protections against family values and the safety of children.

While both sides speak to the emotional undercurrents on which our country was built, ultimately it was the First Amendment right to freedom of speech that prevailed. In the pages to come, the arguments of the Court are explored through analysis of the amicus briefs, the oral arguments and finally the written opinions of the Court. Understanding the environment surrounding this case provides a backdrop for the opposing arguments and the eventual outcome of the case – a victory for Playboy.

By the time *Playboy* made it to Court, many cable companies were no longer using analog systems – the switch to digital was already underway. And yet, the case still offered an important precedent for the regulation of cable as a medium. Prior legal decisions had not clearly defined whether cable should be treated similarly to broadcast television and radio. Because broadcast television and radio enter the home (via airwaves) whether a person wants them or not, and because the

---

[2] Catherine Ross. "Anything goes: Examining the state's interest in protecting children from controversial speech" Vanderbilt Law Review, (March 2009), www.lexisnexis.com (accessed February 25, 2008).

[3] Josh Grushkin. "Signal bleed: Congress attacks when it sounds like sex" *Hastings Communication and Entertainment Law Journal*, (Winter 1999) www.lexisnexis.com (accessed February 25, 2008).

[4] Lawrence Winer. "Brief of Media Institute, as amicus curiae in support of appellee" The Media Institute, *United States et al* v. *Playboy Entertainment Group, Inc* (September 24, 1999): 7.

public perceives these media as a limited public good, television and radio encounter more stringent regulations than media such as the newspaper. The decision in *Playboy* directed future court decisions to classify cable differently than broadcast media – an important legal decision providing cable broader freedom in selecting content.

BACKGROUND OF THE CASE

The 1996 Act was a major victory for Congress, ending a 14-year Congressional deadlock over new telecommunications policy.[5] Heralded by Congress and the Government, it enacted many important updates to telecommunications regulations including a more competitive marketplace for cable and telephone providers, the introduction of the V-chip, a first attempt at regulating the Internet, and many updates to radio operation. In an article covering the event, President Clinton was quoted after the bill's signing: "This law is truly revolutionary legislation that will bring the future to our doorstep" (*Washington Post*, February 9, 1996). While this may have been true for portions of the Act, several sections contained First Amendment issues that came to light almost immediately.

At question in the case of *Playboy* was a short section affecting sexually explicit cable programming – §505. The section stated:

> "(a) Requirement
>
> In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel or programming so that a nonsubscriber does not receive it.
>
> (b) Implementation
>
> Until a multichannel video programming distributor complies with the requirement set forth in subsection (a) of this section, the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it."[6]

Essentially §505 required cable programmers with primarily sexually explicit content to take one of two actions: 1) Air programs only during hours when children are less likely to see them, 10 p.m. to 6 a.m., or 2) Upgrade scrambling devices to a more advanced technology that does not allow signal bleed. Most cable operators affected by this legislation found the second option prohibitively expensive and instead cut back programming hours. As a result, both children *and adults* would be restricted from watching Playboy's programming for approximately two-thirds of the day. The law directly targeted only those cable programmers whose content was mainly sexually explicit or "indecent," a content-based regulation that Playboy called unfair. Content-based restrictions are illegal for protected speech in America. The only restrictions that can be legally placed on protected speech target the time, place and manner of the speech.[7] In proving that a content-based restriction on speech existed, Playboy pointed out that several other channels, such as HBO, carried similar content as part of their overall

[5] Congressional Press Release. *Commerce Committee telecommunications reform fact sheet: An overview of the first overhaul of U.S. telecommunications law since 1934* (Washington, DC: Congressman Thomas Bliley, February 8, 1996).
[6] Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996).
[7] Don Pember. *Mass Media Law* (New York: McGraw Hill, 2007).

programming, yet these programmers were not affected by §505. As Chairman of Playboy Enterprises, Inc. Christie Hefner said: "It singles out a programmer such as Playboy."[8]

In immediate response to the enactment of the Act, Playboy sought to stop the implementation of §505. In a press release issued just weeks after the Act was signed, Playboy stated: "§505 tramples the rights of viewers, unnecessarily burdens cable companies and consumers, and discriminates against Playboy."[9] Playboy sued the United States for content-based discrimination of the right to First Amendment protections. Playboy's argument focused on another option available for monitoring signal bleed, described in §504 of the Act.

Historically, Supreme Court cases involving the First Amendment have required that stipulations limiting free speech use the least restrictive alternative (*Sable Communications, Inc.* v. *FCC* [1989]). Playboy argued that §505 was unnecessary and violated this principle, in that §504 offered a less restrictive but equally capable option with regards to its programming. §504 stated:

> "Upon request by a cable service subscriber, a cable operator shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it."[10]

§504 allowed concerned parents or viewers to request a free lock box that would block receipt of any unwanted station(s).[11] Cable companies were required to offer this service to their customers. With §504, which fully scrambled signals allowing no signal bleed, customers and their children would have no possibility of receiving channels they did not want. Meanwhile, Playboy's programming would not be interrupted.

After seeking a temporary injunction to §505, Playboy lost the initial case but immediately sued for a permanent injunction. Playboy's case then went to Delaware District Court, where a unanimous three-judge panel decided in favor of Playboy Entertainment Group: The Court deemed §505 unconstitutional in light of the less restrictive option posed by §504. In conjunction with the application of §504, cable operators were required to advertise the availability of lockboxes, and the potential for signal bleed even if customers were not paying for the channel. The Government appealed and the case was brought to the Supreme Court for the 1999-2000 docket. The Supreme Court decision was announced on May 22, 2000 – a 5-4 decision in favor of Playboy.

FRIENDS OF THE COURT

The support shown on behalf of Playboy throughout the case demonstrated the public's dedication to protecting the freedom of speech. A total of six amicus briefs were submitted in the case of *United States et al* v. *Playboy Entertainment Group*, of which only one was on behalf of the United States. Many groups in the United States vigilantly defend the value of freedom of speech, even in cases of potentially harmful or low-value speech. While each party submitting in amicus had its own agenda, each worked towards developing analogies between the current case and past court decisions.

---

[8] Jeannine Aversa. "Playboy Challenges Law Blocking Adult Cable Companies," *Associated Press* (February 28, 1996): Business News.

[9] Playboy Enterprises. Playboy Entertainment Group challenges Telecom Act's new "scrambling" rule as unnecessary, illogical. (Chicago, Il: Martha Lindeman, February 27, 1996).

[10] Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996).

[11] Aaron Epstein. "Court to decide whether sex, even scrambled is free speech," *The Inquirer* (June 22, 1999): A03.

In Favor of the Petitioners

The Family Research Council ("FRC") submitted on behalf of the United States and was joined in support by several other organizations. The FRC made several arguments regarding the case, notably including a designation of the speech as "nuisance speech," defending the content-neutrality of §505, and demonstrating Playboy's incentives to fight for signal bleed. The first argument was that signal bleed falls under a category called "nuisance speech," a term which was first introduced in *Chaplinsky* v. *New Hampshire* (1942). Nuisance speech is a narrowly defined category of speech that is seen as intentionally offensive and containing no true value. Supreme Court rulings, such as *Chaplinsky* v. *New Hampshire*, in effect develop categories of protected (and unprotected) speech. Some categories of speech, such as obscene or nuisance speech, receive fewer protections because the Court views them as offering little or no value for society. As a result, nuisance speech is a speech category deserving less protection under the First Amendment.[12] FRC claims the speech in *Playboy* is nuisance speech based on the fact that it penetrates the home and is accessible to children. However, an important element of the *Playboy* case is that nowhere in *Playboy* does the Government charge that the speech in question is without value or "obscene" in nature; rather it was defined as "indecent" speech, a category of speech that may be offensive to some, but does carry a value for society. While the excerpt from the *Chaplinsky* ruling does mention lewd and obscene speech, the legally established term of "indecent" speech is not included. The brief then builds the "nuisance" argument on the case of *FCC* v. *Pacifica Foundation* (1978).

FCC v. *Pacifica Foundation* ("*Pacifica*") targeted broadcast radio transmission content that was considered indecent, not obscene. Indecent speech is a category of speech receiving protection under United States' law. This case centered on a single complaint received from a father who while riding in his car with his son, turned on the radio and heard the "Filthy Words" routine by George Carlin being played over the air during the daytime hours. The routine played in its entirety and contained language widely considered unsuitable for children. The Court found in favor of the FCC and determined that stations such as Pacifica should not broadcast material that is inappropriate for children during the hours that children might be listening. In its decision, written by Justice John Paul Stevens, the Court focused on the idea that radio, like broadcast television, is transmitted over the air and therefore subject to scarcity. Scarcity refers to the nature of broadcast programming – only a limited number of stations can be transmitted via broadcast technology, therefore, the existing stations must serve the greater good and not a particular section of the people. This gave the FCC significant regulation rights over broadcast media transmitting indecent content.

The FRC also works to disprove the lower court's finding that a content-based regulation was unfairly placed on Playboy. The brief states: "§505's regulation of signal bleed does not prohibit Playboy from showing its sexually explicit or indecent programming, it merely prohibits them from showing it to those who do not wish to view it."[13] This argument centers on the broad nature of indecent programming that will be affected, such as medical or scientific programming.[14] It is a useful argument that works to undermine Playboy's basis for the case – with no content discrimination, §505 is just another

[12] Paul McGeady, Robin Whitehead, Janet LaRue, Bruce Taylor, J. Flores, and Chawicke Groover. "Brief of Family Research Council, Morality in Media, National Law Center for Children and Families, National Coalition for the Protection of Children and Families, and Concerned Women for America as amici curiae in support of petitioners," Family Research Council et al, *United States et al v. Playboy Entertainment Group, Inc.*, (August 5, 1999): 2.
[13] Paul McGeady et al, pp. 14.
[14] Paul McGeady et al, pp. 5.

time/place restriction on speech. Yet preliminary research shows no history of such a channel that would be simultaneously affected. As §505 targets what *currently* exists, it therefore targets explicitly the programming on channels like Playboy. The closest approximation to a "medical channel," for example, might be the Discovery Channel, but content on this channel would not be considered 100% indecent, making it comparable to a channel like HBO rather than Playboy.

A minor argument woven throughout the FRC's brief deserves attention – that the benefits Playboy receives from signal bleed motivated its fight against §505. Most notably, the FRC claimed that signal bleed is a "particularly obnoxious marketing ploy."[15] Shifting Playboy's argument of the potential losses incurred by upgrading to a more expensive scrambling technology, FRC instead frames it as the lost opportunity to solicit new subscribers through the brief moments when scrambling technology allows full images and sounds to come through. While this is possible, no evidence exists citing its occurrence and appears a conclusion of the amicus party, rather than of reality.

In Favor of the Appellee

Of the five groups submitting on behalf of Playboy, interest in the case ranged from directly related, such as the National Cable Television Association, to broadly related, such as First Amendment advocates like the Thomas Jefferson Center for the Protection of Free Expression and Sexuality Scholars. Though each group approached the case from a different angle, several key themes emerged in their briefs. Arguments included the separation of the facts of the case from those in *Pacifica*, the failure to use the least restrictive means possible, and finally the lack of compelling state interest shown by the Government. Additionally, each group also brought up related points for their personal missions.

The *Pacifica* case appeared in every amicus brief as a critical perspective in this case. Each brief worked to disprove any analogy between the facts of that case and those presented in *Playboy*. *Pacifica* does not directly align with the situation created by Playboy's programming because it involved broadcasting, which has a limited spectrum and is subject to scarcity, while cable does not face issues of limited space. Further, the *Pacifica* case revolved around a clear, uninterrupted broadcast, while *Playboy* is concerned with at least partially distorted, "scrambled" programming.

The Thomas Jefferson Center aptly outlines the inapplicability of *Pacifica* when considering *Playboy*, noting the differences between cable and broadcast television, between the terms "indecency" and "sexually explicit," in overall programming effect in *Pacifica* as compared with *Playboy*, and finally the fact that "the very premises on which *Pacifica* rests have been steadily eroded in the last two decades, leaving grave doubt whether it should today be reaffirmed even in the narrow context to which it originally applied."[16]

Changes in technology affecting *Pacifica* were consistently mentioned, as the Media Institute wrote: "Technological advances allowing much greater parental control over what children can see on television have rendered *Pacifica* woefully out of date."[17] The challenges of regulating media are noted in the earlier case of *Columbia Broadcasting System* v. *Democratic National Committee* (1973); the opinion of the Court noted: "The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now,

[15] Paul McGeady et al, pp. 15.
[16] J. Wheeler and Robert O'Neil. "Brief of amicus curiae," The Thomas Jefferson Center for the Protection of Free Expression, *United States et al* v. *Playboy Entertainment Group, Inc* (September 24, 1999): 4-5.
[17] Lawrence Winer. "Brief of Media Institute, as amicus curiae in support of appellee," The Media Institute, *United States et al* v. *Playboy Entertainment Group, Inc* (September 24, 1999): 11.

and those acceptable today may well be outmoded 10 years hence."[18] In disproving similarity to *Pacifica*, the amici worked to prove that *Reno* v. *American Civil Liberties Union* (1997) offered a much more appropriate comparison.

Reno v. *American Civil Liberties Union* ("*Reno*") targeted legislation that was part of the 1996 Communications Decency Act (CDA), a section of the 1996 Act intended to protect minors from obscene or indecent speech on the Internet. The Court decided in favor of the American Civil Liberties Union based on the fact that the language of legislation was too broad in defining the types of speech it regulated, and therefore violated the First Amendment. Writing the opinion for the Court, Justice Stevens rhetorically questioned the vagueness of the CDA's language:

> "Could a speaker confidently assume that a serious discussion about birth control practices, homosexuality, the First Amendment issues raised by the Appendix to our *Pacifica* opinion, or the consequences of prison rape would not violate the CDA? This uncertainty undermines the likelihood that the CDA has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials."[19]

Because the law was written in an unclear manner, its result was a complete ban on free speech – a content-based restriction. Though the legislation specifically included both obscene and indecent speech, had the language only included obscene speech the case may have been decided differently. Relating *Playboy* to *Reno*, the Sexuality Scholars conclude in their brief: "Although 'sexually explicit' or 'indecent' cable programming may not have the range of the Internet speech at issue in *Reno*, the constitutional analysis is the same."[20]

Building on the arguments surrounding *Pacifica*, the "least restrictive alternative" promoted in *Sable Communications, Inc.* v. *FCC* (1989) also consistently emerged as a critical element for Playboy's case. As the American Booksellers Foundation et al (ABF) brief states: "Congress has begun wielding a hatchet where the constitution mandates a scalpel."[21] This sentiment captures the feelings of all five interested parties, who felt that Playboy's speech deserved protection. In a persuasive moment, the National Cable Television Association (NCTA) writes: "The more stringent 'less restrictive means' test that applies to content-based regulation is no less applicable to cases where the important interest at stake involves protecting children from inadvertent exposure to sexually explicit programming than in cases involving other compelling interests."[22]

As a whole, the briefs claimed that §505 did not offer the least restrictive means for controlling speech, and that §504 was the constitutional alternative. "In this case, as the court below correctly held, it is possible to prevent the intrusion of unwanted indecent programming through means substantially less restrictive than the requirements imposed by §505," writes the NCTA. They cited the District Court's findings: "To any parent for whom signal bleed is a concern, §504 along with 'adequate notice' is an effective solution."[23] The brief filed by ABF presented a unique angle on the preference of §504 as a less restrictive means – the rights accorded cable programmers under the Equal Protection Clause of the Fifth Amendment. ABF claims §505 targeted and placed an unfair burden on a special group of cable programmers that ultimately resulted in a

---

[18] Lawrence Winer. "Brief of Media Institute, as amicus curiae in support of appellee," The Media Institute, *United States et al* v. *Playboy Entertainment Group, Inc* (September 24, 1999): 16.

[19] *Reno* v. *American Civil Liberties Union*, No. 96-511 (Supreme Court of the United States, June 26, 1997).

[20] Marjorie Heins and Joan Bertin. "Brief amici curiae in support of appellee," Sexuality Scholars, Researchers, Educators, and Therapists, *United States et al* v. *Playboy Entertainment Group, Inc. (* September 14, 1999): 14.

[21] Michael Bamberger "Brief of amici curiae in support of appellee," American Booksellers Foundation for Free Expression et al, *United States et al* v. *Playboy Entertainment Group, Inc.* (September 24, 1999): 4.

[22] Daniel Brenner. "Amicus curiae brief for National Cable Television Association in support of appellee," National Cable Television Association, *United States et al* v. *Playboy Entertainment Group, Inc.* (September 24, 1999): 5.

[23] Daniel Brenner. "Amicus curiae brief for National Cable Television Association in support of appellee," National Cable Television Association, *United States et al* v. *Playboy Entertainment Group, Inc.* (September 24, 1999): 12.

limit on speech. This is evidenced by the fact that most programmers affected by §505 chose to cut programming back to the hours of 10 a.m. to 6 a.m. rather than upgrade scrambling technology.

Finally, the briefs argued that the Government failed to prove a compelling interest for stepping in on behalf of parents. In its joint brief, ABF writes: "When courts have permitted regulation of indecent speech, they have done so only where it was clear that parents had no means to do so themselves."[24] For the Sexuality Scholars, this failure came in a lack of quality experts and proof that actual harm was caused by the images potentially coming through via signal bleed. The Media Institute framed its argument around the idea of a "compelling interest" in protecting children, saying: "It is impossible to challenge such a statement. That is the problem; it is so general a statement as to be trivially true, but it therefore lacks any analytical power."[25] For the Thomas Jefferson Center, the failure came in signaling out those broadcasters dedicated to 100% sexually explicit programming: "If the evil to be eradicated is the momentary unscrambled image and the sound of indecent sexual behavior, then applying the absolute scrambling mandate to one provider but not to others undermines the very argument for mandating absolute scrambling in the first place."[26]

UNDERSTANDING THE ENVIRONMENT

When the Act first passed in 1996, news reports summarizing its contents almost completely left out §505. As Playboy notes in its brief to the Court, §505 was introduced to Congress as a floor amendment without debate. Notably, §505 fell under a section entitled "Obscenity and Violence," yet was never considered "obscene" during court proceedings. The Act received plenty of initial coverage – from noting the pen President Clinton used to the location of the Act's signing, and even the emphasis on cyberspace. When Playboy's requested injunction was made public two weeks later, news coverage was minimal at best. The *Associated Press* ran a piece the day after Playboy's press release, but was one of the only news media outlets to cover the story. Days before Playboy's announcement, the *Denver* case had come before the Supreme Court, and yet the similarity of the cases never came out in the news.

A month after the Act was passed, when Playboy won its initial case to stop application of §505 on a temporary basis, the media started to pay more attention. Still Playboy's case remained minor news, generally receiving only one to two lines of coverage in a longer summary piece. *The Washington Post* consistently followed the case, but was the only major news outlet besides the *Associated Press* to do so. With the high profile *Reno* case ongoing, Playboy's lawsuit was not considered big enough news.

By late 1996 when the first ruling came out against Playboy, the media began to pay attention. In March 1997 Playboy lost the first round of legal battles, and media coverage focused on the loss of potential revenues for Playboy. Playboy certainly had a lot to lose. In particular, critics lauded Playboy's television channel as one of the main reasons the company's stock had seen impressive growth over the previous few months. Dennis McAlpine, an analyst cited in *Business Week*

---

[24] Michael Bamberger. "Brief of amici curiae in support of appellee," American Booksellers Foundation for Free Expression et al, *United States et al v. Playboy Entertainment Group, Inc.* (September 24, 1999): 5.

[25] Lawrence Winer. "Brief of Media Institute, as amicus curiae in support of appellee," The Media Institute, *United States et al* v. *Playboy Entertainment Group, Inc.* (September 24, 1999): 19.

[26] Michael Bamberger. "Brief of amici curiae in support of appellee," American Booksellers Foundation for Free Expression et al, *United States et al* v. *Playboy Entertainment Group, Inc.* (September 24, 1999): 16.

magazine, noted that the number of homes receiving the Playboy channel had risen from 400,000 to 4.5 million in 1997.[27] However, by the time the case came before the Supreme Court, Playboy had cited a significant decrease in subscribers as a result of the implementation of §505.

Additionally, during the period of the lawsuit many articles featured the company's CEO Christie Hefner, daughter of the company's founder Hugh Hefner. Ms. Hefner took over as CEO about a decade before the Playboy case, and the effects of her management style contributed to the company's recent success. Upon taking the lead role at the company, she was left with a mess of licensing deals and brand devaluation. She immediately targeted the company's unprofitable investments and focused on newer media.[28] "She is most definitely a hands-on CEO," said Playboy publisher Richard Kinsler.[29] With a heightened interest in the expanding television and pay-per-view Playboy products, Ms. Hefner certainly had the desire to prove the Government wrong about §505. As a *Washington Post* article noted about the ongoing lawsuit, "Playboy isn't letting the law go by without a fight."

In 1999, the Supreme Court finally heard the *Playboy* case. When the final announcement was made in favor of Playboy in May 2000, newspapers printed both the satisfied comments of Christie Hefner, and the disappointment voiced by child advocates. The close ruling on the case offered a complex story, the details of which, as seen throughout the case, proved to be critical.

Technology played a big part in the story portrayed by newspapers – a story that complemented the emerging digital technologies in the marketplace. Alan Dershowitz, a professor at Harvard Law School and a regular contributor to Court TV, commented on the impact of technology in a *Daily Variety* article: "This is a very important decision because it says that the First Amendment must not be bent to fit the technology. The technology is what must be bent."[30] *The New York Times* coverage agreed with this comment, noting: "The court signaled a promising reluctance to allow the Government to regulate content in the newer communications technologies."[31] Because technology is changing the way Americans receive their news and entertainment, the FCC is faced with a new frontier in terms of regulation – a frontier that changes comparatively fast as a medium, such as the Internet and even cable. As Mike Godwin writes in his book *Cyber Rights*, technology changes more quickly than new legislation can be developed, a conundrum that makes the FCC's job quite difficult.[32]

ARGUMENTS PRESENTED TO THE COURT

United States v. *Playboy Entertainment Group, Inc.* reached the Supreme Court in late 1999. At issue were several key points for the case: how to treat indecency on cable, whether the problem of signal bleed was significant, whether parents or the Government are responsible for the well-being of America's children, and finally whether the stipulations of §505 were

[27] Gene Marcial. "Why Playboy is hot again," *Business Week* (February 24, 1997): 122.
[28] Jan Hopkins, Beverly Schuch, David Van Der Mark, Susan Lisovic. "The Playboy Empire," CNN Business Unusual (November 1, 1997), 7:30 p.m. ET.
[29] Paul Farhi. "Christie Hefner is reshaping and revamping her father's adult empire," *The Washington Post* (August 3, 1997): H01.
[30] John Dempsey. "Playboy's key club: Supreme court nixes cable ban on adult vid times," *Daily Variety* (May 23, 2000): 5.
[31] Editorial. "Cable shows and free speech," *The New York Times* (May 23, 2000): A24.
[32] Mike Godwin. *Cyber Rights* (Cambridge: Massachusetts Institute of Technology, 2003).

necessary or overbroad. Addressing these details of the case provides answers to the case's central question: "Does §505 violate the First Amendment?"[33]

Arguments Presented to the Court by Playboy Entertainment Group, Inc.

Playboy's case aimed to demonstrate that §505 limited speech unnecessarily, through a step-by-step process of breaking down the constitutionality of §505 and the inapplicability of previous cases such as *Pacifica*. Ultimately, Playboy mounted an attack built around its success experienced in the lower courts and the vague nature of "indecent" speech as it applies to the cable medium.

Throughout its brief Playboy quotes the District Court's previous findings in its favor, reminding the Court in question of those findings – a persuasive and effective tactic. The language employed in the brief avoids serious discussion of the potential harm to children, instead referring to §505 as the "statute that forced Playboy Entertainment Group, Inc.'s cable television networks off of most cable systems except during a late night/early morning window."[34] In effect, Playboy keeps the emotional aspects of the case out of the Court, sticking instead to its clear-cut details. Playboy supplements the facts with examples and descriptions meant to fully develop its case against the Government.

Playboy's arguments attempt to disprove §505 as the least restrictive means for achieving Congress' goal. The brief uses statistics gained after the initial implementation of §505 to bolster its argument that §505 effectively curbs free speech. Examples of negative impacts for Playboy included decreasing subscriber numbers, the move by virtually all cable providers to "safe harbor hours," and the percentage of viewers who previously watched the channel during daytime hours. As Playboy writes: "The Government's current argument that the burden on speech 'is not great,' is nothing more than an attempt to describe the video bookshelf as half full, rather than half empty."[35] The company contends that 30-50% of all viewers watch during the hours of 6 a.m. to 10 p.m., restricting both Playboy's right to speech, and the viewers' right to receive its content. Playboy ultimately claimed a loss in revenues of $25 million or more.

Moving from this argument, Playboy next works through the technicalities of signal bleed in an attempt to show the variance in cable technology and the lack of proof that this is a "pervasive" problem. Here Playboy recalls the failed efforts on behalf of the Government to accurately show the extent to which American homes are affected by signal bleed. "The extent to which any particular household may experience signal bleed varies significantly from one cable system to another, and even from household to household within a system," as noted in the brief.[36] Playboy mentions that several cable providers already offer technology that completely scrambles signals to avoid any bleed, in addition to the lockboxes made available in §504.

Playboy also uses the household numbers developed by the Government to break down the argument that signal bleed is a pervasive problem. For example, in the oral arguments Robert Corn-Revere, Playboy's attorney, noted that of the 33,000 complaints received by the Federal Communications Commission (FCC) since 1982, a mere 72 mentioned Playboy (it is unclear how many concerned signal bleed). That means that 0.002% of the calls were about Playboy – a number so small it

[33] Christopher J. Wright and Seth P. Waxman. "Jurisdictional Statement," *United States et al* v. *Playboy Entertainment Group, Inc. (*October 1998).
[34] Playboy Enterprises, Inc. "Brief of Appellee," *United States et al* v. *Playboy Entertainment Group, Inc*. (September 24, 1999): 2.
[35] Ibid, pp. 15.
[36] Ibid, pp. 16.

could be determined insignificant.[37] Supporting this argument further is the fact that over two-thirds of the households receiving cable *do not even have children* living at the residence.

As §505 targeted only those programmers whose content was deemed "indecent" such as Playboy's, Playboy believed the content-based nature of the statute was unconstitutional, as indecent speech receives full protection under the law. Playboy directly addresses the Government's argument that §505 is meant for a byproduct of speech (signal bleed), rather than speech itself, and illustrates this point with a footnote from the earlier Court's findings: "Signal bleed from the Disney Channel, for example, does not come within purview of the statute."[38]

After fully expanding the argument that §505 is a restriction of speech, Playboy works to separate the facts of the case from *Pacifica*. *Pacifica* centered on a specific instance – one listener's complaint regarding the broadcast of "Filthy Words"; however, *Playboy* potentially restricts an entire channel's programming. In *Pacifica*, the broadcaster was free to transmit regular programming that was not considered "indecent" during the daytime hours. The daytime programming hours were still available, and the "safe harbor" rule guided the remaining indecent programming. For Playboy, those daytime hours would result in dead programming hours. Making its case, Playboy cites language from *United States* v. *National Treasury Employees Union* (1995): "A blanket rule 'chills potential speech before it happens' and imposes a far greater First Amendment burden than an isolated disciplinary action."[39]

Playboy also uses the case of *Denver Area Educational Telecommunications Consortium, Inc., et al.* v. *Federal Communications Commission et al* (1996) to draw an analogy to this case. In *Denver*, a similarly restrictive portion of the 1992 Cable Television Consumer Protection and Competition Act was struck down for restricting freedom of speech and not utilizing the least restrictive means possible to protect children from obscene speech. Playboy's brief argues the sections found unconstitutional in *Denver* bear striking resemblance to §505.[40] Under *Denver*, cable operators could individually determine what was "indecent" and select to accept or reject the channel at their preference – opposite the restrictions that §505 imposed.[41]

Finally, Playboy launches its strongest reason that §505 is unconstitutional – the availability of the less restrictive §504. Here again Playboy draws comparisons to the decisions made in the *Denver* case – from the use of hypothetical alternatives in the early stages of the case to the fallacy of inattentive parents as rationale for more restrictive measures to the lack of precedent for acts that would restrict access to all homes because some will not take the action offered in §504.[42] Additionally, Playboy discusses the sufficiency of §504 for the purposes of dealing with signal bleed. Because §504 does pose a viable alternative that is less restrictive, Playboy argues that the Court must accept this revision when considering legally protected speech. The brief states: "There is no question in this case that individualized blocking pursuant to §504 effectively prevents signal bleed when it is used," and later continues, "The very few cases in which the Government was able to document a problem, §504 was effective in solving it."[43]

---

[37] Transcript of oral argument. *United States et al* v. *Playboy Entertainment Group*, (November 30, 1999).
[38] Playboy Enterprises, Inc. "Brief of Appellee," *United States et al* v. *Playboy Entertainment Group*, Inc. (September 24, 1999): 21.
[39] Ibid, pp. 25.
[40] Ibid, pp. 33.
[41] Ibid, pp. 33.
[42] Ibid, pp. 41-42.
[43] Ibid, pp. 42-43.

In building its case that §504 offers a less restrictive option, Playboy also works to prove that it is a more effective solution. Even when only programming during "safe harbor" hours, a significant portion of the 24-hour period still exists when cable customers may experience signal bleed. With §504, a customer no longer receives any signal bleed because lockboxes work around the clock to fully scramble any signal. Therefore even the "resourceful minor" is restricted from the effects of signal bleed.[44] During the proceedings, the Government criticizes §504 for placing an undue expense on cable operators should even a small percentage of cable customers request the lockbox. The expected result is that cable operators would drop Playboy's channel due to high expense of the lockboxes. However, Playboy contends that the Government has overestimated the resulting demand and cost for lockboxes.

In the evidence brought to Court, Playboy shows that cable customers requested only a small number of lockboxes following 1996. For Playboy, this confirms that signal bleed is not a pervasive problem, and therefore people do not require the boxes. The United States claims this number is low because the public is unaware that they are receiving signal bleed from channels such as Playboy, and that there has been no public notice of the bleed (as required by the District Court in implementing §504). These hypothetical arguments from both parties reiterate that many unproven facts about signal bleed still remain. Ultimately, the burden of proof is the Government's, and Playboy is not required to show findings to back its claim.

Playboy then works to methodically break down the arguments for §505 as stated by the United States. Regardless of the content shown on the channel, it was deemed "indecent" by the courts and as such, it enjoys First Amendment protections like many other forms of speech. Playboy boldly posits, "None of the Government's arguments for expanding its authority over protected speech has merit," a succinct summary of its opinion of the case and one in which the Court ultimately agrees.

Arguments Presented to the Court by the United States

The United States offered a series of arguments building on two main ideas. The first and main argument was that signal bleed from Playboy's channels was harmful to children and as a result a more stringent regulation such as §505 was required. By showing parental inertia and the poor chance of success for §504, the United States hoped to prove that §505 was a necessary step for protecting their best interests. The second tack taken by the United States was to develop the similarity and application of prior cases, including *Pacifica,* to *Playboy*. When presenting its case, the United States worked to prove, as attorney James A. Feldman told *The New York Times*, that there is a "social interest" best served by a more stringent regulation such as §505.[45]

For the Government, illustrating an analogous situation to *Pacifica*, and the inadequacy of *Denver* was critical. In their briefs submitted to the Court, the Government urges the Court to consider the split decision of *Denver* and the similarity to *Pacifica*. *Pacifica*, which focused on radio broadcasting, introduced the "safe harbor" hours into the legal framework. The Government argues that *Pacifica* deals with similar, if not tamer, programming than Playboy's channel. In direct opposition

[44] Ibid, pp. 44.
[45] Linda Greenhouse. "U.S. Seeks to Restore Limits on Cable Sex Programming," *The New York Times* (December 1, 1999): A19.

to Playboy's claim of freedom of speech violations, the Government argues the speech in question is not being unfairly limited, stating: "At worst, [§505] addresses when – not whether – appellee's programming will be shown."[46]

Additionally, the Government uses *Pacifica* to justify its general statistics on signal bleed, rather than statistics providing more exact definitions as to the nature and persistence of signal bleed. In *Pacifica*, only one listener voiced a complaint about the broadcast, which the Government uses to demonstrate that a requirement for more precise data is "inconsistent with *Pacifica*."[47] In working to show differences between the recently decided *Denver* case and the current proceedings, the Government says, "The fractured opinions in *Denver Area* cannot be said to have definitely resolved the question of the standard of review applicable to indecency on cable television."[48]

One of the facts found in the case was that the Government presented a "compelling interest" to protect children from television shows that may be inappropriate. This interest was found as a result of three independent needs put forth by the Government:

1. The Government's interest in the well-being of the nation's youth;
2. The Government's interest in supporting parental claims of authority in their own household; and
3. The Government's interest in ensuring the individual's right to be left alone in the privacy of his or her home.[49]

The Court found that these three interests were all present in the *Playboy* case, and "in sum" were compelling. For the United States, this was a critical element in building its argument – in effect it stated action of some sort needed to be taken. It offered the United States' first building block, hypothetically, for a successful case. As a result of this finding, the Government then offered argument regarding the necessity of §505, as compared to a less restrictive alternative such as §504.

The Government believes §504 does not offer a comparable safeguard for children as compared to §505. This argument centers on the idea that parents do not realize they are receiving signal bleed that might contain indecent material, and that §504 is an unrealistic scheme for regulation. The Government writes of its interest in the case, "A party claiming that a particular regulation violates the First Amendment must do something more than dream up a theoretically possible alternative regulatory scheme."[50] Because of the cost associated with §504, and the lack of detail about the required publicity, the Government argues §505 is necessary.

In its initial brief, the Government discusses at greater length the notion of an unbearable financial burden associated with §504 (as compared to Playboy's claim that §505 is the cause of financial strain). Should a significant number of parents request lockboxes, the lack of profits might force the cable provider to drop the channel altogether. This argument utilizes statistics on households with children. A hotly contended fact in the case was that only .5% of parents nationwide had requested a lockbox while the option had been available. This low number resulted from parents' lack of awareness that free

---

[46] Seth P. Waxman. "Reply Brief for the Appellants," *United States et al* v. *Playboy Entertainment Group, Inc.* (October 1998).
[47] Seth P. Waxman and Christopher J. Wright. "Brief in opposition to motion to affirm," *United States et al* v. *Playboy Entertainment Group, Inc*. (October 1998): 4.
[48] Seth P. Waxman and Christopher J. Wright. "Brief in opposition to motion to affirm," *United States et al* v. *Playboy Entertainment Group, Inc*. (October 1998).
[49] Christopher J. Wright and Seth P. Waxman. "Jurisdictional Statement," *United States et al* v. *Playboy Entertainment Group, Inc. (*October 1998).
[50] Seth P. Waxman and Christopher J. Wright. "Brief in opposition to motion to affirm," *United States et al v. Playboy Entertainment Group, Inc.* (October 1998).

lockboxes were available, the Government argued. Should §504 be advertised as required by the District Court's findings, the Government felt the percentage of homes requesting a lockbox would increase significantly.

In its brief to the Court, the Government works to use legal precedent and rational thought to its advantage. To argue that §505 is not causing a financial burden for Playboy that would not be unavoidable with other restrictions, the Government points out the costs surrounding §504. Additionally, the comparison of cases such as *Pacifica* shows a legal history of similar court decisions surrounding indecent speech and the Government's obligation to protect children. Ultimately, Playboy works to address the senses of the Court, but fails to provide data and evidence compelling enough to make clear the burden of proof for §505.

ASSESSING THE ORAL ARGUMENTS OF THE CASE

The oral arguments in the *Playboy* case highlight the key issues for the Justices. When speaking with both James A. Feldman on behalf of the United States and Robert Corn-Revere on behalf of Playboy, the Justices probe each representative about the classification of "indecent," the actual existence of signal bleed, and whether the Government should step in as a "super parent." Justice Antonin Scalia and Justice David Souter dominate the oral arguments with the most questions; notably, Justice Anthony Kennedy, who wrote the Opinion of the Court, spoke up only a few times to clarify facts of the case. While both attorneys aim to nail down their key points, it is clear that Playboy is much more comfortable in its position – Corn-Revere's arguments come across confident and well-researched. The United States has the bigger obstacle – providing the burden of proof that §505 offers the least restrictive means of regulation in light of the facts.

The Justices question Feldman and Corn-Revere, beginning both oral arguments with a strict inquiry regarding the type of speech in question. At question for the Court is whether the speech in question is obscene rather than indecent. Justice Scalia asks the Government if that is its claim, stating that the "indecency" finding was not included in the statement of fact in the lower court, and Feldman responds that the Government does not claim this is obscenity. The Justices give both representatives equal scrutiny regarding this point. Of the examples submitted to the Court, Justice Scalia says, "I wouldn't even read the descriptions [of these videos] in public."[51]

Next, the Court addresses the question of signal bleed – a statistic that is broad and hard to pinpoint in terms of effect. The Government cites the statistics found by the District Court: that signal bleed potentially affects 39 million homes in which 29 million children live. However, this number does not describe how many actually experience signal bleed, watch the signal bleed, and how often the signal bleed can be seen clearly. Feldman states: "The key question here is to compare the extent to which there's a burden of speech that's imposed by §505 with the evil that it's addressing." When the Court gets to Corn-Revere, the Justices probe facts about the actual transmission and what is seen and heard. In one of many humorous comments, Justice Scalia asks, "Is the thesis that little kids aren't going to watch this unless it's really good reception?" Corn-Revere notes that 93% of the programming is completely blocked.

A resulting question specifically addressed Playboy regarding whether the outcome of the District Court was reasonable. The District Court found in favor of Playboy and §504, with a stipulation that indecent programmers properly advertise the potential for signal bleed and the availability of a lockbox. The costs associated with this requirement troubled

[51] Transcript of oral argument. *United States et al* v. *Playboy Entertainment Group, Inc.* (November 30, 1999).

the Court, especially since financial implications had been part of the case since the beginning. To this concern, Feldman argues, "One reason is you're operating against – in a situation where the cable operator has a financial incentive not to give the notice both because giving the notice is expensive. If the parent chooses to elect blocking, that's a further cost." Certainly this argument carries some weight, but unfortunately, it comes back to a burden of proof that is the Government's obligation. Corn-Revere says of the potential failure for §504 due to cost, "We at least ought to try [§504] first before we decide that we're going to restrict a significant amount of speech."

Finally, the Justices question both parties about the need for government to act as a "super parent." Justice Kennedy says, "You think we can't know that there are – are parents who are so busy working and making a living that they don't have adequate time to supervise their children, they don't care about this sort of thing? And the Government is very concerned about it." The United States' belief that §505 is not overly restrictive centers on this very idea. For Feldman, proving this point is a critical part of the argument. He argues for the "social interest in the upbringing of children" and that many parents will fail to act on a provision like §504, leaving their children unprotected. In response, Corn-Revere looks to the similarity in the *Denver* ruling.

Throughout the oral testimony, the Justices apply a strict series of questions, which at times make both sides seem uncomfortable. Effectively, the "holes" in the case are covered here, providing a more thorough understanding of both sides' viewpoint of the case. The Government clearly has the tougher position to defend, but both sides are tested by the questioning of the Court.

Decision of the Court

In an opinion written by Justice Kennedy, the Court decided in favor of Playboy. Justice Kennedy was joined by Justices Stevens, Souter, Clarence Thomas, and Ruth Bader Ginsburg. Several key areas contributed to their decision in favor of Playboy. Namely, the Court was concerned with the content-based nature of the regulation, the availability of a less restrictive measure, and the Government's failure to show a compelling interest for §505.

An idea that weaves its way through the court proceedings and is not ignored in the majority opinion is that both sides claim the speech is "indecent" rather than "obscene." Clearly, some of the Justices do not agree with this classification, but since both the Government and Playboy accept the "indecent" classification, this issue is not technically brought before the Court. Though not specified directly in District Court, this fact of the case has not been disputed by either party, giving Playboy's content full First Amendment protection. The content is described by the Court as "highly offensive" even for adult viewers.[52]

This classification of Playboy's content is central to most of the Justices' positions on the case. In concurring opinions by Thomas and Stevens, J.J., both address the issue of content and look to the finding of fact in the case. Since the content was not found to be obscene, it is not a fact in the case and should not be considered. Additionally, Justice Stevens points out the differences in law over time between related cases and *Playboy* – namely that protection of commercial speech is a relatively new development and should be considered when deciding the case at hand. For Justice Scalia, his dissenting opinion argues that this is clearly a case of obscenity, negating any claims to protection under the First Amendment.

[52] *United States et al* v. *Playboy Entertainment Group, Inc.,* 30 F. Supp. 2d 702, affirmed.

Because §505 specifically targets speech, such as Playboy's programming, it is considered a content-based restriction and must be given "strict scrutiny" that the least restrictive alternative for regulation is chosen. Strict scrutiny is a term applied to cases such as this one that requires the Court to apply the harshest consideration as to whether a compelling interest exists *and* a less restrictive alternative is not available[53]. After such careful examination, the Justices found the argument of the Government to lack proof that §505 was in fact a necessity, and agreed that §504 was a less restrictive, equally satisfactory option. Justice Kennedy writes, "The objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative."[54] For the Justices, the ability of §504 to protect children from unwanted television content is not in question, but instead whether §504 is equally effective.

As the District Court determined, the Justices agreed that §504 could be equally protective with the right application. Noting the obligation to closely examine cases such as this one, Justice Kennedy quotes a prior case, *Speiser* v. *Randall* (1958): "The line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed or punished is finely drawn." For the high Court, the Constitutional freedom of speech accorded citizens is a right that must be protected and taken with the utmost seriousness. The Government's evidence, called "anecdotal," was not adequate rationale for the Court to consider §505 essential. Ultimately, the Government failed to show the extent of the problem, consistent evidence of ill-effects resulting from signal bleed, and §504 as an ineffective alternative. Technology's ever-changing properties also influenced the Court's views on the burden of proof. Justice Kennedy notes that with the advent of programmable televisions, digital television and mapping systems, signal bleed will be even less of a problem in the future.

This burden of proof, placed on the Government during the trial, was significant in the outcome of the case. Ultimately, the Government needed to persuade the Court that even given strict scrutiny, §505 was the least restrictive alternative. The Justice notes: "We agree that the Government has failed to establish a pervasive, nationwide problem justifying its nationwide daytime speech ban." Additionally the Government did not show that §504 would be ineffective as an alternative to §505. While promotion of the blocking system is a hypothetical alternative, its failure had not been cited previously in the Court, and its implementation can be expected to properly halt any persisting harm resulting from signal bleed.

In dissent, Justice Stephen Breyer, Chief Justice William Rehnquist, Justice Sandra Day O'Connor and Justice Scalia joined together. They argue that the claims made by the majority do not center on First Amendment principles. A key fact for the minority included the previous failure of signal bleed, which led to the initial creation of §505. The dissent discusses the fact that §504 is essentially an "opt-in" provision, while §505 is an "opt-out" provision – each addressing a different group of subscribers and working towards different goals in relation to protecting cable subscribers from unwanted programming. Second, the minority claimed that §505 was not a prohibitive restriction on free speech. They argued that profitability should not impact First Amendment decisions, and that the restriction does not ban speech, but merely restricts it. In a heated final comment, Justice Breyer concludes: "By finding 'adequate alternatives' where there are none, the Court reduces Congress' protective power to the vanishing point. That is not what the First Amendment demands."[55]

---

[53] *Sable Communications of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989).
[54] *United States et al* v. *Playboy Entertainment Group, Inc.*, 30 F. Supp. 2d 702, affirmed.
[55] *United States et al* v. *Playboy Entertainment Group, Inc.*, 30 F. Supp. 2d 702, (Breyer, J., dissenting).

LEGAL IMPLICATIONS

While *Playboy* was a case that may have been dated before it even appeared before the Supreme Court, it offered a major contribution to First Amendment law: a clear definition for the treatment of the cable medium. In a summary for the *Berkeley Technology Law Journal*, Jennifer Polse notes that: "Prior to the Court's decision in *Turner Broadcasting System, Inc.* v. *FCC*, courts applied various standards to cable, including both the broadcast and print media standards."[56] She continues: "The Court finally defined a standard for cable regulations, holding that laws restricting speech on cable networks should be subject to the same searching scrutiny applied to regulations of the print media."[57] Bradley Skafish also comes to this conclusion in the *Federal Communications Law Journal*: "The most important aspect of *Playboy* is the Court's determination that cable television is not analogous to broadcast media."[58] This is notable because broadcast television as a medium of communication has historically encountered much greater restrictions than other media due to its "pervasive" nature.[59]

By designating a difference between cable and broadcast television, the Court makes an important regulatory decision. The simultaneous growth of the Internet may have contributed to this conclusion by offering an advanced technological comparison – making the archaic problem of signal bleed seem a diminishing issue at best. In the *Minnesota Law Review*, Bell writes: "The Supreme Court has not merely recognized the potentially revolutionary impact of pegging free speech jurisprudence to technological advances, it has embraced it."[60] The impacts of technological advances and the lack of similarity between cable and broadcast can be seen in further commentary by Skafish: "Had the Court viewed cable television as substantially no different from broadcast media, the case would have fallen under the *Pacifica* precedent, and the Government would almost surely have prevailed."[61] As technology continues to advance towards digital convergence, the applicability of pre-digital cases, such as *Pacifica*, may continue to erode. *Playboy's* impact in future cases involving 3G wireless technology[62] and Direct Broadcast Satellite[63] is expected as a precedent for applying strict scrutiny. Forward-thinking Court decisions such as *Playboy* allow the static words of the Constitution to remain relevant in a high-tech world.

SUMMARY

The addition of §505 to the 1996 Telecommunications Act posed a series of complicated questions all working to discover whether signal bleed deserved First Amendment protections. In a close decision, the Court found in favor of

---

[56] Jennifer Polse. "Constitutional law: A. First Amendment: 1. Indecent speech: a) Cable television: *United States* v. *Playboy Entertainment Group, Inc.,*" *Berkeley Technology Law Journal* 16 (2001): 347.

[57] Ibid.

[58] Bradley Skafish. "Smut on the small screen: The future of cable-based adult entertainment following *United States* v. *Playboy Entertainment Group*," *Federal Communications Law Journal* 54: 319-338.

[59] Craig Leis. "United States et al v. Playboy Entertainment Group, Inc. – Sexually explicit signal bleed and 505 of the CDA: Unable to overcome strict scrutiny…but will strict scrutiny be able to overcome the future?" *Capital University Law Review (*2002*)*: 906.

[60] Tom W. Bell, "Free speech, strict scrutiny and self-help: How technology upgrades Constitutional jurisprudence," *Minnesota Law Review* 87: 769.

[61] Bradley Skafish: p. 328.

[62] Jacob Chapman. "Content on the fly: The growing need for regulation of video content delivered via cellular telephony," *Texas Review of Entertainment and Sports Law* 67 (2007), www.lexisnexis.com, (accessed on February 25, 2009).

[63] John C. Quale and Malcolm J. Tuesley. "Space, the final frontier: Expanding FCC regulation of indecent content onto Direct Broadcast Satellite," *Federal Communications Law Journal* 60 (2007), www.lexisnexis.com (accessed on February 25, 2009).

Playboy with a vote of 5-4. The strange alliances that formed during this case were notable – conservative Justice Thomas sided in favor of Playboy with liberals Stevens, Ginsburg, and Souter. Justice Kennedy, who usually takes a moderate position, joined them as well.

The case came down to whether the Government could prove the compelling need for §505, as compared to §504. Ultimately, it failed and the case was decided against the Government. In Playboy's favor was the availability of §504 as a less restrictive alternative, ironically, one the Government itself provided. The illusive nature of signal bleed, indefinable by either party, aided Playboy's case.

Central to the case for all parties was placing *Playboy* into the larger legal framework. The Government worked to prove *Pacifica* offered a clear legal precedent and analogous situation to the one faced here. Playboy worked to disprove the applicability of *Pacifica* and instead looked to *Denver* and *Reno* for comparable outcomes. Similarly the amicus parties also tried to demonstrate *Playboy's* legal precedents. The effect of technology was a clear factor for the media, both appellee and appellant, and the Justices. Because digital technology was emerging, the Internet had arrived, and cable systems allowed for blocking, earlier court decisions could not be cleanly mapped to Playboy's case.

For the Justices, several key questions remained. In oral questioning, they delved further into the "indecent" nature of Playboy's content, the costs associated with both provisions, and the exact nature and scope of signal bleed. Ultimately, five of the Justices decided in favor of Playboy and four in favor of the United States. For those in favor of Playboy, it was clear that the decision focused on the fact that indecent speech is given First Amendment protection, and regulation must use the least restrictive means possible. As the Government was unable to prove a need for §505, the Court decided in favor of Playboy. For those dissenting, the decision centered on the opinion that the speech was, in fact, obscene rather than indecent, and that §504 and §505 were not alternatives, but rather necessary complements.

For now, indecency on cable stands and does not appear to be of further interest in the courts. On its website, the FCC does not list any current initiatives revisiting this issue.[64] But the FCC does reiterate its commitment to First Amendment values: "The Commission is careful of First Amendment protections and the prohibitions on censorship and interference with broadcasters' freedom of speech."[65] While many may find Playboy's programming offensive, the bottom line is that it has a place in America's communications – a place that is well-protected by our Constitution. Until someone can show true harm from that speech, Playboy will have a profitable position in the cable marketplace.

[64] Federal Communications Commission, www.fcc.gov, (Accessed on November 25, 2007).
[65] Ibid.