Case Notes

Parental Initiative in the Age of Signal Bleed

Playboy Entertainment Group v. United States, 30 F. Supp. 2d 702 (D. Del. 1998), *prob. juris. noted*, 119 S. Ct. 2365 (June 21, 1999) (No. 98-1682).

"Signal bleed" describes the partial reception of sexually explicit premium cable-television programming in the homes of non-subscribers to that programming.[1] A colloquial term for the often grotesquely distorted images and "assorted orgiastic moans and groans"[2] that are transmitted as a result of inadequate scrambling technology is "Picasso porn."[3] Some have viewed the phenomenon more skeptically as a deliberate "tease."[4] Three years ago, in an effort to protect American children from exposure to indecent signal bleed, Congress enacted section 505 of the Communications Decency Act of 1996 (CDA).[5] Entitled "Scrambling of Sexually Explicit Adult Video Service Programming," section 505 requires cable-system operators either (i) to scramble fully the transmission to non-subscribers of "sexually explicit" or otherwise "indecent" programming on any channels that are "primarily dedicated to sexually-oriented programming,"[6] or (ii) to time-channel the transmission of such programming to a "safe harbor" period between 10 p.m. and 6 a.m.[7] To comply with section 505, most cable operators have resorted to time-channeling rather than bear the greater cost

1. Playboy Entertainment Group v. United States (*Playboy III*), 30 F. Supp. 2d 702, 708 (D. Del. 1998).

2. Playboy Entertainment Group v. United States (*Playboy II*), 945 F. Supp. 772, 779 (D. Del. 1996).

3. P.J. Huffstutter, *Elements of Nerdspeak Net Argot Creeping into Vernacular*, L.A. DAILY NEWS, May 19, 1997, at B1.

4. *Good Morning America* (ABC television broadcast, June 23, 1999) (statement of Bruce Taylor).

5. 47 U.S.C.A. § 561 (West Supp. III 1998).

6. *Id.* § 561(a).

7. *See id.* § 561(b); Implementation of Section 505 of the Telecommunications Act of 1996, 11 F.C.C.R. 5386, 5387 (1996).

of overhauling their scrambling technology.[8] Since February of 1996, Playboy Entertainment Group has sought a declaratory judgment that the provisions of section 505 violate the First Amendment and injunctive relief preventing their enforcement. In the process, Playboy has been granted a temporary restraining order,[9] denied a preliminary injunction,[10] and granted a permanent injunction.[11] Now, for the second time,[12] *United States v. Playboy Entertainment Group*[13] is before the Supreme Court.

This case deserves more attention than it has received. Signal bleed represents what may become an all-too-familiar phenomenon: diffusive indecent speech and a technology designed to filter that speech that is only partially effective, that allows traces of indecency to "bleed" through. From the beginning, the hinge on which *Playboy* has turned is the question of whether a less restrictive fix for signal bleed is available in section 504 of the CDA, which enables cable subscribers to request the complete scrambling of any channel, indecent or otherwise, free of charge.[14] Students of *Reno v. ACLU*[15] may recognize in this question a conventional dichotomy of First Amendment thinking on indecency filtering: Is the facilitation of parent-initiated filtering sufficient to protect minors from indecent speech, or should providers be required themselves to implement costly, systemic, and possibly ruinous filtering regimes? Underlying both sides of this dichotomy is a more fundamental question, one that confounded the lower courts in *Playboy* and that has not yet been adequately addressed by the Supreme Court: What degree of parental initiative should First Amendment doctrine demand or expect? The *Reno* Court evaded this question by betting that "reasonably effective" or "at least as effective" parent-initiated filtering regimes "will soon be widely available."[16] But in section 504 that regime is available. The future of parental initiative is now. *Playboy* puts *Reno*'s technological meliorism to the test and asks the question that *Reno* deferred.

This Case Note analyzes and endorses the *Playboy* district court's innovative, if sometimes inconsistent, approach to the issue of parental initiative. Confronted with parents' near total failure to take advantage of

8. *See Playboy III*, 30 F. Supp. at 711.

9. *See* Playboy Entertainment Group v. United States (*Playboy I*), 918 F. Supp. 813 (D. Del. 1996).

10. *See Playboy II*, 945 F. Supp. at 772.

11. *See Playboy III*, 30 F. Supp. at 702.

12. In *Playboy Entertainment Group v. United States*, 520 U.S. 1141 (1997), the Supreme Court affirmed without comment the district court's denial of the preliminary injunction.

13. *Prob. juris. noted*, 119 S. Ct. 2365 (June 21, 1999) (No. 98-1682).

14. *See* 47 U.S.C.A. § 560 (West Supp. III 1998).

15. 521 U.S. 844 (1997).

16. *Id.* at 846. For criticism of this aspect of the *Reno* opinion, see Lawrence Lessig, *What Things Regulate Speech: CDA 2.0 vs. Filtering*, 38 JURIMETRICS J. 629 (1998), and Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141.

section 504's full-scrambling provisions, the court that issued the permanent injunction in *Playboy* expanded the concept of parental initiative to include the possibility of parental abstention, or informed parental inaction. This is an important advance in current First Amendment doctrine. As less restrictive parent-initiated filtering mechanisms become "widely available" throughout the electronic media, it is likely that many parents will elect not to use them, and will do so notwithstanding government claims that indecency harms their children. Lest the momentum of *Reno* be reversed, least-restrictive-alternative analysis needs to be prepared to defend this result. In its development of the concept of informed parental abstention, the *Playboy* district court demonstrates how this defense may succeed.

I

Though *Playboy* is properly understood as a sequel to *Reno*, it arrives at the Supreme Court from a different but no less troubled region of the First Amendment landscape, the "doctrinal wasteland"[17] of the cable-television medium. The current state of the art in First Amendment doctrine relating to cable is *Denver Area Educational Telecommunications Consortium v. FCC*,[18] a case which one commentator has called "arguably . . . the nadir of the Court's First Amendment jurisprudence."[19] The fractured authorities of *Denver Area* failed to clarify whether content-based regulations of cable television should receive strict scrutiny, as apparently endorsed by *Turner Broadcasting System v. FCC*,[20] or some lower standard of scrutiny, such as that applied to the radio-broadcast medium in *FCC v. Pacifica Foundation*.[21] For better or worse, *Denver Area* was handed down as a work in progress. Its plurality urged caution before the new media but, in doing so, produced a cautionary object lesson in support of the proposition that medium-specific considerations are properly analyzed through the application of strict scrutiny.[22]

Playboy has proven to be another such object lesson. It has confirmed Justice Kennedy's prediction that the *Denver Area* plurality's "flight from

17. Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 813 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part).

18. 518 U.S. at 727.

19. James C. Goodale, *Caught in Breyer's Patch*, 216 N.Y. L.J. 1 (1996).

20. 512 U.S. 622, 637 (1994) ("[T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation . . . does not apply in the context of cable regulation.").

21. 438 U.S. 726 (1978) (holding that, in light of the "pervasiveness" of the medium, the FCC could use administrative sanctions to regulate indecent speech in radio programming).

22. *See Denver Area*, 518 U.S. at 804 (Kennedy, J., concurring in part and dissenting in part) ("[Pervasive-medium] concerns are weighty and will be relevant to whether the law passes strict scrutiny. They do not justify, however, a blanket rule of lesser protection for indecent speech.").

standards"[23] would "sow confusion in the courts bound by our precedents."[24] After postponing its preliminary injunction decision until the Supreme Court's ruling in *Denver Area*, the three-judge district court was clearly somewhat mystified as to how to proceed in its "aftermath."[25] In quick succession, the *Playboy* court noted the plurality's unwillingness to "declare a 'rigid single standard,'" acknowledged the strict scrutiny standard endorsed by the "other five members of the Court," and then settled upon "strict scrutiny or something very close to strict scrutiny."[26] "[W]hatever the standard of scrutiny,"[27] the district court upheld section 505 "[b]ecause the Supreme Court endorsed a time-channeling solution in very similar circumstances in *Pacifica Foundation*."[28] This method did not survive in the opinion granting the permanent injunction. There, the court made only passing reference to *Pacifica* and *Denver Area* and cited the later case as authority for the application of conventional least-restrictive-alternative analysis.[29]

II

If it is true, as many have argued, that the age of medium-specificity is in its twilight,[30] then *Turner* and *Pacifica* form a dialectic waiting to be transcended. *Denver Area* implies as much, and the lower-court history of *Playboy* suggests a certain ripeness. The new synthesis for content-based regulations of the electronic media will likely be called "strict scrutiny," perhaps in *Playboy*, perhaps elsewhere. If parental initiative is to play any role in this new synthesis, *Pacifica*'s notion of pervasiveness must be reformulated to reflect "the new technology."[31] This reformulation should take two forms.

First, notwithstanding three decades of McLuhanesque hype,[32] First Amendment jurisprudence should consider the pervasiveness of the content, not of the medium. The opinion granting the permanent injunction in *Playboy* properly demonstrated the importance of this distinction. For the

23. *Id*.
24. *Id*. at 786.
25. *Playboy II*, 945 F. Supp. at 784.
26. *Id*. (quoting *Denver Area*, 518 U.S. at 742)
27. *Id*. at 785.
28. *Id*. at 789.
29. *See Playboy III*, 30 F. Supp. 2d at 715.
30. *See, e.g.*, Monroe E. Price & John F. Duffy, *Technological Change and Doctrinal Persistence: Telecommunications Reform in Congress and the Court*, 97 COLUM. L. REV. 976, 1013 (1997) ("[T]he jurisprudential debate in *Denver Area* should not distract from a larger unity. Now, all the Justices seem to be gliding toward consolidated approaches to the media which differ from the schema of media classification that had been dominant just two terms ago in *Turner I*.").
31. *Denver Area*, 518 U.S. at 777 (Souter, J., concurring).
32. *See generally* MARSHALL MCLUHAN, UNDERSTANDING MEDIA (1964).

district court, the gravamen of the case was not whether cable television was a pervasive medium, but whether the specific indecent content at issue was itself pervasive. The court discounted the Government's evidence of households with the "potential to be exposed" (pervasive-medium evidence) and demanded instead some quantitative evidence of households "actually exposed" (pervasive-content evidence).[33] In qualitative terms, the court implied that even when exposure to signal bleed does occur, its indecent content is often garbled beyond recognition, rendering the images harmless to children.[34] Thus, notwithstanding the pervasiveness of the medium, the court concluded that signal bleed was not a "pervasive problem."[35] As we "approach the day of using a common receiver"[36] for all content, for CNN as well as for an individual's dead letter to the web, this distinction between the medium and the varying reach of its messages becomes all the more meaningful.

Second, indecency jurisprudence should calibrate pervasiveness according to the extent of control that an individual can exert over the receipt of content through the medium at issue.[37] From this follows a "spectrum of control . . . for the electronic media,"[38] with broadcasting at one extreme and the telephone or the World Wide Web at the other.[39] Though *Playboy* would appear to present classic broadcast-medium facts, in that a child may encounter signal bleed accidentally by browsing through cable channels, a "spectrum of control" analysis of section 504 urges a different, more promising result. Indeed, the *Playboy* district court demonstrated the potential of this analysis when it speculated that section 504 might control children's exposure to signal bleed more effectively than the broadcast-era time channeling provisions of section 505, since "a resourceful minor can still watch signal bleed after the safe-harbour hours," whereas "parental vigilance" can eliminate signal bleed altogether.[40]

33. *Playboy III*, 30 F. Supp. 2d at 709.
34. *See id*. at 716.
35. *Id*. at 719.
36. *Denver Area*, 518 U.S. at 776 (Souter, J., concurring).
37. *See* Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1080 (1994).
38. *Id*.
39. The Supreme Court has already begun to move toward this theory of pervasiveness, though indirectly, in its application of "affirmative steps" analysis to the Internet and dial-a-porn. *See* Reno v. ACLU, 521 U.S. 844, 867 (1997) (noting the district court's finding that "the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material."); Sable Communications v. FCC, 492 U.S. 115, 127-28 (1989) ("[T]he dial-it medium requires the listener to take affirmative steps to receive the communication. There is no 'captive audience' problem here; callers will generally not be unwilling listeners.").
40. *Playboy III*, 30 F. Supp. 2d at 719.

III

Taken together, sections 504 and 505 form a "multi-layered"[41] content-based regulatory scheme. As a filtering mechanism initiated and controlled by the receiver of content, section 504 is said to be the likely future of indecency regulation. As a filtering mechanism initiated and controlled by the transmitter, section 505 is said to be its likely past.[42] When the *Playboy* permanent-injunction court applied "strict scrutiny or something very close to strict scrutiny," it found itself wandering between these two worlds. In enjoining section 505, the court arrived at the right result. It did so, however, by finessing a question that continues to confuse indecency jurisprudence: How should least-restrictive-alternative analysis interpret parents' failure to take advantage of the indecency controls made available to them?

The issue came last in the opinion and nearly unraveled everything before it. The court noted that the Government had supplemented the record with survey evidence concerning a fourteen-month period when section 504 was in effect and section 505 was not. During this period, cable system operators distributed section 504 blocking technology to only 0.5% of their subscribers. While the Government presented this statistic as evidence of the ineffectiveness of section 504, Playboy argued that it showed only the "lack of parents' concern."[43] The court agreed with Playboy. The 0.5% statistic was "consistent . . . with a societal response that signal bleed is not a pervasive problem."[44] Such a result must have surprised the Government. In the *Playboy* court's preliminary-injunction opinion, the section 504 alternative failed for want of adequate notice to or adequate response by parents, yet here it somehow thrived. Perhaps more suprisingly, the court then pointed to an additional problem with the Government's interpretation of its survey evidence: The interpretation was "premised on adequate notice to subscribers. It is not clear, however, from the record that notices of the provisions of § 504 have been adequate."[45] Accordingly, the court volunteered a shorthand version of "adequate notice" and specified appropriate venues for its broadcast and publication.[46]

41. *See* J.M. Balkin, *Media Filters, the V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1155 (1996) ("What I fear is that the V-chip will be used instead to impose an additional layer of content-based regulation on top of existing indecency prohibitions and safe harbor provisions. . . . Courts must be especially vigilant to ensure that a 'multi-layered' approach to broadcast regulation does not result.").

42. *See* Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619 (1995).

43. *Playboy III*, 30 F. Supp. 2d. at 719.

44. *Id.*

45. *Id.*

46. *Id.*

This reasoning is as distorted as signal bleed itself. It attests to the fact that First Amendment doctrine lacks an authoritative model of parental initiative. The Supreme Court has recognized that parents have the "primary responsibility for children's well-being [and] are entitled to the support of laws designed to aid discharge of that responsibility."[47] But the Court has never clearly stated where governmental "support" should end and parental "responsibility" should begin. A number of models have taken shape despite the Court's silence. In a somewhat notorious passage in its brief for *Denver Area*, the Government provided a strong form of one model, which rejected the viability of subscriber-initiated filtering technology because of the condition of "absence, distraction, indifference, inertia, or insufficient information" that besets "innumerable parents" in America.[48] Chief Judge Harry Edwards of the D.C. Circuit is the champion of a contrasting model, which denies that "parents are unavailable and inept at the task of parenting"[49] and seeks to protect parental choice from encroachment by censors acting in its name.[50]

But the problem is not one of modeling parental responsibility. The problem is the persistence of a "multi-layered" compelling-interest framework in which the old and the new uneasily coexist. Indecency jurisprudence has long held that the government has an "independent" interest in protecting American youth from indecency.[51] As Chief Judge Edwards has argued, this independent interest tends to override the government's interest in facilitating or "support[ing] parental supervision of children."[52] *Playboy* demonstrates one way in which this can occur. When, as with section 504, parents fail to take advantage of indecency controls, the independent interest assumes misinformed or even negligent parents, for to do otherwise would cut against the authority of its own claims concerning harm. Like Justice Thomas's peculiar, broadcast-era version of parental facilitation in *Denver Area*,[53] the independent interest's "default" is censorship. It operates according to the government censor's vision of an identity between governmental and parental interests. At its core, it assumes

47. Ginsberg v. New York, 390 U.S. 629, 639 (1968).

48. Respondent's Brief at 37, Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727 (1996) (Nos. 95-124, 95-227).

49. Action for Children's Television v. FCC, 58 F.3d 654, 679 (D.C. Cir. 1995) (Edwards, C.J., dissenting).

50. *See* Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 NW. U. L. REV. 1487, 1563 (1995) ("The state's compelling interest lies not in protecting children, but in protecting parenting.").

51. *See, e.g.*, *Ginsberg*, 390 U.S. at 640 ("The State also has an independent interest in the well-being of its youth.").

52. *Action for Children's Television*, 58 F.3d at 678 (Edwards, C.J., dissenting).

53. *See Denver Area*, 518 U.S. at 832 (Thomas, J., concurring in the judgment in part and dissenting in part) ("Our precedents establish that government may support parental authority to direct the moral upbringing of their children by imposing a blocking requirement as a default position.").

that if parents only knew, or had the power, they would act as the government would.

For decades, the independent interest has occupied a seemingly unassailable position in indecency jurisprudence. With the rise of parent-initiated filtering technology, however, this position may well find itself under siege. As filtering technology improves and its capabilities become widely publicized, the probability that parents suffer from "insufficient information" decreases, and the degree of parental initiative necessary to control indecency declines. With a low threshold for parent-initiated filtering, the argument that the government should act on behalf of inactive parents who are too "distracted" or "inert" to cross that threshold loses much of its force. It yields to the probability that inactive parents have made a passive judgment that the controls available to them are simply unnecessary. In this sense, by devolving competence upon parents, parent-initiated filtering technology creates the conditions for an informal referendum on indecency control, some of whose results may refute the identity of governmental and parental interests.

In *Playboy*, the district court sought to create the conditions for just such a referendum. The court's strategy was straightforward: "With adequate notice of the issue of signal bleed, parents can decide for themselves whether it is a problem. Thus to any parent for whom signal bleed is a concern, § 504, along with 'adequate notice,' is an effective solution."[54] In essence, this is a traditional "more speech" remedy.[55] Comparable in effect to the *Denver Area* majority's notion of "informational requirements,"[56] "adequate notice" redefines parental initiative as a matter of information, not action. Under its terms, if parents are informed, then they are sufficiently "initiated" to preclude government intervention on their behalf. This model of parental initiation represents a shift away from the independent interest, which demands that parents act (or else the government will act for them), and toward the facilitation interest, which demands simply that parents know. The result is that notice is no longer judged adequate according to how many parents act on it. Rather, notice is judged adequate according to the extent to which it enhances a parent's authority and, perhaps more importantly, legitimates a parent's decision not to act in the way that the government would.

—Barton Beebe

54. *Playboy III*, 30 F. Supp. 2d at 719.

55. *See* Whitney v. California, 274 U.S. 357, 375, 377 (1927) (Brandeis, J., concurring) ("[T]he fitting remedy for evil counsels is good ones . . . . If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence."), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

56. *Denver Area*, 518 U.S. at 759.