



CDT, PFF Urge Courts To Limit FCC's Authority to Regulate Speech

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As communications technologies converge, courts must rein in the Federal Communications Commission's continued efforts to expand its authority to regulate speech over broadcast media. In friend-of-the-court briefs filed in conjunction with Adam Thierer of the Progress and Freedom Foundation (PFF), the Center for Democracy & Technology (CDT) today argued that courts should not allow the FCC to expand its regulatory authority even as the original basis for that authority withers.

CDT and PFF filed the briefs in the U.S. Courts of Appeals for the 2nd and 3rd Circuits in two recent appeals by broadcasters challenging "broadcast indecency" determinations made by the FCC. The briefs make the case that the FCC's radical expansion of its indecency enforcement violates the First Amendment of the Constitution and the Administrative Procedures Act and that the determinations should be overturned. The FCC's expanded indecency enforcement has already led some public television stations to remove some historical documentaries from their broadcast schedule. Copies of the CDT-PFF briefs are available at <http://www.cdt.org/speech/20061129circuit2.pdf> [1] and <http://www.cdt.org/speech/20061129circuit3.pdf> [2].

"The FCC's increasingly aggressive attempts to control speech on the radio and television are on a collision course with a wave of technological change that will soon render the Commission's involvement in these matters obsolete," said CDT Staff Counsel John Morris. "As the distinctions between broadcast and digital media fade into history, policy makers, technologists and civil libertarians must work together to ensure that the light-touch approach to Internet communications, and not the outdated rules for broadcast, becomes the standard for regulation in the converged media world."

As an organization focused on the Internet and emerging digital technology, CDT has not typically involved itself in the broadcast indecency debate. But the FCC's increased indecency enforcement is likely in this age of convergence to threaten the underlying freedom of other digital communications. The FCC's authority to regulate "indecency" in the broadcast arena emerged during a time when viewers and listeners had little power to control the nature of the media coming into their homes. That is simply not the case in the digital world, and the FCC cannot be allowed to extend its archaic authority to other technologies, where user control is a built-in function.

Added Thierer, "with a wide diversity of parental control tools now at their disposal, families have the ability to construct and enforce their own 'household standard' for acceptable media content in their homes. Consequently, government does not have a compelling interest in imposing an amorphous 'community standard' on Americans since there are less restrictive ways for families decide for themselves what should and should not be seen or heard in their homes." Thierer is Senior Fellow and Director of the Center for Digital Media Freedom at PFF.

The briefs contain two major components. First, they challenge the arbitrary, unconstitutional nature of the FCC's procedures for punishing broadcast indecency. Among other things, CDT and PFF argue that the commission has made no attempt to identify the "community standards" it relies on to make

determinations about what is "indecent." As a result the commission's rules make it easy for a vocal minority of viewers to shout down content that they don't like.

Second, the briefs challenge the very foundation of the FCC's authority to regulate speech. The briefs identify how convergence is undermining the jurisprudence surrounding broadcast regulation and argue that technological advancements like the V-chip now allow parents to rely on their own standards to determine what media their children have access to. Those advancements undercut the need for aggressive government censorship, and the chilling of valuable content that has flows with such censorship.

About PFF: The Progress & Freedom Foundation is a market-oriented think tank that studies the digital revolution and its implications for public policy. It is a 501(c)(3) research ↦ educational organization.

About CDT: The Center for Democracy and Technology works to promote democratic values and constitutional liberties in the digital age. With expertise in law, technology, and policy, CDT seeks practical solutions to enhance free expression and privacy in global communications technologies. CDT is dedicated to building consensus among all parties interested in the future of the Internet and other new communications media.

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