

# A COMPARATIVE ANALYSIS OF THE REFORMATION OF AMERICAN AND ARGENTINIAN MEDIA LAWS AND THE PUBLIC POLICIES BEHIND SUCH CHANGES

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## I. INTRODUCTION

Ever since Janet Jackson experienced a wardrobe malfunction at the 2004 Super Bowl Halftime Show—exposing her breast for half a second to nearly one hundred and forty million viewers, seven million of which were children—the Federal Communications Commission’s (FCC) goal has been to prevent such moral disasters from reaching the eyes of the young American public.<sup>1</sup> Although the Janet Jackson scandal was not the first and certainly not the only event to cause the FCC to reevaluate its standards of permissible broadcast content, the 2004 incident jumpstarted a regulatory and legislative crackdown on indecency in broadcast television and

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1. B. Chad Bungard, *Indecent Exposure: An Economical Approach to Removing the Boob From the Tube*, 13 UCLA ENT. L. REV. 187, 187 (2006).

elsewhere.<sup>2</sup> Shortly thereafter, the U.S. Government passed legislation that imposed stricter fines on broadcast licensees that intentionally (or unintentionally) showed material that violated the FCC's shifting standards.<sup>3</sup>

Similar to the drastic reforms in American media laws, in October of 2009, the Argentine Government adopted a new law regulating broadcast and cable television, radio, and other media services.<sup>4</sup> Although the motivation behind reforming Argentine media law was decentralization and democratization of the media by supporting the protection and dissemination of Argentina's culture, both countries ultimately wanted to make these changes to protect its youth. This protection, however, will surely be at the cost of the broadcasters' freedom of speech.

Part II.A. of this article will examine the history and evolution of American media laws, including case law and codifications of restrictions that govern the content seen on television. Part II.B. will focus on the fluctuating standards by which broadcasting companies must comport themselves, including indecency, obscenity, profanity, and violence. Part III.A. will discuss the history of the Argentine Government and the formation and reformation of media laws in the twentieth century. And finally, Part III.B. will discuss the motivation behind the new law and how it will affect the future of Argentinian media.

## II. AMERICAN HISTORY AS TOLD BY YOUR TELEVISION SET

The FCC was not always the powerful federal agency it is today. The Communications Act of 1934 abolished the Federal Radio Commission and transferred jurisdiction of radio licensing over to the new FCC.<sup>5</sup> Included in this transfer was jurisdiction over telecommunications that was previously handled by the Interstate Commerce Commission.<sup>6</sup> As new communications technologies emerged, so did efforts by Congress to restrict content and increase the power of the FCC over communication in America. As of today, the FCC is responsible for:

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2. Shalom C. Stephens, *What About Broadcast Violence?*, 15 MEDIA L. & POL'Y 57, 57 (2005).

3. *Id.*

4. See generally *Ley de Servicio de Comunicación Audiovisual* [Audiovisual Communication Services Law], Law No. 26.522, Oct. 10, 2009, [31756] B.O. 1 (Arg.) [hereinafter *Audiovisual Law*].

5. 47 U.S.C. § 151 (1996).

6. *Id.*

[R]egulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications.<sup>7</sup>

The FCC is an independent government agency directed by five commissioners appointed by the President and confirmed by the Senate to serve five-year terms.<sup>8</sup> It is organized into seven bureaus, which are responsible for “processing applications for licenses and other filings; analyzing complaints, conducting investigations; developing and implementing regulatory programs; and taking part in hearings.”<sup>9</sup> In order to enforce its regulations, the FCC relies largely on public complaints to alert them of violations.<sup>10</sup> Using the power granted to it in the Communications Act, the FCC determines the validity of these complaints on a case-by-case basis.<sup>11</sup> If the reported instance is judged to be indecent or obscene, the Commission takes action and penalizes those FCC license holders.<sup>12</sup>

One restriction of the FCC is that it does not have the ability to violate First Amendment rights regarding the freedom of speech.<sup>13</sup> This is outlined by the Communications Act and supported by the courts.<sup>14</sup> However, in most cases, the FCC does not end up facing this issue head-on.<sup>15</sup> It only influences the content decisions broadcast companies make through threats

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7. *Id.*

8. Jordan Butler, *The FCC in 2010: Seventy-Six Years of Obscenity, Indecency, and Inconsistency*, 39 CAP. U. L. REV. 621, 625 (2001).

9. *Id.*

10. Michael J. Cohen, *Have You No Sense of Decency? An Examination of the Effect of Traditional Values and Family-Oriented Organizations on Twenty-First Century Broadcast Indecency Standards*, 30 SETON HALL LEGIS. J. 113, 124–26 (2005).

11. *Id.*

12. *Id.*

13. Robert Valdes, *How Does the FCC Police Obscenity: Enforcing Obscenity Regulations*, HOW STUFF WORKS (Mar. 16, 2004), <http://people.howstuffworks.com/fcc-obscenity3.htm> (last visited Mar. 19, 2014).

14. *Id.*

15. *Id.*

of hefty fines and license revocations.<sup>16</sup> Technically, the FCC is not the party enforcing the suspensions in these cases because it has the option to enforce its restrictions through the courts.<sup>17</sup> Furthermore, the FCC has built an elastic clause into its policy that states that obscenity is not protected under the First Amendment, and because the FCC itself defines what is obscene, there is no violation of First Amendment rights in most situations.<sup>18</sup>

#### A. *Police Power of the FCC*

Although most people think the FCC actively monitors broadcasts, enforcement actions are typically based on documented complaints received from the public about obscene, indecent, or profane material.<sup>19</sup> The FCC staff reviews each complaint to determine whether the material in question falls within any of the restricted categories: Obscenity, indecency, and/or profanity.<sup>20</sup> If a complaint does not warrant an investigation, the Commission dismisses it.<sup>21</sup> However, if it appears that a violation has occurred, the staff starts an investigation, which may include a letter of inquiry to the broadcast station.<sup>22</sup> This letter informs the broadcast station that a complaint has been filed and requests additional information regarding the broadcast in question.<sup>23</sup> When the Commission receives a response from the broadcaster it must then determine whether a violation occurred, and then it must send a Notice of Apparent Liability (NAL) to the broadcaster.<sup>24</sup> An NAL is a preliminary finding that a law or the FCC's rules have been violated.<sup>25</sup> The broadcaster can either pay a forfeiture or submit an opposition to the NAL arguing why the forfeiture should not be

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16. *Id.*

17. *Id.*

18. Valdes, *supra* note 13.

19. Butler, *supra* note 8, at 639.

20. *Obscene, Indecent and Profane Broadcast*, FCC.GOV (Jan. 14, 2013), <http://www.fcc.gov/guides/obscenity-indecency-and-profanity> (last visited Mar. 19, 2014); Butler, *supra* note 8, at 639.

21. Butler, *supra* note 8, at 639.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 640.

imposed or whether it should be reduced.<sup>26</sup> In most cases, the broadcaster simply pays the forfeiture.<sup>27</sup>

On June 15, 2006, President George W. Bush signed into law the Broadcast Decency Enforcement Act of 2005 (BDEA).<sup>28</sup> The bill was sponsored by then-Senator Sam Brownback—now Governor of Kansas and former broadcaster himself—and endorsed by Congressman Fred Upton of Michigan who authored a similar bill in the U.S. House of Representatives.<sup>29</sup> The new law stiffened the penalties for each violation of the Act.<sup>30</sup> The FCC is now able to impose a maximum of \$500,000 in fines for each violation by a licensee or a non-licensee, such as an individual entertainer.<sup>31</sup> The legislation raised the fine more than ten-times over the previous maximum of \$32,500 per violation.<sup>32</sup>

Non-licensees who violate the indecency laws on live television are subject to \$11,000 fines on their second offense.<sup>33</sup> The law also allows the FCC to revoke the license of any station that violates its regulations, but it has never done so for an indecency violation.<sup>34</sup> For the first time in FCC history, the BDEA makes entertainers personally liable on their first violation of the FCC's indecency policy.<sup>35</sup> As well as increased penalties, the BDEA also expanded the list of factors the Commission must consider when assessing penalties for indecency violation, including “the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”<sup>36</sup> When evaluating the degree of culpability, the FCC must consider “whether the material uttered by the violator was live or recorded, scripted or unscripted; whether there was a reasonable opportunity to review recorded or scripted programming; whether there was a time delay mechanism for live programming; the size

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26. Butler, *supra* note 8, at 640.

27. *Id.*

28. Lili Levi, *The FCC's Regulation of Indecency*, 7 FIRST REPORTS 1, 11 (2008), available at [http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/FirstReport.Indecency.Levi\\_final\\_.pdf](http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/FirstReport.Indecency.Levi_final_.pdf) (last visited Mar. 29, 2014).

29. *Id.* at 10.

30. *See id.* at 11.

31. Cohen, *supra* note 10, at 135.

32. *Id.* at 134.

33. *Id.*

34. *Id.*

35. *Id.* at 135.

36. Cohen, *supra* note 10, at 136.

of the audience; and whether the content is considered children's programming."<sup>37</sup>

*B. FCC v. Pacifica: The Seven Filthy Words That Traumatized America's Youth*

Indecency was largely a non-issue in the initial days of American broadcasting. As a matter of fact, there was never a provision in the Communications Act prohibiting indecent broadcasts.<sup>38</sup> Instead, the Commission and the courts have historically relied upon a provision in the criminal code, which makes it a federal crime to transmit "obscene, indecent, or profane" material over the radio.<sup>39</sup> Although the FCC is prohibited from interfering with the First Amendment rights of broadcasters, it is empowered to regulate its content under 18 U.S.C. § 1464.<sup>40</sup> The Statute does not give the Commission express authority to impose sanctions on indecent broadcast, but the FCC and the courts have always recognized it by implication.<sup>41</sup>

Aside from a few isolated incidents, broadcast standards regarding indecency did not begin to change until the 1978 decision of *FCC v. Pacifica*, the first Supreme Court case on the issue.<sup>42</sup> In *Pacifica*, the Supreme Court defined the FCC's power over regulating "indecent" material.<sup>43</sup> The issue was whether the FCC had the power "to regulate a radio broadcast that was indecent but not obscene."<sup>44</sup>

In this case, comedian George Carlin recorded a twelve-minute monologue delivered to a live audience entitled "Filthy Words," which was about the seven words one cannot say in public.<sup>45</sup> A New York radio station owned by Pacifica aired the monologue at two o'clock in the afternoon.<sup>46</sup> The Commission ruled that Pacifica could have been subject to administrative sanctions, and while it did not impose formal sanctions, the

37. *Id.*

38. Michael Botein & Dariusz Adamski, *The FCC's New Indecency Enforcement Policy and Its European Counterparts: A Cautionary Tale*, 15 *MEDIA L. & POL'Y* 7, 9 (2005).

39. *Id.*

40. James C. Hsiung, *Indecent Broadcast: An Assessment of Pacifica's Impact*, 9 *COMM. & L.* 41, 43 (1987).

41. Botein & Adamski, *supra* note 38, at 9.

42. *Id.* at 10; *see also* *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

43. *Pacifica*, 438 U.S. at 729.

44. *Id.*

45. *Id.*

46. *Id.*

incident was noted in *Pacifica*'s license file.<sup>47</sup> Further, the Commission also stated, "in the event subsequent complaints were received, the Commission would then decide whether it should utilize any of the available sanctions granted by Congress."<sup>48</sup>

The Commission characterized the language used in Carlin's monologue as "patently offensive," but not necessarily obscene.<sup>49</sup> The distinction between offensive speech and obscene speech is relevant because the Supreme Court's First Amendment jurisprudence has protected only the former.<sup>50</sup> However, the monologue was characterized as "indecent."<sup>51</sup>

The Court held that the broadcasting was "uniquely pervasive."<sup>52</sup> The Court reasoned that "because the broadcast audience is constantly tuning in and out," warnings about the offensive material were impossible.<sup>53</sup> The Court focused on its assumption that broadcasting was "uniquely accessible by children, even those too young to read."<sup>54</sup> It found that exposing children to indecency would lead to traumatizing innocent young minds.<sup>55</sup> The Court did not take into consideration how little time was necessary to turn off a radio or change a channel, the fact that it is a parent's responsibility to supervise children's media exposure, or the possibility of future technological developments.<sup>56</sup>

*Pacifica* is particularly important because it gave the Commission broad leeway in determining what constitutes indecency and obscenity in different contexts.<sup>57</sup> Although its holding was quite narrow, and for a long time the FCC only sanctioned the broadcast of the seven words at issue in *Pacifica*, it would take thirty years for the Supreme Court to rule on another case involving foul language.<sup>58</sup>

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47. *Id.* at 730.

48. *Pacifica*, 438 U.S. at 730.

49. *Id.* at 731.

50. Brian J. Rooder, *Broadcast Indecency Regulation in the Year of the "Wardrobe Malfunction": Has the FCC Grown Too Big for Its Britches?*, 74 *FORDHAM L. REV.* 871, 873-74 (2005).

51. *Pacifica*, 438 U.S. at 738-39.

52. *Id.* at 748.

53. *Id.*

54. *Id.* at 749.

55. *Id.*

56. Botein & Adamski, *supra* note 38, at 12.

57. Butler, *supra* note 8, at 628.

58. *Id.*

### C. *Obscenity, Indecency, and Inconsistency*

Under federal law, anyone who utters any obscene, indecent, or profane language by radio communication can be fined, imprisoned for a maximum of two years, or both.<sup>59</sup> It is also a violation of federal law to air indecent programming or profane language during certain hours.<sup>60</sup> Congress has given the FCC the responsibility for administratively enforcing these laws.<sup>61</sup> The FCC may also revoke a station license, impose monetary forfeiture, or issue a warning if a station airs obscene, indecent, or profane material.<sup>62</sup> However, no statute defines what constitutes “obscene, indecent, or profane.”

#### 1. Indecency and Profanity

In 1987, the FCC readdressed the indecency standard established in *Pacific*, which held that indecent speech involved the description of sexual or excretory activities or organs in a “patently offensive manner as measured by contemporary community standards.”<sup>63</sup> Although the standard was to be assessed based on context and could not be judged in the abstract, the FCC decided not to confine itself to the narrowness of the *Pacific* holding.<sup>64</sup> The FCC found that Carlin’s seven words were no longer the only words that were indecent: “Those particular words are more correctly treated as examples of, rather than a definite list of the kind of words that constitute indecency.”<sup>65</sup>

Today, the definition of indecency is “language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities.”<sup>66</sup> Specifically, indecent programs are those that contain patently offensive, sexual, or excretory material that do not rise to the level of obscenity.<sup>67</sup> With context being the critical factor, the FCC looks at three additional factors in analyzing broadcast material: 1) whether the description or depiction is explicit or graphic; 2) whether the material

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59. 18 U.S.C. § 1464 (2013).

60. *Regulation of Obscenity, Indecency, and Profanity*, FCC.GOV (July 17, 2012), <http://transition.fcc.gov/eb/oip/Welcome.html> (last visited Mar. 19, 2014).

61. *Id.*

62. *Id.*

63. Butler, *supra* note 8, at 630.

64. *Id.*

65. *Id.* at 631.

66. *Obscene, Indecent and Profane Broadcast*, *supra* note 20.

67. *Id.*



dwells on or repeats at length descriptions or depictions of sexual or excretory organs; and 3) whether the material appears to pander or is used to titillate or shock.”<sup>68</sup> Other than context, none of these factors are critical—rather, the Commission “weighs and balances” the factors.<sup>69</sup>

While courts have held that indecent material is protected by the First Amendment and cannot be banned entirely, it may be restricted in order to avoid its broadcast during times of the day when there is a reasonable risk that children may be in the audience.<sup>70</sup> Consistent with a federal indecency statute and federal court decisions interpreting the statute, the Commission adopted a rule that broadcasts (both on television and radio) that fit within the indecency definition and that are aired between 6:00 a.m. and 10:00 p.m. are prohibited and subject to indecency enforcement action.<sup>71</sup> “Profane language” includes words so highly offensive that “their mere utterance in the context presented may amount to nuisance.”<sup>72</sup> Like indecency, profane speech is prohibited on broadcast radio and television between the hours of 6:00 a.m. and 10:00 p.m.<sup>73</sup> The definition the FCC employs is “vulgar and coarse language.”<sup>74</sup>

#### *a. Bono’s F-Bomb*

In a 2004 order, the Commission established new definitions of “indecency” and “profanity” on broadcast television.<sup>75</sup> At issue were musician Bono’s remarks on an NBC television network program after he received the 2003 Foreign Press Association’s Golden Globe award for “best popular song.”<sup>76</sup> The words of controversy were “this is fucking brilliant.”<sup>77</sup>

The FCC held that Bono’s use of the F-word on national television was not only indecent but profane as well.<sup>78</sup> The opinion held that Bono’s words were a “depiction” because they had a sexual connotation.<sup>79</sup>

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68. Butler, *supra* note 8, at 631.

69. *Id.* at 632.

70. *Obscene, Indecent and Profane Broadcast*, *supra* note 20.

71. Butler, *supra* note 8, at 632.

72. *Id.*

73. *Id.*

74. *Id.*

75. Botein & Adamski, *supra* note 38, at 19.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

Because of its context and the time of the day of the utterance, the “F-word” amounted to profanity, not just indecency.<sup>80</sup> It found them “patently offensive” for several reasons.<sup>81</sup> First, “fucking” was one of the most vulgar, graphic and explicit descriptions of sexual activities in the English language.<sup>82</sup> Second, “children were expected to be in the audience.”<sup>83</sup> And third, NBC was on notice of Bono’s proclivity for indecency.<sup>84</sup>

Historically, speech that was found to be profane was focused in the context of blasphemy.<sup>85</sup> Recognizing that the FCC previously had refused to impose liability upon “isolated or fleeting” uses of indecency, Michael Powell, Chairman at the time, overruled an entire line of cases dating back more than fifteen years.<sup>86</sup> The 2004 order put broadcasters on notice that profane speech will not be confined to the blasphemous, but rather that the “F-word” and other highly offensive words will be considered, depending on the context.<sup>87</sup> Before the order, the Commission did not make clear which words were within the new ban—once again, leaving unclear the status of the seven sinful words of George Carlin and others.<sup>88</sup>

In the end, the Commission did not fine CBS for the broadcast on the ground that it did not have sufficient notice of the change in the law.<sup>89</sup> However, Commissioners Michael Copps and Kevin Martin, concurring in part with Chairman Powell, expressed their desire to have imposed a fine on the grounds that CBS should have known the material’s indecency and did not make sufficient efforts to censor it.<sup>90</sup>

### b. *The Super Bowl Slip-Up*

In terms of fines, there was no action taken by the FCC since *Pacifica* until 1987, about ten years later.<sup>91</sup> In the early 2000s, the FCC began to

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80. Botein & Adamski, *supra* note 38, at 19.

81. *Id.*

82. *Id.*

83. *Id.*

84. See Botein & Adamski, *supra* note 38, at 19 (basing its assumptions upon quotations from an entertainment news website).

85. *Id.* at 20.

86. *Id.*

87. *Id.*

88. *Id.*

89. Botein & Adamski, *supra* note 38, at 19.

90. See Botein & Adamski, *supra* note 38, at 19 (they were not concerned that the technology necessary to establish even a five-minute delay costs hundreds of thousands of dollars per station).

91. See *supra* Part II.B.

increase censorship and enforcement of indecency regulations, most notably following the Janet Jackson “wardrobe malfunction” that occurred during the halftime show of Super Bowl XXXVIII.<sup>92</sup>

In September 2004, the FCC issued a \$550,000 Notice of Apparent Liability against Viacom, Inc., the owner of the CBS and MTV Networks, for airing a program with a half-second image of Janet Jackson’s breast.<sup>93</sup> During a dance routine, as Justin Timberlake sang “bet I’ll have you naked by the end of this song,” he removed “a portion of Jackson’s bustier,” exposing her breast to the camera for 19/32 of a second.<sup>94</sup>

The Commission found the incident to be indecent under the Golden Globe’s two-part test.<sup>95</sup> First, it held that the half-second image of Ms. Jackson’s breast was a depiction of a “sexual organ.”<sup>96</sup> Second, it found that it had “pandered” viewers, noting that children were probably in the audience.<sup>97</sup> Jackson and Timberlake both stated that they had not informed CBS nor MTV of the planned “costume reveal.”<sup>98</sup> Thus, since there was no evidentiary hearing to establish their credibility, the chairman had great difficulty establishing Viacom’s responsibility for the material.<sup>99</sup> Despite the lack of evidence, the FCC found that CBS and MTV were “well aware of the overall sexual nature of the Jackson/Timberlake segment” and still took no action to prevent possible indecency.<sup>100</sup>

In retrospect, the FCC seemed to be suggesting that the broadcaster’s failure to detect and remedy potential indecency was a basis for liability.<sup>101</sup> This rationale raises difficult issues as to both liability and evidence.<sup>102</sup> It is easy to build one inference upon another, especially when the Commission consistently avoids holding evidentiary hearings on cases, relying instead solely upon written filings.<sup>103</sup> This was not the first time, and certainly will not be the last, that the FCC expects a broadcaster to anticipate the actions and words of its entertainers.

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92. Botein & Adamski, *supra* note 38, at 21.

93. *Id.* at 20–21.

94. *Id.* at 21.

95. *Id.*

96. *Id.*

97. Botein & Adamski, *supra* note 38, at 21.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. Botein & Adamski, *supra* note 38, at 21.

103. *Id.*

## 2. Obscenity

Obscene material is not protected by the First Amendment to the Constitution and cannot be broadcasted at any time.<sup>104</sup> The restrictions on obscene material were established in *Miller v. California*.<sup>105</sup> Although *Miller* had nothing to do with violations of broadcast restrictions, it set the stage for the obscenity standard.<sup>106</sup> The case involved the application of a state's criminal obscenity statute to the aggressive sale of sexually explicit materials to unwilling recipients, who had in no way indicated any desire to receive such materials.<sup>107</sup> The Supreme Court recognized that States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when it carries with it a significant danger of offending the sensibilities of unwilling recipients or exposures to juveniles.<sup>108</sup> Consequently, the Court outlined the standard that States may use to identify obscene material in order to regulate such content without infringing on the First Amendment.<sup>109</sup>

Although the Court acknowledged the inherent dangers of undertaking regulation of any form of expression, it confined the permissible scope of such regulation to works that depict or describe sexual conduct.<sup>110</sup> The Court established a three-prong test to determine whether material is obscene:

- 1) An average person, applying contemporary standards, must find the work, taken as a whole, appeals to the prurient interest;
- 2) The material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable state law; and
- 3) The material, taken as a whole, must lack serious literary, artistic, political or scientific value.<sup>111</sup>

The Court held that sex and nudity may not be displayed without limit by films or pictures exhibited or sold in places of public accommodation

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104. *Obscene, Indecent and Profane Broadcast*, *supra* note 20.

105. See *Miller v. California*, 413 U.S. 15 (1973).

106. *Id.* at 24.

107. *Id.* at 18.

108. *Id.* at 18–19.

109. *Id.* at 19–20.

110. *Miller*, 413 U.S. at 24.

111. *Id.*

any more than live sex and nudity can be.<sup>112</sup> At a minimum, the sexual content, although perhaps appealing to the prurient interest or patently offensive, must have serious literary, artistic, political, or scientific value to merit such First Amendment protection.<sup>113</sup> Under *Miller*, no person will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive sexual conduct as defined by state law.<sup>114</sup> The Court stated that the specific requisites set forth would provide fair notice to a dealer that his public and commercial activities may bring prosecution.<sup>115</sup> Accordingly, if the States and Congress are unable to define regulated materials with critical precision, such power will be removed altogether and “hard core” pornography may be exposed without limit to the juvenile, the passerby, and the consenting adult alike.<sup>116</sup>

### 3. Inconsistency

It is worthy of noting the inconsistency between definitions and their application in the three categories of FCC restrictions. Obscene material, which can be seemingly obvious to the naked eye, is defined so specifically and so narrowly, and yet its broadcast is not permitted at any time. On the other hand, a vague term like “decency,” which its interpretation varies from one person to another, is the very restriction imposed on broadcast television for fourteen hours a day. Similarly, profanity is accessible almost anywhere you go outside the home and cannot be blocked from your ears once you have heard it—the home itself is the only place where you have complete control over what you hear, and yet the FCC also has jurisdiction there.

### 4. What About Broadcast Violence?

Amid the focus of legislative concern about sexual content on television, little attention has been paid to violent content on broadcast television.<sup>117</sup> Despite all the studies that purport to link violent television programming to violent conduct on impressionable children, the FCC, Congress, and the general public have done nothing about the amount of violence that airs daily on public television.<sup>118</sup> While the general public

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112. *Id.* at 25–26.

113. *Id.* at 26.

114. *Id.* at 27.

115. *Miller*, 413 U.S. at 27.

116. *Id.* at 28.

117. Stephens, *supra* note 2, at 57.

118. *Id.*

was appalled by the slight glimpse of Janet Jackson's bare breast in the "family-friendly" Super Bowl, the general public did not seem offended by the blood and gore in a primetime airing of *Saving Private Ryan*.<sup>119</sup> It seems that the government is more concerned about the effect that hearing the F-word or seeing a part of the human body on television has on children, than the effect of viewing violence or the gore of war.<sup>120</sup>

The first attempt by Congress to regulate broadcast violence came with Section 551 of the Telecommunication Act, known as "Parental Choice in Television Programming."<sup>121</sup> The two main components of the law are: "1) [T]he requirement that a voluntary rating system be established for rating programs on both broadcast and cable television that contains sexual, violent or other materials parents may deem inappropriate, and 2) the establishment of a mandatory blocking system for all new television sets over thirteen."<sup>122</sup>

The voluntary rating system requires the rating given to each program to be displayed for the first fifteen seconds of broadcast and the v-chip must be programmable to block those particular programs with a rating deemed unacceptable by a parent.<sup>123</sup> Cable content providers were also given the choice of whether to rate the programming themselves.<sup>124</sup> To date, the v-chip legislation has been the only law Congress has passed that affects violent content on television.<sup>125</sup>

The Broadcast Decency Enforcement Act of 2004 maintained an increase in penalties and added an additional section titled "Children's Protection from Violent Programming."<sup>126</sup> A letter from the American Civil Liberties Union (ACLU) urged opposition to the entire bill, stating that the FCC's definition of indecency was vague, and as a result, speakers were engaged in speech at their own peril, making them guess what the FCC would determine as prohibited.<sup>127</sup> Speakers and smaller broadcasters were more likely to remain silent rather than face a potentially ruinous

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119. *Id.* at 58.

120. *Id.*

121. *Id.* at 67.

122. Stephens, *supra* note 2, at 67.

123. *Id.*

124. *Id.*

125. *Id.* at 68.

126. *Id.* at 69.

127. Stephens, *supra* note 2, at 69.

fine.<sup>128</sup> Although the bill died in committee, it was revived in 2005 without any of the provisions related to violent content.<sup>129</sup>

### III. THE ARGENTINE STORY

The fundamental principle of media law in Argentina is freedom of the press.<sup>130</sup> Freedom of the press allows the press to publish or broadcast without censorship. However, in Argentina, certain limits are imposed on the media for the protection of minors, as required by international standards.<sup>131</sup> The Argentine Constitution sets out that anything published or broadcasted within the country cannot infringe the rights of others and should not be contrary to what is considered “public order or morality.”<sup>132</sup> The following section will discuss the history of Argentine media laws and analyze how they evolved.

#### A. *History of Broadcasting Laws in Argentina*

In 1976, under the belief that the state was entitled to control the mass media, the Peronist Government single-handedly cancelled the licenses of several private television channels.<sup>133</sup> It also confiscated production companies “in the name of the public interest,” and levied taxes on advertising that decreased the earnings of the privatized media and increased the government’s control.<sup>134</sup> Upon the death of President Peron in 1974, Argentina entered an era of lawlessness, in which the armed-forces (the “Junta”) staged a military coup.<sup>135</sup> Although the military maintained its belief of freedom of the press and private media ownership to the citizens, it ordered strict adherence to the notion of Argentine national security: Indefinite jail terms for media outlets that released information on guerilla groups and ten-year jail terms for members of the media who transmitted information in opposition to the armed forces or made mention

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128. *Id.*

129. *Id.* at 70.

130. ANDREW B. ULMER, *MEDIA, ADVERTISING, & ENTERTAINMENT LAW THROUGHOUT THE WORLD* § 1:1 (2013 ed.).

131. *Id.*

132. *Id.*; see also Art. 4, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

133. Julieta Grinffiel, *Media Laws in Latin America: A Comparison Between Venezuela and Argentina*, 17 L. & BUS. REV. AM. 557, 567 (2011).

134. *Id.*

135. *Id.*

of the military's disregard for human rights.<sup>136</sup> This demand converted Argentina into a state of terror.<sup>137</sup>

Although the Junta had promised it would allow television channels to regain the private control they previously held, instead, it used them to gain "favorable news coverage and strict censorship control."<sup>138</sup> The Junta regime also passed the Broadcasting Law of 1980, which established "caps on station ownership, prevented newspaper-TV cross-ownership, prohibited the formation of TV broadcasting networks, banned foreign investment, and imposed numerous content regulations."<sup>139</sup> During this period, local broadcasting licensing cases were the responsibility of the executive branch and cases of complementary services, such as cable television, was in the hands of the "Comite Federal de Radiodifusión" (COMFER).<sup>140</sup>

In the late 1980s, Argentina began to see a new era where the government was loosening its control over media outlets, and underwent a process of internationalization.<sup>141</sup> In 1991, a Presidential decree lifted the ban on the creation of national networks and eliminated the cap on advertisement time per hour and product placement during regular programming.<sup>142</sup> Thereafter, in 1994, the ban on foreign investments was lifted through a treaty with the United States.<sup>143</sup> The increase on foreign investment lifted a financial burden from Argentina and led to more educational and cultural programming.<sup>144</sup>

The Law on Audiovisual Communication Services (ACA), enacted in 2009 and adopted in 2010, replaced the Broadcasting Law of 1980.<sup>145</sup> Its purpose is not to control the programming of a media broadcasting company nor limit or sanction freedom of expression, but rather to promote the ideals of ethics.<sup>146</sup> Although the law does not expressly state the protection of the youth as its objective, it could be implied by the underlying tones of the text.

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136. *Id.*

137. *Id.*

138. Grinffiel, *supra* note 133, at 658.

139. *Id.*

140. *Id.*

141. *Id.* at 569.

142. Grinffiel, *supra* note 133, at 659.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 569–70.



### 1. AFSCA and the New Law

The FCC's counterpart in Argentina is the Federal Authority of Audiovisual Communication Services (AFSCA).<sup>147</sup> It is a decentralized agency created from Article 10 of Law No. 26.522 of the ACA, and its main function is to implement, interpret, and enforce the new media laws.<sup>148</sup> The AFSCA is in charge of issuing television and radio operating licenses restrictions.<sup>149</sup> The new law also seeks to "regulate audiovisual media services rendered in Argentinian territory, and to develop mechanisms aimed at promoting decentralization and thriving competition in order to lower costs, democratize and universalize the utilization of new information and communication technologies."<sup>150</sup>

The key provisions of the new law require cable television networks to include channels of universities, municipalities, and provinces within their coverage area of services.<sup>151</sup> In addition, it limits the percentage of foreign ownership in local radio and television broadcasting to thirty percent, as long as non-Argentina-based ownership does not result in direct or indirect control of the company.<sup>152</sup> One of the most important provisions of the new law is the restriction on television content. According to the law:

The content of programming, previews and advertising must in all cases be G-rated from 6:00 to 22:00 and programs considered to be suitable for adults only, from 22:00 to 6:00. Programs subject to parental guidance must show the relevant rating just at their beginning. Children under twelve shall not participate in programs broadcast from 22:00 to 8:00 unless such programs shall have been recorded beyond those hours and a legend for the purpose shall be shown on the screen. Regulations shall establish the minimum number of hours of production and broadcasting of audiovisual material for children on open television channels, at least fifty of which shall be national in origin, and shall require that a specific warning is shown in the event information (news programs/ashes) potentially harmful to children were required to be broadcast during hours not reserved for adult audiences.<sup>153</sup>

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147. *Qué es el AFSCA [What is AFSCA]*, AFSCA, <http://www.afsca.gob.ar/que-es-el-afsca> (last visited Mar. 19, 2014).

148. *Id.*

149. *Id.*

150. *See* Audiovisual Law, *supra*, note 4, art. 1.

151. *Id.* art. 1(g).

152. *Id.*

153. *Id.* art. 68.

The objective of this specific restriction is to ensure that children have access to information and material from a diversity of national and international sources.<sup>154</sup> Especially those aimed at the promotion of social, spiritual, and moral well-being, and physical and mental health.<sup>155</sup> The law suggests that the Argentinian Government will develop appropriate guidelines to protect children from information and material that could injure their well-being.<sup>156</sup> However, such developments have yet to be made. Although the law threatens to impose sanctions on non-compliant stations, four years later, such guidelines still do not exist.

The Argentinian children's "well-being" standard is even more vague than the American decency standard. Pursuant to the Law, Argentinian television content must promote, for sixteen hours of the day, the social, spiritual, and moral well-being, and physical and mental health of children. This new law ignores two factors: 1) While aiming to increase foreign investment, the government is not taking into consideration the significant amount of technology, time, and work it will cost foreign broadcasters to comply with such vague laws, and 2) that the government is completely taking over the job of parenting. Instead of allowing more varied content on daytime television, the Argentine Government is restricting the whole country to view television fit for a twelve year-old. It would be acceptable if these restrictions were placed on free television, but they are also being placed on paid television channels.

#### IV. CONCLUSION

In conclusion, although it is apparent that both the United States and Argentina have valid justifications for regulating the content available to their youth, it is very difficult to draw an exact line with regard to what content is acceptable to air. The FCC itself has not been able to create a definition for indecency that is sufficiently specific as to put all broadcasters on alert of a possible violation. The fact that this broadcast content is judged based on contemporary community standards is the most troubling part. We currently have a generic contextual rule which allows the FCC the discretion to decide the meaning of decency according to ever changing standards. On the contrary, a bright-line rule would be sure to infringe on First Amendment rights of broadcasters. Setting such strict guidelines of what is and is not decent for purposes of broadcast television

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154. *Id.*

155. *Id.*

156. *Id.*

is also a matter of public opinion, which is evolving and changing with younger generations.

Furthermore, the new media law in Argentina is not yet ripe for a full-fledged criticism. Insufficient time has passed since the passing of the law to determine just how far the Argentinian government is willing to take its discretionary power. The law was established under the basic principle of freedom of the press and free from censorship. However, AFSCA has censored on a program-by-program basis for the past two years without introducing any guidance reports on its interpretation of material fit for minors. Without criteria for the broadcast companies to abide by, AFSCA sends warning letters to the broadcast companies individually, per program, for violating its laws. This standard has forced companies to comport themselves based on their past mistakes; only learning by doing wrong. Before meaningful progress can be made, both the American and the Argentinian legislatures need to provide clear guidelines for their respective agencies to follow in making indecency determinations, independent from the influence of socially conservative organizations.