

The Decline of Medium-Specific Content and the End of Medium-Specific Content Regulation: A Response to Professor Calvert

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In his Article *The Two-Step Evidentiary and Causation Quandary for Medium-Specific Laws Targeting Sexual & Violent Content: First Proving Harm and Injury to Silence Speech, then Proving Redress and Rehabilitation Through Censorship*, Professor Clay Calvert argues that the government, in defending regulations that target content on a particular medium, cannot demonstrate that such regulations achieve the effect of reducing the alleged harm of exposure to such content in light of the fact that the same or similar content is available from other, nontargeted media. Professor Calvert focuses on the ubiquity of sexual and violent content in the abstract, while providing brief examples of instances where identical sexual or violent content may be simultaneously available on different media. This Response will focus on the latter issue in more detail, discussing the trend of media outlets providing the same content on multiple platforms, and will argue that this trend marks a movement away from the notion of medium-specific content. In light of the decline of

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medium-specific content, medium-specific content regulation necessarily fails both as a practical and legal matter.

In recent years, online content has become an increasingly significant element of media programming. The importance of online content in the entertainment industry was dramatically illustrated, in more ways than one, through the recent strike by the Writers Guild of America (“WGA”). The WGA called the strike last Fall in response to a dispute over compensation for work provided over the Internet, mobile phones, and iPods.¹ Once the strike was underway, many striking writers and underutilized actors began producing content designed exclusively for the Internet, both to express their talents during the studio shut-down and to publicize the strike itself.² The broad presence of alternative media may also have affected the strike’s impact as compared with previous WGA strikes, with the ready availability of entertainment from other media creating an exacerbated risk of permanent abandonment of traditional media by viewers.³ The WGA strike demonstrated that alternative electronic media is, and will continue to be, an integral component of the entertainment industry. Accordingly, any attempt at media regulation by the government must account for the importance of multimedia content delivery.

The alternative content distribution at the center of the WGA strike takes many forms, as television networks have incorporated online content into their programming in several ways. In perhaps the simplest way, major networks are now making full episodes of popular television shows available online, both through Web sites run by the networks themselves and through download services such as iTunes.⁴ In addition to these simple wholesale shifts of televised content from one format to another, networks are combining online content with televised content, creating integrated narratives that are presented simultaneously across different media. For example, the popular television series *Lost* airs in typical weekly hour-long

1. Press Release, Writers Guild of America, Writers Guild of America Votes to Call for Strike, Effective Monday, November 5 (Nov. 2, 2007), available at http://www.wga.org/subpage_newsevents.aspx?id=2534.

2. Dave Itzkoff, *Sidelined by the Strike, Comedy Goes Online*, N.Y. TIMES, Feb. 10, 2008, at AR1.

3. Dave McNary, *Economist forecasts impact of strike*, VARIETY, Nov. 28, 2007, available at <http://www.variety.com/article/VR1117976653.html?categoryid=1066&cs=1> (“Video games, Wiis, PlayStation 3s and other devices, content downloaded to iPods, and telephones, YouTube, MySpace and Facebook, are but a few of the threats to the industry of a long strike.”).

4. See, e.g., Press Release, The Walt Disney Company and Affiliated Companies, Disney-ABC Television Group’s Emmy-Winning ABC.com Brings Back Enhanced, Ad-Supported Broadband Player This Month, available at http://corporate.disney.go.com/news/corporate/2006/2006_0913_abcbroadband.html; CBS.com – Video, <http://www.cbs.com/innertube/>; FOX Broadcasting Company: FOX On Demand, <http://www.fox.com/fod/>.

episodes on ABC television stations. However, ABC has added to the *Lost* universe with content available exclusively online, including fully produced short videos, written by the show's regular writers and featuring the show's actors, that provide additional plot elements to the overarching storyline.⁵ In addition to these online features, the producers of *Lost* have released mobile phone content,⁶ and even a print novel purportedly authored by a fictional character from the show.⁷ Unlike traditional cross-media promotions which simply provide information about television programs, each of these features provides separate plot elements that are not directly presented during the on-air broadcasts. The producers of *Lost* are thus telling a single story with discrete content on numerous different media.⁸

The use of multiple media platforms to provide traditional broadcast content limits the reach of government regulations. Significantly, in at least one instance, a television network has offered a more explicit version of a television broadcast online. When NBC's digital short, "Dick in a Box," originally aired during *Saturday Night Live* in December 2006, the feature's many instances of the word "dick" were censored.⁹ However, NBC later posted a complete, uncensored version of the video on its Web site.¹⁰ Of course, the original airing occurred during the statutory safe harbor period, and therefore indecency regulations were inapplicable regardless of the televised content. However, the fact that NBC applied different censorship standards to the same content on two different media is telling. The uncensored version of "Dick in a Box" is available to anyone, twenty four hours a day on NBC's Web site. As a general matter, there is no legal reason why a network could not provide a sexually explicit episode of *Grey's Anatomy* or a profanity-laced installment of *How I Met Your Mother* online, well beyond the reach of government censorship.

5. Edward Wyatt, *Webisodes Of 'Lost': Model Deal For Writers?*, N.Y. TIMES, Nov. 20, 2007, at E1.

6. Andrew Wallenstein, *'Lost' deal hatched for mobile*, THE HOLLYWOOD REPORTER, Nov. 17, 2005, available at http://www.hollywoodreporter.com/hr/search/article_display.jsp?vnu_content_id=1001523765.

7. Gary Troup, *Bad Twin* (2006).

8. Supplemental content is not limited to fictional programming. As another example of unified content presented on multiple platforms, National Public Radio often provides additional details—such as photographs, videos, and original source material—regarding its radio broadcasts on its Web site, NPR.org. See About NPR, <http://www.npr.org/about/> ("With original online content and audio streaming, NPR.org offers hourly newscasts, special features and ten years of archived audio and information.").

9. Jacques Steinberg, *Censored 'SNL' Sketch Jumps Bleepless Onto the Internet*, N.Y. TIMES, Dec. 21, 2006, available at <http://www.nytimes.com/2006/12/21/arts/television/21sket.html>.

10. *Id.*

Given the ease with which content providers are able to switch between different media to convey the same content, the quandary facing government regulators discussed in Professor Calvert's article becomes all the more acute. In addition to the general ubiquity of sexual, violent, and indecent content in media, regulators must further contend with the fact that a content provider, faced with a regulation targeting one medium, can simply move the targeted content to a wholly different, relatively unregulated medium and reach just as wide of an audience. From the consumer's standpoint, the government has altogether failed to provide any "protection" from the offending content. As multiplatform programming becomes more common, a consumer will perceive less of a difference between viewing content on a television set and viewing the same content online or by mobile phone. A medium-specific regulation in this scenario provides no remedy at all.

The concept of switching media to escape government regulation is not new. When radio host Howard Stern left broadcast radio for satellite radio, he explicitly (and repeatedly) cited his desire to avoid FCC constraints as the motivation for the change.¹¹ However, when a single content provider can make the exact same content available simultaneously through television sets, Web browsers, mobile phones, and iPods, such medium-switching need not be as dramatic as Stern's retirement from terrestrial radio. A television network could easily avoid broadcast regulation either by hosting a different version of "clean" broadcast material on its Web site (as with "Dick in a Box"), or by removing the objectionable subject matter from the broadcast medium altogether and instead including it as supplemental content on a different platform. A viewer consuming the content from multiple sources would be unaffected by a regulation targeting only one platform.

As detailed by Professor Calvert, this remedial failure leaves medium-specific laws difficult to defend against court challenges based on underinclusiveness. The availability of traditional broadcast content on an increasing range of nonbroadcast electronic media also casts doubt upon the constitutionality of content-based broadcast regulation. The rise of cable television in recent decades has led some commentators—including judges and FCC Commissioners—to question whether the technology-based rationales for allowing government regulation of First Amendment-protected speech on broadcast media are still viable.¹² Specifically, the

11. Scott Collins, *Stern Vows He'll Rise Above FCC*, L.A. TIMES, Oct. 7, 2004, at A1.

12. See generally Matthew C. Holohan, Note, *Politics, Technology, & Indecency: Rethinking Broadcast Regulation in the 21st Century*, 20 BERKELEY. TECH. L.J. 341, 366-68 (2005).

FCC's authority over broadcasters has traditionally been justified by the scarcity of broadcast frequencies, the intrusiveness of broadcast signals into households, and the ease of access to broadcast content by children.¹³ With hundreds of cable television channels and an increasing number of American households subscribing to cable television, these rationales have become largely obsolete. In short, there is little justification for treating the handful of broadcast television and, now, radio channels differently from the hundreds of cable and satellite stations accessible through the very same devices. The rationale for targeting broadcast channels dissipates further when the rise of Internet, mobile phone, and iPod content is taken into account. The more electronic platforms exist for delivery of the same content, the less justification there is for singling out one platform for government censorship.

The technological development of the entertainment media continues to outpace both the government's ability to effectively regulate media content and the constitutional rationales for allowing censorship of protected speech. Professor Calvert's proposed solution is "to end the medium-specific regulation of sexual and violent content and, instead, to let technological remedies administered by parents on an individual and voluntary basis take the place of government-mandated censorship." Privately controlled, technological censorship means are better equipped than government regulations to keep up with the technological advancements of media outlets. This is a sensible alternative to decreasingly defensible medium-specific laws.

13. *Red Lion Bdcst. Co. v. FCC*, 395 U.S. 367 (1969); *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).