

Policy Groups: FCC Shouldn't Judge Indecency

Court Filing Says Landmark 'Pacifica' Decision Should Be Overturned

By John Eggerton

Washington -- Public Knowledge, the Cato Institute and a collection of tech-policy groups have called on the U.S. Supreme Court to overturn the 1978 [FCC vs. Pacifica decision](#) and give broadcasters the same First Amendment freedom to program to their audiences as other media including print, cable and the Internet.

That urging came in a friend of the court brief supporting Fox and ABC. The Supreme Court is currently deciding whether to uphold Federal Communications Commission indecency decisions against those two broadcasters after the 2nd U.S. Circuit Court of Appeals ruled that those decisions -- and the FCC's underlying indecency-enforcement policy -- were unconstitutionally vague and chilling. The FCC and DOJ appealed those rulings.

"*Pacifica* is based on an archaic and unrealistic conception of broadcast television," they argued. In the 1978 *Pacifica* decision, the high court voted 5-4 to uphold an FCC decision to reprimand Pacifica-owned New York radio station WBAI for airing comedian [George Carlin's "Filthy Words" routine](#), establishing the current standard of "indecent but not obscene" material.

The groups go further than the National Association of Broadcasters [in asking for the FCC to get out of the content-regulation business](#). Given the way the tech companies frame their support of broadcasting, it is not a surprise they are not exactly on the same page.

The groups, which include TechFreedom, the Center for Democracy & Technology and

the Electronic Frontier Foundation, essentially argue that broadcasting should be free of content regulations because technology has rendered it "rare," rather than pervasive, with only a small and dwindling percentage of people receiving content over the air.

The groups go through a laundry list of alternative video delivery methods they say have "largely displaced" traditional broadcasting, including cable and telco TV, direct-broadcast satellite, Internet streaming and online DVD rentals. That, of course, is the argument tech companies -- particularly computer and consumer-electronics firms -- have used to argue for taking broadcast spectrum back from the industry to make more bandwidth available to smartphones and tablet devices.

They contrast the current media terrain to that of the mid-1970s, when the *Pacifica* decision was rendered. At that time, there were few cable outlets and the choice was essentially between broadcast and print media.

"Whatever legal logic and common sense *Pacifica* might once have had was built on factual foundations that have long since collapsed," the tech firms argued. "Traditional broadcasting has been largely replaced by other video delivery media that are invited into the home."