Techno-neutrality of Freedom of Expression in New Media Beyond the Internet: Solutions for the United States and Canada

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INTRODUCTION

From radio to telephone to television and now the Internet, the evolution of new media technology has soundly tested the value that society, through the law, places on freedom of expression. The law's reaction to new media technology mirrors society's reaction in many ways. Uneasiness of the power and breadth of a new media's expressive possibilities prompts reluctance in creating legal frameworks that address how the media will operate under current freedom of expression constitutional doctrine. Government attempts to regulate media have typically been driven by two goals: protection of the vulnerable from harmful expression and upholding the accessibility to a new mode of expression. These regulatory aims, by their operative nature, impinge on the right of freedom of expression. American courts have

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attempted to address the constitutionality of various media regulations by focusing not so much on the goals of the proposed regulation or on the expression being transmitted but on the unique technical qualities of the medium transmitting the expression. Canadian courts, by contrast, adopt a contextual approach to protecting expression, which involves a balancing of interests based on neither the content of the expression nor its possible medium of transference. Media technology will continue to develop at a rapid pace, bringing into everyday use previously not thought of ways of communicating.

The challenge for American courts appears to be whether or not a consistent and workable freedom of expression jurisprudence can emerge when an emphasis on type of media seems to be supplanting the evolution of a freedom of expression doctrine that is based on the fundamental concern of protecting expression as espoused in the First Amendment.[1] All forms of media have the potential to carry roughly the same content of expression. It is only the degree of transference of that expression that differs from media form to media form. When a court develops freedom of expression doctrine based on this difference in degree of transference, it has historically ignored the purpose of the proposed regulation of expression as well as the competing purpose of protecting that expression from any regulation. The balancing of the interests of speaker and society falls apart. The result is a body of jurisprudence that is overly categorical and inconsistent. No useful precedents are created to aid future courts faced with new media. Rather, courts are forced either to use incompatible analogies between media or to adopt new principles that may be incompatible with past freedom of expression philosophy. A court may also assess the possibilities of new media too early in the life of the media and create a precedent that is either dated or irrelevant, as the media's use will change in the future. Freedom of expression doctrine must therefore be advanced in a technologically neutral fashion, akin to the contextual balancing approach present in Canadian constitutional jurispru-

[1] U.S. CONST. amend. I. states "Congress shall make no law...abridging the freedom of speech." Throughout this paper, the Canadian term "freedom of expression," as espoused in s. 2(b) of the *Canadian Charter of Rights and Freedoms*, CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms) is used to also denote the American concept of "freedom of speech," except where the two terms are specifically differentiated within the text.

dence. This will foster a consistent set of portable constitutional concepts that adhere to the fundamental purposes of balancing the right to express with the need to regulate some expression. Courts facing new and emergent media forms may then develop the law in a more cogent manner without succumbing to the difficulties experienced in past jurisprudence.

This paper is divided into four parts. Part I sketches an overview of the argument that constitutional cases involving freedom of expression in various media should approach American First Amendment questions without regard to the technical qualities of the medium carrying the expression. Various types of media differ only in degree and the differences may be constitutionally irrelevant in many instances. The basic doctrines surrounding constitutional challenges to government attempts at regulating expression are explained. The Part ends with a proposal for a technologically neutral way of balancing the protection of expression with the government's regulatory goals. Part II demonstrates how the pitfalls of analogy, novelty, and timeliness have marred American First Amendment jurisprudence when courts focus primarily on distinctions between types of media. The Part is necessarily exhaustive for two reasons: firstly, to establish the historical patterns of difficulty that courts dealing with new media have encountered and secondly, to ground the parallel to Canadian freedom of expression doctrine which follows in Part III. Part III offers a possible doctrinal approach for a technologically neutral analysis of freedom of expression cases by contrasting the American approach to new media with a possible Canadian jurisprudential solution using Canadian Charter of Rights and Freedoms doctrines. The expansiveness of the Charter's s. 2(b) freedom of expression protection coupled with the contextual balancing effect of s. 1 of the Charter provide a workable, if somewhat unpredictable, alternative for addressing the problems of freedom of expression in different media forms. Part IV concludes with a call for the adoption of a techno-neutral methodology when confronting freedom of expression challenges with media. A Canadian balancing effect coupled with a contextual assessment of the affected expression may be the most effective procedure for achieving techno-neutrality for both American and Canadian courts dealing with freedom of expression in existing and evolving media.

I. CONSTITUTIONAL TREATMENT OF MEDIA REGULATION

A. *Paradigms of Media Technology*

As communication media has developed since the invention of Gütenberg's printing press in 1456, there have been two distinct paradigms in both legal and psychological reactions to the introduction of new media. Primary among these paradigms is the reaction that too much expression, or at least too much undesirable expression, would become too available too quickly. Gütenberg's press brought not only a new mode of disseminating print information, but a new mode in dispersing undesirable, unwanted or obscene material.[2] Governmental censorship of the media began as a result of concern for protecting some members of society from unwanted expression.[3] The second paradigm highlights the fact that the new mode of printing expression onto paper was available only to those who owned a printing press. Access to the new media for disseminating expression was limited by the original scarcity of printing presses. The usual reaction of a government is to regulate access to scarce resources and history is replete with examples of a reigning power attempting to control what was being printed by a printing press. All evolving media since Gütenberg's press have followed both of these paradigms. In the twentieth century, the paradigms have undergone judicial interpretation in order to become aligned in an evolving body of First Amendment jurisprudence. Radio, broadcast and cable television, telephones, the Internet, as well as print-based media have all faced government attempts to regulate based either on potential harm of the expression contained within the media or on the limited availability of a communications resource. The challenges to society's competing values of access to expressive means and decency of expression still remain the same fundamental challenges experienced since Gütenberg's time but differ

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[2] Indeed, Rabelais' *Pantagruel* and *Gargantua* quickly slipped into the hands of more and more readers in 1532 and 1534, the books' racy contents spurning their popularity.

[3] Peter Johnson argues, through an historical and legal analysis of pornography's evolution, that pornography is the driving force behind the development of new media forms. Peter Johnson, *Pornography Drives Technology: Why Not To Censor The Internet*, 49 FED. COMM. L.J. 217 (1996).

only in degree. The actual content of undesirable expression like obscenity has remained largely unchanged throughout history.[4] Furthermore, the ability to print on paper is no longer a limited capability just as there is becoming no limit on the number of cable television channels with the advent of digital television. The only difference between forms of expression is the medium that carries the message.

Various media differ only in degree of transference of the expression. This continuum of transference operates on three planes: degree of sensory information, degree of ease of dissemination, and degree of accessibility.[5] Freedom of expression jurisprudence is concerned with the latter two planes. Degree of sensory information involves which human senses the media invokes. For example, radio carries only auditory information while the Internet can carry audio, static visual, and moving visual information. The two media differ in degree of sensory information.

Degree of ease of dissemination is concerned with the relative availability of a media communications resource to be used to transmit expression. The desire to regulate based on this plane of transference is grounded in the perception that a communications media is a limited resource. It is perhaps more onerous to disseminate information via radio than Internet, as broadcast radio is restricted to regulated radio station usage while anyone can create and post a web page on the Internet. However, this distinction is becoming blurred as the availability of a radio frequency may be no more a hindrance to a potential speaker than if she had to locate a computer and software to post a web page. The degree of ease of dissemination of radio as compared to the Internet may not be a valid distinction with which to limit freedom of expression as perhaps the differences may be negligible in actual practice, or, as this paper argues, completely irrelevant.[6]

Degree of accessibility involves how easy it is for a person to re-

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[4] *See Id.* at 218 - 223.

[5] These planes on a medium's continuum of transference are the author's own conceptions and terminologies. They will be used throughout this paper to reveal the patterns of the decision-making of courts dealing with new media.

[6] Indeed, the editors of the Harvard Law Review argue that scarcity is a quality shared by all economic goods and not just broadcast media. *Note, The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062 (1994) at 1069 - 1077.

ceive communicated expression. Regulation aimed at this plane is usually based on the actual content of the expression and the regulation of unwanted content. To continue with the radio and Internet comparison, anyone tuning to a radio channel may partake of the expression but one must be within range of that radio frequency to hear it, must have the radio turned on, and must be within earshot. The Internet allows anyone anywhere in the world with Internet access to visit a website but one must sit at a computer. The image projects onto a screen that only the viewer and those in the immediate area can see. This degree of accessibility has also become less relevant as many radio stations are also broadcasting over the Internet, allowing simultaneous, real-time, world-wide listening. A radio broadcast of Shakespeare's *Hamlet* may, by its technological nature, contain different sensory information and may perhaps have a more restricted audience than a website dedicated to *Hamlet* which contains the textual, auditory, and visual representation of the entire play. But, when assessing the content and context of the expression, one is lead to roughly the same meaning of the expression: the tragic story of an indecisive Danish king.[7]

The actual distinctions between the planes of transference inherent in radio and Internet media quickly become vague. Basing regulation of the radio or the Internet on the degree of ease of dissemination ignores the fact that distinctions between technical capabilities and access to different media are many times temporally irrelevant. Media technology is in constant flux. Basing regulation of expression on the degree of accessibility to potentially harmful expression necessarily ignores the fact that the message is the same in each medium and it is the message, not the technology, that is the cause for constitutional concern. New media forms repeatedly present the same challenges to freedom of expression law as their predecessor forms. The only quality that changes from medium to medium is the negligible placement of that medium on the continuum of transference.

[7] In similar fashion, the editors of the Harvard Law Review state that "[a] political editorial is still a political editorial whether it is printed in a newspaper, broadcast as teletext on a television screen, downloaded from a computer network, or faxed over a phone line." *Id.* at 1063.

II. AMERICAN CONSTITUTIONAL CHALLENGES OF NEW MEDIA REGULATION

Government attempts at media regulation commonly attract constitutional attention. Typically, the underlying goal of the proposed regulation is either to regulate access to a communication resource that is perceived to be scarce or to regulate expressive content deemed harmful to the vulnerable, usually to children.[8] Both goals necessarily restrict expression by their very nature of regulation and courts are called on to determine if that restriction is constitutionally justified under First Amendment principles. An American court faced with government attempt to regulate media must categorize the restriction and then follow a set of established doctrines in order to decide whether or not the interest of the government in restricting the expression is valid under the First Amendment. The definitive factor in determining whether or not expression in media will be protected expression stems from whether or not the court views a government intent to regulate expression as content-based. Different standards of review for government action apply depending upon the degree of chilling effect the action will have on expression. Content-based restrictions on expression correspond to the intent to regulate harmful expression while content-neutral restrictions correspond to the intent to regulate access to a scarce resource.

A content-based restriction on expression involves regulating the expression because of the message it conveys. If the expression is distinguished from other expression based on whether or not it is considered "disfavored speech," such as harmful, indecent, or obscene expression, the regulation is content-based.[9] A court must first determine whether or not particular expression is worthy of First Amendment protection. An analysis of disfavored expression in media usu-

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[8] For a thorough analysis of First Amendment principles and jurisprudence, *see* LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, ch. 12 (2d ed. 1988).

[9] *See* Ward v. Rock Against Racism, 491 U.S. 781 at 791 (1989), where the United States Supreme Court notes that "as a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based...By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral."

ally involves the application of the legal test for obscenity as developed in Miller v. California.[10] It may also involve the doctrine espoused in Ginsberg v. New York[11] which highlights the protection of minors against indecent expression as a pressing government interest worthy of deference. Content-based restrictions on media invoke "the most exacting"[12] judicial standard of strict scrutiny when courts evaluate the proposed regulation's affect on freedom of expression. The government regulation must serve a compelling, narrowly tailored state interest and must impinge freedom of expression in the least restrictive means possible.[13] There have been many judicial responses to attempts at regulating the content of media. The government has tried to regulate potentially indecent communication in motion pictures,[14] broadcast radio,[15] telephone communications,[16] cable television,[17] and the Internet.[18] As will be shown, the courts' technologically centered approach to content-based media regulation has failed to address either the goals of the government in regulating the expression or the goals

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[10] 413 U.S. 15 (1973). Obscenity receives no protection under the First Amendment. The test as to whether or not a form of speech is obscene involves a determination of:

a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;
b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

[11] 390 U.S. 629 (1968) (involving statutory provisions against providing access to pornographic books and videos to children).

[12] *See* Turner Broadcasting Systems, Inc. v. FCC, 512 U.S. 622 at 642 (1994) where it is noted by the United States Supreme Court that "our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."

[13] *See* United States v. O'Brien, 391 U.S. 367 (1968) for an explanation of the standard of strict scrutiny.

[14] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

[15] FCC v. Pacifica Found., 438 U.S. 726 (1978).

[16] Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989).

[17] Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 116 S.Ct. 2374 (1996).

[18] ACLU v. Reno, 521 U.S. 844 (1997).

of protecting the expression as espoused under the First Amendment. Indecent content in various media is still indecent content, regardless of the technological form the content takes.

A content-neutral restriction on expression does not restrict on the basis of the ideas or views expressed in the expression. Media regulation which purports to control access to a medium of communication that is perceived to be in some scarcity is content-neutral regulation. Courts have dealt with the constitutionality of attempted regulation of access to a modality of expression through cases involving radio broadcast,[19] newspapers,[20] and cable television.[21] Content-neutral regulation is subject to an intermediate standard of scrutiny if it can be proven that the aim of the regulation is not to burden expression based on the message contained in the expression. To pass this standard, a government must prove there exists a substantial state interest that is demonstrated by government regulation that restricts freedom of expression only to an intermediate degree. Here, as will be shown, the matter of scarcity of access is really an ethereal distinction and is becoming irrelevant as media technology pushes forward, making media accessible to more of the population.[22]

A. *Techno-neutrality as a Solution for Freedom of Expression Jurisprudence*

The solution to achieving consistent and coherent principles when courts face freedom of expression challenges in new media is to ap-

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19 Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969) (granting subjects of personal attacks over the radio free airtime to rebut the attack) and NBC v. United States, 319 U.S. 190 (1943) (regarding the conditions of broadcaster's licenses as not restricting free expression).

20 Miami Herald Publication Co. v. Tornillo, 418 U.S. 241 (1974) (the opposite to *Red Lion*, above, the court here did not grant subjects of personal attacks in newspapers free space in the newspaper to rebut the attack).

21 Home Box Office v. FCC, 567 F. 2d 9 (D.C. Cir. 1977) (regarding the regulation of cable 'siphoning') and Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994) (involving the 'must carry' provisions requiring cable systems to reserve some channels for local broadcasters).

22 It is the regulation based on degree of ease of dissemination that has provoked courts to grant broadcast media the most limited First Amendment protection. *See Pacifica*, 438 U.S. 726.

proach constitutional issues in a technically neutral fashion. Techno-neutrality involves assessing constitutional protection for expression contained in a medium without regard to the inherent transference qualities of the medium itself.[23] In other words, the message is key and not the medium of the message.[24] The technology used to transfer the expression should be of no concern when regulating the content of harmful expression; rather, the actual content of the message should be the determining factor in assessing the degree of constitutional protection for the expression. Similarly, the technology used to transfer the expression should also be of no concern when regulating access to media as media technology is mutable and arguably irrelevant because of its mutability.[25]

Techno-neutrality is vital in regulating constitutional assessments of media regulations because an overemphasis on media technology,

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[23] This paper is the first to coin the term "techno-neutrality" and aims to put previous theory in practice by revealing the benefits of a techno-neutral approach and by providing a workable tool for courts to adopt when facing constitutional challenges to new media regulations. The notion of techno-neutrality was first hinted at as far back as 1994 by the editors of the Harvard Law Review who noted that, "rather than resting upon ever-changing technologies to justify government regulation of the electronic media, First Amendment analysis should strip away the technological characteristics of the media. The Court should ground its analysis in essential First Amendment interests and draw upon salient technological characteristics only as the factual background against which the real First Amendment concerns must be applied." Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062 (1994) at 1063. Thomas G. Krattenmaker and L. A. Powe, Jr. furthered the idea of techno-neutrality by arguing that all media should be held against a single standard of scrutiny paralleling the constitutional model for print-based media. Thomas G. Krattenmaker & L. A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media,* 104 YALE L.J. 1719 (1995).

[24] With apologies to Marshall McLuhan, the Canadian cultural critic who coined the phrase "The medium is the message." *See* Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062 (1994).

[25] In their multi-jurisdictional comparative work on freedom of expression doctrine, Caroline Uyttendaele and Joseph Dumortier state the fundamental premise that "freedom of speech is a media-independent principle." Caroline Uyttendaele & Joseph Dumortier, *Free Speech on the Information Superhighway: European Perspectives*, 16 JOHN MARSHALL J. OF COMPT. & INFO. LAW 905 (1998) at 909.

or a techno-centric approach, leads to the pitfalls inherent in analogy, novelty, and timeliness. Analogy is often used to distinguish the characteristics of one media form from another, thereby advocating for different constitutional treatment of that media. The novelty of a new media technology creates a false sense of the uniqueness of the media and an over-emphasis on the degrees to which the media differs in transference abilities from other media. As will be shown, courts produce new legal doctrine aimed at coping with the new media when, in fact, existing legal doctrine will more adequately serve the purpose at hand and with a greater precedential value for future courts. New media also poses a problem for courts due to the particular qualities exhibited by a medium at the specific time of the decision. The technology may be in an infant stage and may not have reached its full potential for use as an expressive medium. A court's decision which focuses on the form of media may become dated and the constitutional principles not portable to cases involving other media. Furthermore, a court may react in the extreme, either too liberally or too conservatively, when granting protection to expression found in a new media form or when determining the relative scarcity of access to the medium. This occurs because a court either does not wish to pronounce too early on a burgeoning media form or mischaracterizes a media form based on its technological differences to other media.

1. Analogy

Analogy seriously distracts American courts faced with a new form of media by emphasizing the qualitative differences between various media instead of determining how the expression contained within the particular medium should be constitutionally treated.[26] This phenomenon occurs regardless of whether or not the proposed government restriction on speech is content-based or content neutral. Content-based analogies focus on the degree of accessibility of the expression to those who may suffer potential harm from exposure.

[26] The editors of the Harvard Law Review note that "courts often succumb to the temptation to analogize new electronic media to existing technologies for which they have already developed First Amendment models." Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062 (1994) at 1062.

Content neutral analogies are concerned with the degree of ease of dissemination of the expression. The goals of protecting free expression and regulating that expression for an over-riding governmental purpose are superceded by a complex set of usually tenuous analogies between differences in degree of various media technologies. At first glance, the benefits of analogizing may seem to assist the law in framing new media constitutionally; [27] however, the historical pattern of analogies proves otherwise.[28] Analogy results in a reliance on categorical approaches to expression. Precedents become inconsistent.

a. Problems of Analogy in Content-based Regulation of Media

Content-based restrictions on expression in new media aim to protect society from harmful expression, yet this aim is forsaken for reliance on an analogy by degree of transference. The actual content of the expression requiring protection is largely ignored. This trend began when the United States Supreme Court considered whether or not motion pictures were protected under the First Amendment in Joseph Burstyn Inc. v. Wilson.[29] The Court debated the technical qualities of a motion picture, "The Miracle," and even noted, rather curiously by today's standards, that motion pictures "possess a greater capacity for evil" than books, magazines, or newspapers. The question of whether or not the story of "The Miracle" itself was worthy of constitutional protection did not arise as prominently as one might ex-

[27] Cass R. Sunstein, in *The First Amendment in Cyberspace,* 104 YALE L.J. 1757 (1995) at 1770, has argued that "the legal culture has no way to think about the new problems [of media] except via analogies. The analogies are built into our very language: email, electronic bulletin boards, cyberspace." Yet, there is a substantive difference between analogizing for the sake of linguistic description of a new technology in order to make it acceptable to the populace and using temporally-specific and often narrow technological analogies as the basis for determining First Amendment protection of speech.

[28] Contrast Sunstein's commentary, *above,* with Mark S. Kende, *The Supreme Court's Approach to the First Amendment in Cyberspace: Free Speech as Technology's Hand-maiden,* 14 CONST. COMMENTARY 465 (1997). Kende argues that the analogies contained in *Denver* (cable analogized with broadcast television) and in *Reno* (Internet analogized with broadcast) are completely irreconcilable.

[29] 343 U.S. 495 (1952). An Italian movie, "The Miracle," was banned from being shown as it was deemed sacrilegious by the New York State Education Department.

pect. Rather, it was "The Miracle" as presented in a motion picture format that framed the constitutional question. The court succumbed to the temptation to analogize and to treat an expression's content as potentially different by the nature of its carriage in that media. Whether "The Miracle" was performed on stage or shown on film, it still contained the same plot, characters, and degree of potential sacrilegiousness. The only difference between a printed book copy of "The Miracle" and its motion picture counterpart was the degree to which a motion picture would be accessible to an unwilling and perhaps vulnerable audience. If the court had adopted a techno-neutral stance when applying First Amendment protection, it should therefore not even have had to consider whether or not movies were speech as protected by the First Amendment. The first constitutional question would thus have been whether or not the movie in any format deserved constitutional protection, rather than what level of protection movies can enjoy under the First Amendment. The second constitutional question would involve an inquiry into whether or not the regulation is aimed at this particular kind of expression. Finally, the third question would determine whether or not the government's intent outweighed the value placed on protecting that kind of expression.

The misaligned analogy pattern established in *Burstyn* worsened and enveloped the United States Supreme Court's reviews of content-based regulation for broadcast radio, telephone, cable television, and the Internet. The court in FCC v. Pacifica[30] established that broadcast radio receives the most limited First Amendment protection. The court upheld a regulation based not on banning obscene content but "indecent" content. It justified this differentiation based on the techno-centric rhetoric stemming from *Burstyn*: "We have long recognized that each medium of expression presents special First Amendment problems."[31] The Federal Communications Commission attempted to regulate the content of offensive radio broadcasts after controversy erupted over the broadcast of comedian George Carlin's ribald "Seven Dirty Words" routine. The Court failed to understand that media differs only in degree of transference and that the fundamental content of the message remains the same, regardless of the

[30] 438 U.S. 726 (1978).

[31] *Id.* at 729.

form it takes.[32] It cited the "uniquely pervasive presence"[33] of broadcast radio as the primary reason for granting broadcast radio the most limited First Amendment protection of media. Unlike the dangers of print-based media, broadcasting can enter places without warning and is "uniquely accessible to children."[34] The media therefore was placed in a constitutional category of expression apart from traditional print media. It could be subject to more regulation than other media because of its technical difference in degree of accessibility.[35] As case law developed, this category became problematic and essentially eroded First Amendment analysis from a question of balancing government intent with free expression to a question of unnecessary technical discourse.[36]

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[32] Indeed, Professor Paul C. Weiler notes in ENTERTAINMENT, MEDIA AND THE LAW (1997) at 914 that the United States Supreme Court in Cohen v. California, 403 U.S. 15 (1971) granted First Amendment protection to the wearer of a jacket worn in a Los Angeles courtroom which read "Fuck the Draft," yet it did not protect the words of comedian George Carlin whose broadcast was at issue in *Pacifica* and consisted largely of the same expletive. Words in the physical reality are granted different protection than those same words in ethereal radio space. As will be shown, this distinction would not likely occur in a techno-neutral constitutional methodology based on a more contextual approach evaluating the expression itself, not the medium.

[33] *Pacifica*, 438 U.S. at 728.

[34] *Id.* at 734.

[35] The court likened the concerns expressed in *Ginsberg,* 390 U.S. 629 (1968), to those of the Federal Communications Commission for radio broadcasts. Interestingly, the Court seems to have forgotten that its decision in *Ginsberg* was one of techno-neutrality as the store in that case sold not only print-based pornographic media but videos as well. The concerns of the *Ginsberg* court were based on concerns for the exposure of children to any pornography, not just pornography as it exists in a specific media. The *Pacifica* court imports the *Ginsberg* rationale of protecting children yet holds that it is the unique nature of broadcasting that warrants limited First Amendment protection in order to protect children. In *Ginsberg,* the court did not limit the sale of pornography to minors because of the unique nature of providing videos and magazines over a store counter. Therefore, the perceived degree of accessibility of radio becomes the basis for limiting free speech protection in this media. The goal of child protection present in *Ginsberg* becomes reduced to rhetoric in *Pacifica,* supplanted by undue concentration on the degree of accessibility of radio over that of print-based media.

[36] Jack M. Balkin notes that regulation of broadcast media is typically justified using the degree of accessibility (he cites the scarcity of frequencies and the per-

Content-based restriction cases after *Pacifica* which involved new media attempted to analogize the media to either print or broadcast media in an effort to determine whether the media deserved the fullest First Amendment protection as print media does or whether the media deserved a modified form of protection as broadcast media does. All analogies were based largely on the degree of accessibility and all analogies seem rather tenuous when observed in an historical context. The United States Supreme Court compared broadcast radio regulation in *Pacifica* to a federal ban on pornographic telephone message services in Sable Communications of California Inc. v. FCC.[37] The Court noted that the "private commercial telephone communications at issue here are substantially different from the public radio broadcast at issue in *Pacifica*."[38] Unlike radio broadcasting, the telephone service required the listener to take affirmative steps to receive the recorded message. Furthermore, there was no captive, unwilling audience in a telephone conversation. Even though the court noted the government's compelling interest to protect minors from harmful communications,[39] the Court concluded that the ban was unconstitutional because it denied speech to adults by allowing them to hear only what was acceptable for children to hear.[40] When reviewing regulations which allowed cable television operators to ban indecent television on leased television channels, the United States Supreme Court exhibited some caution about analogizing based on the technical qualities of cable television. In Denver Area Educational Telecommunications Con-

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ceived pervasiveness of broadcast media as reasons for broadcast regulation). *See* Jack M. Balkin, *Media, Filters, the V-Chip, and the Foundation of Broadcast Regulation*, 45 DUKE L.J. 1131 (1996).

[37] 492 U.S. 115 (1989).

[38] *Id.* at 127.

[39] The Court referred to the importance of protecting children from obscenity as espoused in New York v. Ferber, 458 U.S. 747 (1982) and in *Ginsberg*.

[40] The Court at 126 relied on the doctrine in Butler v. Michigan, 352 U.S. 380 (1957), where the right of an adult to receive indecent but not obscene material was upheld. The *Sable* court also looked to Bolger v. Youngs Drug Products Corp., 463 U.S. 60 at 79 (1983) where the *Pacifica* case was distinguished in this particular challenge to content-based regulation because the government should not "reduce the adult population...to...only what is fit for children."

sortium v. FCC,[41] Justice Breyer, writing for the majority, stated that:

> [N]o definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes...[A]ware as we are of the changes taking place in the law, the technology, and the industrial structure related to telecommunications...we believe it unwise and unnecessary definitively to pick one analogy or specific set of words now.[42]

However, a sharply divided court placed cable television in between the fullest First Amendment protection offered print media and the least protection offered broadcast media. Despite Justice Breyer's comments, the court then emphasized the differing degree of accessibility with the analogy that cable television is "as accessible to children as over the air broadcasting, if not more so."[43] The regulation of indecent programming was deemed constitutionally invalid. The *Pacifica* categorical approach to expression proves difficult for courts to follow through analogy, despite the fact that the government intent behind the content-based regulation is repeatedly the same: the protection of the vulnerable from harmful speech.[44]

The inherent contradictions in this approach to analogy are brought to the forefront in the Supreme Court's efforts to address the regulation of the Internet. The 1996 Communications Decency Act[45] attempted to block "indecent transmissions" and "patently offensive displays" on the Internet. This statute was challenged and struck down in American Civil Liberties Union v. Reno.[46] The court in *Reno* canvassed all media-related constitutional cases discussed thus far, and

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[41] 116 S. Ct. 2374 (1996).

[42] *Id.* at 2385.

[43] *Id.* at 2386.

[44] Christopher M. Kelly argues against a medium-based judicial analysis in favor of an adherence to basic First Amendment principles of protecting speech in any format. This, he states, will reduce the likelihood of splintered, inconsistent cases like *Denver, Id. See* Christopher M. Kelly, *The Spectre of a "Wired Nation:" Denver Area Educational Telecommunications Consortium v. FCC and First Amendment Analysis in Cyberspace*, 3 HARV. J.L. & TECH. 559 (1997).

[45] Telecommunications Act, Pub.L. No. 104-104, 110 Stat. 56 (1996), colloquially referred to as the Communications Decency Act of 1996 by the United States Supreme Court in *ACLU v. Reno*, 521 U.S. 844 (1997).

[46] 521 U.S. 844 (1997).

endeavored to analogize the Internet to each specific type of media the court had dealt with in the past. Indecent information on the Internet was not encountered by accident and so the Internet was not likened to television or radio, according to the court:

> [the Internet] requires affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended.[47]

The court held that stressing the degree of accessibility in media to differentiate between First Amendment standards of judicial review, as was done for radio in *Red Lion*[48] and *Pacifica*,[49] for cable television in *Turner*[50] and *Home Box Office*,[51] and for telephone in *Sable*,[52] was not applicable due to the innate qualities of the Internet as a media form. The Internet was deemed "not as 'invasive' as radio or television" and "users seldom encounter content 'by accident.'"[53] The Internet was most closely compared to the telephone message service in *Sable* and the affirmative steps, indecent content, and pervasiveness of that media were seen to be most like the Internet. Therefore, although the court acknowledged that the government intent to protect children was an important goal, the court cited the lack of content-based regulation in cable television in *Denver*[54] and held that the Internet would be granted full First Amendment protection like print-based media.[55]

The analogies used by the Supreme Court during review of content-based regulation seem rather thin once one considers the practical

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47 *Id.* at 854.

48 395 U.S. 367 (1969).

49 438 U.S. 726 (1978).

50 512 U.S. 622 (1994).

51 567 F. 2d 9 (D.C. Cir. 1977).

52 492 U.S. 115 (1989).

53 *Reno*, 521 U.S. 844 (1997) at 869.

54 116 S.Ct. 2374 (1996).

55 It is interesting to note for comparative purposes, as will be developed more fully later in this paper, that the Canadian government has recently canvassed the issue of content-based regulation of the Internet, similar to the goals of the Communications Decency Act. The report Industry Canada, Information and Communication Technologies Branch, *Regulation of the Internet: A Technological Perspective* (1999) concludes that content-based regulation of the Internet is currently impractical.

effects of granting First Amendment protection based on differing degrees of accessibility to media. Likening one media form to another based on the complexity of required affirmative steps to receive the communication seems to be a way to differentiate between whether or not inappropriate content would be accessible by children. However, one only has to think about the actual act of listening to a radio broadcast, dialing a telephone, or logging on to the Internet. The affirmative steps required to place a telephone call are really not that much more onerous that turning a radio dial or clicking a mouse. The degree of accessibility issue as it affects children is perhaps the most salient in the court's mind, yet it forsakes the government objective of protection by assuming that only adults could perform more complex steps to access controversial media. Unsupervised children are perhaps more apt to place a secretive phone call than tune in to an indecent radio broadcast as the telephone call is a more private communication which can escape the ears of supervising parents. Also, many children are more skilled at the use of a computer than are their parents. Stating that access by accident is more likely to occur on radio than for the Internet is also unwise. A child's innocent Internet search can call up a variety of obscene and indecent material with no intention to do so.[56] Lastly, attempting to determine which media form is more invasive in nature, and therefore more dangerous to the unwilling or unsupervised listener, seems fruitless with the advent of the Internet. Most homes have a radio, telephones, at least one television if not more, and now most have personal computers with access to the Internet. Aside from the home, vulnerable media users can find the Internet at schools, at public libraries, and in commercial establishments as diverse as restau-

[56] For example, using popular search engines on the Internet, a seemingly harmless search for children's material can call up surprising results. A search for the children's novel "Black Beauty" on the search engine Yahoo lists in its top ten links two sites containing images of nude African-American women (search conducted by author on April 12, 2001). Similar effects are obtained for "Little Women," "boy," "girl," "teen," "doggy," "Sleeping Beauty," and "Babe." Indeed, www.whitehouse.com is not the link to the Presidential building on Capitol Hill but to a pornographic media site. For a legal analysis of this type of accidental encountering of content on the Internet, *see* Marci A Hamilton, *Regulating the Internet: Should Pornography Get a Free Ride on the Information Superhighway?*, 14 CARDOZO ARTS & ENT. L.J. 343 (1996).

rants and airports. Media that transmits expression exists everywhere. A court deciding what First Amendment protection to give expression contained in various media should concentrate on the expression itself, and not on the media's differing qualities.

b. Problems of Analogy in Content-neutral Regulation of Media

Judicial review of content-neutral regulation is also plagued by problems of analogy. The difficulties of analogizing past precedents in content-based regulation cases parallel those faced by courts conducting reviews of content-neutral media legislation. The *Burstyn* decision began the trend of differentiating expression based on degree of accessibility of media in content-based cases. In similar fashion, the NBC v. United States[57] decision began the trend in content-neutral decisions of differentiating expression based on degree of ease of dissemination. The Supreme Court cited the perceived scarcity of broadcast frequencies as the reason for upholding the government's conditions found in broadcast licenses. The intermediate category of protection of expression as carried in broadcasting became problematic for courts categorizing new media after *Pacifica* in content-based regulation cases. The Red Lion Broadcasting v. FCC[58] decision was a similar crutch to future courts dealing with content-neutral media regulations. The court in *Red Lion* upheld a statute allowing subjects of personal attacks on broadcast radio free air time to rebut the attacks. As with the *NBC* case, the perceived scarcity of the broadcasting resource prompted the court to use a relaxed First Amendment standard in upholding the government's objective. This differentiation between broadcasting and traditional print media was made vividly clear when the Supreme Court in Miami Herald Publishing Co. v. Tornillo[59] struck down a nearly identical provision to the one in *Red Lion*. This provision would have provided subjects of personal attacks in newspapers free space in the newspaper to answer the attack.

The court did not resist analogizing to broadcast in determining

[57] 319 U.S. 190 (1943).

[58] 395 U.S. 367 (1969).

[59] 418 U.S. 241 (1974). The *Tornillo* decision, decided merely five years after the *Red Lion* case, did not even mention *Red Lion*.

constitutional validity of cable television regulations. In Home Box Office v. FCC,[60] the court found that cable television was not like broadcast media because cable used a physical cable to carry the transmission of expression. The relaxed First Amendment standard for broadcasting as established in *Red Lion* was rejected. In Turner Broadcasting System, Inc. v. FCC,[61] the court again distinguished cable from broadcasting based on the perceived scarcity of the broadcast medium. The *Red Lion* standard of First Amendment for broadcasting was again rejected for cable based on the perceived degree of ease of dissemination for cable.

As with content-based restrictions on expression, content-neutral restrictions fall victim to a court's tendency to create categorical and inconsistent analogies which force various type of media to conform to certain judicial definitions based on degrees of transference. Early precedents like *Burstyn* and *NBC* began a long chain of contrived analogies which expends a court's resources by focusing on technical qualities of the media at issue. The balancing of the government's intent with the desire to uphold freedom of expression takes second seat to the difficulties of analogizing shifting standards for media. Different categories of expression based on degrees of transference, like those created for broadcast in *Pacifica* and *Red Lion,* coerce courts into likening a new media form to either print or broadcast in order to avoid creating a third category of expression. The end result is a rather contorted and unpredictable approach to fitting new media in the existing legal framework for First Amendment challenges to new media regulation.

2. Novelty

The apparent novelty of a media form also distracts courts facing constitutional challenges to new media. A court may focus on the new, unique qualities of a particular media form as a reason for holding that the form is fundamentally different from other media either in degree of accessibility or degree of ease of dissemination.[62] This, in

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[60] 567 F.2d 9 (D.C. Cir. 1977).

[61] 512 U.S. 622 (1994).

[62] A court's recognition of a media's uniqueness is usually in the context that the media is unique to the law and not necessarily that the media is unique to society at

turn, leads to different constitutional treatment of various media. Courts mirror society when approaching new media for the first time. Initially, the new form seems revolutionary in its degrees of transference. It seems fundamentally different from what has come before. It can reach more people more quickly.

The result for challenges to content-based regulation is usually an over-emphasis of the ability of the media to transmit expression, an over-emphasis on the perceived degree of accessibility. The intermediate constitutional protection of broadcasting expression in *Pacifica* is a direct result of a court focusing on the unique features of broadcasting's technological qualities. Broadcasting is more strictly regulated than other forms of speech because the *Pacifica* court believed that broadcasting had a "uniquely pervasive presence" and was "uniquely accessible to children."[63] Because the medium was seen as new and unique to the law, a corresponding new category of protection for expression was developed.

The opposite result occurred when the Supreme Court hailed the Internet as a "unique medium" in *Reno.*[64] The *Reno* court noted that the Internet could transmit text, sound, pictures, and moving images and held that the novel qualities of the Internet warranted the strongest First Amendment protection so the medium could grow unhampered.[65] Therefore, because it was a new and unique medium, it should be granted the fullest protection from regulation. The court failed to recognize that the Internet, and broadcasting for that matter, was not transferring any novel harmful expression but was just transferring the expression in a novel fashion. The groundwork laid for dealing with obscenity in *Miller* and for deferring to the importance of protecting children in *Ginsberg* was acknowledged in *Pacifica* but seemed to be ignored by the *Reno* court. The ability of the Internet to transfer text, sound, and images is not unique to the Internet, but is found in sepa-

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that point in time.

[63] *Pacifica*, 438 U.S. at 748.

[64] *ACLU v. Reno*, 521 U.S. 844 at 851 (1997).

[65] The court in *Denver*, 116 S.Ct. at 2374, also did not want to restrict the regulation of cable television and so a very divided United States Supreme Court attempted to "do no harm" by granting the fullest First Amendment protection to cable transmissions.

rate types of media. The Internet is a combination media, melding the abilities of radio and television. Why the novelty of the Internet translates into more freedom of expression while the novelty of broadcasting translates into restriction of expression is an anomaly based on the degree of accessibility of each form of media. Perhaps courts believe that new media may mean more harmful expression will permeate the marketplace of ideas. Yet, if that were the case, the Internet would rightly have deserved even more regulation than broadcast media. Novelty causes courts to mischaracterize the evolution of media as a revolution of media. And that results in an inconsistent application of constitutional principles balancing free expression with protection of the vulnerable.[66]

At the same time, a new media form may not initially be available to much of the public because the new form has not yet caught on. The technology to drive the media may seem to be scarcely located and may at first be prohibitively expensive for people to utilize. Challenges to content-neutral regulation usually result in an over-emphasis on the perceived scarcity of the media, or an over-emphasis on the degree of ease of dissemination. The court in *NBC* held that radio broadcasting in 1943 was "unique" from other print-based media and subject to regulation because it was not accessible to everyone.[67] Thirty-four years later, the court regarded cable television as a unique medium to the law in *Home Box Office*.[68] Cable was not to be treated constitutionally separate from print-based media, as was broadcast radio or broadcast television, because cable utilized a new means of transmitting expression: a physical cable which was fed directly into the homes of viewers. There was no issue of scarcity of the resource but the method of delivery was new and therefore deserved the fullest First Amendment protection. In 1994, the court in *Turner* also held

[66] Eugene Volokh advocates that, where children's interests are at stake, the only relevant question for a court should be whether there is some less burdensome method to achieve the same censoring goal. Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 31 SUP. CT. REV. 38 (1998).

[67] *See NBC*, 319 U.S. at 226, where the United States Supreme Court states that "[u]nlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why...it is subject to regulation. Because it cannot be used by all, some who wish to use it may be denied."

[68] *Home Box Office*, 567 F.2d 9 (D.C. Cir, 1977).

that cable was a unique medium and was to be protected expression for nearly the same reasons as in *Home Box Office*.[69] As with content-based restrictions on media-related expression, content neutral restrictions must face two standards of protection: one for broadcast media and one for non-broadcast media.

Concentrating on novelty of media forms when examining content-based regulations leads courts to act as if harmful expressive content is qualitatively different if carried in a new media form. It is important to remember that it is the potentially harmful content that has prompted the content-based regulation from the government. First Amendment doctrine dealing with harmful or obscene content should be easily transferable from one media to the next yet courts repeatedly fashion new technologically-dependent methodologies for dealing with harmful content.

The ease of access to harmful expression seemed greater for broadcast media than for print-based media, hence the more relaxed standard of scrutiny for government action suppressing broadcasting expression. As with the problems faced with technical analogies, this second category of expression has created difficulty for courts considering new media after *Pacifica* as a court must decide which standard to apply to the media: strict scrutiny for print-based media or an intermediate level of scrutiny for broadcast media. Novelty thus prompts courts to create overly structured constitutional categories for new media and thereby ignore fundamental principles established in previous First Amendment cases.

3. Timeliness

Determining constitutional protection of expression based on the expression's medium of transference can lead to a premature assessment of the capabilities of a particular media form. This creates an inconsistent and dated First Amendment doctrine which is not portable from one media form to another. The way in which a media form is used is not static and changes over time.[70] The assertion by the court

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[69] *Turner*, 512 U.S. at 637) cited FCC v. League of Women Voters, 468 U.S. 364 (1984) (regarding the right to carry political messages on public television broadcasting stations), *Red Lion*, 395 U.S. 367 and *NBC*, 319 U.S. 190 for this idea.

[70] For example, the Internet is now being used as a major platform for com-

in *Home Box Office* that cable is a unique medium because it uses a system of transfer based on a physical cable now seems irrelevant with the advent of Internet access through household cable systems. After *Home Box Office*, the courts which dealt with the cable medium recognized the danger of assessing a technology too quickly and erred on the side of caution. The decision in *Turner* noted that soon there would be no limit on the number of cable channels with the advent of fiber optic technology; the degree of ease of dissemination would become irrelevant as there would be near limitless numbers of channels available. Justice Breyer in *Denver* refused to create a new constitutional category for cable television, as was created for broadcast television in *Pacifica*, because he felt that it was too early in the life of the media to categorize it.[71]

Yet the court in *Reno* used static evidence of the Internet as it existed in 1997 to determine that the Internet should receive the fullest First Amendment protection. That court did not shy away from assessing the capabilities of the net and included an exhaustive evidentiary summary of the Internet's character in the text of the judgment. It also noted that soon the Internet would incorporate a technical ability for parents and authorities to effectively keep harmful material from children. Until that time, however, Internet expression was to be granted full protection. One court since *Reno* has also had to consider the lack of a filtering mechanism for harmful expression on the Internet. A constitutional challenge of a public library board's decision to provide only filtered access to the Internet resulted in the mandated removal of those filters as they were deemed to impinge freedom of expression.[72] Granting the Internet such protection from regulation

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merce, a large expansion of its original conception as a virtual library (and an even larger expansion from its true original purpose of a computerized network for national defense systems). Also, cable television providers are now providing Internet access to patrons through television sets.

[71] Justice Breyer stated in *Denver*, 116 S.Ct. at 2385 that "no definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes."

[72] Mainstream Loudoun v. Board of Trustees of Loudoun County Library, 24 F. Supp. 2d 552 (1998) (striking down a public library board policy permitting library staff to install a content-based software filter on all computers providing Internet ac-

while the technology is in its stage of infancy makes it nearly impossible for regulators to pursue any efforts to provide protection from harmful expression on the web.[73]

As has been demonstrated throughout the history of media evolution, the degrees of transference of various media are mutable over time. The degrees of ease of dissemination and ease of accessibility of all media have broadened in scope from the original frequency dependence of radio to the limitless bounds of cyberspace. Combinations of technology within the various media forms themselves has also advanced to involve a wider possible audience than ever before. The same frequency-dependent radio can now be broadcast live over the Internet to a world-wide audience. Subscribers to cable television can now opt for direct satellite television. Even the Internet has merged with cable television as many cable access providers are now providing direct access to the Internet through the very same cable originally made for television.[74] On the opposite spectrum, advances like Internet access through cable television allows cable subscribers to receive both Internet and television transmissions through their television sets. The flurry of media products available on the Internet

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cess to library patrons). For excellent analyses of the constitutional issues raised in providing filters for the Internet on public library terminals, compare Brigitte L. Nowak, *The First Amendment Implications of Placing Blocking Software on Public Library Computers*, 45 WAYNE L.REV. 327 (1999) (emphasizing the need to protect intellectual freedom by not filtering access to the Internet) with Kimberly S. Keller, *From Little Acorns Great Oaks Grow: The Constitutionality of Protecting Minors from Harmful Internet Material in Public Libraries*, 30 ST. MARY'S L.J. 549 (1999) (reviewing compromised solutions for libraries, such as filtering Internet access for children only). For a review of First Amendment issues and Internet filters generally, *see* R. Polk Wagner, *Filters and the First Amendment*, 83 MINN. L.REV. 755 (1999) (arguing for a voluntary content-rating system for the Internet coupled with some government regulation).

[73] Lawrence Lessig has argued that the Internet is in a transition period and should be left alone by regulators, allowing the market to sort out how obscenity will be policed. Lawrence Lessig, *What Things Regulate Speech: CEDA 2.0 vs. Filtering* 38 JURIMETRICS J. 629 (1998).

[74] This almost seems to ridicule the court in *Home Box Office*'s notation of the uniqueness of cable television as based on its exclusive use of a physical cable to transmit expression.

ranges from music to movies to live broadcasts of cable television shows. All of these recent technological advances indicate that the traditional forms of media are blurring. The problem of scarcity of broadcast frequencies which led to the different constitutional protection of broadcast expression will be a worry of the past as the federal government has indicated its intention to convert television signals from analog to digital spectrum signals by the end of 2005.[75] A premature assessment of the capabilities of new media can act as a catalyst for creating dated constitutional decisions that rely on a medium's qualities in answering constitutional challenges to media regulation.[76]

III. A POSSIBLE CANADIAN APPROACH TO ASSESSING THE CONSTITUTIONALITY OF REGULATION IN NEW MEDIA

Canadian constitutional law differs from American constitutional law in that a techno-neutral approach is more easily achieved through the very framework of freedom of expression doctrine. Degrees of transference of media technology are largely irrelevant in determining the constitutionality of government restrictions on expression. Categories of speech and standards of scrutiny are not mutable categories in Canadian law. Instead, Canadian law takes a contextual approach to evaluating regulations and ignores the technical qualities of various media in favor of examining the context of the expression and the expression itself. Furthermore, the interests of government in regulating the expression are given a careful weighing against the desire to protect freedom of expression. Canadian constitutional jurisprudence therefore avoids the problems of analogy, novelty, and timeliness associated with an over-emphasis on the degrees of transference of media technology.

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[75] *See* News Release, Federal Communications Commission, "FCC Adopts Rules for Cable Carriage of digital TV Signals: Also Requests Further Information Regarding Dual Carriage of Analog and Digital TV Signals," January 22, 2001, summarizing action by the Commission, January 18, 2001, by Report and Order and Further Notice of Proposed Rulemaking (FCC 01-22).

[76] Lawrence Lessig cautions courts not to make any broad pronouncements about the Internet; rather, courts should wait until tangible cyberspace practices have been established before the Internet is evaluated in a legal context. Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869 (1996).

A. *Freedom of Expression Doctrine in Canada*

Canadian freedom of expression law is derived from the application of the Canadian Charter of Rights and Freedoms' section 2(b), protecting freedom of expression.[77] The Charter applies only to government attempts to regulate expression and the scope of what is considered part of government is narrowly drawn by s. 32 of the Charter.[78] Anything that "attempts to convey meaning" constitutes expression under the Charter.[79] Unlike American freedom of speech law, all expression is protected by the Charter, even obscene or unfavorable expression like hate speech,[80] pornography,[81] and communications for the solicitation of prostitution.[82] The only expression not protected by the Charter is expression communicated by violence.[83] The Canadian approach to protection of expression is thus permanently content-neutral, unlike its American counterpart which does not protect obscene expression[84] and does place some restrictions on protecting indecent expression.[85] This content-neutrality in the protection

[77] Section 2(b) of the Charter guarantees "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communications." *Canadian Charter of Rights and Freedoms*, CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms). For a recent historical analysis of freedom of expression in Canada, *see* Clare Beckton, *Freedom of Expression in Canada – 13 Years of Charter Interpretation*, in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 3rd ed. 5-1 (Gerald A. Beaudoin & Errol Mendes, eds., 1996).

[78] For example, universities are not considered government under the Charter in McKinney v. University of Guelph, 3 S.C.R. 229 [1990] but community college boards of regents are in Lavigne v. Ontario Public Service Employees Union, 2 S.C.R. 211 [1990].

[79] Irwin Toy Ltd. v. Quebec, 1 S.C.R. 927 at 1002 [1989].

[80] R. v. Zundel, 2 S.C.R. 731 [1992] (spreading false news that the Holocaust was a myth) and R. v. Keegstra, 3 S.C.R. 697 [1990] (high school teacher teaching anti-Semitism).

[81] R. v. Butler, 1 S.C.R. 452 [1992] (selling obscene pornography).

[82] Prostitution Reference, 1 S.C.R. 1123 [1990].

[83] Committee for Commonwealth of Canada v. Canada, 1 S.C.R. 927 [1991] (distribution of pamphlets in airport).

[84] *Miller*, 413 U.S. 15 and Roth v. United States, 354 U.S. 476 (1957).

[85] *Ginsberg*, 390 U.S. 629, where what is considered obscene for children may not be so for adults. *See* also the upholding of the regulation of indecency in broad-

of all expression dodges the difficulties American courts have experienced when deciding whether or not expression is worthy of protection in the first place, regardless of the media in which the expression is contained. By initially protecting all expression, Canadian courts therefore proceed directly to an assessment of the government attempt to curb expression.

A Canadian court determines the constitutionality of a government's regulation of expression by following a contextual balancing of interests approach as first developed in Irwin Toy Ltd. v. Quebec.[86] A court must first decide if the thing desiring to be protected from regulation is truly expression. Next a court must determine whether or not the purpose or resulting effect of a government's regulation is to restrict that expression. If the purpose or effect of the regulation is to restrict expression, the court then determines whether that government action can be upheld under s. 1 of the Charter. Section 1 is the balancing provision of the Charter and allows fundamental rights and freedoms to be infringed only under "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[87] The test to determine whether or not the government action is a reasonable limit on a right or freedom was delineated in R. v. Oakes[88] and is as follows:

1. The objective of the law must be pressing and substantial;
2. The law must be proportional in its purpose and effect, which entails:
   a) the requirement of a rational connection to the objectives of the law;
   b) that the law minimally impair rights and freedoms;
   c) that the effects of the law and the objectives of the law be proportional to one another (or in other words, that the burden on rights or freedoms is not too great to outweigh the benefits of the law).

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cast radio in *Pacifica*, 438 U.S. 726.

[86] *Irwin Toy*, 1 S.C.R. 927.

[87] R. v. Oakes, 1 S.C.R. 103 [1986].

[88] *Id.*

The wide scope of protected expression coupled with the balancing effect of the Oakes test results in a flexible mechanism for evaluating regulations on expression that does not necessarily require that expression in different media be treated differently.

This is accomplished through a contextual rather than categorical evaluation of the actual expression being protected. Protecting expression under the Charter does not require a court to determine whether or not the expression itself is worthy of constitutional protection. There is no need for American categories of excepted expression like obscenity in *Roth*[89] and *Miller*,[90] or of an intermediate level of protection of indecent expression for adults but not for children, as in *Ginsberg*.[91] Furthermore, because all expression is protected regardless of the medium in which it is carried, there is no intermediate protection of certain forms of expression like broadcast radio or broadcast television. Canadian courts completely avoid getting into technological distinctions of media when determining worthiness of constitutional protection.

When measuring the government's objectives against the right to free expression, Canadian courts are also less bound by rigid categories and techno-centric evaluations of media. A Canadian government has less of a burden to meet when proffering a new media regulation which infringes freedom of expression because there are no shifting standards of scrutiny. In American jurisprudence, the existence of a strict scrutiny standard for all content-based media regulation except broadcast media holds any governmental attempt to regulate media based on content to a near "fatal" standard.[92]

Perhaps the strict scrutiny standard itself perpetuates a techno-centric approach to freedom of expression because a court is prompted to exhaustively analyze the effects on expression. The practical effect in American constitutional challenges to media regulation has been to strike down the proposed regulation despite a government's pressing

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[89] *Roth*, 354 U.S. 476.

[90] *Miller*, 413 U.S. 15.

[91] *Ginsberg*, 390 U.S. 629.

[92] Douglas W. Vick, *The Internet and the First Amendment*, 61 MOD. L.REV. 414 (1998) at 416 discusses that the standard of strict scrutiny in media regulation cases is "strict in theory and fatal in fact."

and substantial concern for protecting the vulnerable from harmful content. It may be concluded that courts strategically utilize arguments based on degrees of transference of various media to bolster their conclusions that freedom of expression trumps all content-based governmental regulation even when there is a clear beneficial purpose for that regulation. Furthermore, the requirement under strict scrutiny that a government must use the least restrictive means possible to regulate the expression seriously hampers any efforts to regulate content. Canadian courts do not require the least restrictive governmental means of regulation but only reasonable means.

This somewhat more flexible standard reduces a court's need to resort to technical distinctions between media to uphold either freedom of expression or the government's regulation. Instead, the context of the expression is evaluated, as is the context of the effects of the proposed regulation.[93] These are balanced together in the section 1 analysis. The result for content-based restrictions on expression may be that Canadian courts would concentrate more on the competing interests of the government and the expressive public and less on what medium carries that expression. The result for content-neutral restrictions on expression may be that Canadian courts would not concentrate at all on issues of differing degrees of ease of dissemination like scarcity of broadcast frequencies. Expression is expression, no matter what its carriage device may be. The question before a Canadian court would be whether or not the government's objective of regulating broadcast would be pressing and substantial. The court would then have to ask if broadcast radio or television really is a scarce commodity which requires government regulation and, if it does, are the proposed regulation's effects proportional to the goals of the regulation.

B. Canadian Techno-neutrality Through the Charter

The Canadian Charter approach to expression regulation more effectively anticipates new media through a techno-neutral freedom of

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[93] Justice L'Heureux-Dubé in *Committee for Commonwealth of Canada*, 1 S.C.R. 927 distinctly rejected the American approach to freedom of expression and preferred to evaluate the challenged expression in its context, rather that determine what category of speech it belonged to or what category of scrutiny a government should have to pass to regulate the expression.

expression methodology.[94] Because the Charter does not require a differentiation of types of protected expression, there is little need to focus on degrees of accessibility or ease of dissemination between media. This eliminates the temptation to analogize between various media forms as each government regulation is guaranteed its own section 1 analysis based on the context of the regulation and the particular nature of the content of the expression.[95] No comparison among various regulatory regimes for various media is necessary. Expression on the Internet would not have to be compared to expression in broadcasting or in cable. It is the actual content of the expression as balanced against the proposed restriction of expression that is the focus of a Canadian court's attention. For similar reasons, novelty of the media's capabilities is also largely irrelevant as government intent to regulate is weighed against the content of the expression, irrespective of the expression's medium of transfer. The uniqueness or novelty of a media form only factors in to the weight placed on the feasibility of the government's desire to regulate and not to what the expression's constitutional protection should be. Lastly, determining constitutionality of a regulatory provision by balancing the objective of the provision with its proportional effect may allow the constitutional doctrine to develop without having to assess how the expression is carried by technology at a particular moment in time. This avoids the problems associated with developing freedom of expression doctrine around mutable technology.

The fact that there are no Canadian constitutional decisions focusing on the specific media of transfer for expression may well be evidence that the Charter proceeds in a techno-neutral fashion. Freedom of expression jurisprudence has progressed since the advent of the Charter in 1982 to encompass a wide variety of media, from print to the Internet. Yet a glance at the court decisions demonstrates that what concerns a Canadian court faced with a Charter challenge is not

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[94] Susan M. Ross and Brian M. O'Connell in *The Boundaries of Expression: Canadian Law and the Dynamics of the Internet*, 35 FREE SPEECH YEARBOOK 175 (1997) argue that the Canadian Charter and its doctrine anticipates new media more effectively than does the American First Amendment.

[95] *See* the comments of Chris Gosnell, *Hate Speech on the Internet*, 23 QUEENS L.J. 369 at 401: "Canadian law accepts that content may be relevant and crucial in determining whether speech should be constitutionally protected."

what medium contains the expression but what purpose the government has in restricting the expression and in what contexts does that restriction arise. The use of precedent in these cases is not categorical, as it is in the United States with print and broadcast media types, but rather contextual and inclusive. It does not matter to a court using past Charter doctrine from a different fact scenario whether the expression in either case was for commercial or private purposes any more than it matters that the expression was obscene or indecent. It is the principled doctrine that is drawn upon and incorporated into the case at hand. For example, the Supreme Court of Canada dealt with the Criminal Code provision for spreading false news in R. v. Zundel.[96] The accused, Mr. Zundel, handed out pamphlets that discounted the Holocaust experience. Mr. Zundel now has a website through which he can reach more of an audience than if he were handing out paper pamphlets on a street corner. Yet whether or not Zundel used a website or printed pamphlets to spread the false news, the constitutional outcome would be the same. The degrees of accessibility and of ease of dissemination are irrelevant in the Charter context.

What matters is firstly that the expression is automatically protected expression. Secondly, the government intent to stop the spread of false news as a pressing and substantial concern must be balanced against a corresponding restriction of the right to freedom of expression. Similar to *Zundel*, the Supreme Court of Canada in Taylor v. Canada (Canadian Human Rights Commission)[97] upheld a provision of the Canadian Human Rights Act[98] which made it discriminatory to communicate race or religion-based hatred by telephone. The corresponding Charter analysis did not turn on the fact that the communication was disseminated by telephone as opposed to direct speech or the Internet. The analysis instead determined that the expression was worthy of protection but the government ban on discriminatory communications was upheld as the concern of protecting those from hateful expression in this context outweighed the right to express this par-

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[96] *Zundel*, 2 S.C.R. 731. The statutory provision at issue in the case, s. 181 of the Canadian Criminal Code, R.S.C. 1985, c. C-46, did not reference by what means false news could be spread.

[97] Taylor v. Canada (Canadian Human Rights Commission), 3 F.C. 593 (1987), appeal dismissed 3 S.C.R. 892 [1990].

[98] Canadian Human Rights Act, R.S.C. 1985, s. 13(1).

ticular form of hatred. Once again, the court relied on a techno-neutral methodology inherent in Charter analyses.

C. *The Techno-neutrality Movement in Canada*

Canada has always fostered a techno-neutral culture in the development of constitutional legal policy. Recently, the growing concern over the law's interaction with the Internet has tested the valuation of techno-neutrality in Canadian law. Legal policy developers and commentators have concluded that techno-neutrality is still possible in the wake of cyberspace. A 1997 Industry Canada report from the Information and Communications Technology Branch did an extensive review of all major areas of Canadian law as it was impacted by the age of the Internet.[99] The report concluded that legal policy should evolve in as "technologically neutral" a way as possible.[100] Established precedents should be maintained wherever feasible. The report also cautioned about the dangers of analogy, novelty, and timeliness and argued for an adherence to the "basic underlying principles of the individual statutes or laws being considered."[101] The Canadian Radio-Television and Telecommunications Commission issued a public notice regarding broadcasting in May 1999 which stated that the Commission would not be regulating the Internet as it did broadcasting and telecommunications.[102] The principal reason for this decision was the fact that there was seen to be no advantage to Internet regulation according to the objectives that established the Commission. The Commission refused to analogize the Internet with broadcasting or television, was not swayed by the novelty of the Internet, and did not attempt to freeze the qualities of the Internet in the present time. Rather, the Commission held that "generally applicable Canadian laws, coupled with self-regulatory initiatives" were well-equipped to deal with content-based regulations. The Commission overtly placed its faith in a techno-neutral approach to this new media and refused to

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[99] Industry Canada, Information and Communication Technologies Branch, *The Cyberspace is Not a No Law Land* (1997).

[100] *Id.* Conclusion 1.1.

[101] *Id.*

[102] Broadcasting Public Notice, Canadian Radio-Television and Telecommunications Commission, 1999-84, 17 May 1999.

develop new regulation based solely on new media type.

D. *The Unpredictability of a Canadian Approach to Freedom of Expression*

A Canadian constitutional solution to freedom of expression in new media does have the drawback of being seemingly unpredictable. Scholars have noted that it is next to impossible to predict how a court will weigh the competing aspects of a section 1 analysis.[103] Justice Dickson capsulized this problem in *R. v. Keegstra* through his comments that "the proper judicial perspective under section 1 must be derived from an awareness of the synergetic relation between two elements: the values underlying the Charter and the circumstances of the particular case."[104] It is questionable how any judge could articulate the precise logic of a section 1 analysis using such broad concepts as Charter values and synergetic relationships between varying circumstances. Although the cost-benefit balance inherent in a Charter analysis is unpredictable, it perhaps may be no more unpredictable than a highly categorized American approach to freedom of expression which relies on differing protections for expression, differing types of judicial scrutiny, differing standards of protection for broadcast or print media, and even differing degrees of transference between media forms.

Indeed, the difference between the two jurisdictions may be that a Canadian court makes no effort to hide the fact that its constitutional doctrine is based on a fluid contextual balancing approach which rests on the variable concept of reasonableness.[105] An American court, by contrast, uses doctrinal categories to provide an air of systematic order in First Amendment cases. That order quickly falls apart when various types of expression are forced into ill-fitting categories based on

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[103] Jamie Cameron calls for a consistent approach to s. 1 analyses in freedom of expression cases in *The Past, Present, and Future of Expressive Freedom Under the Charter*, 35 OSGOODE HALL L.J. 1 (1997).

[104] *R. v. Keegstra*, 3 S.C.R. 697 at 704.

[105] Peter Hogg acknowledges the unpredictability of the Charter analysis in Canadian freedom of expression cases but also hints that it may be no worse than an American categorical approach. *See* PETER HOGG, CONSTITUTIONAL LAW OF CANADA, 3rd ed. (1999).

the type of media carrying the expression. To highlight an example, a content-based restriction on freedom of expression may lead a Canadian court applying the Charter's s. 1 balancing provisions to accept government limitations on expression where that expression is merely unpopular to a majority of society. However, this is no different in actual effect than using varying degrees of community standards as developed in *Miller* to determine obscenity in First Amendment cases.[106] If techno-neutrality is a laudable goal, which this article argues it most definitely is, then perhaps the most prudent way to proceed for a court would be to acknowledge that freedom of expression doctrine involves great degrees of judicial discretion. When dealing with new or existing media, a court could at least strive toward the goal of techno-neutrality in developing doctrine so as not to fragment the law based on media type and thereby increase the illegitimacy of an already unpredictable process. This would foster usable precedents and perhaps create at least one binding force in the otherwise irregular realm of the law of expression in media.

IV. A TECHNO-NEUTRAL METHODOLOGY FOR ADDRESSING THE CONSTITUTIONALITY OF NEW MEDIA REGULATION

A. *The Future of New Media Regulation*

Media regulation, like media technology, is in constant flux. The American Congress has already mandated that all new television sets incorporate the Canadian-invented V-Chip, a microchip which allows a television viewer to filter out certain television programs based on

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[106] How predictable the community standard approach to obscenity is for the realm of new media like the Internet remains to be seen. For a review of the difficulties inherent in the application of a community standard to wide-reaching media, *see* William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197 (1995) (regarding the proposal for a federal obscenity test based on *Miller* standards), Rebecca Dawn Kaplan, *Cybersmut: Regulating Obscenity on the Internet,* 9 STAN. L AND POLICY REV. 189 (1998) (proposing use of Internet surveys as evidence of community standards in cyberspace), and Patrick T. Egan, *Virtual Community Standards: Should Obscenity Law Recognize the Contemporary Community Standard of Cyberspace?,* 30 SUFFOLK U. L. REV. 117 (1996) (proposing that judges should instruct juries to apply the obscenity standard of the cyberspace community).

the labeled content of the program.[107] The current culture of content-based media regulation is focused predominantly on the Internet. As has been mentioned, the Canadian government has refrained from attempted regulation of cyberspace.[108] By contrast, American efforts are already under way to regulate the Internet after the demise of the Communications Decency Act. Professor Lawrence Lessig argues that the Internet is the most plastic media yet, and perhaps the most capable of being regulated; therefore, governments will not resist regulating the Internet for long.[109] There is a movement to establish the Platform for Internet Content Selection (PICS) system which is a type of Internet filtering system that uses an embedded software code to label content on the web.[110] There has also been a proposed bill in Congress to compel government funded schools and libraries to install content filters on computer terminals with Internet access.[111] As well, the Child Online Protection Act was passed in 1998,[112] which was to succeed where the Communications Decency Act of 1996 failed.[113] This Act punishes the communication, for commercial purposes, of any material harmful to minors. The Act is currently enjoined by the American Civil Liberties Union and is facing a constitutional challenge.[114] The present flurry of regulation for new media like the Internet and for new technological filtering solutions for media like television increases the likelihood that American and Canadian courts will

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[107] PAUL C. WEILER, ENTERTAINMENT, MEDIA AND THE LAW (1999) at 74 – 78. Professor Weiler dubs the V-Chip the "C-Chip," the letter "C" representing "choice."

[108] *See* note 55, Industry Canada Report.

[109] LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999).

[110] *See* R. Polk Wagner, *Filters and the First Amendment*, 83 Minn. L. Rev. 755 (1999) for a description of how the PICS system might be incorporated into a government regulatory regime.

[111] *See* Christopher G. Newell, *The Internet School Filtering Act: The Next Possible Challenge in the Development of Free Speech and the Internet*, 28 J. OF LAW AND ED. 129 (1999).

[112] Child Online Protection Act, Pub. L. No. 105-277, § 231, 112 Stat. 2681-2736 (1999).

[113] See, Note, *The Law of Cyberspace*, 112 HARVARD L. REV. 1574 (1999) for a summary of the status of the Child Online Protection Act.

[114] American Civil Liberties Union v. Reno, 31 F. Supp. 2d. 473 (E.D. Pa. 1999), where the court determined that the Act was unconstitutional.

be asked to determine the constitutionality of these new regulatory regimes. As new media technology develops, the challenges to established freedom of expression doctrine will emerge at a greater pace than before.

B. A Solution for American and Canadian Courts

American and Canadian courts require a techno-neutral legal solution to confront challenges to new media regulation. Either jurisdiction could strive to reduce some of the inherent flaws in their current freedom of expression doctrines. However, it is perhaps more effective for courts to become aware of both the benefits of techno-neutrality and the pitfalls of emphasizing degrees of transference *before* constitutional analysis begins. This approach would preserve the existing constitutional framework of the respective jurisdictions and allow changes to that framework to occur without being captive to the pace of media technology. The following is a series of preliminary questions designed to prompt a techno-neutral approach for a court of any jurisdiction. The checklist synthesizes what has been extracted from a comparison between American and Canadian jurisprudential approaches to new media. Courts should complete this checklist before applying established freedom of expression doctrine in order to have an informed response to constitutional challenges to new media regulation.

A CROSS JURISDICTIONAL TECHNO-NEUTRAL PRE-FLIGHT CHECKLIST TO FREEDOM OF EXPRESSION ANALYSIS OF NEW MEDIA REGULATION

A. Focus on the expression itself:

1. What exactly is the content of the expression to be regulated, regardless of its medium of carriage?
2. What is the underlying goal of the proposed regulation: protection from harmful expression or regulation based on a scarce communication resource?

B. Focus on the goals of the proposed regulation:

- ***If the goal is protection from harmful expression*:**

1. How would the medium be treated if it were print-based media? Does its message have anything qualitatively different merely because it is differently transferred?
2. What is the context in which the expression will be encountered by possible audiences?
3. Is there a fear of differentiating the medium based on degree of sensory information?

Degree of Accessibility

4. Is there a fear of differentiating the medium based on degree of accessibility?
   a. Is the message in the medium really more accessible in this particular medium than by another medium?

   Analogy

   b. Are analogies contrived and based on degrees of transference? Are analogies even necessary?

   Novelty

   c. Is the medium really that revolutionary that it does not differ only in degree of transference?

   Timeliness

   d. Is the medium in its final form or will it mutate?

- ***If the goal is regulation based on a scarce communication resource*:**

Degree of Ease of Dissemination

1. Is there a fear of differentiating based on degree of ease of dissemination?

a. Is the medium really that scarce?
b. Will it always be that scarce?

Analogy

c. Are analogies contrived and based on degrees of transference? Are analogies even necessary?

Novelty

d. Is the medium really that revolutionary that it does not differ only in degree of transference?

Timeliness

e. Is the medium in its final form or will it mutate?

By adopting this pre-flight checklist, courts should be sufficiently focused to balance the content of the expression with the goals of the proposed regulation. No one knows how new media technology will advance; only time will tell. Yet techno-neutrality should help constitutional doctrine remain consistent and portable.

Using a futuristic, fictional and perhaps initially outrageous example should serve to demonstrate the utility of the checklist. The advancements of the Internet, satellite, telephone, and virtual reality computer technology may soon make it possible for one to transmit or receive expression merely by thought transference.[115] With the aid of a special headset, wearers of the headset could transmit visual and auditory images to one another. There would at first be no filtering mechanism to control the content of the thoughts transferred. These expressions would be created from pure thought, making their composition limitless. A government would likely press for a content-based regulation of headset wearers in order to protect headset wearers who

[115] While the author acknowledges that this type of media is still in the realm only of science fiction, he reminds readers of the rapid pace of technological innovation in the past five years, which has seen the widespread use of pocket cellular phones, virtual reality for not only video gaming pleasure but for real-world applications like previewing architectural constructions, and the increasing use of satellite transmissions. Only the imagination knows what new media the next five years will bring.

were minors from receiving harmful obscene expression. Whatever the statutory mechanism to pursue this goal, it will likely face a constitutional challenge as it limits freedom of expression through thought transference. A court should then run through its checklist as follows, in order to assess the constitutionality of the statute in a techno-neutral fashion:

A. Focus on the expression itself:

1. What exactly is the content of the expression to be regulated, regardless of its medium of carriage? *A: Obscene expression.*
2. What is the underlying goal of the proposed regulation: protection from harmful expression or regulation based on a scarce communication resource? *A: Protection from harmful expression.*

B. Focus on the goals of the proposed regulation:

- *If the goal is protection from harmful expression:*

1. How would the medium be treated if it were print-based media? Does its message have anything qualitatively different merely because it is differently transferred? *A: If print-based media, would likely be regulated by adult zones as per* Ginsberg *(i.e. keeping adult magazines and videos inaccessible to children) or by parental control. The message is not qualitatively different due to its transmission by thought.*
2. What is the context in which the expression will be encountered by possible audiences? *A: Private users who choose to wear the helmet, children who use the helmet with or without parental supervision.*
3. Is there a fear of differentiating the medium based on degree of sensory information? *A: Medium may be thought but it still transmits traditional visual and auditory signals found in television and radio.*

Degree of Accessibility

4. Is there a fear of differentiating the medium based on degree of accessibility? *A: Yes. No ability to block out transmitter's harmful message.*
   a. Is the message in the medium really more accessible in this particular medium than by another medium? *A: Not really. One still has to put on the helmet to receive the transmission.*

   Analogy

   b. Are analogies contrived and based on degrees of transference? Are analogies even necessary? *A: Analogies should not be necessary in this case as the medium differs only in degree of accessibility.*

   Novelty

   c. Is the medium really that revolutionary that it does not differ only in degree of transference? *A: Only differs in degree of accessibility. Same content of expression as found in other media.*

   Timeliness

   d. Is the medium in its final form or will it mutate? *A: Will probably mutate. Possible mutations could include a content-based filtering mechanism, or perhaps the medium will be a replacement for the telephone.*

Any court would then approach the constitutional analysis of the proposed regulation having already flagged the possible dangers of proceeding in a media-dependent fashion. The court is free to balance the interest of protecting minors from obscene thought transference with the value of free expression in thought transference. Furthermore, it is free to develop freedom of expression doctrine with the assurance that the doctrine will retain maximum precedential value for all possible media forms encountered in the future.

The use of the Pre-Flight Checklist should help foster a techno-

neutral approach to freedom of expression jurisprudence. This approach will allow previous constitutional doctrine to stand while, at the same time, prepare American and Canadian courts for challenges to regulation of new media like the Internet, or, perhaps one day, media based on a revolutionary technology of thought transference.