

# Branding as an Antidote to Indecency Regulation

Kristin L. Rakowski\*

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\* Staff Law Clerk, United States Court of Appeals for the Seventh Circuit. A.B., Harvard University; J.D., Northwestern University School of Law. Many thanks to Professor James Speta.

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## I. INTRODUCTION

In the wake of CBS's broadcast of a bared breast during the 2004 Super Bowl and Fox's airing of the isolated, unscripted expletives Nicole Richie and Cher uttered during their speeches at the 2002 and 2003 Billboard Music Awards, the Federal Communications Commission (FCC) drastically changed its policy on television indecency. Among other changes, airing fleeting expletives would now be met with hefty fines.<sup>1</sup> In addition to being an arbitrary and capricious shift in policy, such zealous regulation violates the First Amendment.

In its October 2008 Term, the Supreme Court heard arguments in *Fox Television Stations, Inc. v. FCC*,<sup>2</sup> which arose out of the Billboard Music Awards kerfuffle. In *Fox* the Court may address the constitutionality of the FCC's regulation of broadcast television for the first time in thirty years and finally put an end to the constitutional debate.<sup>3</sup> But, if the Court instead resolves the case on administrative law

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<sup>1</sup> See, e.g., *CBS Corp. v. FCC*, 535 F.3d 167 (3d Cir. 2008) (Janet Jackson's wardrobe malfunction); *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 464-65 (2d Cir. 2007) (Richie and Cher's expletives), cert. granted, 128 S. Ct. 1647 (Mar. 17, 2008); *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975 (2004) (Bono's exclamation upon winning).

<sup>2</sup> 489 F.3d 444. *Fox* was argued on November 4, 2008. The transcript of the argument is available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/07-582.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-582.pdf).

<sup>3</sup> The last major case in which the Court squarely ruled on the constitutionality of FCC broadcast regulation was *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978).

grounds, as the Second Circuit did,<sup>4</sup> the debate of will continue in the courts,<sup>5</sup> Congress, and the commentariat.

A yet-unexplored issue in this debate is the role that market forces may play. This Article argues that television networks warn viewers of their content through “branding,” providing an alternative to FCC regulation of broadcast television. Moreover, because viewers are no longer “surprised” by indecency, stringent regulation of broadcast television is unconstitutional and thus cannot be extended to cable.<sup>6</sup>

When the Supreme Court last considered broadcast indecency regulation, thirty years ago in *FCC v. Pacifica Foundation*, the Court considered surprise to be one of the central justifications for giving broadcast less First Amendment protection than it gives to cable—and all other media.<sup>7</sup> The idea was that viewers flip through channels frequently and could never be warned properly of the indecency to come, warranting curtailed First Amendment freedom for the broadcaster who was intruding upon their home.<sup>8</sup> But now that broadcast television networks are establishing for themselves narrow niches (in terms

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<sup>4</sup> In *Fox*, the Second Circuit based its decision on the APA, but nevertheless opined that the FCC’s actions likely were unconstitutional. *Fox*, 498 F.3d 444. Similarly, the Third Circuit recently overturned the fine the FCC imposed for Janet Jackson’s wardrobe malfunction during the 2004 Super Bowl, also relying on the Administrative Procedure Act (APA) but declining to reach the constitutional question. *CBS Corp. v. FCC*, 535 F.3d 167 (3d Cir. 2008).

<sup>5</sup> See, e.g., *Fox*, 489 F.3d 444.

<sup>6</sup> Other scholars have opined that *Pacifica*’s rationale cannot support cable regulation for various reasons. E.g., Robert Corn-Revere, *Can Broadcast Indecency Regulations Be Extended to Cable Television and Satellite Radio?*, 30 S. ILL. U. L.J. 243, 244–247 (2006) (arguing that case law thus far and technological changes allowing increased viewer control counsel against extending regulation to cable); Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 Nw. U. L. REV. 1487, 1496 (1995); (arguing that there is no reason to have different standards for broadcast and cable and that broadcast’s standard cannot constitutionally be extended to cable); Thomas G. Krattenmaker & L.A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719 (1995) (“[T]he latest advances in telecommunications provide federal courts the opportunity to discard the inherently silly notion that freedom of speech depends on the configuration of the speaker’s voicebox or mouthpiece. . . . [T]his step would not be a radical jurisprudential leap.”); Adam Thierer, *Why Regulate Broadcasting? Toward a Consistent First Amendment Standard for the Information Age*, 15 COMM.LAW CONSPECTUS 431 (2007) (arguing for a consistent First Amendment standard for all media); Howard M. Wasserman, Comment, *Second-Best Solution: The First Amendment, Broadcast Indecency, and the V-Chip*, 91 Nw. U. L. REV. 1190 (1997).

<sup>7</sup> 438 U.S. 726. The other justifications for the distinction offered in *Pacifica* have since eroded. For example, the “uniquely accessible to children” rationale lost force with the introduction of the V-chip, which gave parents the ability to make selected programming inaccessible to their children, and the numeric pervasiveness of broadcast is now rivaled by cable. E.g., Thierer, *supra* note 6 (outlining various rationales for regulating broadcast and explaining why they are no longer persuasive).

<sup>8</sup> See *Pacifica*, 438 U.S. 726.

of content and the level of indecency permitted)<sup>9</sup>, and familiarizing the public with those niches through branding techniques, the “surprise” rationale is undercut because brands warn viewers of what to expect from the network.

Cable networks started the branding trend. From their inception, the networks established and publicized their clearly defined programming niches: for example, Nick is for kids, and MTV is rock and roll for the rebellious teen set.<sup>10</sup> Broadcast networks are increasingly adopting this strategy by emulating a successful cable counterpart: ABC courts the female audience of Lifetime, NBC is fashioning itself after quality-driven FX, and the CW recruits the viewers that MTV attracted in its heyday.<sup>11</sup> Part of the brand is how risqué the network’s programming is—Disney is wholesome but Fox is “edgy”; Playboy is sexy-but-classy whereas Spice is “hot.”<sup>12</sup>

Awareness of network brands is only increasing.<sup>13</sup> Undercutting Pacifica’s “surprise” rationale through branding undermines the basis for the lowered First Amendment protection that allows the FCC to regulate broadcast content as much as it does. And cable’s deeply defined brands provide a powerful reason to think that cable viewers know what they are getting when they tune into a particular network, and that the FCC’s strict regulation of broadcast television cannot constitutionally be extended to cable.

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<sup>9</sup> SYLVIA M. CHAN-OLMSTED, *COMPETITIVE STRATEGY FOR MEDIA FIRMS: STRATEGIC AND BRAND MANAGEMENT IN A CHANGING MEDIA MARKET* 5 (2006); see *infra* Part V.

<sup>10</sup> See *infra* Part IV.B.

<sup>11</sup> Ben Grossman, *Broadcast Goes Cable; Networks Seek Bigger Audiences by Playing to Niche Themes*, BROADCASTING & CABLE, May 21, 2007, at 8; see *infra* Part IV.C. Brand identities are so important that “sharp, urban” cable network Bravo, the current home of *Project Runway*, is suing the owner of the program for cutting a deal to air it next on Lifetime. The network a program airs on is part of the show’s image, and it matters to viewers as well: the move “makes some *Runway* fans cringe.” Allen Salkin, *In Bed with ‘Runway’: A Lifetime Story*, N.Y. TIMES, Apr. 13, 2008 (explaining that while intellectuals and academics are willing to indulge in guilty reality-TV pleasure by watching *Runway* on Bravo, they would flinch at tuning in to Lifetime).

<sup>12</sup> See *infra* Part IV.B–C.

<sup>13</sup> Cf. Catherine Johnson, *Tele-Branding in TVIII: The Network as Brand and the Programme as Brand*, 5 NEW REV. OF FILM & TELEVISION STUD. 5, 5–24 (2007). Television and advertising insiders certainly are aware of networks’ brand identities, which are documented in trade publications such as *Adweek* and *Broadcasting and Cable*. E.g., Grossman, *supra* note 11, at 8; see *Adweek Magazine’s Special Report*, ADWEEK, May 29, 2006 (quoting NBC entertainment president Kevin Reilly). Furthermore, the current generation of children is the most brand-aware yet. See, e.g., MARTIN LINDSTROM, BRANDCHILD 10–11, 23 (2003) (“[Today’s tweens] have been exposed to much more at a very young age—younger than any other generation. It’s all about . . . more brands.”); cf. Kenneth L. Karst, *Law, Cultural Conflict, and the Socialization of Children*, 91 CAL. L. REV. 967, 1004 (2003) (“[B]abes in arms learn to recognize advertising logos and start to pronounce brand names soon after they say their first words.”).

Although no cable regulations have been signed into law yet, if in Fox the Court were to hold that the FCC's regulation of broadcast is constitutional despite the vitiation of the rationale underlying it, cable's independence likely would be challenged soon thereafter. Political pressure to increase television regulation is strong, and supporters of cable regulation argue that cable's pervasiveness justifies regulating it under broadcast standards.<sup>14</sup> Watchdog groups such as the Parents Television Council are mobilizing viewers to submit indecency complaints to the FCC and urging the FCC to step up prosecution of indecency on television.<sup>15</sup> Several bills to increase indecency regulation of both broadcast and cable television have been introduced in Congress.<sup>16</sup> But so far the Supreme Court has considered cable to be beyond the FCC's regulatory purview.<sup>17</sup>

The standards of First Amendment protection given to broadcast and cable television and the FCC's recent increase in regulatory enforcement are described in Part II. Parts III and IV explain the fundamentals of branding and the structure of the television industry. Part V explores case studies of cable and broadcast brands that reveal the extent to which branding provides notice to viewers and prevents surprise. Part VI concludes that the strength of network brands undermines the justification for regulation of broadcast television and precludes extending it to cable.

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<sup>14</sup> See, e.g., Matthew S. Schwartz, *A Decent Proposal: The Constitutionality of Indecency Regulation on Cable and Direct Broadcast Satellite Services*, 13 RICH. J.L. & TECH. 17, at \*2-4 (2007). The majority of homes now subscribe to cable. See *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 465 (2d Cir. 2007), cert. granted, 128 S. Ct. 1647 (Mar. 17, 2008).

<sup>15</sup> See generally Parents Television Council, <http://capwiz.com/parentstv/home/> (last visited Oct. 19, 2008). For the argument that there is no regulatory means to insulate children from indecency and "adult" subjects because of what children learn through their peers, see Karst, *supra* note 13, at 1007-11.

<sup>16</sup> E.g., FCC Reauthorization Act of 2003, S. 1264, 108th Cong. (2004); Indecent and Gratuitous and Excessively Violent Programming Control Act of 2005, S. 616, 109th Cong. (2005); Kid Friendly TV Programming Act of 2005, S. 946, 109th Cong. (2005); Corn-Revere, *supra* note 6, at 244-247 (collecting and describing these various bills). There is also a movement to require cable companies to offer channels a la carte, both for economic reasons and because some groups claim that there is a significant amount of inappropriate material even on basic cable. See Corn-Revere, *supra* note 6, at 246-47. Similarly, there is a movement to create an ".xxx" domain on the internet to facilitate filters and provide notice for net surfers: the Cyber Safety for Kids Act of 2006 would have required a designated internet domain for "adult" material. Cyber Safety for Kids Act of 2006, S. 2426, 109th Cong. § 2 (2006).

<sup>17</sup> See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813-15 (2000); *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994); see also *infra* Part II.B.

## II. THE FIRST AMENDMENT AND FCC REGULATION

The level of First Amendment protection afforded speech depends on the medium through which the speech is presented. Broadcast, considered an “intruder,” receives the least protection, whereas cable, considered an “invited guest,” receives the same protection afforded print media. Both the degree to which the FCC has prosecuted indecency and its definition of what constitutes indecency have shifted over the years, and the FCC’s current regime is the most rigorous yet.

### A. *First Amendment Protection for Broadcasting*

Broadcast media receives less First Amendment protection than any other form of media.<sup>18</sup> Print publications may publish “indecent” material with full First Amendment protection, crossing the line only when the material is “obscene,”<sup>19</sup> but broadcasters can be sanctioned for airing any “indecent” material. Indecency regulations of other media are subject to strict scrutiny by the courts, and will be upheld only if narrowly tailored to meet a compelling state interest. In practice, content-based indecency regulation has not survived in any medium, with the exception of broadcast. For broadcast, the Court has held that the government interest need only be “substantial” to support content regulation.<sup>20</sup>

The lower First Amendment protection for broadcast stems from the early broadcast radio cases *NBC v. United States*<sup>21</sup> and *Red Lion Broadcasting Co. v. FCC*,<sup>22</sup> which relied on the scarcity of radio frequencies to justify it.<sup>23</sup> In 1978, the seminal case of *FCC v. Pacifica Foundation* shifted the rationale while upholding decreased protection.<sup>24</sup> Although the Supreme Court did not reject the scarcity rationale in *Pacifica*<sup>25</sup>—nor has it done so in any case since then<sup>26</sup>—the

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<sup>18</sup> *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (plurality opinion).

<sup>19</sup> *See id.* at 745 (“Obscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral standards.” (citing *Roth v. United States*, 354 U.S. 476 (1957))).

<sup>20</sup> *FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984) (collecting cases); *see also* *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 464–65 (2d Cir. 2007) (citing *League of Women Voters*), *cert. granted*, 128 S. Ct. 1647 (Mar. 17, 2008).

<sup>21</sup> 319 U.S. 190 (1943).

<sup>22</sup> 395 U.S. 367 (1969).

<sup>23</sup> *NBC*, 319 U.S. at 226; *Red Lion Broad.*, 395 U.S. at 390; *see also* Thierer, *supra* note 6, at 435–36 (explaining the history and development of the scarcity rationale).

<sup>24</sup> *See Pacifica*, 438 U.S. 726, 751 (1978).

<sup>25</sup> *See id.* at 748.

<sup>26</sup> Thierer, *supra* note 6, at 435–36.

Court instead looked to considerations of pervasiveness and accessibility to children.<sup>27</sup>

The complaint in *Pacifica* was filed by a father who was taking an afternoon car trip with his young son when they heard George Carlin's "Filthy Words" monologue broadcast over a radio station owned by Pacifica Foundation.<sup>28</sup> Carlin's monologue satirized the meaning people that attach to curse words, or, as Carlin described them, those words that "you couldn't say on the public, ah, airwaves."<sup>29</sup> Carlin listed the words and repeated them constantly throughout the twelve-minute monologue in what Justice Powell described as a "verbal shock treatment."<sup>30</sup> The Court concluded that these words were indecent, but not obscene, and thus for the first time had to determine whether the First Amendment allows the FCC to restrict the broadcast of indecent material.<sup>31</sup>

The Court determined that the government did have the power to restrict indecency on broadcast media and offered two primary reasons for treating broadcast differently than other forms of media: (1) "the broadcast media have established a uniquely pervasive presence in the lives of all Americans;" and (2) "broadcasting is uniquely accessible to children, even those too young to read."<sup>32</sup>

The first reason, pervasiveness, is actually comprised of three, referred to here as the popularity, intruder, and surprise rationales. The popularity rationale is essentially that because broadcast television is so widespread, more regulation is justified. Broadcast's popularity is no longer unique, however, given that eighty-six percent of American households also have cable.<sup>33</sup>

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<sup>27</sup> See *Pacifica*, 438 U.S. at 748–50. Three justices signed on to the opinion of the Court. See *id.*

<sup>28</sup> *Id.* at 729–30.

<sup>29</sup> *Id.* at 729–30.

<sup>30</sup> *Id.* at 729; *id.* at 757 (Powell, J., concurring). Carlin's seven dirty words were "shit, piss, fuck, cunt, cocksucker, motherfucker, and tits." *Id.* at 751 (appendix to the opinion of the Court).

<sup>31</sup> *Id.* at 741–42, 744 (plurality opinion).

<sup>32</sup> *Id.* at 748–50. One scholar has argued that *Pacifica*'s reliance on these rationales was questionable even at the time because the assertions were factually unproven: there was no showing that listeners frequently encounter offensive material on broadcast while in the privacy of their homes, and there was no showing either of a widespread problem of unsupervised radio and television usage by children or that exposure to such material harms children. William E. Lee, *Manipulating Legislative Facts: The Supreme Court and the First Amendment*, 72 TUL. L. REV. 1261, 1291–93 (1998).

<sup>33</sup> *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 465 (2d Cir. 2007), cert. granted, 128 S. Ct. 1647 (Mar. 17, 2008). *Pacifica* dealt with broadcast radio but applies to broadcast television as well.

The intruder rationale is the idea that broadcast “intrudes” into the privacy of one’s home, and therefore the homeowners’ rights take precedence over the First Amendment rights of the “intruder.”<sup>34</sup> The Court implied that this rationale was significant, citing *Cohen v. California* for the proposition “that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue.”<sup>35</sup> (The child subjected to an indecent radio broadcast in *Pacifica*, however, was in the car rather than the home.) This rationale has been strongly criticized. As Judge Edwards notes, “[t]his controversial characterization might prompt Joe Couch Potato to wonder whether the Justices ever noticed the ‘off’ button on their remote controls as an efficient mechanism with which to fend off intrusive and pervasive television.”<sup>36</sup>

The surprise rationale is the notion that because people are constantly tuning in and out of a broadcast, they could miss any warnings of indecency given at the beginning of a program and then be surprised by offensive content. The Court was concerned that a viewer or listener would be subjected to a “first blow” before being able to escape the indecent content by turning off the program. The Court considered turning the program off to be an insufficient remedy when the objectionable content appears in the privacy of the home.<sup>37</sup> The Court anal-

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<sup>34</sup> *Pacifica*, 438 U.S. at 748.

<sup>35</sup> *Pacifica*, 438 U.S. at 749 n.27 (citing *Cohen v. California*, 403 U.S. 15, 21 (1971)).

<sup>36</sup> Edwards & Berman, *supra* note 6, at 1496; *see also* Thierer, *supra* note 6, at 482 n.244 (“The TV set attached to rabbit ears is no more an intruder into the home than cable, DBS, or newspapers for that matter. Most Americans are willing [to] bring TVs into their living rooms with no illusion as to what they will get when they turn them on.” (quoting Michael K. Powell, Comm’r, FCC, Remarks Before the Media Institute: Willful Denial and First Amendment Jurisprudence (Apr. 22, 1998) (transcript available at <http://www.fcc.gov/Speeches/Powell/spmcp808.html>)). Similarly, in *Pacifica* Justices Brennan and Marshall said in dissent:

[U]nlike other intrusive modes of communication, such as sound trucks, “[t]he radio can be turned off”—and with a minimum of effort. . . . “[T]he scanner who stumbles onto an offensive program is in the same position as the unsuspecting passers-by in *Cohen* and *Erznoznik*: he can avert his attention by changing channels or turning off the set.” Whatever the minimal discomfort suffered by a listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations or flick the “off” button, it is surely worth the candle to preserve the broadcaster’s right to send, and the right of those interested to receive, a message entitled to full First Amendment protection. To reach a contrary balance, as does the Court, is clearly, to follow Mr. Justice STEVENS’ reliance on animal metaphors, “to burn the house to roast the pig.”

*Pacifica*, 438 U.S. at 765–66 (Brennan, J., dissenting) (internal citations omitted).

<sup>37</sup> *Pacifica*, 438 U.S. at 748–49; *see also id.* at 759–60 & n.2 (Powell, J., concurring). Justices Brennan and Marshall also took issue with this contention, arguing that broadcast is more aptly characterized as a public medium because although a person can tune in within

ogized unexpected indecency on the airwaves to indecent phone calls, which Congress had recently prohibited.<sup>38</sup> Further, Justice Powell noted in his concurrence: “I do not think Carlin, consistently with the First Amendment, could be punished for delivering the same monologue to a live audience composed of adults who, knowing what to expect, chose to attend his performance.”<sup>39</sup> It is the surprise rationale that this Article argues current branding practices have undercut.<sup>40</sup>

The Court has relied on the surprise rationale in post-Pacifica cases as well. In *Sable Communications of California, Inc. v. FCC*, the Court addressed a statute that banned indecent phone messages (that is, “dial-a-porn” services). In finding the statute at issue unconstitutional, the Court distinguished it from *Pacifica* on the basis of a lack of surprise.<sup>41</sup> The Court found actively calling a dial-a-porn service to be quite different from “turning on a radio and being taken by surprise by an indecent message.”<sup>42</sup> In the more recent *Reno v. ACLU*, which overturned a statute regulating indecency on the internet, the Court quoted this same language from *Sable*.<sup>43</sup> Furthermore, the FCC relied on this rationale in *Fox Television Stations* to support its efforts to enforce sanctions for fleeting expletives, arguing that the fleeting expletive was a “first blow.” The Second Circuit, however, found that the rationale did not justify the FCC’s selective and inconsistent enforcement.<sup>44</sup>

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the home, “an individual’s actions in switching on and listening to communications transmitted over the public airways and directed to the public at large do not implicate fundamental privacy interests, even when engaged in within the home.” *Id.* at 764–65 (Brennan, J., dissenting).

<sup>38</sup> *Id.* at 749 (citing Consumer Credit Protection Act Amendments, 91 Stat. 877, 15 U.S.C. § 1692d (1976 ed., Supp. II)).

<sup>39</sup> *Id.* at 757 (Powell, J., concurring).

<sup>40</sup> This rationale, or aspect of the pervasiveness rationale, has not been significantly addressed in the literature.

<sup>41</sup> *Sable Comms. of Ca., Inc. v. FCC*, 492 U.S. 115, 128 (1989) (“Unlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it.”).

<sup>42</sup> *Id.* at 128.

<sup>43</sup> *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (quoting *Sable Comms. of Ca.*, 492 U.S. at 128).

<sup>44</sup> *Fox*, 489 F.3d at 458. The Second Circuit explained that not only was there no reasoned explanation for the FCC’s policy change—sanctioning fleeting expletives after excusing them for thirty years—but that the theory was inconsistent with the selective enforcement of such expletives. The FCC was only sanctioning fleeting expletives in certain circumstances, and excusing them when, for example, they were uttered in the course of a news program, or where they were “integral” to an artistic work like *Saving Private Ryan*. *Id.* at 458. Moreover, the *Pacifica* Court expressly noted: “We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution.” *Pacifica*, 438 U.S. at 750.

The second reason that broadcast is treated differently is that broadcast is “uniquely accessible to children,” — it is unlike other forms of media because even children too young to read can see it and understand it.<sup>45</sup> The Pacifica Court found it significant that young children could access broadcast programming by simply pushing a button in their own home, whereas the purveyors of other protected material, such as movies and books, could more easily keep such material out of the hands of children without limiting it at the source. Children’s ease in accessing this material was significant to the Court because, under *Ginsberg v. New York*,<sup>46</sup> regulating protected expression is justified by governmental interests both in children’s well-being and in the authority of parents in their own home.<sup>47</sup> The accessibility to children rationale has also been challenged, primarily because new technological tools such as the V-chip<sup>48</sup> allow parents to control which channels and programs their children can view and regain authority in their homes.

A content-based regulation generally only withstands strict scrutiny under the First Amendment if it is narrowly tailored to serve the compelling government interest at issue. Only for broadcast, however, has the Court allowed the government to meet its burden by providing merely a “substantial” and not a “compelling” government interest.<sup>49</sup> Nonetheless, the Court has not upheld regulations serving substantial interests when there is a less restrictive alternative.<sup>50</sup> In 2000, the Court in *United States v. Playboy Entertainment Group* overturned a content regulation of cable television because there was a less restrictive alternative available through technology, namely targeted blocking.<sup>51</sup> The V-chip is essentially a targeted blocking mechanism for

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<sup>45</sup> *Pacifica*, 438 U.S. at 749.

<sup>46</sup> *Ginsberg v. New York*, 390 U.S. 629 (1968).

<sup>47</sup> *Id.* at 749–50 (citing *Ginsberg*, 390 U.S. 629).

<sup>48</sup> All thirteen-inch or larger television sets sold since 2000 are required to contain V-chip technology, and parents with older televisions may also purchase and use a set-top box with V-chip technology. FCC, *The V-Chip: Putting Restrictions on What Your Children Watch*, <http://www.fcc.gov/cgb/consumerfacts/vchip.html> (last visited Oct. 19, 2008). Nearly all television channels voluntarily assign their programs a rating according to the TV Parental Guidelines, a system of ratings for television similar to but more detailed than those used for film, and the V-chip allows parents to block all programs of particular ratings from even appearing on their television. See *The TV Parental Guidelines*, <http://www.tvguidelines.org> (last visited Oct. 19, 2008).

<sup>49</sup> *Fox*, 489 F. 3d 464–65 (citing *FCC v. League of Women Voters of Ca.*, 468 U.S. 364, 376, 380 (1984)).

<sup>50</sup> *League of Women Voters*, 468 U.S. at 395 (“Finally, although the Government certainly has a substantial interest in ensuring that the audiences of noncommercial stations will not be led to think that the broadcaster’s editorials reflect the official view of the government, this interest can be fully satisfied by less restrictive means that are readily available.”).

<sup>51</sup> *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813–15 (2000). In *Playboy*, the Court struck down a statute addressing the problem of “signal bleed” of adult content

broadcast television that arguably is a less restrictive alternative that serves the same governmental interest in protecting children.<sup>52</sup>

### B. *First Amendment Protection for Cable*

Although broadcast television is an “intruder” in the home, cable is an “invited guest”<sup>53</sup> and thus enjoys full First Amendment protection. The Supreme Court thus far has not applied to cable the lesser First Amendment protection afforded broadcast.<sup>54</sup> The Court held in *Playboy* that the “key difference” between broadcast and cable that prevents the application of the *Pacifica* regime to cable is that unwanted cable channels can be blocked from individual households.<sup>55</sup> This suggests that now that the V-chip exists to block unwanted broadcast channels, if broadcast and cable are to be treated the same way the only constitutional option is to give them both full protection.<sup>56</sup>

### C. *FCC Regulation of Indecency*

The statutory authority for the FCC to regulate indecency on broadcast television (and radio) lies in 18 U.S.C. § 1464, which allows the FCC to fine or imprison those who broadcast “obscene, indecent, or profane” language.<sup>57</sup> Another section of the Code, § 326, limits this authority, specifically denying the FCC the authority to censor or to

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that had required cable operators who provided adult channels to either scramble those channels or transmit their programming only between 10pm and 6am, finding that a less restrictive option was blocking the adult channels from only the homes of subscribers who request the blocking. *Id.*

<sup>52</sup> *Id.* at 813–15; *Fox*, 489 F.3d at 465–66 (citing *Playboy* and opining that the V-chip would be relevant to the question that the court did not reach, whether technological changes created a less restrictive alternative to the FCC’s fleeting expletive regulation). Indeed, what the V-chip does is return control of children’s television consumption to their parents—and “the state’s compelling interest lies not in protecting children, but in protecting parenting.” Edwards & Berman, *supra* note 6, at 1563.

<sup>53</sup> *Cnty. Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099, 1113 (D. Utah 1985), *aff’d sub nom. Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff’d mem.* 480 U.S. 926 (1987) (cited in *Corn-Revere*, *supra* note 6, at 256); *CABLE VISIONS: TELEVISION BEYOND BROADCASTING* 6 (Sarah Banet-Weiser et al. ed., 2007) (“Cable and DBS are, in the eyes of courts and other authorities, ‘invited guests’ (perhaps, more accurately, hired help) that a subscriber could banish simply by unsubscribing.”).

<sup>54</sup> *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994); *Playboy*, 529 U.S. at 815. For an argument that there is no reason for making this distinction, see Thierer, *supra* note 6.

<sup>55</sup> *Playboy*, 529 U.S. at 815.

<sup>56</sup> See *Corn-Revere*, *supra* note 6, at 256. *Corn-Revere*, notably, is the former Chief Counsel to the FCC Chairman. *Id.* at 243 n.\*.

<sup>57</sup> 18 U.S.C.A. § 1464 (2007) (titled “Broadcasting Obscene Language”). Contrast 18 U.S.C.A. § 1468 (2007), granting the authority to regulate cable television, which provides that only “obscene,” and not “indecent,” material may be sanctioned.

“interfere with the right of free speech.”<sup>58</sup> The Court, however, has held that § 326 precludes only prior restraints on speech.<sup>59</sup> The FCC’s policy for determining what constitutes indecency has varied over the years, and clarity has not been its strong suit.<sup>60</sup>

### 1. A Brief History

The FCC’s definition of what constitutes indecency has fluctuated since the agency first began regulating broadcast. In the 1970’s, the FCC established a broad definition of indecency and began sanctioning expletives when they were used not for their meanings but for emphasis.<sup>61</sup> Following *Pacifica* in 1978, the FCC focused its attention primarily on the “seven dirty words” contained in George Carlin’s “Filthy Words” monologue. But in 1987 the FCC returned to a broad definition of indecency: “language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.”<sup>62</sup>

### 2. Recent Regulation

Beginning in 2003, the FCC stepped up its enforcement efforts, going after fleeting expletives and the infamous wardrobe malfunction.<sup>63</sup> The FCC also changed the process by which people submit indecency complaints so as to increase their volume and make it more difficult for broadcasters to fight them.<sup>64</sup> Congress, in turn, passed the Broadcast Indecency Enforcement Act, vastly increasing the maximum fine for broadcasting indecent material.<sup>65</sup>

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<sup>58</sup> 47 U.S.C.A. § 326 (2007) (“Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.”).

<sup>59</sup> *FCC v. Pacifica Found.*, 438 U.S. 726, 735 (1978).

<sup>60</sup> See Thierer, *supra* note 6, at 457.

<sup>61</sup> Lili Levi, *The Hard Case of Broadcast Indecency*, 20 N.Y.U. REV. L. & SOC. CHANGE 49, 88-89 (1993); see, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (plurality opinion).

<sup>62</sup> Levi, *supra* note 61, at 91-92.

<sup>63</sup> Lili Levi, First Report: The FCC’s Regulation of Indecency 15, 18-21 (Univ. of Miami Legal Studies Res. Paper No. 2007-14, Aug. 6, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1023822](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1023822); see also *CBS Corp. v. FCC*, 535 F.3d 167, 177 (3d Cir. 2008).

<sup>64</sup> Levi, *supra* note 63, at 22-24.

<sup>65</sup> Broadcast Decency Enforcement Act of 2005, Pub. L. 109-235, 120 Stat. 491 (amending 47 U.S.C. § 503(b)(2)) (cited in Thierer, *supra* note 6, at 431 & n.1; Levi, *supra* note 63, at 82 & n.38).

The FCC has also made several dramatic policy changes, including prosecuting broadcasters for unscripted “fleeting expletives,”<sup>66</sup> using the context of a program to prove indecency rather than excuse it, and developing seemingly bright-line rules that deem certain material per se indecent.<sup>67</sup> It remains to be seen how much of this regime will survive judicial scrutiny. The Second and Third Circuits have both declared the fleeting expletive policy arbitrary and capricious in violation of the Administrative Procedure Act, but the Supreme Court is reviewing the Second Circuit’s decision.<sup>68</sup>

The FCC, per its 2001 Policy Statement, analyzes indecency using a two-part framework: (1) “the material alleged to be indecent must fall within the subject matter scope of [the FCC’s] indecency definition—that is, the material must describe or depict sexual or excretory organs or activities,” and (2) “the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium.”<sup>69</sup> If the first test is met, the analysis proceeds to the second.<sup>70</sup> The FCC describes the “community standard” as being from the perspective of the “average broadcast viewer or listener”<sup>71</sup>—for example, a complainant from a person living in a conservative town does not receive a more sensitive standard of review. Furthermore, the FCC

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<sup>66</sup> The starkness of the policy change is evidenced by *Fox Television Stations v. FCC*, 489 F.3d 444, 464–65 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (Mar. 17, 2008), which found the change to arbitrary and capricious in violation of the Administrative Procedure Act). *See also In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 2664 (Mar. 15, 2006), *vacated in part*, 21 F.C.C.R. 13,299 (Nov. 6, 2006), *vacated and remanded*, *Fox*, 489 F.3d 464.

<sup>67</sup> *Levi*, *supra* note 63, at 29.

<sup>68</sup> *Fox*, 489 F.3d 444, *cert. granted*, 128 S. Ct. 1647 (Mar. 17, 2008); *CBS Corp. v. FCC*, 535 F.3d 167 (3d Cir. 2008). The question in *Fox* that the Supreme Court accepted for review is whether the Second Circuit erred in overturning the FCC’s determination that broadcasting fleeting expletives violates federal law. *See* Petition for a Writ of Certiorari at I, *FCC v. Fox Television Stations, Inc.*, 489 F.3d 444 (2007) (No. 07-582), 2007 WL 3231567, at \*I. Although the Second Circuit decided *Fox* on the basis of the APA, it expounded in dicta on the constitutional questions for several pages, expressing “skeptical[ism] that that the Commission [could] provide a reasoned explanation for its ‘fleeting expletive’ regime that would pass constitutional muster,” *Fox*, 489 F.3d. 444, and at oral argument *Fox* urged the Court to reach the First Amendment question. *See* Transcript of Oral Argument at 37–41, *Fox*, 489 F.3d 444 (No. 07-582), *available at* [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/07-582.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-582.pdf).

<sup>69</sup> Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, Policy Statement, 16 F.C.C.R. 7999, 8002 (2001) [hereinafter FCC Policy Statement] (citing WPBN/WTOM License Subsidiary, Inc. (WPBN-TV and WTOM-TV), 15 F.C.C.R. 1838, 1840–41 (2000)).

<sup>70</sup> *See* FCC Policy Statement, 16 F.C.C.R. at 8002.

<sup>71</sup> *Id.* at 8002 (citing WPBN/WTOM License Subsidiary, 15 F.C.C.R. at 1841).

emphasizes that context is extremely important to its determination.<sup>72</sup> It uses what is essentially a balancing test of the following three factors:

- (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.<sup>73</sup>

In its Policy Statement, the FCC gives numerous examples of what it has considered to be indecent and not indecent.<sup>74</sup> Those examples include a radio broadcast of the song *Sit on My Face* from Monty Python Live at the Hollywood Bowl,<sup>75</sup> which was found indecent “despite [being sung in an] English accent”;<sup>76</sup> whereas an NPR story containing an excerpt from a wiretap recording of mobster John Gotti, in which he uses the word “fuck” ten times within seven sentences, was found not to be indecent because it was used in the course of a “bona fide news story” about evidence presented at Gotti’s trial.<sup>77</sup>

### 3. The FCC’s Current Consideration of Notice Versus Surprise

Although the FCC does not list notice as a specific factor in its analysis, notice of the offensive material appears to be relevant to the FCC analysis,<sup>78</sup> which is appropriate in light of Pacifica’s underpinnings.

In the FCC Remand Order that preceded the federal court litigation in Fox, the FCC cited lack of notice as one of its reasons for finding patently offensive Cher and Nicole Richie’s fleeting expletives during the 2002 and 2003 Billboard Music Awards. Cher, in her acceptance

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 8003 ¶ 10. The FCC further elaborates its analytical process:

In examining these three factors, we must weigh and balance them to determine whether the broadcast material is patently offensive because “[e]ach indecency case presents its own particular mix of these, and possibly, other factors.” In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent, or, alternatively, removing the broadcast material from the realm of indecency.

*Id.* (internal citations omitted).

<sup>74</sup> *Id.* at 8003–15.

<sup>75</sup> The original movie clip is available at <http://www.youtube.com/watch?v=FkeQpeDkoGc> (last visited Oct. 20, 2008).

<sup>76</sup> FCC Policy Statement, 16 F.C.C.R. at 8007.

<sup>77</sup> *Id.* at 8012. Although the letter denying reconsideration does not explicitly rely on a warning the announcer gave before the excerpt aired, *see* Letter to Peter Branton, 6 F.C.C.R. 610 (1991)), the brief description in the Policy Statement does mention that warning in support of its conclusion. FCC Policy Statement, 16 F.C.C.R. at 8012.

<sup>78</sup> Levi, *supra* note 63, at 33 & n.133.

speech, said, "I've also had critics for the last 40 years saying that I was on my way out every year. Right. So fuck 'em."<sup>79</sup> Richie, ad-libbing from a milder script about her show *The Simple Life*, said, "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple."<sup>80</sup> The FCC noted that the awards shows were rated TV-PG and TV-PG(DL), respectively, ratings that "would not have put parents or others on notice of such vulgar language."<sup>81</sup> In addition, the broadcast of Richie's remarks "contained no other warnings to viewers that it might contain material highly unsuitable for children,"<sup>82</sup> and the notice accompanying the broadcast of Cher's speech was "inadequate and misleading."<sup>83</sup> The FCC found this lack of notice relevant to its examination of context under *Pacific*<sup>84</sup> and asserted that it could take action on these "first blows" to the audience.<sup>85</sup>

In contrast, adequate notice about indecent material in *Saving Private Ryan* led the FCC to conclude that ABC's broadcast of the movie was not indecent. In the FCC's 2005 order dismissing an indecency complaint regarding ABC's airing of the film, the FCC spent a paragraph describing the extensive warnings given to viewers about the potentially offensive material in the film.<sup>86</sup> The broadcast, on Veteran's Day, was preceded by an introduction by World War II veteran Dr. Harold Baumgarten and Vietnam veteran Senator John McCain.<sup>87</sup> McCain discussed the importance of the film, but warned that "the R-rated language and graphic content [of the film] is for mature audiences and not appropriate for children."<sup>88</sup> This verbal warning was followed by a viewer advisory, as well as a TV Parental Guidelines rating of "TV MA LV,"<sup>89</sup> which indicates that the program is suitable only for mature audiences because it contains "graphic violence" and "crude indecent language."<sup>90</sup> This advisory notice and the rating were aired again after

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<sup>79</sup> *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002, and March 8, 2005*, 21 F.C.C.R. 13,299, 13,323 ¶ 56 (Nov. 6, 2006).

<sup>80</sup> *Id.* at 13,303 ¶ 13.

<sup>81</sup> *Id.* at 13,306 ¶ 18, 13,324 ¶ 59.

<sup>82</sup> *Id.* at 13,306 ¶ 18.

<sup>83</sup> *Id.* at 13,325 ¶ 62.

<sup>84</sup> *See id.* at 13,306 ¶ 18.

<sup>85</sup> *Id.* at 13,308 ¶ 24, 13,325 ¶ 62.

<sup>86</sup> *In re Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 F.C.C.R. 4507, 4508 ¶ 3 (Feb. 28, 2005).

<sup>87</sup> *Id.* at 4507-08 ¶ 2.

<sup>88</sup> *Id.* at 4508 ¶ 3.

<sup>89</sup> *Id.*

<sup>90</sup> TV Parental Guidelines, Understanding the TV Ratings, <http://www.tvguidelines.org/ratings.htm> (last visited Oct. 20, 2008).

every commercial break, and had been posted on the ABC website before the movie was broadcast.<sup>91</sup>

In the midst of the order's discussion of whether the vulgar language in the movie was "patently offensive," the FCC again referenced the warnings. It spent another paragraph explaining that the program was "not intended as family entertainment," as the advisory notice and ratings expressed. Thus, the FCC concluded that "parents had ample warning" about the content of the film.<sup>92</sup> The order based its decision at least in part on this factor:

Thus, in light of the overall context of the film, including the fact that it is designed to show the horrors of war, its presentation to honor American veterans on the national holiday specifically designated for that purpose, the introduction, which articulated the importance of presenting the film in its unedited form, and the clear and repeated warnings provided by ABC, not only in the introduction but also at each commercial break, we find that the complained-of material is not patently offensive as measured by contemporary community standards for the broadcast medium, and, therefore, not indecent.<sup>93</sup>

Similarly, a broadcast of *Schindler's List* was found not indecent in part because of warnings that accompanied the film.<sup>94</sup> The FCC's reliance on notice in this context suggests that the surprise rationale of *Pacifica* is still very much alive, and that when it can be overcome, indecency sanctions are not warranted.

### III. BRANDING

Branding, at its core, is a means of providing notice to consumers about the quality and characteristics of a product. Branding of television networks provides notice to a viewer about the characteristics of the programming, as well as cues about its intended audience. Trademark law ensures that brands continue to provide accurate and adequate notice to consumers by prohibiting misleading use of brand names.

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<sup>91</sup> Complaints Against "Saving Private Ryan," 20 F.C.C.R. at 4508 ¶ 3.

<sup>92</sup> *Id.* at 4513 ¶ 15.

<sup>93</sup> *Id.* at 4513 ¶ 16 (emphasis added).

<sup>94</sup> *In re WPBN/WTOM License*, 15 F.C.C.R. 1838, 1841 ¶ 13 ("[The FCC Staff's] determination [that the broadcast of *Schindler's List* before 10 p.m. did not warrant sanctions] was properly based on the full context of its presentation as outlined by the staff in response to North's complaints—including the subject matter of the film, the manner of its presentation, and the warnings that accompanied the broadcast of this film—and not the standards of any particular community or individual viewer or complainant." (emphasis added)).

### A. *Law and Economics of Trademarks*

The basic function of a trademark is source identification, which means identifying the origin of a good by distinguishing it from other goods with the use of a recognizable mark, thus making it easier for a consumer to remember and locate a particular good.<sup>95</sup> This benefits the consumer by lowering the costs, both in time and energy, of obtaining a particular good of a certain quality.<sup>96</sup> The producer of the good benefits because lower search costs allow more consumers to successfully find and purchase its good.<sup>97</sup> These benefits only adhere, however, when the producer can maintain the quality of the good over time, ensuring that the trademark accurately represents the good's quality.<sup>98</sup> Once consumers discover inconsistencies, they will stop relying on the trademark and will not purchase the good.<sup>99</sup>

### B. *Fundamentals of Branding*

“Branding” is the broader process of distinguishing both a product's quality and its source from its competitors. Brand differentiation is most important in highly competitive industries, where small differences between products are significant.<sup>100</sup> This section explains the business of branding for media companies to provide a backdrop for evaluating the extent to which television branding effectively provides notice to viewers.

Brand management is the process by which a producer creates and maintains those qualities that make a brand valuable—the qualities that the consumer comes to associate with and expect from that particular brand.<sup>101</sup> For example, the brands of CNN, ESPN, HBO, and Disney bring to mind certain attributes and elicit certain expectations from their viewers.<sup>102</sup> Brand management should permeate the company:<sup>103</sup>

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<sup>95</sup> WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 166–67 (2003).

<sup>96</sup> *Id.* at 167.

<sup>97</sup> *Id.* at 168.

<sup>98</sup> *Id.* at 168.

<sup>99</sup> *Id.* at 168.

<sup>100</sup> Robert V. Bellamy, Jr. & Paul J. Traudt, *Television Branding as Promotion*, in *RESEARCH IN MEDIA PROMOTION* 127, 132 (Susan Tyler Eastman ed., 2000).

<sup>101</sup> Sylvia M. Chan-Olmsted & Richard A. Gershon, *Telecommunications Marketing*, in RICHARD A. GERSHON, *TELECOMMUNICATIONS MANAGEMENT: INDUSTRY STRUCTURES AND PLANNING STRATEGIES* 281, 292–93 (2001); *see also* LANDES & POSNER, *supra* note 95.

<sup>102</sup> Chan-Olmsted & Gershon, *supra* note 101, at 293.

<sup>103</sup> *Id.* at 282; *see also* Robert A. Klein, *Cable Marketing and Promotion*, in *MEDIA PROMOTION AND MARKETING FOR BROADCASTING, CABLE, AND THE INTERNET* 191, 208 (Susan Tyler Eastman, Douglas A. Ferguson & Robert A. Klein eds., 5th ed. 2006).

the CEO should be the chief “steward of the brand,”<sup>104</sup> Branding is about a relationship with the consumer—indeed, some even think of brands as people.<sup>105</sup>

A brand’s “identity” is the company’s own conception of what the brand stands for,<sup>106</sup> expressed through, for example, logos<sup>107</sup> and slogans. The brand’s identity must be durable in order to have value.<sup>108</sup> This parallels the importance of consistency in a product’s quality for trademarks<sup>109</sup>—only a consistent brand identity will provide enough notice to be valuable to consumers and thus valuable to companies.<sup>110</sup>

To be valuable the brand identity must be meaningful and coherent to its audience.<sup>111</sup> “Brand image” is the consumer’s perception of the brand.<sup>112</sup> Brand image is colored by the consumer’s own views, and can be quite different from brand identity.<sup>113</sup> Brand identity and brand image collectively comprise “brand knowledge.”<sup>114</sup> In order to turn brand identity into a favorable brand image, the company must create “brand awareness,” which is consumer recognition of both the brand

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<sup>104</sup> See MARK TUNGATE, *MEDIA MONOLITHS* 183 (2004) (internal quotation marks omitted) (quoting Playboy CEO Christie Hefner); see also George Avgerakis, *The Branding of Broadcast*, TELEVISION BROADCAST, Dec. 1, 2005, at 18; cf. KEVIN DRAWBAUGH, BRANDS IN THE BALANCE: MEETING THE CHALLENGES TO COMMERCIAL IDENTITY 266 (2001); CHAN-OLMSTED, *supra* note 9, at 58–59.

<sup>105</sup> See DRAWBAUGH, *supra* note 104, at 268; *id.* at 249. Others even compare top brands to religious cults. MATT HAIG, BRAND ROYALTY: HOW THE WORLD’S TOP 100 BRANDS THRIVE AND SURVIVE 2 (2004) (pointing out that the top brands have “faith” in the product and concomitant devotion, “places of worship” (for example, Disneyland), and “icons” (such as Michael Jordan for Nike)).

<sup>106</sup> CHAN-OLMSTED, *supra* note 9, at 60.

<sup>107</sup> Logos are particularly important for television networks, which display them to ensure viewers associate their programming with their brand. See Klein, *supra* note 103, at 208.

<sup>108</sup> CHAN-OLMSTED, *supra* note 9, at 60.

<sup>109</sup> LANDES & POSNER, *supra* note 95, at 167.

<sup>110</sup> The identity should remain adaptable, however. CHAN-OLMSTED, *supra* note 9, at 60; see, e.g., DRAWBAUGH, *supra* note 104, at 249 (“Before Eisner’s arrival, [Disney] was a case study in the danger of letting a brand stand so still that it fossilizes.”); Alec Foege, *Adweek Magazines Special Report: Playboy—All Business*, BRANDWEEK, Oct. 23, 2006 (“Envisioning the Playboy brand as a living, breathing thing, as opposed to an immutable icon, has the company constantly rethinking the essence of the brand.”).

<sup>111</sup> CHAN-OLMSTED, *supra* note 9, at 60.

<sup>112</sup> Kevin Lane Keller, *Conceptualizing, Measuring, and Managing Customer-Based Brand Equity*, J. MARKETING, Jan. 1993, at 1, 3; see also CHAN-OLMSTED, *supra* note 9, at 60–61 (citing Keller).

<sup>113</sup> CHAN-OLMSTED, *supra* note 9, at 60–61. For example, Fox has a strong brand identity built around conservative commentary, but whether that translates to a favorable brand image depends on the perception of the audience: the brand generally is viewed more positively by conservative viewers than by liberal viewers. *Id.* at 60

<sup>114</sup> Keller, *supra* note 112; see also Bellamy & Traudt, *supra* note 100 (citing Keller).

and its identity.<sup>115</sup> Finally, “brand equity” is the resulting value of the brand from the consumer perspective.<sup>116</sup>

Once a brand is developed, there are various means of growth.<sup>117</sup> One of the most rapidly-emerging growth strategies in television is cross-promotion.<sup>118</sup> Cross-promotion is marketing a single brand or product using various kinds of media.<sup>119</sup> This can take the form of promoting one company holding through another, such as Disney (which owns ABC) promoting Disneyland within ABC programming,<sup>120</sup> or using one platform to promote content that is available on another, such as Disney using the Disney website to promote the Disney channel.<sup>121</sup> Opportunities for cross-promotion make it even more important for networks to establish distinctive brand images because those images must endure outside of their original contexts.<sup>122</sup>

#### IV. THE TELEVISION INDUSTRY

Television viewing habits and the technological changes that affect them are instrumental in understanding the degree to which viewers are exposed to and aware of television brands. Awareness of the brand affects the degree of notice the brand provides viewers. The very structure of the industry dictates a certain level of brand consistency: net-

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<sup>115</sup> CHAN-OLMSTED, *supra* note 9, at 61; *see* Keller, *supra* note 112, at 3 (defining brand awareness as the “likelihood that a brand name will come to mind and the ease with which it does so,” including a consumer’s ability to recognize the brand as one she has encountered before and to recall the brand name upon being given a category into which the brand fits).

<sup>116</sup> Brand equity takes into account factors including brand knowledge, brand awareness, brand loyalty, assets such as trademarks, and “resultant brand behavior” such as television ratings. CHAN-OLMSTED, *supra* note 9, at 66; *see also* Bellamy & Traudt, *supra* note 100, at 133–34. Brand equity is difficult to measure, and there is a consensus that several variables must be considered in evaluating it. Maria Norbäck, *Cross-Promotion and Branding of Media Product Portfolios*, in *MEDIA PRODUCT PORTFOLIOS: ISSUES IN MANAGEMENT OF MULTIPLE PRODUCTS AND SERVICES* 139, 139 (Robert G. Picard ed., 2005); Bellamy & Traudt, *supra* note 100, at 133.

<sup>117</sup> GERSHON, *supra* note 101, at 18–19. Diversification is growth by purchase, whether purchase of similar companies or distinct ones. For discussion of other growth strategies, *see id.* at 18–19, and *see also* DAVID CROTEAU & WILLIAM HOYNES, *THE BUSINESS OF MEDIA: CORPORATE MEDIA AND THE PUBLIC INTEREST* 124 (2001).

<sup>118</sup> *See* Thierer, *supra* note 6, at 445; *cf.* Douglas A. Ferguson, *Network Television Promotion*, in *MEDIA PROMOTION AND MARKETING FOR BROADCASTING, CABLE, AND THE INTERNET*, *supra* note 103, at 163, 169–70 (discussing broadcasters’ cross-promotion strategies).

<sup>119</sup> CROTEAU & HOYNES, *supra* note 117, at 125. Although cross-promotion is discussed in business literature, it has not yet received much academic attention. Norbäck, *supra* note 116, at 139.

<sup>120</sup> CROTEAU & HOYNES, *supra* note 117, at 125.

<sup>121</sup> *See, e.g.*, Disney Channel, <http://home.disney.go.com/tv/> (last visited Mar. 22, 2008).

<sup>122</sup> Johnson, *supra* note 13, at 20.

works are funded by advertisers, who wish to advertise during programming that will complement rather than tarnish their products.

### A. *How Viewers Choose What to Watch*

Not all television viewers make their viewing decisions the same way, but research suggests that they fall into broad categories. Some viewers are indiscriminate and just watch television, rather than particular networks, programs, or genres. Those tend to be “ritualized/habitual viewers” who watch television as a matter of habit or simply to pass time.<sup>123</sup> Such viewers are relatively unaware of the network affiliation of particular content or channels, but they are also uninterested in becoming aware,<sup>124</sup> suggesting that they also do not seek (or require) notice of what sort of programming they are viewing.

Other viewers, however, specifically watch particular networks.<sup>125</sup> Many of these viewers are also “appointment” viewers, that is, those who seek out and watch specific programs, sometimes after reading television guides or viewing network websites.<sup>126</sup> This phenomenon is most common when viewers are watching broadcast networks.<sup>127</sup> These viewers may be more tied to given programming than to the network itself, but they know what the programming stands for and actively seek it out. Furthermore, it is widely recognized in the industry that most viewers choose among a personal “repertoire” of a dozen or so channels to begin with,<sup>128</sup> so if they are flipping channels, they are not doing so blindly but rather are looking at a pre-selected set of

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<sup>123</sup> Robert Abelman, David Atkin & Michael Rand, *What Viewers Watch When They Watch TV: Affiliation Change as Case Study*, 41 J. BROADCASTING & ELECTRONIC MEDIA 360, 375 (1997).

<sup>124</sup> *Id.* at 375.

<sup>125</sup> *Id.* To determine whether viewers focused on network brand identity, respondents were asked how much they agreed with statements such as:

“I use the network on which a program appears to help determine the quality of the program,” “I feel comfortable watching any program that appears on a favorite network,” “When I turn on the TV, I turn to a particular network to find programs I might be interested in watching,” “I tend to choose one network over another when choosing television programs to watch,” and “I am more likely to watch a program that that appears on a channel without any connection to a television network.”

*Id.* at 369.

<sup>126</sup> See Sylvia M. Chan-Olmsted & Louisa Ha, *Cross-Media Use in Electronic Media: The Role of Cable Television Web Sites in Cable Television Network Branding and Viewership*, 48 J. BROADCAST & ELECTRONIC MEDIA 620, 630 (2004) (explaining the term and noting that half of the television survey respondents were appointment viewers).

<sup>127</sup> Bellamy & Traudt, *supra* note 100, at 155.

<sup>128</sup> See WALTER McDOWELL & ALAN BATTEN, *BRANDING TV: PRINCIPLES AND PRACTICES* 5 (2d ed. 2005); Bellamy & Traudt, *supra* note 100, at 132; *id.* at 146 (citing various studies supporting this proposition); see also Scott Woolley, *Rebranding the Boob Tube*, FORBES, Dec. 12, 2005, at 52.

brands. Industry literature shows that networks with a well-defined and highly differentiated brand are more likely to become part of their target audience's repertoire,<sup>129</sup> increasing the incentive to brand in the cluttered media marketplace.

### B. *Technological Changes that Reward Brands*

Recent technological developments have changed the way people watch television in ways that give networks a strong incentive to strengthen their brand identities. Most viewers no longer flip blindly through channels, having no idea what lies after the next click of the remote. Even basic cable subscribers receive more channels than they would wish to flip through, requiring some choice on the part of the viewer. Moreover, all television is digital as of early 2009, so viewers have access to the superior notification that digital television (DTV) provides.<sup>130</sup> On DTV, when the viewer clicks the channel button, a box pops up at the bottom of the screen providing the names of the network, the program, and the episode, as well as the first few words of the description of that episode. As a result, when viewers of DTV flip channels, they will see basic brand information.

Because the broadcast network business model is to partner with a local channel,<sup>131</sup> however, the network affiliation that appears on the digital menu is the local channel rather than the national network. For example, in Chicago, the CW shows up as WGN. Broadcast is a step behind cable here because viewers must make the extra connection from the affiliate to the network. But many networks continually display an onscreen logo,<sup>132</sup> mitigating the effect of the lack of network identification on the digital menu. Furthermore, digital technology

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<sup>129</sup> Bellamy & Traudt, *supra* note 100, at 132.

<sup>130</sup> 47 U.S.C. § 337 allocates to public safety services and certain commercial use the spectrums analogue television currently uses, and mandates transitioning from analogue to digital broadcast no later than February 17, 2009.

<sup>131</sup> GERSHON, *supra* note 101, at 31. Broadcast networks are intermediaries of a sort, purchasing programming from producers and then contracting with local television stations, called network affiliates, who show the broadcast network's programming. Typically, network programming accounts for sixty to seventy percent of the affiliate's programming schedule. *Id.*

<sup>132</sup> HOWARD J. BLUMENTHAL & OLIVER R. GOODENOUGH, *THIS BUSINESS OF TELEVISION* 399-400 (1998); Peter Drinkwater & Mark Uncles, *The Impact of Program Brands on Consumer Evaluations of Television and Radio Broadcaster Brands*, 16 J. PROD. & BRAND MGMT. 178, 179 (2007) ("Many television networks now place their logo as a constant onscreen 'watermark/bug' to reinforce the connection between programs and the broadcaster brand."). Although Drinkwater and Uncles's study examined Australian broadcasting, it used hypothetical new programs. *Id.* at 181. Furthermore, although Australian television has different networks than U.S. television does, several of the programs are the same. *See id.* at 179 (discussing *Desperate Housewives* and *Who Wants to Be a Millionaire*).

presents significantly more than just the network name, such that viewers familiar with CW programming but unaware that the CW and WGN are one and the same may still recognize the channel.

In fact, with the advent of DTV, viewers may stop flipping channels entirely and nearly all television viewing may be by deliberate choice of a channel or program with knowledge of what sort of material it is likely to contain. With DTV, viewers can click the “menu” button and scroll through an on-screen guide, viewing their options more quickly and completely than they would be able to by merely flipping channels. The onscreen guide provides the same information that appears when the viewer changes the channel, except that more of the program’s description is immediately visible. DTV also makes it possible to compile a list of favorite channels, enabling viewers to flip through only their preselected channels.

Some viewers are now skipping the television set entirely, choosing to watch television programming via the internet—a trend that rewards strong network brands and reinforces their importance. Twenty-five percent of internet users watch a television show online in a given month.<sup>133</sup> This viewing trend demonstrates that many television viewers are seeking out exactly what they want to watch, even if it means going to another format to do so, rather than passively watching whatever is on television at the time.<sup>134</sup> Indeed, there is an awareness in the television industry that internet viewing and network websites are a necessary part of television’s future.<sup>135</sup> This trend rewards strong brands because there is no internet equivalent to channel-flipping. Internet television consumers must specifically seek out a particular web-

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<sup>133</sup> Brian Stelter, *Serving Up Television Without the TV Set*, N.Y. TIMES, Mar. 10, 2008, at C1 (citing the Nielsen Media Ratings). Networks have not researched this issue, likely because if much of the audience watched a show via the internet, the price of the network’s advertising space almost certainly would fall. *Id.*

<sup>134</sup> Media consumption habits are a subject of much interest, particularly to the advertising world, and are just beginning to be fully studied. The Council for Research Excellence, a subdivision of the Nielsen Company, has commissioned a study to find out how people consume both traditional and new video media by having researchers follow people around and record their activities—in ten-second intervals—all day. Nielsen Media Research, Council for Research Excellence to Fund Landmark Study: Video Consumption, <http://www.nielsenmedia.com/nc/portal/site/Public/menuitem.55dc65b4a7d5adff3f65936147a062a0/?vgnextoid=43edc1a824058110VgnVCM100000ac0a260aRCRD> (last visited Oct. 20, 2008); see also Steve McClellan, *I’ll Be Watching You: Study to Track 24-Hour Media Usage*, ADWEEK, Feb. 25, 2008.

<sup>135</sup> E.g., Sylvia M. Chan-Olmsted & Jung Suk Park, *From On-Air to Online World: Examining the Content and Structures of Broadcast TV Stations’ Web Sites*, 77 JOURNALISM & MASS COMM. Q. 321, 321 (Summer 2000); Phil Rosenthal, *CBS Views Web as Ally to Boost TV Viewership*, CHI. TRIB., Jan. 17, 2007, at C3. The *Tribune* article further notes that although the public is still catching on to the new phenomenon, those previously unaware of the internet option indicate a likelihood of using it. Rosenthal, *supra*.

site, and will do so only when they are familiar with the associated brand.<sup>136</sup>

Finally, Digital Video Recording (DVR) technology is becoming ever more popular, again rewarding strong brands because of the deliberate nature of DVR viewing patterns. Approximately twenty percent of homes had DVRs as of early 2008,<sup>137</sup> and research predicts that by 2011 fifty percent of homes will be DVR-equipped.<sup>138</sup> At the rate cable companies are developing competing technology, the use of DVR devices may spread even faster.<sup>139</sup> DVR allows viewers to watch content they deliberately select at their convenience, which assumes that viewers know what they want to watch to begin with. With the possible exception of the issue of unscripted fleeting expletives during live programming, viewers generally have an idea of what to expect from the program they are seeking out because they likely have seen it, or advertisements for it, before. DVR viewers are probably less likely to browse channels randomly,<sup>140</sup> again rewarding brands that have made themselves known to and valued by their viewers.

### C. *How the Television Industry's Structure Promotes Branding Practices*

The business of a television network is as much about delivering identifiable and saleable audiences to advertisers as it is about produc-

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<sup>136</sup> See Stuart Elliott, *Free to Gain Traction for About \$50 Million*, N.Y. TIMES, Aug. 26, 2006, at C1.

<sup>137</sup> Marc Berman, *The Programming Insider*, MEDIAWEEK, Mar. 10, 2008.

<sup>138</sup> John Hilbrich, *Misusing Targeted Media*, PROMO MAGAZINE, Mar. 1, 2008. Viewers that have DVRs still watch live television approximately half the time. See Saul Hansell, *TiVo Is Watching When You Don't Watch, and It Tattles*, N.Y. TIMES, July 26, 2006, available at [http://www.nytimes.com/2006/07/26/technology/26adco.html?\\_r=2&th&emc=th&oref=slogin&oref=slogin](http://www.nytimes.com/2006/07/26/technology/26adco.html?_r=2&th&emc=th&oref=slogin&oref=slogin).

<sup>139</sup> Amy Saunders, *Cable Providers Step Up Features; Competition Driving Time Warner to Put Convenience First*, THE COLUMBUS DISPATCH, Mar. 8, 2008, at C12.

<sup>140</sup> Furthermore, when TiVo users are looking for a new program, TiVo will suggest programs for them based on past viewing habits or on categories, such as children's programming. See Tivo Central Online, KidZone Guides, <http://www3.tivo.com/tivo-tco/mix/kzindex.do> (last visited Oct. 20, 2008) (explaining how to use KidZone Guides, which are "lists of high-quality kid's TV shows recommended by leading national children's organizations"). The category-recommendations technology does at least assist viewers in selecting certain types of programming, but anecdotal evidence suggests that the past-viewing-habit recommendations system is less than perfect. E.g., Jason Fry, *Under Recommendation Engines' Hood*, WALL ST. J., June 12, 2006, available at [http://online.wsj.com/public/article/SB114961753581872822-jcRIO7GbCpnPIHxI4kKqWTOufgA\\_20070611.html](http://online.wsj.com/public/article/SB114961753581872822-jcRIO7GbCpnPIHxI4kKqWTOufgA_20070611.html) (explaining the insistence of the author's TiVo on recommending and recording Korean language programs, despite the fact that he does not speak Korean); Jeffrey Zaslow, *If TiVo Thinks You Are Gay, Here's How to Set It Straight*, WALL ST. J., Nov. 26, 2002.

ing programming for viewers.<sup>141</sup> Both are the “customers” of the network, and it must please both to survive. Though the two customers are distinct, they are intertwined. Commercial networks and local stations sell advertising space in order to purchase programming for viewers.<sup>142</sup> To attract advertising dollars, television stations must offer programs that attract either a large, broad audience or a devoted niche audience.<sup>143</sup> The latter strategy, always widespread among cable networks,<sup>144</sup> recently has become more prevalent in broadcast. What many advertisers want is to reach as many of the “right” people as possible, rather than just as many people as possible.<sup>145</sup> The right audience consists of those people within the demographic group most likely to purchase the product.<sup>146</sup> Advertisers will pay a premium for advertising space that reaches their desired niche audience.<sup>147</sup>

To determine what type of programming to offer, the network must understand its market. Thus, networks seek out both quantitative research (who is watching what and how often), and qualitative research (their reactions to what they are watching). They review a variety of sources, including focus groups, audience ratings reports, rating agency reports (e.g., the Nielson Ratings), internet rating service reports, psychographic consumer reports (determining how psychological characteristics affect buying behavior), and geodemographic consumer reports (defining and analyzing the preferences of neighborhoods).<sup>148</sup>

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<sup>141</sup> GERSHON, *supra* note 101, at 27, 51 (“A popular misconception about the use of audience research is that ratings are of primary interest to programmers. The fact is, however, that while program directors, producers and writers follow the ratings assiduously, the main motive for conducting audience research is advertising sales.” (quoting Barry Sherman)). Advertisers fund much of network programming by purchasing commercial air time. *Id.* at 35. Although the “premium” channels, subscription service cable, rely only on viewer subscriptions, they can also make money by syndicating their programming to broadcast networks, and thus have incentives to facilitate those sales by creating programs that appeal to advertisers. Amanda D. Lotz, *If It's Not TV, What Is It?*, in *CABLE VISIONS: TELEVISION BEYOND BROADCASTING*, *supra* note 53, at 88–89.

<sup>142</sup> GERSHON, *supra* note 101, at 27.

<sup>143</sup> Katherine Sender, *Dualcasting: Bravo's Gay Programming and the Quest for Women Audiences*, in *CABLE VISIONS: TELEVISION BEYOND BROADCASTING*, *supra* note 53, at 32. But even cable networks must take care not to craft too small a niche, because if the Nielsen ratings stop paying attention, so do advertisers. *Id.*

<sup>144</sup> *Cf.* Klein, *supra* note 103, at 208 (explaining that to compete in the market, cable networks must “identify a viable niche and develop a distinct, positive image”).

<sup>145</sup> CROTEAU & HOYNES, *supra* note 117, at 123.

<sup>146</sup> *Id.* at 123.

<sup>147</sup> *Id.* at 123.

<sup>148</sup> Chan-Olmsted & Gershon, *supra* note 101, at 285–290. *See generally* Claritas, Prizm NE: The New Evolution in Segmentation, <http://www.claritas.com/claritas/Default.jsp?ci=3&si=4&pn=prizmne> (last visited Mar. 17, 2008) (the homepage for the primary source of geodemographic consumer reports).

The results of this research help the network craft its blend of programming.<sup>149</sup>

Broadcast networks take their audience research, target audiences, and advertisers into account when scheduling programming.<sup>150</sup> The traditional wisdom is that a network should schedule recognizable blocks of similar programming to encourage a viewer who turns on a program to continue watching the rest of the block.<sup>151</sup> Blocks may become less significant in the age of DVR, though, if viewers do not watch television in real time.<sup>152</sup>

All of this benefits the broadcast programmer's customer, the advertiser. Advertisers control their brand image by choosing appropriate programming during which to advertise. An advertiser wants to know who watches the program to ensure that the people most likely to purchase its product see the ad.<sup>153</sup> Moreover, to assure consonance between the product advertised and the program, an advertiser wants to know about the program itself, such as what it is about and whether it enhances the advertiser's brand or could be a potential liability.<sup>154</sup> For example, advertising research has shown that incongruent product placements adversely affect viewers' impressions of the brand because the disparity causes viewers to question the presence of the branded product.<sup>155</sup> Furthermore, when advertisers schedule a season's worth of advertising during certain programming, they want to ensure a certain degree of consistency across that programming. Television networks harbor similar concerns in selecting appropriate advertising. For example, when subsidiaries of the Big Ten sports conference reached a deal with Fox Cable Networks to create the Big Ten Network, part of

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<sup>149</sup> Avgerakis, *supra* note 104.

<sup>150</sup> GERSHON, *supra* note 101, at 44; Avgerakis, *supra* note 104.

<sup>151</sup> GERSHON, *supra* note 101, at 44 (further describing five strategies of program scheduling: the compatibility (with average lifestyle) principle, audience flow, stripping (keeping a program at the same time on different days), special event programming, and counter-programming ("targeting an underserved audience segment," like non-sports-fans during a big football game)).

<sup>152</sup> Paul Brownfield, *Loyal Propositions*, L.A. TIMES, May 20, 2007, at E20 (describing programming blocks as "an old-fashioned, pre-TiVo approach of pushing a prix fixe meal of shows . . . on a nation of nibblers").

<sup>153</sup> GERSHON, *supra* note 101, at 29, 35, 39.

<sup>154</sup> See James A. Karrh, Kathy Brittain McKee & Carol J. Pardun, *Practitioners' Evolving Views on Product Placement Effectiveness*, J. ADVERTISING RESEARCH, June 2003, at 146; see, e.g., Harry Bruinius, *And Now, A Word from Our Sponsor: 'Gasp!'*, CHRISTIAN SCI. MONITOR, Feb. 5, 2001, at 1.

<sup>155</sup> Cristel Antonia Russell, *Investigating the Effects of Product Placements in Television Shows: The Role of Modality and Plot Connection Congruence on Brand Memory and Attitude*, J. CONSUMER RES., Dec. 2002, at 306, 309.

the agreement was that the new network would not air commercials for beer or gambling.<sup>156</sup>

Some advertisers are concerned with program content as a matter of principle. Advertisers worried about the scarcity of family-friendly programming formed the Family Friendly Programming Forum, a division of the Association of National Advertisers. The Forum works to promote programming that “has multi-generational appeal, depicts real life[,] . . . is appropriate in theme, content, and language, . . . [and] embodies a responsible resolution of issues.”<sup>157</sup>

New technology further reinforces advertisers’ interest in the content of programs. TiVo users reportedly skip seventy percent of commercials,<sup>158</sup> causing advertisers to seek new ways to advertise.<sup>159</sup> One of the most promising TiVo-proof solutions is product integration (product placement), that is, incorporating the product into the program itself.<sup>160</sup> As advertisements move from commercial breaks into the programs themselves, advertisers are more concerned with the fit between the product and the program.<sup>161</sup> For example, Applebee’s has

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<sup>156</sup> Mark Snyder, *TV Channel Will Be ‘Destination’ for Big Ten Fans*, DETROIT FREE PRESS, June 22, 2006, at 5.

<sup>157</sup> Association of National Advertisers, Family Friendly Programming Forum: About FFPF, <http://www.ana.net/ffpf/content/aboutffpf> (last visited Oct. 20, 2008). Members of the Forum include Coca-Cola, Pepsi, McDonalds, Kellogg, Johnson & Johnson, Proctor & Gamble, and Verizon, and together its members control thirty percent of all money spent on advertising in the United States. Association of National Advertisers, Family Friendly Programming Forum FAQs, <http://www.ana.net/ffpf/content/ffpfaq> (last visited Oct. 20, 2008).

<sup>158</sup> Hansell, *supra* note 138.

<sup>159</sup> See Karrh, McKee & Pardun, *supra* note 154, at 146.

<sup>160</sup> MARY-LOU GALICIAN, HANDBOOK OF PRODUCT PLACEMENT IN THE MASS MEDIA 148 (2004); Karrh, McKee & Pardun, *supra* note 154, at 146. . One scholar has even argued that “brand integration,” i.e., product placement, is the only way for the entertainment and advertising industries to survive—broadcast because of its dropping ratings, and advertising because of DVR. Scott Shagin & Matthew Savare, *Lawyering at the Intersection of Madison and Vine: It’s About Brand Integration*, ENT. & SPORTS LAW. (Fall 2005).

<sup>161</sup> See Tina M. Lowry, L. J. Shrum & John A. McCarty, *The Future of Television Advertising*, in *MARKETING COMMUNICATIONS: NEW APPROACHES, TECHNOLOGIES, AND STYLES*, at 113, 121 (describing how in the age of DVR, “advertisers now have more input into the actual programs,” whereas before the main concern was ensuring that the program did not “reflect negatively” on the advertiser); see, e.g., Mullman, *supra* note 162 (“[Applebee’s] had ongoing discussions with Starcom about becoming more integrated in programming content because of the challenges [all advertisers] face, . . . [and] the restaurant chain rejected a number of earlier concepts that weren’t an ideal fit.” (quotation marks omitted)); Daniel B. Honigman, *Youth Marketers Galvanized; Media & Marketers Diversify to Reach a Mercurial Market*, *MARKETING NEWS*, Apr. 1, 2008, at 16 (describing the Cartoon Network’s “pickiness when selecting and integrating an advertiser,” because the network must partner with a brand that “makes sense” and “maintains that ‘cool’ element” to avoid “becom[ing] uncool” with the youth market).

a standing placement agreement with *Friday Night Lights*,<sup>162</sup> one of the shows that the Family Friendly Programming Forum helped develop through its fund for family friendly scripts.<sup>163</sup> Applebee's slogan is "eating good in the neighborhood," and the interior design of its restaurants reflects local culture and schools. It saw the association with *Friday Night Lights*, a show about a high-school-football-centric community in small-town Texas, as the perfect way to complement and enhance its brand.<sup>164</sup>

If DVR technology encourages more advertisers to switch to product placements, advertisers will be even more closely enmeshed with television than before. Given their own branding concerns, they are likely to demand increasing consistency.<sup>165</sup> Before signing up for an entire seasons' worth of product placements, advertisers will want to know that every episode reflects the advertiser's values. Furthermore, consumer research has shown that the placement must be congruent to be persuasive,<sup>166</sup> so it is not worth the advertiser's money to arrange a placement in a program that is not consistently congruent with the product. If advertisers concerned with the wholesome image of their own brand are able to determine which networks and programs are suitable for families, and conversely, advertisers concerned with promoting a sexy image are able to find sexy programming, it seems logical that viewers can do the same.

## V. BRAND DIFFERENTIATION PROVIDES NOTICE

Cable brands such as Playboy, Disney, MTV, and HBO occupy well-defined niches, while their broadcast counterparts, such as CW, Fox, ABC, NBC, and CBS, though strong, are not yet as well-defined. Broadcast brands are likely to begin catching up, however: competition has increased dramatically, and the economic structure of the television industry is shifting towards the cable model, which suggests that branding practices will only become more important. Furthermore, the cable brands targeted at groups who find risqué programming particularly distasteful, or particularly appealing, have established their "rating" as part of their brand image. Although the broadcast brands are not as narrowly focused, their ratings are largely within a certain limit. Fi-

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<sup>162</sup> Jeremy Mullman, *Starcom Puts Applebee's Into the 'Friday Night' Game*, ADVERTISING AGE, Mar. 3, 2008, at S2 .

<sup>163</sup> Association of National Advertisers, The Script Development Fund, <http://www.ana.net/ffpf/content/scriptdevelopment> (last visited Mar. 17, 2008).

<sup>164</sup> Mullman, *supra* note 162.

<sup>165</sup> See the discussion of consistency concerns in trademarks and branding, *supra* Part III.A-B.

<sup>166</sup> Russell, *supra* note 155, at 313-14.

nally, programs and program blocks often have distinct sub-brands, which may be more familiar to some viewers than are the network brands, and provide notice to viewers who are not as focused on networks.

### A. *Television Meets Branding*

Many of the traditional advantages of branding apply in the media context: branding reduces search costs, creates a relationship with the viewer, and develops consumer loyalty.<sup>167</sup> Additionally, certain advantages of branding apply specifically to the media industry. Branding can be used to differentiate the different media outlets owned by a single conglomerate and to lower the monetary risks of introducing new products.<sup>168</sup> Strong brands attract viewers, which are paramount for all networks, but especially for subscription-based ones.<sup>169</sup> When a television program itself has a strong brand, the brand can be extended to other media platforms and thus make the brand more valuable. Such branding is increasingly important as internet and mobile usage increases.<sup>170</sup>

When television was first introduced, three broadcast networks served the entire country.<sup>171</sup> In order to compete for the median viewer effectively, the three channels strove to appeal to a wide variety of viewers, and, perhaps more importantly, to avoid offending any of them.<sup>172</sup> In the 1970's (when Pacifica was decided), ninety percent of evening television viewers were watching one of those three channels.<sup>173</sup> When so few options existed for viewers, there was little incentive for a network to risk alienating some to become more appealing to others.

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<sup>167</sup> CHAN-OLMSTED, *supra* note 9, at 59; *see also* Johnson, *supra* note 13, at 6 (“A clear brand identity can help viewers to choose between the wide range of different channels by providing points of access that are recognizable and reliable, while also helping to establish a strong and loyal relationship between viewers and networks which then makes the network a prerequisite for any cable operator putting together a package of channels.” (citing TIMOTHY M. TODREAS, VALUE CREATION AND BRANDING IN TELEVISION’S DIGITAL AGE (1999))).

<sup>168</sup> Johnson, *supra* note 13, at 6.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 19–20.

<sup>171</sup> McDOWELL & BATTEN, *supra* note 128, at 3; Bellamy & Traudt, *supra* note 100, at 132.

<sup>172</sup> CROTEAU & HOYNES, *supra* note 117, at 124. The strategy during this period is also known as the “least objectionable program” theory. McDOWELL & BATTEN, *supra* note 128, at 4–5.

<sup>173</sup> CROTEAU & HOYNES, *supra* note 117, at 123.

Cable was seen to be a solution to the homogenization of America encouraged by the existing networks' barely-differentiable programming. Cable was premised on a different economic model than broadcast was.<sup>174</sup> Cable networks were meant to appeal to very specific demographics, and thus could freely offend a majority of the public so long as they still attracted their target demographic.<sup>175</sup> In order for the target viewer to find the network, however, the network had to cultivate a brand that conveyed its identity.<sup>176</sup> Cable executives were the first to believe that viewers knew the difference between networks and would choose programming accordingly.<sup>177</sup>

The resulting proliferation of channels created a fundamental change in market structure that increased the incentive for all networks to brand. More channels meant stiffer competition, and competition drives branding.<sup>178</sup> So broadcast networks, especially the newer entrants to the field, Fox and the CW, began to mimic cable's programming strategy.<sup>179</sup> They increasingly narrowcast or "niche-cast,"<sup>180</sup> that is, they target a specific demographic in hopes of obtaining a small but devoted audience and its accompanying advertiser revenue.<sup>181</sup> This

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<sup>174</sup> Monroe E. Price, *Requiem for the Wired Nation: Cable Rulemaking at the FCC*, 61 VA. L. REV. 541, 547 (1975) ("Cable could affirmatively pinpoint differentiated audiences and serve them economically. The limitations of broadcast economics would be replaced by cable economics; the need to serve mass audiences would be supplemented by the viability of serving smaller, more intensive ones.") (footnote omitted) (citing SLOAN COMMISSION ON CABLE COMMUNICATIONS, *ON THE CABLE: THE TELEVISION OF ABUNDANCE* 64-70 (1971)).

<sup>175</sup> CROTEAU & HOYNES, *supra* note 117, at 124; *see* Price, *supra* note 174, at 548 (discussing the problem of broadcast economics and how cable "would supply a market for widely distributed and theretofore unrecognizable broadcast interests, financing opera, a different kind of news, or other specialized programming"). Although the strategy places "all of the company's eggs in one basket," the consolidation of media outlets has obviated this problem: narrow channels are owned by conglomerates whose various holdings protect them from the failure of such a channel. CROTEAU & HOYNES, *supra* note 117 at 110-11, 125.

<sup>176</sup> *Cf.* Johnson, *supra* note 13, at 8-11 (describing the brand of the HBO network and how it communicates what HBO is).

<sup>177</sup> Abelman, Atkin & Rand, *supra* note 123.

<sup>178</sup> *See* CHAN-OLMSTED, *supra* note 9, at 57; Bellamy & Traudt, *supra* note 100, at 132; *see also* McDOWELL & BATTEN, *supra* note 128, at 3-4.

<sup>179</sup> CROTEAU & HOYNES, *supra* note 117, at 125. Although one industry writer has described the trend in broadcast as being the "inadvertent" result of networks creating programming similar to previous hits, media marketing literature suggests that the result is achieved deliberately. Compare Grossman, *supra* note 11, with CROTEAU & HOYNES, *supra* note 117, at 125, and Drinkwater & Uncles, *supra* note 132, at 178.

<sup>180</sup> *See* John Ellis, *Scheduling: The Last Creative Act in Television?*, 22 MEDIA, CULTURE & SOCIETY 25, 38 n.15 (2000) (quoting VARIETY, Oct. 20, 1997).

<sup>181</sup> CHAN-OLMSTED, *supra* note 9, at 5; GERSHON, *supra* note 101, at 321.

global trend<sup>182</sup> parallels the trend in marketing as a whole towards narrower targeting.<sup>183</sup>

Absent a drastic decrease in competition and resulting change in market structure, the importance of branding in television is unlikely to diminish.<sup>184</sup> As former Disney CEO Michael Eisner explains it, “When the choices have become vast, the only thing[s] that will matter are brand names.”<sup>185</sup>

## B. *Network Case Studies*

Examining a set of cable and broadcast networks provides a clearer picture of the degree to which the networks have established brand identities and communicated those identities to viewers.

### 1. The Cable Networks

Playboy, Disney, MTV, and HBO are established cable networks that have well-defined and well-advertised niches.

#### i. Playboy

Playboy is the epitome of niche brands. Its magazine developed its reputation as a lifestyle brand centered on “the good life”—which included naked women.<sup>186</sup> Although the Playboy brand has always fit into the niche of “adult” products, Playboy is not about hardcore pornography,<sup>187</sup> and it strives to distinguish itself from the rest of the adult market. Indeed, it has a brand limit on indecency. The magazine fea-

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<sup>182</sup> Drinkwater & Uncles, *supra* note 132, at 178 (providing examples from various countries).

<sup>183</sup> CABLE VISIONS: TELEVISION BEYOND BROADCASTING, *supra* note 53, at 133 (“[M]arketers seek to divide consumers into finer and finer segments in hopes of maximizing the effects of their advertising dollars by appealing to consumers or audiences who are most likely to buy or watch their products.”).

<sup>184</sup> *Cf. id.* at 133 (opining that the emphasis on branding is unlikely to diminish because consolidation has created a new global oligopoly that makes branding essential to differentiating “‘sibling’ services of [a single] corporation,” among other reasons); *id.* at 136–37 (explaining that the barriers to entry in the television market are high because it is very difficult to compete against well-known and well-defined brands).

<sup>185</sup> DRAWBAUGH, *supra* note 104, at 9 (quoting Michael Eisner).

<sup>186</sup> *Case Study—Playboy: Rampant Rabbit*, BRAND STRATEGY, Feb. 15, 2008.

<sup>187</sup> When asked whether *Playboy* is pornography at all, CEO Christie Hefner’s response is: “One man’s pornography is another man’s erotica. For those people who enjoy reading *Playboy*, there’s no dichotomy in the fact the magazine has an erotic component and an intellectual, humorous and celebrity component; that is the world they would like to live in.” Playboy Enterprises, Inc., FAQs, [http://www.playboyenterprises.com/home/content.cfm?content=T\\_template&packet=00017B97-9135-1C72-8FEA8304E50A010D&artTypeID=00025AAE-7EF7-1C72-8FEA8304E50A010D](http://www.playboyenterprises.com/home/content.cfm?content=T_template&packet=00017B97-9135-1C72-8FEA8304E50A010D&artTypeID=00025AAE-7EF7-1C72-8FEA8304E50A010D) (last visited Apr. 20, 2008) (internal quotation marks omitted).

tures pinups, not sex—it is “risqué [but] sophisticated.”<sup>188</sup> Its “couples-friendly” television content is rated X, whereas competitors feature double- and triple-X content.<sup>189</sup>

The key example of Playboy’s brand limit is the company’s treatment of its relatively recent acquisition, Spice.<sup>190</sup> Spice’s reputation is for hard-core adult entertainment, but Playboy “is careful to differentiate [Spice] from Playboy’s soft-focus, rather kitsch positioning.”<sup>191</sup> Playboy capitalizes on the difference between the two brands to use one to promote the other. It links its website to Spice’s in several places, but with strategic advertising at the gateway: “Still not finding what you’re looking for? We also have some hotter content available via our trusted partners that you can view here!”<sup>192</sup> The clear demarcation establishes a limit to what the Playboy brand is,<sup>193</sup> a limit that stops far short of Spice’s content.<sup>194</sup>

<sup>188</sup> TUNGATE, *supra* note 104, at 175.

<sup>189</sup> Compare DishNetworks, Adult Programming, Playboy TV, [http://www.dishpronto.com/adult\\_programming.asp](http://www.dishpronto.com/adult_programming.asp) (last visited Oct. 21, 2008) (listing Playboy TV’s rating as X), with Spice: Digital Networks, Management Facts, [http://www.pbtvnetworks.com/sdn/toolkit/t\\_qa.htm](http://www.pbtvnetworks.com/sdn/toolkit/t_qa.htm) (last visited Oct. 21, 2008) (explaining Spice’s ratings and content while describing Playboy as “couples-friendly”). Playboy’s response to the explosion of free adult content on the internet was to become more modest. TUNGATE, *supra* note 104, at 180. It advertises itself as “[a]dult entertainment with style and class.” *Id.* Spice, on the other hand, eliminated its single-X channels favor of double-X, explaining that there is simply too much free single-X programming to compete with. Spice: Digital Networks, Management Facts, *supra*.

<sup>190</sup> Spice is really a stable of networks rather than a single network. Before Playboy acquired Spice, Spice was composed of several channels with “Spice” in their names. Now, they have been rebranded to more accurately convey their content, but they are all part of the Spice suite. Spice: Digital Networks, Management Facts, *supra* note 189.

<sup>191</sup> TUNGATE, *supra* note 104, at 179. Indeed, Playboy is very protective of the Playboy name, particularly when it is licensed to someone else. The Palms Hotel, rather than Playboy, will be running Playboy’s new Las Vegas casino, but Playboy is exercising quality control: it has hiring “Bunny Mothers” to ensure that the bunnies conform to “reasonable standards set by Playboy.” Gregory Meyer, *Quality Control at Playboy Club; Company Sees Growth Potential in Licensing*, CRAIN’S CHI. BUS., Sept. 17, 2007, at 21. As Playboy explained in a statement, “[t]he Bunny Mother is in place, in part, to educate the Bunnies about the iconic status and history of the Playboy Bunny and her role as an ambassador of the brand.” *Id.* (quotation marks omitted).

<sup>192</sup> Playboy, Premium Sites, [http://www.playboy.com/commerce/landingpages/sampler/premium\\_sites/prem2/v2/?\\_2008\\_02\\_PS\\_BNR\\_SO\\_JO\\_GARCIA](http://www.playboy.com/commerce/landingpages/sampler/premium_sites/prem2/v2/?_2008_02_PS_BNR_SO_JO_GARCIA) (last visited Mar. 28, 2008). Although some say the effort to distinguish limits opportunities for cross-promotion, see Gregory Meyer, *Poor Reception for Playboy*, CRAIN, Mar. 19, 2007, at 1, Playboy seems to be able to use the differences to encourage viewers who did not find exactly what they wanted with one of the brands to seek out the other.

<sup>193</sup> Playboy features depictions of sexy naked women rather than of sex. Its cable channel has shows with names like *Naked Happy Girls in San Francisco* and *Hot Babes Doing Stuff Naked*. PlayboyTV, Shows, <http://www.playboytv.com/shows> (last visited Oct. 21, 2008).

<sup>194</sup> Spice’s website, in explaining why it recently rebranded its channels, offers the nutshell explanation that applies to the whole television industry: “With so many adult players in the game, viewers need to better understand where they can find what they’re looking for. Our

## ii. Disney

On the other end of the indecency spectrum is Disney, whose clearly-defined brand also features a limit on indecency—no indecency at all. Every show currently on Disney's schedule is rated either G, general audience; TV-Y, designed for children ages two to six and appropriate for all; or TV7, directed at children older than seven due to "mild fantasy or comedic violence."<sup>195</sup> Disney is so thoroughly known as the place for "wholesome family entertainment"<sup>196</sup> that it is hardly necessary to belabor the point.

The Disney channel was recently revamped to compete with Nickelodeon. The channel was not doing as well as the rest of the Disney empire because it was not getting a large share of any particular age group. So the channel targeted a group for which it could conceivably compete with Nickelodeon, nine- to fourteen-year-olds (tweens), and increased viewership in that market by fourteen times in the decade after implementing its strategy.<sup>197</sup> Although the Disney channel still retains its core animated characters, they are now scheduled for the morning "pre-school block," while newer, hipper characters dominate the after-school block for tweens.<sup>198</sup> Disney took care, however, to avoid appealing to this demographic with sexy programming, and instead sought to raise the age group by making the content "more emotionally stimulating."<sup>199</sup> Because today's tweens spend so much time on the internet, Disney increased recognition of its new characters by

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re-branded offerings more clearly define the niche content that viewers demand." Spice: Digital Networks, Management Facts, *supra* note 189. The same page links to explanations of the different Spice channels available. For example, The "clubjenna" channel centers around the famed adult star Jenna Jameson, and features "top-shelf," "story and star driven [movies] with a polished look that the clubjenna viewer has come to expect." Spice: Digital Networks, Club Jenna, [http://www.pbtvnetworks.com/sdn/toolkit/index\\_clubjenna.htm](http://www.pbtvnetworks.com/sdn/toolkit/index_clubjenna.htm) (last visited Oct. 21, 2008). This very description sets up the channel as more than the usual pornography, and suggests that it attracts a viewer looking for something similar to Playboy but "hotter," and thus ties into Playboy's advertising for it. "SPICE:XCESS," on the other hand, is for the viewer who knew the Playboy name but was really looking for a niche on the other end of the spectrum: the channel offers "edgy" and "alternative" content." Spice: Digital Networks, SPICE:XCESS, [http://www.pbtvnetworks.com/sdn/toolkit/index\\_xcess.htm](http://www.pbtvnetworks.com/sdn/toolkit/index_xcess.htm) (last visited Oct. 21, 2008).

<sup>195</sup> For the schedule, see What's on Disney Channel Today!, <http://affiliate.zap2it.com/tvlistings/ZCSGrid.do?aid=disn> (last visited Oct. 21, 2008). For the rating definitions, see Defining the TV Ratings System, <http://www.controlyourtv.org/DetailPage.php?PageID=23> (last visited Mar. 21, 2008). See also The TV Parental Guidelines, *supra* note 48.

<sup>196</sup> CROTEAU & HOYNES, *supra* note 117, at 122.

<sup>197</sup> R. Thomas Umstead, The Magic's Back: Disney Climbs to Top of Ratings by Creating New Kingdom of Characters—and Promoting Them Online, MULTICHANNEL NEWS, Mar. 26, 2007, at 14.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

cross-promoting them on its website.<sup>200</sup> Disney followed the classic model of branding by finding a target demographic, learning what they were doing and what they wanted, providing it, and then cross-promoting it through other media.

What many people do not realize is that Disney also owns several other media companies, such as Touchstone Pictures and Miramax, that provide very different programming. Disney's decision to keep those lines entirely separate from the Disney brand, despite the power of the brand, is telling. Just as Playboy does not want its more refined offerings to be confused with Spice's hard-core offerings, Disney does not want its wholesome image tarnished by the more mature movies it produces through Touchstone and Miramax. In the 1980s, Touchstone produced "adult-oriented live-action films like none Disney had ever seen," such as *Dead Poet's Society*, *Pretty Woman*, and *Who Framed Roger Rabbit*.<sup>201</sup> Disney later acquired Hollywood Pictures, Buena Vista, and Miramax, which had produced "risky" movies such as *Pulp Fiction*, *The Crying Game*, and *Sex, Lies, and Videotape*.<sup>202</sup>

These movies did not harm the Disney brand because the public was largely unaware that Disney and Touchstone were related. Disney's research showed that ninety-nine percent of the public did not know about Disney's affiliations with other media companies until Disney bought ABC in 1995.<sup>203</sup> Disney, however, owns ten television stations and seventy radio stations in addition to the vast empire that bears its name.<sup>204</sup>

### iii. MTV

MTV is known as one of the most "instantly identifiable" brands in the world.<sup>205</sup> MTV began by targeting youth through rock music videos, but cable operators, record executives, and advertisers were skeptical that this model would be successful.<sup>206</sup> In order to attract

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<sup>200</sup> *Id.* Website promotion is recognized as a key part of promoting television programming. Ferguson, *supra* note 118, at 180.

<sup>201</sup> DRAWBAUGH, *supra* note 104, at 255. CEO Michael Eisner describes sitting next to Roy Disney's wife at the screening of *Down and Out in Beverly Hills* and sweating more "after each increasingly vivid expletive." *Id.*

<sup>202</sup> *Id.* at 255.

<sup>203</sup> *Id.* at 255–56. Not only did this strategy protect the Disney brand "inside a ring-fence of alter-ego brands," *id.* at 261, it also allowed Disney to release films that were very successful in a different niche market at a time when its core animation films were not doing well. *Id.* at 255–56. This illustrates the strategy of diversification, a core branding principle. See GERSHON, *supra* note 101, at 18.

<sup>204</sup> HAIG, *supra* note 105, at 65.

<sup>205</sup> *Id.* at 53.

<sup>206</sup> TUNGATE, *supra* note 104, at 40–41.

viewers—and thus advertisers—to the unique new network, executives focused on developing a strong brand identity. MTV’s logo is meant to look “edgy and raw, like graffiti,”<sup>207</sup> and it is seen on-screen continuously.<sup>208</sup> The brand itself was conceived as something especially for kids that adults cannot understand.<sup>209</sup> In keeping with this idea, MTV launched an ad campaign featuring “rock stars saying ‘I want my MTV!’”<sup>210</sup> designed to induce its core audience to convince cable operators to carry MTV. Needless to say, the campaign was successful, and it reinforced MTV’s brand image.

When MTV expanded to international markets, it crafted the network to fit each local culture,<sup>211</sup> but such changes did not undermine the brand image.<sup>212</sup> This type of strategic change maintains the brand’s relevance. As MTV executives recognize, the changes must be subtle so that each channel still fits the MTV identity.<sup>213</sup> Indeed, MTV would be off-brand if it did not evolve because part of its identity is being “cutting-edge.”<sup>214</sup> MTV also pioneered cross-promotion, providing access to the network across a variety of media platforms, such as internet and mobile phone, in addition to traditional books and CDs.<sup>215</sup>

MTV has expanded by crafting sub-brands to appeal to different niche audiences. The premise of the channel is a lack of adult audience appeal, so MTV created a new network, VH1, to appeal to “older and calmer” viewers.<sup>216</sup> Significantly, VH1’s name does not create an instant association with MTV—like Playboy and Disney, the parent company keeps its brands separate despite the ties between them.

#### iv. HBO

HBO defines itself by contrast to the rest of television programming rather than by contrast to its own sister enterprises: its slogan is “It’s not TV; it’s HBO.”<sup>217</sup> That differentiation helps convince viewers that subscribing to the paid service is worthwhile.<sup>218</sup> HBO lives up to

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<sup>207</sup> *Id.* at 41.

<sup>208</sup> HAIG, *supra* note 105, at 54.

<sup>209</sup> TUNGATE, *supra* note 104, at 42.

<sup>210</sup> *Id.* at 42.

<sup>211</sup> *Id.* at 46. That means that MTV is not exactly the same thing in different countries: “In Taiwan it’s very edgy and in your face, in India it’s Bollywood and colourful, in Brazil it’s vibrant and sexy, and in China there is more of an accent on family values.” *Id.*

<sup>212</sup> *See id.* at 46.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 47.

<sup>215</sup> *Id.*

<sup>216</sup> HAIG, *supra* note 105, at 53–54.

<sup>217</sup> ALLEN P. ADAMSON, BRANDSIMPLE 83 (2006); Johnson, *supra* note 13, at 10.

<sup>218</sup> ADAMSON, *supra* note 217, at 83.

that identity by providing original programming that is high-quality but uncensored, and may include sex, violence, profanity, and controversial topics, exploiting HBO's freedom from FCC content regulation.<sup>219</sup> By contrasting its elite-quality programming with ordinary low-brow "TV," HBO seeks to attract a more "sophisticated" audience.<sup>220</sup> The programs themselves are the core of HBO's brand identity.<sup>221</sup>

HBO also distinguishes its network with visual cues that both alert the viewer that he or she is watching HBO and reinforce the HBO brand identity. At the beginning and end of each original HBO program, the network uses an ident that drives home the slogan.<sup>222</sup> The ident simulates a television turning on at the beginning of the program and then turning off at the end, reinforcing the idea that by switching the channel to HBO, the viewer is leaving regular television and "switching over to a uniquely 'HBO' place for the duration of the programme."<sup>223</sup>

## 2. The Broadcast Networks

Broadcast brands are not as deeply defined as cable brands because for much of their history, they were generalist networks designed to appeal to the largest audience possible. Although there is a lack of academic research on the development of the individual network brand identities, recent business literature discusses brand characteristics and recognizes their use of "narrowcasting" to compete with cable networks.

### i. The WB/UPN/CW

The first broadcast networks to emulate cable were the newcomers, the WB and UPN, which merged to form the CW. The CW's branding campaign is the most recent and elaborate.<sup>224</sup> It wants to be "what MTV used to be, a trend-defining place for America's youth to meet," and is courting that demographic.<sup>225</sup> Its branding strategy reflects its target audience. For example, stations have handed out beer

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<sup>219</sup> Johnson, *supra* note 13, at 8.

<sup>220</sup> *Id.* at 10; see also, e.g., Dana Polen, *HBO, The Sopranos, and Discourses of Distinction*, in *CABLE VISIONS: TELEVISION BEYOND BROADCASTING*, *supra* note 53, at 261 (discussing the academic attention to HBO's "quality" programming, particularly *The Sopranos*).

<sup>221</sup> See ADAMSON, *supra* note 217, at 84; Klein, *supra* note 103, at 212.

<sup>222</sup> Johnson, *supra* note 13, at 9.

<sup>223</sup> *Id.*

<sup>224</sup> See Allison Romano, *CW Paints the Town (and Skin) Green; Stations Use Guerrilla Marketing to Promote New Network*, *BROADCASTING & CABLE*, Aug. 28, 2006, at 24 (describing the CW's elaborate 2006 ad campaign).

<sup>225</sup> Grossman, *supra* note 11.

cups bearing the CW logo at concerts,<sup>226</sup> a natural gathering place for the audience.

To advertise its brand identity, the network has chosen not only a slogan, but also a song and a color. Its slogan is “free to be,” which it then adapts for cross-promotion of its programming, for example, ads for Chris Rock’s *Everybody Hates Chris* are tagged “free to be funny.”<sup>227</sup> Its hit theme song and its signature color, bright green, convey that the CW is “not your typical broadcast network.”<sup>228</sup>

The CW uses cross-platform promotion techniques to attract its younger-generation viewers and promote brand loyalty. It has linked itself to MySpace to court teenage viewers, displaying advertisements that stretch across a user’s homepage and are hyperlinked to the network’s “profile” page.<sup>229</sup> Furthermore, it has an elaborate bright-green website with links to music from its programs and games based on those program, all set on the signature-green background.<sup>230</sup>

## ii. Fox

Fox was the first broadcast brand to distinguish itself from the rest.<sup>231</sup> It has long positioned itself as the provider of “edgy”<sup>232</sup> and “irreverent”<sup>233</sup> fare, and viewers recognize that image.<sup>234</sup> As the head of Fox network explains, “[o]n Fox you know you are not going to find *Little House on the Prairie*.”<sup>235</sup> That is, Fox is not bland family programming or Disney-esque children’s entertainment, and viewers know that. A study by advertising agency Young & Rubicam found Fox to be the strongest network brand among the traditional four (Fox, ABC, CBS, and NBC).<sup>236</sup> Fox targets the younger demographic with its

<sup>226</sup> Romano, *supra* note 224.

<sup>227</sup> Elliot, *supra* note 136.

<sup>228</sup> *Id.* (quoting Dan Pappalardo, Executive Creative Director, Troika); Romano, *supra* note 224.

<sup>229</sup> David Goetzl, *Using MySpace to Get the Message; Networks from the CW to NBC Reach Teens by Linking to the Site’s Huge Numbers*, BROADCASTING & CABLE, Apr. 16, 2007, at 22.

<sup>230</sup> The CW, <http://www.cwtv.com/> (last visited Dec. 30, 2008).

<sup>231</sup> McDOWELL & BATTEN, *supra* note 128, at 4.

<sup>232</sup> *E.g.*, Steve McClellan, *Study: Big 4 TV Networks’ Brand Strength Holding Up*, BROADCASTING & CABLE, May 23, 2005; Grossman, *supra* note 11; Ben Grossman, *Earley Rises with Fox*, BROADCASTING & CABLE, Nov. 5, 2007, at 32 (a case study on Fox’s Executive Vice President of Marketing and Communications, Joe Earley).

<sup>233</sup> *E.g.*, GERSHON, *supra* note 101, at 321; McDOWELL & BATTEN, *supra* note 128, at 4; Grossman, *supra* note 232.

<sup>234</sup> *See* McClellan, *supra* note 232.

<sup>235</sup> Woolley, *supra* note 128 (quoting Anthony Vinciquerra, head of Fox Networks Group).

<sup>236</sup> *See* McClellan, *supra* note 232.

counterculture image,<sup>237</sup> and does so successfully. Fox is generally considered by advertisers as the top network for reaching the 18–49 year-old demographic.<sup>238</sup>

### iii. ABC

Rather recently, ABC has become “the Lifetime Television of broadcast TV” by focusing on “light, female-targeted dramas.”<sup>239</sup> After its success with *Grey’s Anatomy* and *Desperate Housewives*, in the 2007 season ABC introduced similar shows including *Grey’s* spinoff *Private Practice* and *Cashmere Mafia*.<sup>240</sup> ABC does not seem to have entirely embraced this role, however. For instance, in the 2007 lineup ABC positioned the popular *Grey’s Anatomy* as the lead-in for its one male-focused program.<sup>241</sup> The strategy would suggest a similar niche for the shows, and likely wasted the opportunity to keep *Grey’s* viewers for the next program.

### iv. NBC.

NBC has structured its brand identity around quality,<sup>242</sup> focusing more on the quality of the programming than on the subject matter.<sup>243</sup> Although quality is not necessarily thought of as a specific niche, HBO successfully developed its brand around that niche. Many of NBC’s latest programs are well-made shows similar to those featured on FX, a well-regarded cable network.<sup>244</sup> NBC’s brand image suffered in recent years, though, because “low-brow reality show”<sup>245</sup> *Real Wedding Crashers* created a disconnect with the network’s brand identity.<sup>246</sup> Although NBC’s brand identity is not yet as well-developed as those of Fox and the CW, its formula shows promise.

### v. CBS

CBS is an anomaly in the trend toward narrowcasting and niches. CBS has a broad variety of programming that appeals to various

<sup>237</sup> GERSHON, *supra* note 101, at 321.

<sup>238</sup> Grossman, *supra* note 232.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *See id.* (noting that scheduling the male drama *Big Shots* in the prime slot after *Grey’s* is “ironic”).

<sup>242</sup> Sylvia Chan-Olmsted & Y. Kim, *Perception of Branding Among Television Station Managers: An Explanatory Analysis*, 45 J. BROADCASTING & ELECTRONIC MEDIA 75 (2001).

<sup>243</sup> *Adweek Magazine’s Special Report*, ADWEEK, May 29, 2006 (quoting NBC entertainment president Kevin Reilly).

<sup>244</sup> Grossman, *supra* note 11.

<sup>245</sup> *Id.*

<sup>246</sup> *See id.*

demographics, and its 2007 season programming was not limited to a particular genre or demographic.<sup>247</sup> As one CBS executive stated, “we are just kind of the ‘big-tent’ network right now, compared to everyone else, and that is fine by us.”<sup>248</sup>

### C. *Broadcast Versus Cable Brand Differentiation and Trends for the Future*

Overall, the network brands are not yet as well-developed as cable brands, but their brand personalities are “distinct and relevant” to viewers.<sup>249</sup> Network brands still come to viewers’ minds more quickly than do cable brands.<sup>250</sup> Given their larger audiences and longevity, that is not surprising.<sup>251</sup> Brand awareness alone, though, does not show how well-defined a viewer’s expectations of a network are. Cable brands have a longer history of niche strategy and still occupy more readily identifiable niches.

The brands that air edgier or “indecent” programming have established some of the strongest brand identities, identities that provide viewers with notice. Cable brands that air content that the FCC would consider indecent—for example, HBO and Playboy—are identifiable as such by their very brands. Fox, too, has long been known as the “edgy” network. When Fox’s programming toes the line, that is consistent with its brand image.

### D. *Alternate Forms of Branding: Program and Programming-Block Brands*

A flaw in the branding-as-notice theory is that although the broadcast networks are beginning to develop niches and brand limits on indecency, they are not as narrowly defined as those of cable. A broadcast network’s programming is more likely to include shows that fall on either side of a viewer’s comfort zone—a viewer might like the family-friendly *Ugly Betty* but find *Grey’s Anatomy* too suggestive, and thus could not make viewing decisions based on the ABC brand alone. But

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<sup>247</sup> *Id.*

<sup>248</sup> *Id.* (some internal quotation marks omitted) (quoting an unnamed CBS executive).

<sup>249</sup> McClellan, *supra* note 232.

<sup>250</sup> Bellamy & Traudt, *supra* note 100, at 143–44 (reporting their experimental findings that major networks had significantly better brand awareness than cable channels when measured by “top-of-mind” awareness—the first brands that seventy percent of respondents recalled were broadcast networks); *see also* McClellan, *supra* note 232.

<sup>251</sup> Bellamy & Traudt’s study showed that networks with high brand awareness were those with long histories: viewers were most aware of the broadcast networks and then the oldest cable networks (ESPN, MTV, CNN, HBO). Bellamy & Traudt, *supra* note 100, at 148.

a viewer familiar with the individual program brands would still be on notice of what to expect and avoid being surprised.

### 1. Program Brands

As network branding increases, so does program branding. Programs are like brand extensions<sup>252</sup>—they share the parent brand, but they are entities of their own, with specific identities and target demographics.<sup>253</sup> The effects of a strong program brand extend beyond high ratings for that program and induce viewers to continue watching the channel once the program is over.<sup>254</sup> Just as a viewer who finds a network appealing watches more of its programming, a viewer who finds a program appealing will not change the channel.<sup>255</sup>

A program also sets certain expectations for itself. For example, characters will say or do some things but not others. Trademarks work when they connote not only a particular product, but a specific and consistent quality associated with that product. Media studies have shown viewers to be sufficiently aware of program and network brands such that when a broadcaster schedules a program incongruous with its network's identity, the program has a negative effect on the network brand image.<sup>256</sup> Conversely, scheduling a program that is consistent with the network brand image enhances the viewers' impression of the brand.<sup>257</sup> This is true even when the program itself fails.<sup>258</sup> People like brands to be consistent, just as trademarks should be consistent. For example, part of the brand of Disney's *Hannah Montana* is that, although the program is aimed at older children, it omits indecent language and any suggestion of sexuality. On the other end of the spectrum, HBO's *The Sopranos* is meant to be a realistic portrayal of

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<sup>252</sup> Drinkwater & Uncles, *supra* note 132, at 179.

<sup>253</sup> Johnson, *supra* note 13. The existence of merchandising practices demonstrates the existence and exploitation of program brands. *Id.* at 15–22 (describing the different types of merchandise for branded programs and analyzing HBO programs *The Sopranos* and *Six Feet Under* as case studies for the merchandising of programs).

<sup>254</sup> Walter McDowell & John Sutherland, *Choice Versus Chance: Using Brand Equity Theory to Explore TV Audience Lead-In Effects, A Case Study*, 13 J. MEDIA ECONOMICS 233, 233–34 (2000).

<sup>255</sup> See generally *id.* (discussing the connections between programs and network brands and how the success and congruence of a particular program influences viewer perceptions of the network).

<sup>256</sup> See Drinkwater & Uncles, *supra* note 132, at 184. Even if the program is considered successful, it dilutes the specific image, though not the perceived quality, associated with the network brand. *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

the mob, and a certain amount of coarse language and violence is a necessary part of that concept.<sup>259</sup>

Network program brands contribute to the brand image of the network itself.<sup>260</sup> A program-oriented viewer (as opposed to the network-oriented viewer) is still likely to be informed by branding.<sup>261</sup> Moreover, a program-oriented viewer can easily locate the TV Parental Guidelines rating assigned to the program, and thus quickly ascertain whether, for example, the program is for mature audiences or for families, avoiding indecency and surprise.<sup>262</sup>

## 2. Programming-Block Brands

Programming blocks are programs of a similar type that are blocked together in hopes of carrying the audience from one show to another through the block.<sup>263</sup> Branding these blocks is another way that networks notify viewers.<sup>264</sup> Programming blocks help avoid surprise by putting similar programs together, so that a viewer who watches one program can safely stay for the next.

For example, NBC had “Must See TV” on Thursday nights, and while the programming within the block changed, it was always anchored with a hit show, such as *Friends* or *Seinfeld*,<sup>265</sup> and was composed of programming of the same general type.<sup>266</sup> NBC tried to reincarnate that successful block with the 2007’s Thursday block “Comedy Night, Done Right.”<sup>267</sup> Similarly, ABC had the “TGIF” programming

<sup>259</sup> See Johnson, *supra* note 13, at 17.

<sup>260</sup> See *infra* Part III.C. Industry insiders recognize that one season of bad programming will not destroy a network brand, but over time it can. McClellan, *supra* note 134 (quoting Tom Thornton, Vice President and Director of Marketing for Young & Rubicam’s Brand Knowledge Group).

<sup>261</sup> See Abelman, Atkin & Rand, *supra* note 123, at 368.

<sup>262</sup> See *supra* note 48.

<sup>263</sup> GERSHON, *supra* note 101, at 44; see *supra* note 151 and accompanying text.

<sup>264</sup> See Ellis, *supra* note 180, at 25. One scholar and producer characterizes scheduling as the key to a “generalist” broadcast channel’s brand identity:

[Broadcasters’] brand identity lies in the overall character of their programmes, their placing in a recognized pattern incarnating both viewing habits and judgments of ‘fitness for [audience] purpose.’ The brand of generalist channels, in other words, lies in the schedule and how that schedule is known by their client audiences.

*Id.* at 36, 38 n.15 (quoting VARIETY, Oct. 20, 1997).

<sup>265</sup> Brownfield, *supra* note 152.

<sup>266</sup> Jamal Shamsie, Danny Miller & William Greene, *A Question of Timing: Strategies for Scheduling Television Shows*, in THE BUSINESS OF CULTURE: STRATEGIC PERSPECTIVES ON ENTERTAINMENT AND MEDIA 119, 119 (Joseph Lampel, Jamal Shamsie, Theresa K. Lant eds., 2006).

<sup>267</sup> See Brownfield, *supra* note 152. “Comedy Night, Done Right” evidently is not as popular, however. *Id.*

block on Fridays.<sup>268</sup> Cable channels also schedule blocks targeting particular niches. For example, Disney has a “pre-school block” targeting toddlers that features the animated Mickey Mouse Clubhouse, and Nickelodeon has a similar block called “Nick Jr.”<sup>269</sup>

Nickelodeon also has the “Nick at Nite” block, which it has managed to clearly distinguish from the channel as a whole. At eight o’clock, children go to bed and so does their network, and in its place adults can find Nick at Nite, which remains suitable for a general audience.<sup>270</sup> It largely features older hits, such as *The Cosby Show*, whose run was in the 1980s, and *The Fresh Prince of Bel-Air*, from the 1990s.<sup>271</sup> In the 1990s, it featured “relics” like *The Donna Reed Show*, *The Patty Duke Show*, *Mr. Ed*, and *Bewitched*, yet it “transformed [this] collection of antique comedies into one of the hottest programming lineups on cable” by using successful marketing.<sup>272</sup> Nick at Nite even has its own separate website, reinforcing that it is a separate brand for a separate audience.<sup>273</sup>

Although programming schedules may be less important as DVR increases in popularity, even DVR users watch “real-time” television about half the time,<sup>274</sup> suggesting that scheduling is still relevant and will be for some time.

## VI. CONCLUSIONS FOR REGULATION

Much has changed since *Pacifica* was decided, and the rationales it provided for affording broadcast television less First Amendment protection have eroded with the changes in the market. Changes in technology have quashed the notion that broadcast is uniquely accessible to children in a manner that their parents cannot control. Meanwhile, changes in branding practices suggest that it is rare for viewers to be legitimately surprised by what they see. If broadcast branding trends continue on the same narrowcasting track, the surprise rationale of *Pacifica* will disappear, leaving little justification for giving broadcast

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<sup>268</sup> Shamsie, Miller & Greene, *supra* note 266, at 122.

<sup>269</sup> Umstead, *supra* note 197.

<sup>270</sup> Benjamin Svetkey, *Nick’s Knack*, EW.COM, June 29, 1990, <http://www.ew.com/ew/article/0,,317663,00.html>.

<sup>271</sup> Nick at Night, <http://www.nickatnite.com/> (last visited Apr. 18, 2008).

<sup>272</sup> Svetkey, *supra* note 270. Svetkey described a classic, wacky Nickelodeon marketing campaign: having “[d]ozens of Donna Reed clones—all wearing identical high heels, kitchen aprons, and pearl necklaces — marching down the middle of Chicago’s Michigan Avenue, brooms and dustpans clutched to their sides[, shouting] ‘Make your beds!’ [and] ‘Clean your rooms!’” *Id.*

<sup>273</sup> Nick at Night, *supra* note 271.

<sup>274</sup> See *supra* note 138.

less First Amendment protection than is afforded other forms of media. Furthermore, cable brands are already so well-defined that they provide sufficient notice of their content to avoid surprise, and as a result Pacifica's surprise rationale does not apply to and could not justifiably be extended to cable.

Branding is or soon will be providing viewers with enough information that they should be able to avoid most programming surprises simply by paying attention to the brand of the network, program, or programming block. Technology reinforces notice by allowing viewers to quickly identify the current network and program, allowing every viewer to evaluate the programming based on brand image. For branding to provide sufficient notice for First Amendment purposes, viewers need not know the precise type of content in every program, but only enough to be on notice of "indecenty." The Court has never required all programming to be reduced to what is appropriate for children.<sup>275</sup> There simply is a line behind which the network stays. Although the limit may be high, the narrower a range it falls into, the more notice it provides. When brand indecency levels are firmly established, the viewer is on notice of the network's content, and in tuning to that particular channel is not legitimately surprised by its content. Thus, Pacifica's surprise justification no longer supports limiting First Amendment protection for broadcast.

If broadcast is entitled to full First Amendment protection, many of the FCC's regulations become invalid—any regulation of indecency that does not rise to the level of obscenity would be unconstitutional. That is the standard applied to cable, which the FCC cannot regulate, and, indeed, to all other forms of media. Such a ruling would significantly curtail the FCC's role in regulating content on broadcast television, though it would not affect the FCC's regulation of other aspects of the television business. In addition, Congress would be powerless to step up content regulation if the Supreme Court found broadcast to be entitled to a higher degree of protection by the First Amendment.

There are limits to this brand theory. To the extent that the FCC is targeting fleeting expletives in otherwise neutral shows, the brand theory does not provide an answer. Such regulation might violate the First Amendment nevertheless, as the Second Circuit suggested in *Fox*. But a viewer probably cannot rely on the brand of the network to predict whether celebrities speaking at awards programs and sporting events

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<sup>275</sup> See *FCC v. Pacifica Found.*, 438 U.S. 726, 750 n.28 (1978) (plurality opinion); *id.* at 760 (Powell, J., concurring); *id.* at 769 (Brennan, J., dissenting).

will utter fleeting expletives<sup>276</sup>—unless, of course, the network is still forced to air the programming on a time delay in order to eliminate offensive material. The brand theory is most applicable to that programming over which the network has the most control.

To the extent that broadcast networks are not yet providing sufficient notice to avoid surprise entirely, they may wish to focus on brand development and awareness in order to reach that stage and solidify the argument against continuing indecency regulations. More research addressing the success of broadcast branding would also better inform this theory. In the meantime, courts should avoid making constitutional decisions that create a lowered First Amendment standard for broadcast or suggest expanding it to cable, and instead allow market forces to take their course.

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<sup>276</sup> As the Third Circuit held in *CBS*, networks do not have control over celebrities speaking during events that are broadcast live. *See CBS Corp. v. FCC*, 535 F.3d 167, 189 (3d Cir. 2008).

