cess. A lack of submissions could still result in less invalid patents and applications, and it would not have a side effect of bogging down the examiner with inapplicable submissions. The Patent Reform Act of 2011 requires applicants to submit stronger applications for fear of an invalidating third-party submission. This will result in less litigation and less invalid patents and applications. Small companies should not fear opposition from larger companies because the system imposes limitations on the number of observations third parties can submit. Also, if small companies submit strong applications, they should not fear litigation because their patents will be less likely to be invalid.

Although the Patent Reform Act of 2011’s amendment to 35 U.S.C. § 122 does not fix all of the USPTO examination deficiencies, or even be as good as Article 115 EPC, it should still improve USPTO efficiency and patent validity. Thus, Congress took a step in the right direction by passing the Patent Reform Act of 2011.

ABSTRACT

The First Amendment guarantees the right to free speech—but that protection is not absolute. Some speech is banned outright, such as child pornography. Other speech is nearly fully protected, such as erotic speech. Caught in the middle of the two is obscene speech, which can be owned in the privacy of one’s home, but cannot be disseminated publicly.

The line between obscenity and eroticism is hard to pinpoint, and varies from community to community. In general, the process of analyzing whether a work is obscene includes asking whether the content violates the community standards of the local geographic area where the material was published. Thus, for most media, publishers of potentially obscene content must choose the communities into which they publish, or face criminal charges from the least tolerant communities. But for online media, the Supreme Court remains undecided whether the obscenity analysis should use the local community standard. The Court’s doubts stem from the Internet’s global reach and lack of control over who receives free online content. For example, if a work is nationally-available online, and is judged using the same legal standard as in other traditional media, any local community offended by the content has the power of a heckler’s veto to make the publisher liable for distributing obscenity.

This Note explains why the use of a new online technology resolves the question of whether local community standards should be used to judge online content. Called geotargeting, the technology creates borders on the previously borderless Internet, which allows publishers to specifically target geographically localized communities, thereby excluding areas where the material might lead to criminal charges. This new power to publish potentially obscene materials only
to selected communities drastically reduces the constitutional concerns of applying traditional obscenity law to online content.

INTRODUCTION: "2 GIRLS 1 CUP" AND THE LINE BETWEEN LEGAL EROTICISM AND ILLEGAL OBSCENITY

Indecency, vulgarity, obscenity—these are strictly confined to man; he invented them. Among the higher animals there is no trace of them.

- Mark Twain

Generally, most erotic material can be published publicly, given certain restrictions. For example, publishing erotic videos of a female’s nude breasts and buttocks does not amount to criminal sanction in any jurisdiction as long as basic guidelines of age, location, and time are met. In contrast, it is a federal crime to publish obscene material in public. Unfortunately, there is no clear or consistent boundary between erotic and obscene material. In some jurisdictions, distributing material showing violent and depraved acts may constitute a criminal violation of obscenity laws. But jurisdictions differ

2 Erznoznik v. City of Jacksonville, 422 U.S. 205, 206, 263-14 (1975) (allowing a nude film to be broadcast where the public may see it, even considering the risk to children, traffic, or offended persons); see Jenkins v. Georgia, 418 U.S. 153 (1974) (holding that mere nudity is not obscenity).
4 Miller v. California, 413 U.S. 15, 20 (1973) (stating that the Court’s attempts to define obscenity over the years were “tortured” because it was so difficult to land on a definition); William A. Huston, Under Color of Law: Obscenity vs. the First Amendment, 10 NEXUS 75, 78-79 (2005) (arguing that attempting to define obscenity is an exercise in futility because definitions are subjective, vary so widely between individuals and communities, and are inherently paradoxical, and because imposing a rigid definition smacks of tyranny).
5 See, e.g., United States v. Extreme Assoc., 431 F.3d 150, 151 (3d Cir. 2005), cert. denied 547 U.S. 1143 (2006) (finding the publishers of murder/rape pornography videos guilty of distributing obscenity online); see also Brief for the United States at 7 n.2, United States v. Extreme Assoc., 431 F.3d 150 (3d Cir. 2005) (No. 05-1555), 2005 WL 6104849 at *7 n.2 (describing the videos upon which the obscenity charges against Extreme Associates were based, including porn films that were intended only for sexual gratification and portrayed the extremely graphic rape and murder of three women by a serial killer); BRENDA COSSMAN, SEXUAL CITIZENS: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING 56 (2007) (“The Extreme Associates website describes [one of the videos upon which obscenity charges were based] as ‘the most controversial movie’ in their ‘video arsenal’: ‘A Stunningly Dis-

about whether it is criminally obscene to distribute material that is merely gross. Such non-violent videos depicting sickening (but ultimately non-violent) acts may or may not be obscene; it all depends on who defines obscenity. And more recently, obscenity is even harder to define when it is distributed online.

For example, consider the online distribution of the scatologically themed Brazilian video “2 Girls 1 Cup,” a viral video that rose in popularity in 2007. The video depicts two women using excrement to engage in extreme sex acts, ostensibly for the sexual gratification of the viewers. Soon after its online release, viewers began recording and posting their reactions while watching the video. The viewers’ shocked reactions to the video became so popular that references to the “2 Girls 1 Cup” video began to appear in advertisements, movies

8 See <http://www.slate.com/id/2182833> (explaining the “phenomenon” of people recording their reactions to 2 Girls 1 Cup); Femia, supra note 6.
9 Heidi Blake, Coca-Cola Accused of Using Porn to Target Children on Facebook, TELEGRAPH.CO.UK (July 19, 2010, 7:30 AM), http://www.telegraph.co.uk/technology/facebook/7797706/Coca-Cola-accused-of-using-porn-to-target-children-on-Facebook.html (reporting how references to “2 Girls 1 Cup” were used by Coca-Cola’s ad agency in an online marketing campaign for Dr. Pepper); Vikram Dodd, Coca-Cola Forced to Pull Facebook Promotion After Porn References, GUARDIAN.CO.UK (July 18, 2010, 6:51 PM), http://www.guardian.co.uk/business/2010/jul/18/coca-cola-facebook-promotion-porn (reporting that Coca-Cola’s use of references to “2 Girls 1 Cup” encouraged a 14-year-old British girl to search online for the scat-porn video); Laura Shunk, Coca-Cola apologizes for Dr. Pepper’s “2 Girls 1 Cup” Facebook snafu, DENVER WESTWORD, (July 20, 2010, 1:13 PM), http://blogs.westword.com/cafe/society/2010/07/coca-cola_pals-porn-laced_fac.php (reporting how references to “2 Girls 1 Cup” were used by Coca-Cola’s ad agency in an online marketing campaign for Dr. Pepper); Ken Wheaton & Emily Bryson York, Quizzno's: We Did Not Hop on Poop-Porn Bandwagon, ADAGE.COM (May 19, 2009, 4:10 PM), http://adage.com/digital/post/article_id=136753 (reporting on the advertisement run by Playboy in which two bikini-clad women perform the similar actions as those shown in “2 Girls 1 Cup” while sharing a sandwich, which many viewers mistook as a Quizzno’s advertisement).
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5 Michael Ager, 2 Girls 1 Cup 0 Shame, SLATE.COM (last updated Jan. 31, 2008, 4:20 PM) http://www.slate.com/id/2162833/ (explaining the "phenomenon" of people recording their reactions to 2 Girls 1 Cup); Femia, supra note 6.
6 Heidi Blake, Coca-Cola Accused of Using Porn to Target Children on Facebook, TELEGRAPH.CO.UK (July 19, 2010, 7:30 AM), http://www.telegraph.co.uk/technology/facebook/7897706/Coca-Cola-accused-of-using-porn-to-target-children-on-Facebook.html (reporting how references to "2 Girls 1 Cup" were used by Coca-Cola's ad agency in an online marketing campaign for Dr. Pepper); Vikram Dodd, Coca-Cola Forced to Pull Facebook Promotion After Porn References, GUARDIAN.CO.UK (July 18, 2010, 6:51 PM), http://www.guardian.co.uk/business/2010/jul/18/coca-cola-facebook-promotion-porn (reporting that Coca-Cola's use of references to "2 Girls 1 Cup" encouraged a 14-year-old British girl to search online for the scat-porn video); Laura Shunk, Coca-Cola apologizes for Dr. Pepper's "2 Girls 1 Cup" Facebook ninja, DOWNTOWN WESTWORD, (July 20, 2010, 1:13 PM), http://blogs.westword.com/cafesociety/2010/07/coca-cola_porns-naked_friend.php (reporting how references to "2 Girls 1 Cup" were used by Coca-Cola's ad agency in an online marketing campaign for Dr. Pepper); Ken Wheaton & Emily Bryson York, Quizzno's: We Did Not Hop on Poop-Porn Bandwagon, ADAGE.COM (May 19, 2009, 4:10 PM), http://adage.com/adages/post/article_id=136753 (reporting on the advertisement run by PlayBoy in which two bikini-clad women perform the same actions as those shown in "2 Girls 1 Cup" while sharing a sandwich, which many viewers mistook as a Quizno's advertisement).
and television shows, video games, online humor sites, and even on tee-shirts. "2 Girls 1 Cup" has been commented on by a number of entertainers, and has garnered media attention from well-known sources such as Slate, VH1, and Esquire. The "2 Girls 1 Cup" video remains available online.

Contrast the online success of "2 Girls 1 Cup" with very similar scatologically themed videos that have generated criminal sanctions when they were distributed through traditional media (such as radio, television, or mail). For example, Mr. Danilo Simees Croce, a Brazilian citizen living in Florida, was indicted in 2006 for distributing obscene hardcopy videos that displayed paraphilic acts of coprolagnia, urolagnia, and vomerophilia, very similar to those depicted in "2 Girls 1 Cup." Mr. Croce pled guilty to the obscenity charges.

What is even more startling is that soon after Mr. Croce returned home to Brazil, it was his company that produced and distributed the "2 Girls 1 Cup" trailer video, and to date, it appears no one has been charged for its distribution online.
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What is even more startling is that soon after Mr. Croce returned home to Brazil, it was his company that produced and distributed the "2 Girls 1 Cup" trailer video, and to date, it appears no one has been charged for its distribution online.
So why are some videos considered illegal when distributed via traditional media, but are tolerated when distributed online? The answer is linked to the confusion regarding how obscenity law applies to the Internet. For most media, jurors draw upon local community standards to determine if a work appeals to an unwholesome sexual desire and is so patently offensive that it should be criminal to distribute the work. This “local community standard” is used to judge works that are published through traditional media such as books, mailings, radio shows, television broadcasts, and telephone messages. For example, if a publisher broadcasts an obscene film over the television, at trial a juror will apply the community standards of the juror’s local geographic area.

However, for works distributed online, it is unclear whether local community standards should be used, and opposing viewpoints exist on how obscenity should be judged online. A recent pair of cases has highlighted how courts have split over online obscenity. The Ninth Circuit recently held that because posting content onto the Internet makes the content available nationwide, jurors should judge the work using nationwide standards for obscenity, rather than limiting themselves to the standards of the local community in which the jurors live. Under that approach, a juror using a nationalized standard could protect an obscene work that the local community would have otherwise banned (or even ban a work that the local community would have otherwise tolerated).

On the other hand, the Eleventh Circuit held that when judging whether an online work is obscene, jurors should apply a local community standard as defined by a small area around the place where the work was downloaded (similar to the standard used in all other media). Under that local standard, a producer of potentially obscene material in Hollywood who makes his content nationally available online could be charged with obscenity in Florida, and the jury would disregard whether the work would have been tolerated in Hollywood, applying only local, Floridian community standards.

Choosing one standard over the other raises fundamental questions concerning free speech on the Internet. If local community standards are used, Internet publishers who make their material available worldwide can be charged for distributing obscene material when someone downloads the obscene work in a community where the work is not tolerated. However, if national standards are used, some communities could be forced to tolerate works they consider to be obscene material, while other communities could be required to punish the distribution of works they consider to be free speech. The stakes are high because under present conditions, the application of either standard will impact someone’s use of online media.

This issue has been presented to the U.S. Supreme Court, but the Internet’s disregard of geographic boundaries paralyzed the Court’s willingness to decide whether local standards should be applied to Internet obscenity cases. For other forms of media, the Court previously decided that local standards were the more reasonable approach. Although the Court noted problems of chilled speech under either standard, it felt that the local standard was less chilling because geographic controls associated with each medium allowed publishers of potentially obscene material to tailor their messages based on the targeted communities.

States. See supra note 7. This is in contrast to the websites that originally hosted the other scat-porn videos upon which Mr. Croce’s obscenity charges were based. See Criminal Complaint, supra note 20, at 3; see e.g., http://www.dragonfilms.com.br/ (last visited Nov. 13, 2011) (showing the site no longer exists). It is also in contrast to other similarly themed websites where obscene content was successfully prosecuted. See United States v. Little, 365 F. App’x 159, 169 (11th Cir. 2010); see, e.g., http://www.maxhardcore.com (last visited Nov. 13, 2011) (showing a website that has been forfeited to the U.S. Government pursuant to an obscenity conviction); see also infra Part III.B.

28 This is just one prong of the test for obscenity. See infra Part II.A; see also Miller v. California, 413 U.S. 15, 24 (1973). The other prongs are whether the material is patently offensive or has value other than sexual excitement. Id. Those additional aspects of obscenity law are beyond the scope of this Note.

29 See Miller, 413 U.S. at 30–34; infra Part II.A.
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31 See infra Parts II.B, III.
32 United States v. Kilbride, 584 F.3d 1240, 1254 (9th Cir. 2009); see infra Part III.A.
33 United States v. Little, 365 F. App’x 159, 162–64 (11th Cir. 2010); see infra Part III.B.
34 See Matthew Towns, Note, The Community Standards of Utah and the Amish Country Rule that the World Wide Web, 68 Mo. L. Rev. 735, 740–43 (2003) (explaining how under a local standard online speech would be chilled by giving the least-tolerant community a heckler’s veto); see also infra note 141 and accompanying text.
36 Ashcroft v. ACLU (Ashcroft I), 535 U.S. 564 (2002); see also infra Part II.B.
37 See Ashcroft I, 535 U.S. 564; infra Part II.
38 See Miller v. California, 413 U.S. 15, 30-34 (1973); infra Part II.A.
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United States v. Kilbride, 584 F.3d 1240, 1254 (9th Cir. 2009); see infra Part III.A.
Obscenity is not protected speech. Under the First Amendment to the Constitution, "Congress shall make no law . . . abridging the freedom of speech . . ." The strong language used in the First Amendment seems to imply that freedom of speech covers every kind of speech or expression. However, "it is well understood that the right of free speech is not absolute at all times and under all circumstances." Certain kinds of speech may be classified as illegal, and a person may be punished for publishing such speech. Obscene utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Obscenity law's foundations seem clear enough, but the application of legal standards to obscenity has a long and troubled history. After a number of iterations, the Court finally settled on a definition in the case of Miller v. California.

Part II.A discusses the Miller test for obscenity, how the Court decided to allow local communities to determine obscenity standards (rather than impose a national standard), and how the Court extended the local community standard for obscenity to nearly every form of communication. Part II.B then examines the Court's fragmented decision in Ashcroft v. ACLU and how the Internet's independence from real-world geography caused the Court to doubt whether local community standards should extend to online content.

A. Miller and the Precedent for Local Community Standards: Why the Court Agrees it is All About Location, Location, Location

44 Miller, 413 U.S. at 23.
45 U.S. CONST. amend. I.
48 Roth, 354 U.S. at 485 (quoting Chaplinsky).
49 Miller, 413 U.S. at 20–23 (reviewing the highlights of "the somewhat tortured history of the Court's obscenity decisions"); see also Chris Hunt, Community Standards in Obscenity Adjudication, 66 CALIF. L. REV. 1277, 1278–83 (1978) (describing in greater detail the history of obscenity law prior to Miller); GEORGE B. DELTA & JEFFREY H. MATSUMOTO, LAW OF THE INTERNET § 12.01, 12.4 to 12.8 (2010) (giving a very detailed history of obscenity law).
50 Miller, 413 U.S. at 24.
But the Internet is different—there are no central controls over where online content is distributed in the United States. This lack of control has led to fractured ambivalence among Supreme Court Justices over whether a national or local standard approach should be used when judging online content. 40

Enter “geotargeting,” a new means by which online publishers can control where their content is accessible. 41 This advance in technology heralds the resolution of the debate over whether local community standards should be applied to the Internet because publishers will be able to tailor their messages to the communities into which they wish to distribute their content, just as they have in all other media. The Court and many other courts have oft lamented that publishers of online content had no control over where their material was downloaded. 42 Geotargeting promises to be the white knight that can rescue obscenity law from its current paralysis over what to do with the Internet.

This Note explains how the use of geotargeting resolves the question of whether local community standards should be used to judge online content. Part II of this Note provides a background of traditional obscenity law and the Supreme Court’s indecision over whether local community standards should apply to obscenity on the Internet. Part III details how two United States Courts of Appeals have split over online obscenity and discusses the rationales for applying the national and local obscenity standards to the Internet. Part IV analyzes how geotargeting technology makes applying local standards to the Internet more reasonable than applying national standards, and proposes a modified local standard that can be applied to online obscenity. Part V concludes with predictions on the use of geotargeting technology and how the Court can apply traditional obscenity law to the Internet.

I. BACKGROUND: A PRIMER ON PRURIENCE

[Sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interests. 43]

40 See infra Part II.B; see generally Ronald P. Reid, Csc Note, Ashcroft v. American Civil Liberties Union, 7 J. L. & POL. 95, 103–11 (2003).
41 See infra Part IV.
42 See infra notes 97 & 120 and accompanying text.
43 Roth v. United States, 354 U.S. 476, 487 (1957); cf. Webster’s Dictionary, supra note 22, at 1829 (defining “prurient” as “longings marked by restless craving ... having or easily susceptible to lascivious thoughts or desires.”).

Obscenity is not protected speech. 44 Under the First Amendment to the Constitution, “Congress shall make no law ... abridging the freedom of speech . . . ” 45 The strong language used in the First Amendment seems to imply that freedom of speech covers every kind of speech or expression. However, “it is well understood that the right of free speech is not absolute at all times and under all circumstances.” 46 Certain kinds of speech may be classified as illegal, and a person may be punished for publishing such speech. 47 Obscene utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 48 Obscenity law’s foundations seem clear enough, but the application of legal standards to obscenity has a long and troubled history. 49 After a number of iterations, the Court finally settled on a definition in the case of Miller v. California. 50

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A. Miller and the Precedent for Local Community Standards: Why the Court Agrees it is All About Location, Location, Location
In Miller, the Court specified three criteria to decide whether or not a publication is protected free speech or unprotected obscenity.\(^{51}\) One of the criteria asks "whether the average person, applying contemporary community standards" would find that the alleged obscene material appeals to an unwholesome sexual interest.\(^{52}\) In Miller, the Court explained that the local community into which a work had been published gets to define the line between eroticism and obscenity using its local community standards.\(^{53}\) Thus it is the recipient community, represented by jurors in a trial, that judges whether speech is outside the protection of the First Amendment.\(^{54}\)

The Court ultimately rejected a uniform national standard.\(^{55}\) Instead, the Court felt that community standards are essentially questions of fact, and our Nation is simply too big and diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the requisite consensus exists. \(...\) [To] structure obscenity proceedings around evidence of a national "community standard" would be an exercise in futility.\(^{56}\)

The Court determined a national community standard was "unreasonable" because it "is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept the depiction of conduct found tolerable in Las Vegas, or New York City. ... [D]iversity is not to be strangled by the absolutism of imposed uniformity."\(^{57}\)

Because the facts in Miller dealt with the mass mailing of allegedly obscene printed material, the Court's holding meant that local community standards should be used when examining obscenity in print media.\(^{58}\) However, publishers challenged the application of Miller to other media,\(^{59}\) relying on the Court's assertion that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."\(^{60}\)

Twice, the Supreme Court firmly reiterated that for traditional media, the local community standard for obscenity the proper standard.\(^{61}\) The Court has noted that even though a local standard approach might dissuade the publication of otherwise protected materials (because the publisher "would be unwilling to risk criminal conviction by testing variations in standards from place to place"\(^{62}\)), the Court concluded that the local standard best balanced the advantages and disadvantages associated with using either standard. By using local standards, publishers could tailor their messages by controlling the geographic locations where their messages would be published.\(^{63}\) Thus, for communications by mail, telephone, radio, and television, obscenity is determined using a local standard that is tied to the geographic space where the work was distributed.\(^{64}\)

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\(^{51}\) Id. ("The basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards would find that the work ... appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct ...; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.") (internal quotation marks and citations omitted).

\(^{52}\) Id.

\(^{53}\) Id. at 30-34.

\(^{54}\) Id.

\(^{55}\) Id.

\(^{56}\) Id. at 30.

\(^{57}\) Id. at 32-33.

\(^{58}\) Id. at 16-18.

\(^{59}\) E.g., Sable Commc'n of Cal., Inc. v. FCC, 492 U.S. 115 (1989) (obscenity charges against a "dial-a-porn" operator).


\(^{61}\) See Sable, 492 U.S. at 116 ("There is no constitutional barrier under Miller prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others."); see also Hamling v. United States, 418 U.S. 87, 104, 106 (1974) ("A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination. ... [A] federal obscenity case may be tried on local community standards.").

\(^{62}\) Miller, 413 U.S. at 34 (quoting Jacobellis v. Ohio, 378 U.S. 184, 194-95 (1964)).

\(^{63}\) See Hamling, 418 U.S. at 106 ("The fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity."); see Sable, 492 U.S. at 125-26 ("If Sable's audience is comprised of different communities with different local standards, Sable [the publisher] ultimately bears the burden of complying with the prohibition on obscene messages.").

\(^{64}\) While there is some nuance to the definition of the geographic contours of the local community, the Court has held that the community standards are informed by the geographic space where the obscene material was received. See Jenkins v. Georgia, 418 U.S. 153, 157 (1974) (holding that "States have considerable latitude" in framing the geographic contours of the community, ranging from leaving the boundary undefined, or defining the local community using precise boundaries); see, e.g., Kaplan v. California, 413 U.S. 115, 121 (1974) (allowing the community standards to be defined by the geographic limits of the State of California).
In Miller, the Court specified three criteria to decide whether or not a publication is protected free speech or unprotected obscenity.\(^{51}\) One of the criteria asks “whether the average person, applying contemporary community standards” would find that the alleged obscene material appeals to an unwholesome sexual interest.\(^{52}\) In Miller, the Court explained that the local community into which a work had been published gets to define the line between eroticism and obscenity using its local community standards.\(^{53}\) Thus it is the recipient community, represented by jurors in a trial, that judges whether speech is outside the protection of the First Amendment.\(^{54}\)

The Court ultimately rejected a uniform national standard.\(^{55}\) Instead, the Court felt that community standards are essentially questions of fact, and our Nation is simply too big and diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. \(^{56}\)

To structure obscenity proceedings around evidence of a national “community standard” would be an exercise in futility.\(^{57}\)

The Court determined a national community standard was “unreasonable” because it “is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept the depiction of conduct found tolerable in Las Vegas, or New York City. . . . [D]iversity is not to be strangled by the absolutism of imposed uniformity.”\(^{58}\)

Because the facts in Miller dealt with the mass mailing of allegedly obscene printed material, the Court’s holding meant that local community standards should be used when examining obscenity in print media.\(^{59}\) However, publishers challenged the application of Miller to other media,\(^{60}\) relying on the Court’s assertion that “differences in the characteristics of new media justify differences in the First Amendment standards applied to them.”

Twice, the Supreme Court firmly reiterated that for traditional media, the local community standard for obscenity the proper standard.\(^{61}\) The Court has noted that even though a local standard approach might dissuade the publication of otherwise protected materials (because the publisher “would be unwilling to risk criminal conviction by testing variations in standards from place to place“),\(^{62}\) the Court concluded that the local standard best balanced the advantages and disadvantages associated with using either standard. By using local standards, publishers could tailor their messages by controlling the geographic locations where their messages would be published.\(^{63}\)

Thus, for communications by mail, telephone, radio, and television, obscenity is determined using a local standard that is tied to the geographic space where the work was distributed.\(^{64}\)

\(^{51}\) Id. (“The basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards would find that the work . . . appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct . . . ; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”) (internal quotation marks and citations omitted).

\(^{52}\) Id.

\(^{53}\) Id. at 30-34.

\(^{54}\) Id.

\(^{55}\) Id.

\(^{56}\) Id. at 30.

\(^{57}\) Id. at 32-33.

\(^{58}\) Id. at 16-18.

\(^{59}\) E.g., Sable Comm’ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989) (obscenity charges against a “wire-porn” operator).


\(^{61}\) See Sable, 492 U.S. at 116 (“There is no constitutional barrier under Miller to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others.”); see also Hamling v. United States, 418 U.S. 87, 104, 106 (1974) (“A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination. . . . [A] federal obscenity case may be tried on local community standards.”).

\(^{62}\) Miller, 413 U.S. at 34 (quoting Jacobellis v. Ohio, 378 U.S. 184, 194-95 (1964)).

\(^{63}\) See Hamling, 418 U.S. at 106 (“The fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity.”); see Sable, 492 U.S. at 125-26 (“If Sable’s audience is comprised of different communities with different local standards, Sable [the publisher] ultimately bears the burden of complying with the prohibition on obscene messages.”).

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B. Ashcroft and the Web Gone Wild: How the Lack of Geographic Controls Made the Court Doubt the Applicability of Local Community Standards to the Internet

Miller established "local community standards" as the appropriate gauge for determining obscenity in traditional media. But when the Internet emerged as a new medium divorced from real-world geography, the extension of traditional obscenity law became problematic.

Judged by the standards of the community most likely to be offended by the measure for determining obscenity in traditional media, but when prohibited by the Act, including:

Online censure that using local community standards might chill too much free speech.

Ashcroft v. ACLU ("Ashcroft II") is the most recent decision in which the Supreme Court raises the question of whether local standards apply to online content. In 1998, Congress, alarmed by the rise in obscenity and indecency on the Internet, and fearing easy access by minors, passed the Child Online Protection Act ("COPA"). COPA copied the Miller criteria nearly verbatim to define online material prohibited by the Act, including "applying contemporary community standards" to determine whether material appealed to the prurient interest.

A number of Justices were concerned that applying local standards to a medium with inherently national content would chill too much speech. Thus, Ashcroft II fragmented into at least five distinct opinions, with no clear consensus on whether local, national, or some other community standard should be used for the new online medium in which geographic control was nonexistent.

The plurality opinion (fully endorsed by Justices Thomas, Scalia, and Rehnquist, and joined in part by Justices O'Connor and Breyer) noted that while there was no requirement that the community standards had to be tied to some precise geography, it was inevitable that jurors would draw upon their respective local communities to determine if a work is obscene. The plurality further noted that the unique characteristics associated with the Internet did not justify adopting a different approach to obscenity, and posited that the continued application of a local standard to the Internet was tolerable.

Recognizing the need for some consensus, Justices Thomas, Scalia, and Rehnquist conceded their position and merely ended the plurality opinion by stating that, "[t]he scope of our decision today is quite limited. We hold only that COPA's reliance on community standards to identify [obscene material] does not by itself render the statute [unconstitutional]." Thus, COPA was not struck down for its use of local standards, but instead was remanded to the lower court with instructions to determine if there were other reasons that made COPA unconstitutional.

In a separate opinion that concurred in part and concurred in the judgment, Justice O'Connor felt compelled to "express [her] own views on the constitutionality and desirability of adopting a national
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Ashcroft v. ACLU ("Ashcroft I") is the most recent decision in which the Supreme Court raises the question of whether local standards apply to online content. In 1998, Congress, alarmed by the rise in obscenity and indecency on the Internet, and fearing easy access by minors, passed the Child Online Protection Act ("COPA"). COPA copied the Miller criteria nearly verbatim to define online material prohibited by the Act, including "applying contemporary community standards" to determine whether material appealed to the prurient interest.

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The plurality opinion (fully endorsed by Justices Thomas, Scalia, and Rehnquist, and joined in part by Justices O'Connor and Breyer) noted that while there was no requirement that the community standards had to be tied to some precise geography, it was inevitable that jurors will draw upon their respective local communities to determine if a work is obscene. The plurality further noted that the unique characteristics associated with the Internet did not justify adopting a different approach to obscenity, and posited that the continued application of a local standard to the Internet was tolerable. Recognizing the need for some consensus, Justices Thomas, Scalia, and Rehnquist conceded their position and merely ended the plurality opinion by stating, "[t]he scope of our decision today is quite limited. We hold only that COPA's reliance on community standards to identify [obscene material] does not by itself render the statute [unconstitutional]." Thus, COPA was not struck down for its use of local standards, but instead was remanded to the lower court with instructions to determine if there were other reasons that made COPA unconstitutional.

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65 See Reno v. ACLU, 521 U.S. 844, 877-88 (1997) (expressing concern that using "community standards" when regulating online content could cause it to be "be judged by the standards of the community most likely to be offended by the message").


70 Ashcroft I, 535 U.S. at 587 (O'Connor, J., concurring in part and concurring in the judgment) (using a local community standard "would potentially suppress an inordinate amount of expression"); id. at 590 (Breyer, J., concurring in part and concurring in the judgment) (using a local community standard "would provide the most purview of communities with a hecker's veto affecting the rest of the Nation"); id. at 594-96 (Kennedy, J., with whom Souter, J., & Ginsburg, J., join, concurring in the judgment) (using a local community standard could lead web publishers to avoid using the Internet because they cannot control who receives their content); id. at 612 (Stevens, J., dissenting) (using local community standards would remove all online speech that was intolerable to the least-tolerant community).
standard for obscenity regulation on the Internet. 87 She explained using a local standard would chill too much speech, "effectively forcing all speakers on the Web to abide by the most puritan community's standards." 88 Given Internet publishers' "inability to control the geographic location of their audience," requiring such publishers to control where their speech was received would be unduly burdensome, and would "potentially suppress an inordinate amount of expression." 89 Thus, according to Justice O'Connor, a national standard would be less chilling for Internet speech. However, Justice O'Connor concluded by noting that although she wished the Court would "explicitly adopt(...) a national standard for defining obscenity on the Internet," 89 she agreed with the plurality that under the circumstances of the case, local standards alone were not sufficient to invalidate COPA. 90

In a contrasting opinion concurring in part and concurring in the judgment, 91 Justice Breyer argued that Congress never intended for COPA to apply a local standard, but instead intended to apply a "nationally uniform adult-based standard" to online content. 92 He argued that although a juror might inevitably use his own local standards to judge obscenity, such variations would be minor and would not invalidate a national standard. 93 Notwithstanding his advocacy of a national standard, Justice Breyer conceded that the use of local standards was tolerable and, as such, did not invalidate COPA. 94

In a fourth opinion, Justices Kennedy, Souter, and Ginsburg expressed their own concerns about both the national and local standards. 95 They agreed with the plurality that local standards are sometimes appropriate; 96 however, they were also concerned that the unique characteristics of the Internet may "justify differences in the First Amendment standards applied to [the Internet]." 97 The three Justices noted that applying a local standard in other media was tolerable because publishers could easily target their audience geographically. 98

In contrast, using a local standard to judge online content presented a "particular burden on Internet speech" due to inevitable variation among the nation's communities. 99 Nevertheless, the three Justices could not decide which standard was appropriate in this case and merely concurred in the judgment. 90

In the fifth and final opinion, Justice Stevens provided the only dissent. 92 Justice Stevens reasoned that because Internet publishers have no control over where their content is distributed, using the community standards set forth in Miller leads to overbreadth in any application to online content. 93 Stevens principally disagreed with the plurality's acceptance of local standards for the Internet; but he also criticized Justice Kennedy's opinion. 94 Although Justice Stevens conceded that obscene "hard-core pornography ... does not belong on the Internet," he nevertheless felt that "applying community standards to the Internet will restrict a substantial amount of protected speech," because the "sorting mechanism [present in other geographically linked media] does not exist in cyberspace." 95 Justice Stevens did not propose some other standard or criterion for obscenity on the Internet—he merely disagreed with using community standards as detailed by the other Justices. 96

It is notable that each opinion (and thus every Justice of the Court) lamented the fact that online technology lacked the same geographic controls available in all other media. 97

Ashcroft I thus provides little guidance about how to determine obscenity online, instead leaving lower courts with the unenviable task of interpreting Ashcroft I to decide which community standard, if any, should apply to the Internet. Since eight Justices concurred in the judgment, the most that can be said is that using local standards does not automatically condemn Internet regulation as unconstitutional. 98

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77 Id. at 586.
78 Id. at 577.
79 Id. at 587.
80 Id. at 589.
81 Id.
82 Id. at 589–91 (Breyer, J., concurring in part and concurring in judgment).
83 Id. at 591.
84 Id.
85 Id. at 589.
86 Id. at 591–602 (Kennedy, J., concurring in judgment).
87 Id. at 594.
88 Id. at 595.
89 Id. at 595–97.
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II. RECENT DEVELOPMENTS: SPLITTING THE CIRCUITS

Obscenity is whatever happens to shock some elderly and ignorant magistrate. 99

- Bertrand Russell

Because of the Supreme Court’s vague, noncommittal, and fractured holding in Ashcroft I, lower courts have to grapple with Internet obscenity cases without the clarion guidance of whether a local or national community standard applies. Two recent United States Courts of Appeals decisions stand on opposite sides of this issue, and highlight the main theories behind the arguments for applying one standard over the other to Internet obscenity cases. 100

A. The Ninth Circuit: Kilbride and the National Community Standard

In October 2009, the Ninth Circuit “squarely turned its back” on the long-standing local community standard used by courts when analyzing all other forms of media. 101 In United States v. Kilbride the Ninth Circuit ruled that national community standards should be applied to the Internet because the Internet was so completely devoid of geographic controls. 102

The defendants (Jeffrey Kilbride and James Schaffer) began advertising borderline-obscene porn via email in 2003. 103 They earned a commission every time an email recipient used links in his or her email to access and pay for online content. 104 But the emails contained more than mere links—they also had graphic images of extreme sex acts, 105 which compelled over 662,000 people who received the messages to complain to the Federal Trade Commission. 106 The two men were charged with distributing obscene material in violation of Federal obscenity law. 107 At trial, the judge instructed the jury that it could use the community standards of “society at large, or people in general,” and that the community they “should consider … is not defined by a precise geographic area.” 108 The jury found the two men guilty of distributing obscenity, and they were sentenced to approximately five years of jail-time. 109

The defendants appealed, arguing that the jury instructions were prejudicial and plainly erroneous. They reasoned that because they had no control over where their email spam would be downloaded, a fully national standard should apply. 110 Thus, the defendants argued the jury instructions were erroneous and prejudicial because they failed to adequately inform the jury that when using community standards to judge obscenity, the jury should consider nothing less than the nation-wide community. 111 The Ninth Circuit agreed with the defendants that a national standard should apply to Internet obscenity cases, but at the same time, held that the jury instructions were not plainly erroneous under a national community standard.” 112

The Ninth Circuit arrived at this decision by first interpreting what it considered to be the holding of Ashcroft I. 114 The court em...
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100 See United States v. Little, 365 F. App’x 159 (11th Cir. 2010) (affirming the use of a local community standard); United States v. Kilbride, 584 F.3d 1240 (9th Cir. 2009) (holding that the jury should have applied a national community standard).
102 Id.
103 Kilbride, 584 F.3d at 1250–55.
104 Id. at 1244–45 (“Defendants’ convictions arose from . . . their business of sending unsolicited bulk email . . . advertising adult websites”). email to access and pay for online content.106 But the emails contained more than mere links—they also had graphic images of extreme sex acts,107 which compelled over 662,000 people who received the messages to complain to the Federal Trade Commission.108 The two men were charged with distributing obscene material in violation of Federal obscenity law.109 At trial, the judge instructed the jury that it could use the community standards of “society at large, or people in general,” and that the community they “should consider . . . is not defined by a precise geographic area.”110 The jury found the two men guilty of distributing obscenity, and they were sentenced to approximately five years of jail-time.111

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employed the Marks Rule, which requires that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” Thus, the Ninth Circuit examined the five fragmented opinions of Ashcroft I, and by overlapping the various concurrences, concluded that the narrowest grounds upon which a holding could be based was that “while application of a national community standard would not or may not create constitutional concern, application of local community standards likely would.”

Notwithstanding its conclusion that national standards should be applied to Internet obscenity cases, the court upheld the defendants’ convictions because the jury instructions had been adequate. The Ninth Circuit reasoned that plain error is found only when the case law is “clear and obvious,” and the district court fails to follow that clear and obvious precedent. But, because the case law was not clear and had required the Ninth Circuit to divine a holding from Ashcroft I, the district court had not committed clear and obvious error by giving jury instructions requiring less than a fully national standard for judging online obscenity.

It is noteworthy that the Kilbride court lamented that online publishers are not able to tailor their message for specific geographic areas like they can in traditional media.

**B. The Eleventh Circuit: Little and the Local Community Standard**

In contrast to the Ninth Circuit, the Eleventh Circuit in United States v. Little concluded the opposite of Kilbride: local standards should apply to Internet obscenity cases. Interestingly, the Eleventh Circuit marked this circuit-splitting opinion to remain unpublished.

Defendant Paul Little, a.k.a. Max Hardcore, moved to California and began producing pornographic films in the early 1990s. Mr. Little’s pornography pushed the boundaries of decency, and his self-described “vile and crazy” videos garnered negative attention both inside and outside the porn industry, including the attention of the Federal government.

In 2007, the Department of Justice conducted an investigation into the content on Mr. Little’s website, after which it indicted Mr. Little for distributing obscenity. One mild description of the videos stated that they portrayed “abusive sexual acts between adult males and females dressed to look and act like minor children,” including, “simulated rape” and other extreme sex acts. After indictment, Mr. Little moved to dismiss the case because it had relied on a local community standard, arguing that after Ashcroft I, local standards could not constitutionally apply to Internet obscenity. The trial court dismissed the motion to dismiss, holding that local standards still applied to the Internet. At trial the district judge noted “it would be very difficult for the jury to sit through five of these [videos],” and after viewing some of the videos the jury passed a note to the judge begging that

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115 *Id.* at 1253-54 (quoting Marks v. United States, 430 U.S. 188, 193 (1976) (internal quotations omitted).

116 *Id.* at 1254.

117 *Id.* at 1255 (“In light of our holding, the district court’s jury instructions defining obscenity pursuant to *Hamling* was error. However, this error does not require reversal because the district court’s error was far from plain.”).

118 *Id.*

119 *Id.* at 1255 (“[O]ur conclusion was far from clear and obvious to the district court. Hence, we conclude that the district court committed no reversible error in its §§ 1462 and 1465 jury instructions.”).

120 *Id.* at 1250-51.

121 United States v. Little, 365 F. App’x 159, 166 (11th Cir. 2010).

122 See generally *id.*
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At trial the district judge noted “it would be very difficult for the jury to sit through five of these [videos],” and after viewing some of the videos the jury passed a note to the judge begging that...
they only be required to view a few clips. Mr. Little was convicted of all ten counts of violating federal obscenity law, was sentenced to almost four years in prison, three years of probation, and was fined over $80,000.

On appeal Mr. Little argued that it was error to deny his motion to dismiss the indictment. Mr. Little asserted that local community standards should not apply to the Internet because he had no power to control the geographical areas into which his videos were published. The Eleventh Circuit summarily rejected this argument in four short sentences. The court noted that three months earlier the Ninth Circuit in Kilbride had interpreted the holding in Ashcroft I "in such a way as to mandate a national community standard for Internet-based material." However, the Eleventh Circuit "decline[d] to follow the reasoning of Kilbride," stating that the portions of Ashcroft I "that advocated a national community standard were dicta, not the ruling of the court." Thus, the Eleventh Circuit concluded that using local community standards under Miller "remains the standard by which the Supreme Court has directed us to judge obscenity, on the Internet and elsewhere." Thus, the Eleventh Circuit upheld Mr. Little's conviction. However, due to a sentencing enhancement error, the case was remanded to the district court for re-sentencing.

The Kilbride and Little decisions illustrate how reasonable people can interpret the Ashcroft I decision and arrive at contrasting conclusions. They also illustrate how the lack of Supreme Court direction over which standard should be used for online obscenity cases could lead to even more splits among the courts. It is noteworthy that the Little court—like the Kilbride court and the U.S. Supreme Court—lamented that online publishers have no means to tailor their message like they can in traditional media.

131 Clay Calvert, Judicial Erosion of Protection for Defendants in Obscenity Prosecutions?: When Courts Say, Literally, Enough is Enough and When Internet Availability Does Not Mean Acceptance, 1 HARV. J. OF SPORTS & ENT. L. 7, 22 (2010); see Clerk’s Minutes—General at 1, United States v. Little, No. 8:07-cr-00170-SCB-TBM (M.D. Fla. May 29, 2008), ECF No. 127 ("[Playing of the dvds continued in open court. ... A note is sent to the Judge by one of the jurors. ... View­ing of the dvds continues.")

132 United States v. Little, 365 F. App'x 159, 161 (11th Cir. 2010).

133 Brief Of Defendants-Appellants Paul F. Little and Max World Ent., Inc. at 13–17, United States v. Little, 365 F. App'x 159 (11th Cir. 2010) (No. 08-15964).

134 Little, 365 F. App'x at 164.

135 Id. at 164 & n.10.

136 Id.

137 Id. at 169.

138 Id. at 163.

Reasonable people may debate about whether a local or national standard should apply to the Internet. But, a recent technological development will end the debate and provide the Court with a good reason to apply local community standards for online content just as it has done for all other media. This development, geotargeting, allows online publishers to control where their content is accessible. While there are already a number of reasons why the Court should apply local community standards to the Internet (such as incorrect attempts to interpret Ashcroft I as advocating national standards, the impossibility of administering a national standard, and the greater
they only be required to view a few clips. Mr. Little was convicted of all ten counts of violating federal obscenity law, was sentenced to almost four years in prison, three years of probation, and was fined over $80,000.

On appeal, Mr. Little argued that it was error to deny his motion to dismiss the indictment. Mr. Little asserted that local community standards should not apply to the Internet because he had no power to control the geographical areas into which his videos were published. The Eleventh Circuit summarily rejected this argument in four short sentences. The court noted that three months earlier the Ninth Circuit in Kilbride had interpreted the holding in Ashcroft I "in such a way as to mandate a national community standard for Internet-based material." However, the Eleventh Circuit "declined[d] to follow the reasoning of Kilbride," stating that the portions of Ashcroft I "that advocated a national community standard were dicta, not the ruling of the court." Thus, the Eleventh Circuit concluded that using local community standards under Miller "remains the standard by which the Supreme Court has directed us to judge obscenity, on the Internet and elsewhere." Thus, the Eleventh Circuit upheld Mr. Little's conviction. However, due to a sentencing enhancement error, the case was remanded to the district court for re-sentencing.

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chilling effects of a national standard\textsuperscript{143}, the most important reason is that Internet users have developed and deployed a technology—
    geotargeting—that allows online publishers to control where their
    content is received. The conflict between local and national standards
    for online obscenity springs from the idea that there were no intrinsic
    geographic controls similar to those in other traditional media—
    geotargeting resolves the issue by giving online publishers the same
    power they have in all other media to target their audience.

This section will give a short history of geotargeting, will explain
how online geotargeting provides publishers of prurience the power to
    target particular geographic areas, and will conclude with a proposal
for a modified local standard that can be used for online obscenity.

A. The History and Ever Expanding Use of Geotargeting On
    the Internet

Many assume that it is impossible to link active users of the Internet
to a geographical location.\textsuperscript{142} However, this was not the case when
the Internet was first created, and is not the case now.

Throughout the first stages of the Internet’s existence, users were
    requested to register with a central database, linking each user to a
real-world name, physical mailing address, telephone number, and
network mailbox.\textsuperscript{141} The central database tracked the real-world loca-
tions of users until the 1990s, when, in the interest of creating com-
petitive balance, registration with the database was deregulated and
additional registrars were permitted to assign Internet domain

\textsuperscript{141} Using a local standard provides the least-tolerant community with veto
    power on a nation-wide medium, thereby chilling the speech of the most tolerant of
    speakers; in contrast, a national standard forces obscene content on unwilling com-
    munities while it prevents ultra-tolerant communities from being able to publish pro-
    curent content they could otherwise publish under the local standard. See supra notes
    56–57 and accompanying text; compare Matthew Towns, Note, The Community
    Standards of Utah and the Amish Country Rule the World Wide Web, 68 Mo. L. REV.
    735, 740–43 (2003) (explaining how under a local standard online speech would be
    chilled by giving the least-tolerant community a hecker's veto), with John V. Ed-
    wards, Note, Obscenity in the Age Of Direct Broadcast Satellite: A Final Burial for
    Stanley v. Georgia?, A National Obscenity Standard, and Other Miscellaneous, 33 WM.
    the interests of both the least tolerant and the most tolerant communities”).

\textsuperscript{142} See Dan Jerker B. Santesson, Geo-Location Technologies and Other
    Means of Placing Borders on the Borderless Internet, 23 J. MARSHALL J. COMPUTER

\textsuperscript{143} Network Working Group, NICNAME/WHOIS, INTERNET ENGINEERING
    users to be linked to real-world locations through registry with the WHOIS database).

\textsuperscript{144} As more registrars were allowed, the database grew more complex and less transparent,\textsuperscript{145} leading many to believe that the Internet’s decentralized design and global reach made it technologi-
    cally impossible to connect to real-world geography.\textsuperscript{146}

Recent technological advances are recreating real-world borders on
    the previously borderless Internet making it much easier to connect
each Internet user to a real-world location.\textsuperscript{147} One sophisticated
method uses Internet Protocol (IP) addresses associated with each
domain registry to track the location of users.\textsuperscript{148} Typically a geo-
location company “maps” all the domains and their associated IP ad-
    dresses to their real-world locations and stores that large amount of
information into a private database.\textsuperscript{149} When a user seeks to access a
certain website, his or her originating IP address can be compared to the
    records in the database, giving an educated guess about the access-
seaker’s location.\textsuperscript{150} Online advertisers and publishers of all types
currently use geotargeting because it gives them the power to show
    customized messages to geographically defined audiences, which
chilling effects of a national standard\textsuperscript{141}), the most important reason is that Internet users have developed and deployed a technology—

geotargeting—that allows online publishers to control where their content is received. The conflict between local and national standards

for online obscenity springs from the idea that there were no intrinsic geographic controls similar to those in other traditional media—

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Throughout the first stages of the Internet’s existence, users were requested to register with a central database, linking each user to a real-world name, physical mailing address, telephone number, and network mailbox.\textsuperscript{143} The central database tracked the real-world locations of users until the 1990s, when, in the interest of creating competitive balance, registration with the database was deregulated and additional registrars were permitted to assign Internet domain names.\textsuperscript{144} As more registrars were allowed, the database grew more complex and less transparent,\textsuperscript{145} leading many to believe that the Internet’s decentralized design and global reach made it technologically impossible to connect to real-world geography.\textsuperscript{146}

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\textsuperscript{143} Network Working Group, NICNAME/WHOIS, INTERNET ENGINEERING TASK FORCE 1 (Oct. 1985), http://tools.ietf.org/html/rfc0954 (requesting early Internet users to be linked to real-world locations through registry with the WHOIS database).


\textsuperscript{146} See Kevin F. King, Geo-location and Federalism on the Internet: Cutting the Internet Gambling’s Gordian Knot, 11 COLOM. SCI. & TECH. L. REV. 41, 41, 44, 59–60 (2010); see also Svantesson, supra note 142.

\textsuperscript{147} See Alex Blyth, IP Targeting: Hit or Miss?, REVOLUTION, Feb. 1, 2008, at 42, available at 2008 WLNR 4114288; Andy Ellenthal, Local Target Practice, ADVERT., Sept. 28, 2009, at 19, available at 2009 WLNR 19658449; Maria L. Montagnani, A New Interface Between Copyright Law and Technology, 26 CARDOZO ARTS & ENT. LJ. 719, 762–63 (2009) (describing how the BBC’s website prevents non-U.K. users from accessing some of its online content using geotargeting); Svantesson, supra note 142.

\textsuperscript{148} Svantesson, supra note 142 at 109–10. There are also less sophisticated (but arguably equally valuable) geolocation methods. Id. at 120–22; see also Matthew Nelson, Utah’s Trademark Protection Act: Over-Reaching Unconstitutional Protection or Decisive Clarifying Legislation?, 2007 UTAH L. REV. 1199, 1214.

\textsuperscript{149} Svantesson, supra note 142, at 110.

\textsuperscript{150} Id.
maximizes advertising dollars and provides hyper-local responses to online queries. Thus, geo-location companies help advertisers or other Internet publishers quickly and efficiently locate their audience through such information as a visitor’s country, region, city, latitude, longitude, zip code, time zone, area code, local weather, and more. There are websites that provide free, easy-to-use geolocation software that is 99.5% accurate on a country level, and 60% accurate at the city level, allowing website designers to create customized lists that block as many (or as few) countries or cities as they wish from accessing a website’s online content.

B. How Geotargeting Gives Online Publishers the Power to Target Their Audience by Geography, Just as in Other Media

As noted in Ashcroft I, Little, and Kilbride, courts have often lamented the fact that web publishers do not have the ability to control the geographic scope of the recipients of their communications, implying that if online publishers could control the geographic scope of their postings, the Court would be more willing to impose local community standards on the Internet, just as it has imposed local standards on previous media. Geolocation provides the Court with the answer. Purveyors of prurient publications can presently employ powerful tools to publish their products into predetermined precincts. And although not yet fully capable of granular targeting at the street or house level, geotargeting is capable of targeting particular cities and zip codes, and is constantly improving.

Some commentators have postulated that geolocation software may already be accurate enough for legal purposes. There are ways to fool geolocation software, but for the first time since Ashcroft I, it is possible for web publishers such as Paul Little (a.k.a. Max Hardcore) to deliberately target those communities tolerant of violent and extreme pornography, and avoid publishing in communities that find such content obscene. Already, at least one foreign country and one state legislature have considered using geolocation to regulate online content.

C. A Proposal to Use Local Community Standards to Gauge Online Obscenity, Justified by Geotargeting

As the fusion of geography with the Internet becomes more and more complete, the Court will be able to comfortably apply the reasoning it applied in traditional obscenity law. Specifically, instead of using a national standard that is hard to determine, and imposes too many burdens on free speech, a local standard should be used to determine obscenity on the Internet. As noted in Miller, using local...
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\footnote{152} See Bob Tedeschi, Borderless is Out: Advertisers Now Want to Know If a Customer Lives in Cairo, Egypt, or Cairo, Ill, N.Y. TIMES, Apr. 2, 2001, at C.10; see e.g., Geotargeting, GOOGLE.COM, http://www.google.com/support/webmasters/bin/answer.py?hl=en&answer=62399 (last visited Nov. 13, 2011) (describing how webmasters can use Google’s geotargeting tools to increase their exposure to users in a specific geographic area).

\footnote{153} Svantesson, supra note 142, at 110. See id. at 111 n.40 (listing eight popular geolocation companies); Demo, GEOBYTES.COM, http://www.geobytes.com/demo.htm (last modified Aug. 29, 2006) (providing a less-than-classy, but very informative, demonstration of the information available using geolocation software, as well as how easy it is to use geolocation software). Since Mr. Svantesson’s article, additional companies have entered and dominated the market, such MaxMind who offers the robust and regularly updated GeoIP Database. See MaxMind’s IP Intelligence Solution, MAXMIND.COM, http://www.maxmind.com/app/ip-locate (last visited Nov. 13, 2011); cf. Randall Munroe, GeoIP, XKCD.COM, http://xkcd.com/713 (last visited Nov. 13, 2011) (providing a humorous spin on how the GeoIP database can be used to create hyper-local advertisements).


\footnote{155} IPInfoDB supra note 153 (follow the “Block IP by Country” hyperlink).
standards is preferable to using national standards; and through the use of technologies such as geotargeting, Internet publishers now have the ability to control the geographic areas where they want to publish, giving them the ability to publish online without risking the heckler’s veto wielded by the most conservative of communities.

One dilemma associated with allowing the use of local standards on the Internet is how the Court will deal with “eavesdroppers.” In other words, when a user in an area where the publisher did not intend to publish uses spoofing or proxy methods to work-around the geolocation software and downloads the obscene material in a jurisdiction where the publisher did not intend to distribute material. In such cases, a modification of the Miller criteria would absolve the publisher of criminal liability. Instead of allowing all downloads to attack liability to the publishers, only those downloads that were (1) intended for that geographic area, as evidenced by the publisher’s use of geotargeting software, or (2) explicitly or implicitly encouraged by the publisher, as evidenced by the usual forms of inducement evidence, could give rise to liability. Thus, the publishers would only liable when they direct their work at an area, or through their actions or expressions, deliberately manipulate someone into downloading content into a restricted geographic area. Under that modified standard, if the recipient eavesdrops and purposely circumvents a publisher’s geotargeting software, such as through proxies or mirrors, then the publisher cannot be liable since he never intended to enter that geographic area. In essence, a publisher whose material was unilaterally taken into an unintended jurisdiction by a third party could not be held liable for distributing obscenity because that state or region would not have jurisdiction over the publisher.

This provides local communities some degree of autonomy and control over what online content will be allowed in their communities (just as they currently have in traditional media), and avoids the uniformity of a national standard which would force conservative communities to protect otherwise obscene works; and more importantly, allows the expression of free speech of borderline obscene material in communities where it is tolerated, preventing the most prudish community from exercising a heckler’s veto power over the Internet.

Thus, due to the widespread and pervasive use of geotargeting, online publishers can be required to target the geographic areas in which they wish to publish or face criminal consequences, which is the same requirement as in other traditional media. The one exception to this rule is that if the recipient takes affirmative steps to circumvent the geotargeting controls, the publisher would not be liable so long as he did not encourage circumvention. This prevents the Court from going down a medium-specific analysis and instead uses the same standard for all media. This proposed modified standard could be similarly extended into any future media, so long as there is some geographic control wielded by the publisher.

III. CONCLUSION

Obscenity, which is ever blasphemy against the divine beauty in life... is a monster for which the corruption of society forever brings forth new food, which it devours in secret.161 - Percy Bysshe Shelley

The law governing online obscenity is at a crossroads. For many years traditional obscenity law used the standards of the local community to determine whether a published work was obscene, requiring publishers of extreme content to target only the most tolerant of communities. But the Internet’s global reach and open infrastructure caused the Court to doubt the applicability of obscenity law to online content, causing lower courts to split over whether the same local standards should be used (such as the Eleventh Circuit in Kilbride), or whether a new national standard for obscenity should be used (such as the Ninth Circuit in Kilbride). Geotargeting technology provides the answer to the conundrum, giving publishers the same power to target audiences as they had in the traditional media, thereby giving the Court reason to reaply local standards to all content, be it traditional or online media.

This all begs the question: if geotargeting is such a neat solution for the community standards debate, when will the Court address the issue? It likely won’t be through Kilbride or Little, because both cases were decided on harmless error grounds.162 But, eventually the Court will once again be asked which standard should be used for online content. And as geotargeting technology continues to improve and be used more widely, the Court will have a great reason to resolve the issue in favor of using local standards to determine obscenity on the

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Internet. Ultimately, in the battle between the two standards, “there can be only one.”

THE WARRANTLESS USE OF GPS TRACKING DEVICES: FOURTH AMENDMENT PROTECTION RESTORED THROUGH APPLICATION OF AN ANALYTICAL FRAMEWORK

David Myers *

INTRODUCTION

Law enforcement’s use of Global Positioning System (GPS) devices continues to expand as the technology gains recognition as an efficient, accurate, and inexpensive method to monitor a suspect’s public movement in automobiles. Federal courts have generally upheld the warrantless use of these devices and determined they do not infringe an individual’s Fourth Amendment right to a “reasonable expectation of privacy.” The U.S. Court of Appeals for the District of Columbia Circuit, however, has recently held that the warrantless use of GPS devices to monitor vehicle movements on public roads is unlawful when used over a prolonged period. The D.C. Circuit based this holding on the belief that long term GPS tracking reveals “the

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1 Adam Koppel, Note, Warranting a Warrant: Fourth Amendment Concerns Raised by Law Enforcement’s Warrantless Use of GPS and Cellular Phone Tracking, 64 U. MIAMI L. REV. 1061, 1064 (2010).
3 United States v. Maynard, 615 F.3d 544, 553 (D.C. Cir. 2010).