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.

2 OBSCENITY STANDARDS, 1 NEAT SOLUTION: HOW G E O T A R G E T I N G EXTENDS TRADITIONAL OBSCENITY LAW TO THE INTERNET

J. Mason Kjar

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 sanctions 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

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2. Ernorrnik v. City of Jacksonville, 422 U.S. 205, 206, 213-14 (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).

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4 In *Jenkins v. Georgia,* the court held that the attempted publication of an erotic film depicting two women using excrement to engage in extreme sex acts, ostensibly for the sexual gratification of the viewers, was not obscene. 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, and other media. The video depicts two women using excrement to engage in extreme sex acts, ostensibly for the sexual gratification of the viewers.
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2 ERNZONIK v. CITY OF JACKSONVILLE, 422 U.S. 205, 206, 213-14 (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).
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5 See, e.g., UNITED STATES v. EXTREME ASSOCIATES, 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 ASSOCIATES, 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 which 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’.”).
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 Simoes Croce, a Brazilian citizen living in Florida, was indicted in 2006 for distributing obscene hardcopy videos that displayed paraphilic acts of coprophilia, 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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For example, Mr. Danilo Simoes Croce, a Brazilian citizen living in Florida, was indicted in 2006 for distributing obscene hardcore 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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10Family Guy: Back to the Woods (FOX Television broadcast Apr. 13, 2008) (showing Stewie—one of the sitcom’s main characters—reacting to 2 Girls 1 Cup); Superhero Movie (Dimension Films 2008).


13Agger, supra note 8.


15Jackets, supra note 14.

16See Hungry Bitches—2 Girls 1 Cup—R33, supra note 7.
Part III.A.

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 unworthy 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 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 content was successfully prosecuted. 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.

26 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.

27 United States v. Kilbride, 584 F.3d 1240, 1254 (9th Cir. 2009); see infra Part III.A.

28 This is just one prong of the test for obscenity. 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.

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30 See Miller, 413 U.S. at 30-34; infra Part II.A.

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 supra note 141 and accompanying text.

35 United States v. Little, 365 F. App'x 159, 162-64 (11th Cir. 2010); see infra Part III.B.

36 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.

37 See John V. Edwards, Note, Obscenity in the Age of Direct Broadcast Satellite: A Final Burial for Stanley v. Georgia(?), a National Obscenity Standard, and Other Miscellany, 33 WM. & MARY L. REV. 949, 992 (1992) ["A national standard compromises the interests of both the least tolerant and the most tolerant communities."]; see also infra note 141 and accompanying text.

38 See Ashcroft v. ACLU (Ashcroft I), 535 U.S. 564 (2002); see also infra Part II.B.

39 See Ashcroft I, 535 U.S. 564; infra Part II.

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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 older 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.

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23 United States v. Little, 365 F. App'x 159, 162–64 (11th Cir. 2010); see infra Part III.B.
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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 lead to fractured ambivalence among Supreme Court Justices over whether a national or local standard approach should be used when judging online content.60

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

[S]ex 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, Cse Note, Ashcroft v. American Civil Liberties Union, 7 JONES L. REV. 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.”).
44 Miller, 413 U.S. at 23.
45 U.S. CONST. amend. 1.
48 Roth, 354 U.S. at 485 (quoting Chaplinsky, 315 U.S. at 571–72).
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. DELLA & JEFFREY H. MATSUURA, 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 lead to fractured ambivalence among Supreme Court Justices over whether a national or local standard approach should be used when judging online content. \(^{40}\)

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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 not 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.\(^{50}\)

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

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\(^{44}\) Miller, 413 U.S. at 23.

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\(^{50}\) Miller, 413 U.S. at 24.
In Miller, the Court specified three criteria to decide whether or not a publication is protected free speech or unprotected obscenity. One of the criteria asks whether the average person, applying contemporary community standards, would find that the alleged obscene material appeals to a prurient interest; 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. Thus, it is the recipient community, represented by jurors in a trial, that judges whether speech is outside the protection of the First Amendment.

The Court ultimately rejected a uniform national standard. 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. To structure obscenity proceedings around evidence of a national "community standard" would be an exercise in futility.

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.... Diversity is not to be strangled by the absolutism of imposed uniformity." 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"), 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.

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.

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35 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).
36 Id. at 30-34.
37 Id. at 32-33.
38 Id. at 16-18.
39 E.g., Sable Comm'ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989) (obscene materials may be subjected to a "dial-a-porn" operator).
41 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.").
42 Miller, 413 U.S. at 34 (quoting Jacobellis v. Ohio, 378 U.S. 184, 194-95 (1964)).
43 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.").
44 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. ... 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. ... Diversity 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

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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.

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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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 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.").
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).
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.

Online in obscenity and indecency on the Internet, and fearing easy access by minors, passed the Child 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 I 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 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 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." 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. 66 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"). 67 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. 68

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67 COPA § 231(6) (2010).
68 Ashcroft v. ACLU (Ashcroft I), 535 U.S. 564 (2002). 69 Id. at 576-77 ("[C]ommunity standards need not be defined by reference to precise geographic area. .... Absent geographic specification, a juror applying community standards will inevitably draw upon personal knowledge of the community or vicinage from which he comes.").
70 Id. at 583 ("While Justice Kennedy and Justice Stevens question the applicability of this Court's community standards jurisprudence to the Internet, we do not believe that the medium's 'unique characteristics' justify adopting a different approach than that set forth in Hamling and Sable [i.e. using local community standards].")
71 See infra notes 71-96; see generally Reid, supra note 40.
72 Ashcroft I, 535 U.S. at 566-86 (Thomas, J., plurality opinion).
73 Id. at 576-77 ("[C]ommunity standards need not be defined by reference to precise geographic area. .... Absent geographic specification, a juror applying community standards will inevitably draw upon personal knowledge of the community or vicinage from which he comes.").
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75 Id. at 585 (emphasis in the original). Eight Justices agreed with the decision to not overrule COPA on the use of local community standards, and the various opinions reiterated the narrowness of their agreement. See id. at 576 (Thomas, J., plurality opinion) ("[W]e do not think it prudent to engage in speculation [about community standards] and deciding this case does not require us to do so."); id. at 596 (Kennedy, J., concurring in the judgment) ("In any event, we need not decide whether [COPA] invokes local or national community standards to conclude that vacatur and remand are in order.").
76 Id. at 586-89 (O'Connor, J., concurring in part and concurring in judgment).
standard for obscenity regulation on the Internet.\textsuperscript{77} 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."\textsuperscript{78} 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."\textsuperscript{79} 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,"\textsuperscript{80} she agreed with the plurality that under the circumstances of the case, local standards alone were not sufficient to invalidate COPA.\textsuperscript{81}

In a contrasting opinion concurring in part and concurring in the judgment, 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.\textsuperscript{82} 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.\textsuperscript{83} Notwithstanding his advocacy of a nationally uniform adult-based standard, Justice Breyer conceded that the use of local standards was tolerable and, as such, did not invalidate COPA.\textsuperscript{84}

In a fourth opinion, Justices Kennedy, Souter, and Ginsburg expressed their own concerns about both the national and local standards.\textsuperscript{85} They agreed with the plurality that local standards are sometimes appropriate;\textsuperscript{86} however, they were also concerned that the unique characteristics of the Internet may "justify differences in the First Amendment standards applied to [the Internet]."\textsuperscript{87} The three Justices noted that applying a local standard in other media was tolerable because publishers could easily target their audience geographically.\textsuperscript{88}

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.\textsuperscript{89} Nevertheless, the three Justices could not decide which standard was appropriate in this case and merely concurred in the judgment.\textsuperscript{90}

In the fifth and final opinion, Justice Stevens provided the only dissent.\textsuperscript{91} 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.\textsuperscript{92} Stevens principally disagreed with the plurality's acceptance of local standards for the Internet; but he also criticized Justice Kennedy's opinion.\textsuperscript{93} 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."\textsuperscript{94} 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.\textsuperscript{95}

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.\textsuperscript{96}

\textit{Ashcroft I} thus provides little guidance about how to determine obscenity online, instead leaving lower courts with the unenviable task of interpreting \textit{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.\textsuperscript{97}

\textsuperscript{77} Id. at 586.
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\textsuperscript{80} Id. at 589.
\textsuperscript{81} Id.
\textsuperscript{82} Id. at 589-91 (Breyer, J., concurring in part and concurring in judgment).
\textsuperscript{83} Id. at 591.
\textsuperscript{84} Id.
\textsuperscript{85} Id. at 589.
\textsuperscript{86} Id. at 591-602 (Kennedy, J., concurring in judgment).
\textsuperscript{87} Id. at 594.
\textsuperscript{88} Id. at 595.
\textsuperscript{89} Id. at 595-97.
\textsuperscript{90} Id. at 597.
\textsuperscript{91} Id. at 591-602 (Kennedy, J., concurring in judgment).
\textsuperscript{92} Id. at 602-12 (Stevens, J., dissenting).
\textsuperscript{93} Id. at 605-06.
\textsuperscript{94} Id. at 605-06, 609-11.
\textsuperscript{95} Id. at 611-12.
\textsuperscript{96} See id. at 602-12.
\textsuperscript{97} See id. at 568, 575, 577, 580-82, 583, 587, 590, 595-596, 605-606. \textit{Ashcroft I} wasn't the first time the Court wished the Internet had more geographic controls. See Reno v. ACLU, 521 U.S. 844, 890 (1997) ("[It] is not currently possible to exclude persons from accessing certain messages on the basis of their identity.").
\textsuperscript{98} See Ashcroft v. ACLU (\textit{Ashcroft II}), 542 U.S. 656, 664 (2004) (stating the "holding [in \textit{Ashcroft I}] was that the community-standards language did not, standing alone, make the statute unconstitutionally overbroad."). In \textit{Ashcroft II}, the Court found that COPA was unconstitutional, but only on the grounds that the statute's language was overbroad, with little discussion of whether local community standards
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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.\textsuperscript{97} Ashcroft I thus provides little guidance about how to determine obscenity online, instead leaving lower courts with the unhealthy 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.\textsuperscript{98}

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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”101 on the long-standing local community standard used by courts when analyzing all other forms of media.102 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.103

The defendants (Jeffrey Kilbride and James Schaffer) began advertising borderline-obscene porn via email in 2003.104 They earned a commission every time an email recipient used links in his or her email to access and pay for online content.105 But the emails contained more than mere links—they also had graphic images of extreme sex acts,106 which compelled over 662,000 people who received the messages to complain to the Federal Trade Commission.107 The two men were charged with distributing obscene material in violation of Federal obscenity law.108 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.”109 The jury found the two men guilty of distributing obscenity, and they were sentenced to approximately five years of jail-time.110

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.111 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.112 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.113

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 (10th Cir. 2010) (holding that the court should have applied a national 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”).
106 Kilbride, 584 F.3d at 1245 (“The Government also presented evidence of over 662,000 complaints received by the FTC from around the country concerning Defendants’ emails.”).
108 Id. at 1248.
109 See id. at 1245.
110 Id. at 1247.
112 Kilbride, 584 F.3d at 1254–55 (“A national community standard must be applied in regulation obscene speech on the Internet … [but] the court has never held that a jury in no case be instructed to apply a national community standard in finding obscenity.”).
113 Id. at 1252–55 (“COPA’s reliance on community standards does not by itself render the statute substantially overbroad for purposes of the First Amendment”).

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101 Clay Calvert, The End of Forum Shopping in Internet Obscenity Cases? 
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102 Id.
103 Kilbride, 584 F.3d at 1250–55.
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ployed 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

115 See generally id.

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

117 Id. at 1254.

118 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").

119 Id.

120 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.").

121 Id. at 1250-51.

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

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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.
123 See supra note 126, at 2.
124 Government's Response and Memorandum to Defendants' Motion to Dismiss at 2, United States v. Little, No. 8:07-cr-00170-SCB-TBM (M.D. Fla. Jan. 14, 1998), http://www.cit pages.com/1998-01-04/arti devil-in-the-flesh/1 (“Hardcore is among the most hated men in the [porn] industry. He’s rumored to have put several actresses in the hospital, and most starlets refuse to work with him.”).
125 Order at 1, United States v. Little, No. 8:07-cr-00170-SCB-TBM (M.D. Fla. Jan 16, 2008), ECF No. 64, 2008 WL 151875 at *1.
127 Government’s Response and Memorandum to Defendants’ Motion to Dismiss at 2, United States v. Little, No. 8:07-cr-00170-SCB-TBM (M.D. Fla. Jan. 4, 2008), ECF No. 63, 2007 WL 2809549 at *2 (internal quotations omitted) (describing Hardcore’s videos which “women are verbally and physically degraded in an unprecedented myriad of ways,” which “[e]ven for the most jaded porn watcher, Little’s oeuvre is over the top.”). Watching Little’s work is less like watching a porn movie than it is akin to witnessing a vivisection.”).
128 Defendants Max World Entm't. Inc. and Paul Little's Motion to Dismiss Indictment at 19-21 8:07-cr-00170-SCB-TBM (M.D. Fla. Oct. 24, 2007), ECF No. 56, 2007 WL 4401064 at *19-21; see also Order supra note 126, at 2.
129 Order, supra note 126, at 2.
131 See supra note 126, at 2.
132 Id. 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
Availability Does Not Mean Acceptance, 2009 13-17, lamented that online publishers have no means to tailor their message. Little lead to even more splits among the circuits. It is noteworthy that the over which standard should be used for online obscenity cases could can interpret the Little’s conviction. However, due to a sentencing enhancement error, sions. They also illustrate how the lack of Internet and elsewhere.” Thus, the Eleventh Circuit upheld Mr. local community standards under which the lack of control the geographical areas into which his videos were published.133 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 circuits. 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.138

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 dvs continued in open court. ... A note is sent to the judge by one of the jurors. ... View ing of the dvs 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), 2009 WL 306653 at 13–17.

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,139 the impossibility of administering a national standard,140 and the greater

139 The Court explicitly stated that no other holding should be extrapolated from the Ashcroft I decision. See supra note 74 and accompanying text. Moreover, the Ninth Circuit court erroneously applied the Marks Rule. Compare supra note 103 (explaining how Kilbride’s use of the Marks Rule on the Ashcroft I opinion was incorrect because it disregarded prior Supreme Court precedent and failed to apply correct interpretive principles), with Nichols v. United States, 511 U.S. 738, 745–46 (1994) (signaling that the Marks inquiry should not be pursued to the “unout logical possibility ... ”), and Linda Novak, Note, The Precedential Value of Supreme Court Plurality Decisions, 80 COL. L. REV. 756, 763 (1980) (explaining that although the Marks Rule can be used in some cases, “[m]ore often, however, there is no clear and explicit agreement on the reasoning supporting the result; instead, two essentially distinct rationales are proposed, and the overlap, if any, is merely implicit.”), and Evan H. Carminker, Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking, 73 TEX. L. REV. 1, 15 (1994) (“[T]here may not be a single dispositional rule endorsed by a majority of the judges. Instead, the disposition may be supported only by an individual or plurality opinion combined with one or more opinions concurring in the judgment. In such event, according to the conventional model, the case establishes no precedential rule. Rather, a decision establishes a legal rule with precedential status only if a majority of judges invoke the same dispositional rule to justify the same disposition, typically embodied within an ‘opinion of the court.’”).

140 Another reason is that using a national standard would prove impossible to administer in court proceedings. Compare Miller v. California, 413 U.S. 15, 30 (1973) (stating that in order to create a record of what the national standard is, which is “essentially a question[s] of fact,” it would necessitate asking a trier-of-fact to plumb the depths of the nation’s opinion which would amount to “an exercise in futility”), with Gambling v. United States, 418 U.S. 87, 103–05 (1974) (analyzing the “difficulty of formulating uniform national standards” and concluding “[n]othing in the First Amendment requires that a jury must consider hypothetical and unascertainable ‘national standards’ when attempting to determine whether certain materials are obscene as a matter of fact.”) (internal quotations omitted), and Jacobellis v. State of Ohio, 378 U.S. 184, 201 (1964) (Warren, Chief J., dissenting) (“I believe that there is no provable ‘national standard’ and perhaps there should be none. At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one.”).
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. 132

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. 133 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." 134 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." 135 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." 136 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. 137

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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. OBJ. SPORTS & ENT. L. 7, 22 (2010); see Clerk’s Minutes—General at 1, United States v. Little, No. 08-07-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 continued.").

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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.

III. AVAILABLE AT AN INTERNET NEAR YOU: GEOTARGETING

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, 139 the impossibility of administering a national standard, 140 and the greater

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chilling effects of a national standard\textsuperscript{140}), the most important reason is that Internet users have developed and deployed a technology—

geotargeting—\textemdash 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{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}

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 addresses 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-seeker’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

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\textsuperscript{146} See Kevin F. King, GeoLocation 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 WLNRL 4114288; Andy Ellenthal, Local Target Practice, ADWEEK, Sept. 28, 2009, at 19, available at 2009 WLNRL 19658449; Maria L. Montagani, A New Interface Between Copyright Law and Technology, 26 CARDOZO ARTS & ENT. L.J. 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.151

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.152 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,153 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.154

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 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

151 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&q=answer:62399 
(last visited Nov. 13, 2011) (describing how webmasters can use Google’s geotag­ 
ting tools to increase their exposure to users in a specific geographic area).

152 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 
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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 as 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 
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Location API” hyperlink); see also GeoPLUGIN, http://www.geoplugin.com (last 
visited Nov. 13, 2011).

154 IPWhoDB supra note 153 (follow the “Block IP by Country” hyperlink).

155 See Ashcroft v. ACLU, 535 U.S. 571, 573 (2002); United States v. Little, 365 F. App’x 159, 163 (11th Cir. 2010); United States v. Kilbride, 584 F.3d 1240, 1252 (9th Cir. 2009).

156 See Digital Element Finding Demand for Granular IP Targeting Says Co­ 
Founder Friedman, AdEXCHANGER.COM (Aug. 20, 2009, 10:07 AM), 
targeting/ (stating that early requests for IP targeting were only at the country level, 
but recent developments are making targeting as granular as cities or even zip codes 
possible, creating a “hyperlocal” experience); see, e.g., Bamba Gueye et al., Con­ 
straint-Based Geolocation of Internet Hosts, 14 IFIP/ACM TRANSACTIONS ON 
mont/hsip (search that webpage for “December 2006”; then follow the “Constr­aint-Based 
Geolocation of Internet Hosts” link on that line; then follow the full-text “PDF” 
link) (detailing a new approach that improves upon traditional landmark-based geo­ 
colocation techniques by using multiple landmarks to triangulate Internet hosts); see also Blyth, supra note 147.

157 Svantesson, supra note 142 at 101–102.

158 See Nelson, supra note 148, at 1214–15; King, supra note 146, at 71.

159 See Krause, It’s Location, Location ... Some Consider Geolocation 
Technology a Way to Solve Internet Disputes, 91 A.B.A. J. 18 (2005) (reporting that 
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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, longitude, latitude, zip code, time zone, area code, local weather, and more.\textsuperscript{152} 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,\textsuperscript{153} 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.\textsuperscript{154}

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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 geolo-
cation 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 obviate the pub-
lisher of criminal liability. Instead of allowing all downloads to attach
liability to the publishers, only those downloads that were (1) intended
for that geographic area, as evidenced by the publisher’s use of geo-
targeting 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 ex-
pressions, 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 geotar-
geting 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.160

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 uni-
formity of a national standard which would force conservative com-
unities 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 com-
munity 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

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160 Svantesson, supra note 142 at 103-04.

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161 Percy Bysshe Shelley, A Defence of Poetry and Other Essays 34
162 See Eugene Volokh, Eleventh Circuit Rejects Ninth Circuit’s National-
Standard-for-Internet-Obscenity Decision, VOLOKH.COM (Feb. 4, 2010, 12:22 PM),
http://volokh.com/2010/02/04/eleventh-circuit-rejects-ninth-circuits-national-
standard-for-internet-obscenity-decision/.

The law governing online obscenity is at a crossroads. For many
years traditional obscenity law used the standards of the local com-
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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 abrogate the publisher of criminal liability. Instead of allowing all downloads to attach 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. 160

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 Little), 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 reapply 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

180 JOURNAL OF LAW, TECHNOLOGY, & THE INTERNET [Vol. 3:1

160 Svantesson, supra note 142 at 103–04.


Internet. Ultimately, in the battle between the two standards, "there can be only one."\(^{163}\)

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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.\(^{1}\) 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”.\(^{2}\) 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.\(^{3}\) 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. M IAMI L. REV. 1061, 1064 (2010).
3 United States v. Maynard, 615 F.3d 544, 558 (D.C. Cir. 2010).