

IN THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

CLINTON R. McCOWEN,

Defendant.

_____ /

CASE NO.: 2006-CF-003151-C

JUDGE: Allen

MOTION TO DETERMINE THE NATURE AND SCOPE OF THE COMMUNITY

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MOTION TO DETERMINE THE NATURE AND SCOPE OF THE COMMUNITY

Defendant, Clinton R. McCowen, pursuant to the First and Fourteenth Amendments to the United States Constitution, and Article 1, §§ 4 & 9 of the Florida Constitution, moves this Court to determine the nature and geographic scope of the relevant community whose standards are to be applied in this case in determining the question of obscenity. Specifically, defendant moves the Court to determine that the relevant community must be the "national" community, rather than any state or local community.

Although use of local community standards has been held to be appropriate in obscenity cases involving traditional "brick and mortar" businesses, substantial precedent suggests that the unique manner in which the Internet operates compels the use of national rather than local standards. This is so because use of local standards would impose an unworkable burden on

internet providers, and would violate the United States Supreme Court's admonition in *Miller v. California*, 413 U.S. 15, 33, 93 S.Ct. 2607, 2620, 37 L.Ed.2d 419 (1973), that the dictates of the most sensitive jurisdictions should not be allowed to suppress the nature of the materials available in communities where they are accepted or tolerated.^{1/}

Alternatively, defendant would move that the Court determine that the relevant "community" whose standards will apply should be that of at least the entire state of Florida, as the use of at least a "state-wide" standard will reduce, to some degree, the inherent self-censorship which would otherwise be caused by subjecting adult website operators to prosecution under the standards of the least tolerant geographic communities in a state. Use of a "state-wide" standard was specifically approved, though not required, in *Miller*.

However, *Miller* was decided long before the birth of the Internet and its widespread commercial development, the World Wide Web (hence "www.***"). *Miller* thus involved only tangible brick-and-mortar businesses. In the context of Internet-based obscenity prosecutions, *Miller's* approval of state wide standards should — in this context only — establish the *smallest*

¹ As that Court stated:

"People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity. . . . [T]he primary concern with requiring a jury to apply the standard of 'the average person, applying contemporary community standards' is to be certain that . . . it will be judged by its impact on an average person, *rather than a particularly susceptible or sensitive person* — or indeed a totally insensitive one." 413 U.S. at 33 (emphasis added).

geographic community whose standards should be applied. Use of the standards of any smaller geographic community than at least the entire state would virtually *guarantee* the type of self-censorship against which the *Miller* Court warned, as the most restrictive communities in the nation would ultimately dictate what would be available for viewing in each jurisdiction and community throughout the nation.

RELEVANT FACTS

Defendant McCOWEN has been charged with two felony counts of violating specified subparagraphs of Florida Statutes ("FS") § 895.03 prohibiting "racketeering activity,"^{2/} including, *inter alia*, alleged violations of FS § 847.011 (transmission or distribution, etc., of obscenity), in connection with his alleged operation of an adult-oriented website.

The statutory elements which the state must prove to justify a finding of obscenity are set forth in FS § 847.001 (10):

"(10) "Obscene" means the status of material which:

"a. The average person, applying contemporary *community standards*, would find, taken as a whole, appeals to the prurient interest;

² The first count asserts a violation of § 895.03(3) (engaging in a pattern of racketeering activity); the second count describes the same activity but asserts a violation of § 895.03(4), engaging in a *conspiracy* to violate the same provision.

"b. Depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; and

"c. Taken as a whole, lacks serious literary, artistic, political, or scientific value." (Emphasis added.)

Superimposed on that statutory definition of "obscene" would be additional *constitutionally required* refinements of that test. Most significant to the present motion is the requirement, first clarified in *Smith v. United States*, 431 U.S. 291, 97 S.Ct. 1756, 52 L.Ed.2d 324 (1977), that the "(b) prong" (patent offensiveness), *as well as the "(a) prong"* (i.e., prurient interest), must be measured by "contemporary community standards."^{3/}

In contrast, the "(c) prong" (serious literary, artistic, political or scientific value - "LAPS"), is measured by a "reasonable man" standard which is *not* tied to the standards of any particular geographic community.^{4/}

The issue presented by *this* motion is a determination of which geographic community's contemporaneous standards are to be applied when determining whether internet materials (which, by definition, are simulta-

³ "[T]he jury must measure patent offensiveness against contemporary community standards." *Smith*, 431 U.S. at 301, 97 S.Ct. at 1764. *Accord, Haggerty v. State*, 531 So.2d 364, 365-366 (Fl.App. 1988), reading the CCS requirement of *Smith* into the obscenity statute's (b) prong to save it from a claim of facial invalidity.

⁴ See *Pope v. Illinois*, 481 U.S. 497, 500-501, 107 S.Ct. 1918, 1921, 95 L.Ed.2d 439 (1987), as well as a recent unpublished decision in *Souliaguine v. State of Florida*, Fifth Judicial Circuit of Florida, Appellate Division, Case no. 2006-AP-300 (at pp. 4-5 of slip opinion) (a copy of which is attached as Exhibit A for the Court's convenience). See also *Luke Records, Inc. v. Navarro*, 960 F.2d 134, 138 (11th Cir. 1992), citing *Pope* and recognizing that local acceptance of materials is irrelevant to the third prong of the obscenity test.

neously and immediately viewable in real time world wide) meet the (a) and (b) prongs of the statutory and constitutional definitions of "obscene."

ARGUMENT

I

IN DETERMINING WHAT COMMUNITY STANDARDS TO APPLY IN OBSCENITY PROSECUTIONS, THE COURTS HAVE DISTINGUISHED BETWEEN TRADITIONAL "BRICK AND MORTAR" PROSECUTIONS AND PROSECUTIONS BASED ON MATERIAL DISTRIBUTED SOLELY VIA THE INTERNET

Although judicial opinions appear to conflict as to the appropriate makeup and geographical dimensions of the relevant geographic "community" whose standards are to be applied in obscenity cases, these apparent conflicts are readily explained by contrasting the opinions involving traditional "brick and mortar" businesses and those operating solely via the Internet.

A. The relevant geographic community standard first developed in prior cases involving traditional "brick and mortar" applications of the obscenity laws.

Traditionally, the question of which geographic community's standards should apply came up solely in the context of prosecutions for selling or distributing tangible "hard copies" of allegedly obscene materials into or from a particular jurisdiction in which the defendant had chosen to do business. For example, in the seminal obscenity case of *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973),^{5/} the United States Supreme Court determined that the geographic community was properly found to include the entire State of California (rather than the entire nation), at least with respect to prosecution of a mail-order business which knowingly mailed "hard copies" of allegedly obscene materials to a particular address located in California.^{6/}

A Florida case similar to *Miller* was *Davidson v. State*, 288 So.2d 483, 486-87 (Fla. 1973). Like *Miller*, *Davidson* involved a defendant who knowingly chose a particular community into which to ship tangible "hard copies" of allegedly obscene materials. While acknowledging that it would have been permissible to employ state-wide standards, the court in *Davidson*, as in *Miller*, indicated that, at least in the context of mailing hard copies of materials to a specific address, it was also constitutionally permissible to apply the commu-

⁵ *Miller* is a seminal decision because it represented the first time in decades of attempts that a majority of the Supreme Court was finally able to agree on a constitutional test for defining obscenity.

⁶ The Court also stated, in *dictum*, that use of a *smaller* geographic community would have been permissible, but was not required.

nity standards of the local geographical area to which the material was shipped.

In the subsequent case of *Skywalker Records, Inc. v. Navarro*, 739 F.Supp. 578, 587-588 (S.D. Fla. 1990), *reversed on other grounds*, 960 F.2d 134 (11th Cir. 1992), and again a case involving hard copies of materials which a party had sold in a specified local community,^{7/} the United States District Court for the Southern District of Florida held that the jury must apply the standards of a tri-county area consisting of Palm Beach, Broward, and Dade Counties (which coincided with the boundary of the jury pool for that court).^{8/} Both of the parties asserted that a smaller geographic community should be used, that of Broward County alone,^{9/} but the Court disagreed, holding that "the boundaries of the relevant community under *Miller* are a matter for judicial, not legislative, determination."^{10/}

However, whether the court used the community standards of an entire state (*Miller*), a three-county area (*Skywalker Records*), or a single county (*Davidson*), the common element of those cases was that they all involved

⁷ This action involved a civil suit brought by a record company seeking a determination that 2 Live Crew's records and audio cassettes were not obscene, contrary to the claims and enforcement threats of the Broward County Sheriff.

⁸ Although the trial judge ultimately found the recording obscene, the Court of Appeals reversed on grounds that the trial judge could not conclude that the recording lacked serious artistic value based solely on his own value judgments, and the trial record reflected no other evidence to support a finding of a lack of serious artistic value.

⁹ "Both parties apparently assumed that the relevant community was only Broward County, Florida." 739 F.Supp. at 587.

¹⁰ 739 F.Supp. at 587.

knowing, targeted dissemination into a particular jurisdiction. They did not involve a medium like the Internet (or, more specifically, the World Wide Web) where the materials are theoretically "present" simultaneously everywhere in the entire world and per force, in every jurisdiction in the nation, with the disseminator having no way to prevent distribution into jurisdictions with more restrictive community standards.^{11/}

B. Where obscenity prosecutions are based on materials available on the Internet, the courts have indicated that the relevant community by whose standards obscenity should be measured must be re-evaluated, because the use of purely local community standards would chill the dissemination of constitutionally protected expression to myriad other communities where the materials would be accepted or tolerated and thus lawful.

With the advent of Internet communications, the constitutionally relevant community in obscenity cases has become exponentially more difficult to determine. The United States Supreme Court's first "internet

¹¹ This inability to control the geographic areas capable of viewing the information on a website has been well documented. *See, e.g., ACLU v. Reno*, 217 F.3d 162 (3rd Cir. 2000), enjoining enforcement of the Communications Decency Act (CDA) based *specifically* on its finding of "the inability of Web publishers to restrict access to their Websites based on the geographic locale of the site visitor." *Id.* at 166. On direct appeal, *no* member of the Supreme Court disagreed with this particular proposition, and four of them expressly addressed it and agreed with it. *See Ashcroft v. American Civil Liberties Union (Ashcroft I)*, 535 U.S. 564, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002), concurring opinion of Justice O'Connor, 535 U.S. at 587; concurring opinion of Justices Kennedy, Souter and Ginsburg, 535 U.S. at 595.

opinion," *Reno v. ACLU*, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997), struck down under the First Amendment portions of the Communications Decency Act that criminalized the online transmission of materials with "indecent" content to persons under 18,^{12/} and the sending or displaying of "patently offensive messages" to persons under 18.^{13/} The Court concluded that the portions prohibiting "indecent" or "patently offensive" materials were vague and posed too great a risk of self-censorship by website operators. Such self-censorship, in turn, would unconstitutionally limit the scope of constitutionally protected non-obscene materials to which adult users would have access.^{14/}

Significantly, the *Reno* Court emphatically *rejected* the Government's argument that these portions of the CDA should be treated as "secondary effects"-based restrictions, analogous to "a sort of 'cyberzoning' on the Internet," subject only to the relatively lax standards for analyzing time, place, and manner restrictions of expression. Instead, the Court held that they should be analyzed under the strict First Amendment standards that govern content-based restrictions on expression. *Id.* at 868, 117 S.Ct. at 2342.

¹² 47 U.S.C. § 223(a).

¹³ 47 U.S.C. § 223 (d).

¹⁴ The terms "indecent" in § 223(a), and "patently offensive" in § 223(d), were both found impermissibly vague, as neither required proof of all the elements of the *Miller* Court's definition of "obscene." *Id.* at 871-874, 117 S.Ct. at 2344-2346. The plaintiffs did not challenge the CDA's separate statutory prohibition of "obscene" materials.

Equally significant, *Reno* rejected the Government's argument that regulations of the internet should be subject to the same level of somewhat deferential constitutional scrutiny the Court had previously allowed for regulations of the content of the *broadcast* industry. *Id.* at 868-869, 117 S.Ct. at 2343. The Court concluded that "the Internet is not as 'invasive' as radio or television" (*id.*), because it would be far easier to be accidentally exposed to sexually explicit content if such were available on broadcast radio or television stations, than it would be to accidentally encounter such materials on the World Wide Web." *Id.* at 869-870, 117. S.Ct. at 2343-2344.

Although the issue of which geographic community's contemporary standards should be employed in determining whether online materials are either indecent or patently offensive obscene did not arise in *Reno* (because the Court's ruling of facial invalidation made it unnecessary to reach that issue), *Reno* did offer the following observation which sheds some light on what is at issue when a court must determine what geographic community's standards should be employed in the context of an internet-based obscenity prosecution. Specifically, the Court noted that the various internet-based media (including, e.g., web-sites, listservs, and "chat rooms") — collectively "known to its users as 'cyberspace' — [are] located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet." *Id.* at 851, 117 S.Ct. at 2335. The Court estimated that by 1999, the Internet would be used by at least 200 million people. *Id.* at 850, 117 S.Ct. at

2334. Of course, the current number of users entirely *dwarfs* that 1999 estimate.^{15/}

After the Supreme Court invalidated the CDA, Congress responded by enacting the Child Online Protection Act ("COPA"), 47 U.S.C. § 231, which uses a modified version of the *Miller* test to determine whether Internet materials are considered "harmful to minors." In reviewing a preliminary injunction restraining enforcement of the statute, the Third Circuit Court of Appeals determined that COPA was facially unconstitutional to the extent that it required the "prurient interest" and "patent offensiveness" prongs to be assessed on the basis of contemporary community standards.^{16/} It reasoned that while the use of contemporary community standards makes sense in traditional obscenity prosecutions where a defendant has an opportunity to limit the geographic areas into which he sells or mails materials, its application in the context of an *internet* obscenity prosecution rendered the statute facially invalid.^{17/}

On appeal, a majority of the Supreme Court vacated the Court of Appeals' ruling and remanded. The Supreme Court said it was premature to

¹⁵ A more recent estimate (updated as of March 10, 2007) places the world-wide number at 6 1/2 *billion* current users. See Internet World Stats, Usage and Population Statistics, <http://www.internetworldstats.com/stats7.htm>.

¹⁶ *American Civil Liberties Union v. Reno*, 217 F.3d 162, 169-170 (3rd Cir. 2000), *vacated by Ashcroft v. American Civil Liberties Union (Ashcroft I)*, 535 U.S. 564, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002); *opinion on remand, ACLU v. Ashcroft*, 322 F.3d 240 (3rd Cir. 2003); *second opinion on appeal, Ashcroft v. American Civil Liberties Union (Ashcroft II)*, 542 U.S. 656, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004); *Dist. Ct. opinion following remand, sub nom. ACLU v. Gonzales*, ___ F.Supp.2d ___ (E.D.Pa. March 22, 2007) (2007 WL 861120).

¹⁷ *ACLU v. Reno*, 217 F.3d 162, 169-179 (3rd Cir. 2000).

hold the statute facially unconstitutional, and that the Court of Appeals had erred in concluding that COPA was *necessarily* rendered facially invalid *solely* by virtue of the fact that it had employed any "community standards" requirement at all.^{18/} However, every member of the Court joined in one opinion or another describing the appropriate "community standards." Significantly, *only three members* of the Court (Justice Thomas, Chief Justice Rehnquist, and Justice Scalia) concluded that it would be permissible to apply *local* (rather than *national*) community standards in Internet prosecutions under COPA. No other justices shared that view.

In contrast, Justice O'Connor concluded that COPA could *only* meet constitutional requirements if a "national [community] standard" were used. 535 U.S. at 587. Justice O'Connor first traced the Court's precedents to conclude that adoption of a national standard in the internet context was not precluded by any prior decisions. She then explained the basis for her opinion:

I agree with Justice Kennedy that, given Internet speakers' inability to control the geographic location of their audience, expecting [Internet speakers] to bear the burden of controlling the recipients of their speech, as we did in *Hamling* and *Sable*,^{19/} may be entirely

¹⁸ *Ashcroft v. American Civil Liberties Union (Ashcroft I)*, 535 U.S. 564, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002).

¹⁹ *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974), involved a brick and mortar prosecution for mailing obscene materials. *Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989), involved decency regulations applicable to what the Court referred to as a "dial-a-porn" service.

too much to ask, and will potentially suppress an inordinate amount of expression.^{20/}

Justice Breyer, also writing individually, concurred on the basis that Congress, as a matter of legislative intent, had intended the statutory word "community" to refer to the entire nation's adult community taken as a whole, and not to geographically separate local areas. *Id.* at 589. However, as reflected in the following passage, he appeared to believe that even had that *not* been Congress' intent, such a standard might have been constitutionally required:

"To read the statute as adopting the community standards of every locality in the United States would provide the most puritan of communities with a heckler's Internet veto affecting the rest of the nation. The technical difficulties associated with efforts to confine Internet material to particular geographic areas make the problem particularly serious."^{21/}

Three other Justices – Justices Kennedy, Souter, and Ginsburg -- separately concurred on the ground that a critical issue is "community standards *as to what?*" *Id.* at 592 (emphasis added). Those Justices concluded that the use of community standards, *per se*, was not unconstitutional, but expressly disagreed with Justice Thomas' opinion that "the Act is narrow enough to render the national variation in community standards unproblematic." *Id.* at

²⁰ *Ashcroft I*, 535 U.S. at 587 (O'Connor, J., concurring).

²¹ *Ashcroft I*, 535 U.S. at 590 (Breyer, J., concurring).

593. In explaining their reasoning, they also commented on the problems associated with using purely local standards:

"Whether the national variation in community standards produces overbreadth requiring invalidation of COPA, . . . depends on the breadth of COPA's coverage *and on what community standards are being invoked.*" 535 U.S. at 592 (emphasis added).

Justice Kennedy expanded upon the above-italicized language:

"The Court of Appeals found that COPA in effect subjects every Internet speaker to the standards of the most puritanical community in the United States. This concern is a real one Unlike Justice Thomas, . . . I would not assume that the Act is narrow enough to render the national variation in community standards unproblematic." *Id.* at 593.

Justice Stevens likewise noted the special First Amendment problems created when internet speech is subjected to "the standards of the community most likely to be offended by the message," *id.* at 603, and concluded that COPA was facially unconstitutional in *all* circumstances. He further observed:

"In its original form, the community standard provided a shield for communications that are offensive only to the least tolerant members of society. . . . In the context of the Internet, however, community standards become a sword, rather than a shield. If a prurient appeal is offensive in a puritan village, it may be a crime to post it on the World Wide Web."

Based on that reasoning, he found COPA facially invalid in all applications, apparently being unwilling to give it a potential saving construction that would require use of national rather than local standards.

Consequently, although the Supreme Court in *Ashcroft I* did not render a square holding on whether national or local community standards should apply where Internet prosecutions are at issue, **at least six Justices strongly suggested that an Internet-based prosecution based upon use of *local* rather than *national* community standards was likely to be unconstitutional.**^{22/} Cf. *Perfect 10, Inc. v. CCBill L.L.C.*, ___ F.3d ___ (9th Cir. 2007).^{23/}

²² In a postscript to this point, defendant notes that a final judgment was just rendered by the District Court in that action on March 22, 2007, following two remands from the Supreme Court. *ACLU v. Gonzales*, ___ F.Supp.2d. ___ (E.D.Pa. 2007) (2007 WL 861120). The District Court found COPA entirely unconstitutional on its face, after it made numerous findings of fact regarding the adverse impact of such a law on Internet expression. As this most recent ruling on remand was not based on the "contemporary community standards" issue, it is not otherwise discussed in the present motion.

²³ In this very recent decision, the Ninth Circuit Court of Appeals concluded that state penalties for certain Internet copyright violations are preempted by federal copyright exemptions for Internet content providers, saying:

"Because material on a website may be viewed across the Internet, and thus in more than one state at a time, permitting the reach of any particular state's definition of intellectual property to dictate the contours of this federal immunity would be contrary to Congress's expressed goal of insulating the development of the Internet from the various state-law regimes. *** In the absence of a definition from Congress, we construe the term "intellectual property" to mean "federal intellectual property." *Id.* at *11.

II

JURORS CAN ASCERTAIN NATIONAL COMMUNITY STANDARDS TODAY BECAUSE INTERNET MATERIALS, LIKE BROADCAST NEWS AND ENTERTAINMENT MEDIA, ARE AVAILABLE TO ALL.

Although the *Miller* Court approved use of state-wide community standards, many courts trying such cases opted for more localized standards, simply because they believed that jurors would be much more familiar with local standards than state-wide or national standards. In the 1970s, when this case law was evolving, that perception may well have been correct.

However, over the last 30 or more years, isolated American communities operating in oblivion and ignorance of the standards and mores outside their borders have become a thing of the past. This striking change in American culture has been brought about by a combination of many factors, including the disappearance of local broadcast news media (increasingly replaced by national and cable newcasts), a significant decrease in other local broadcast programming, and last, but certainly not least, the omnipresent nature of information (including both news and entertainment) coming from the Internet. Everyone potentially sees and experiences everything at the same time — or within hours — of everyone else.^{24/}

²⁴ This contemporaneous level of experience is facilitated by the increasingly
(continued...)

Because of this increased nationalization, all Americans are now exposed to the same information, including the same sounds, images and expression. Consequently, the notion of jurors from an isolated community of sheltered "stay-at-home" citizens being unable to fathom or ascertain national community standards, is certainly not a significant concern (even assuming it ever once was^{25/}).

Certainly, there are still significant differences in that which is tolerated in one community compared to another. However, even in more conservative communities, citizens today have a much greater awareness of what exists in the broader national community.^{26/} These days, and to an ever-increasing extent, we all see essentially the same news reports, the same entertainment, etc.^{27/}

²⁴ (...continued)
ubiquitous handheld and mobile devices which allow users to instantaneously receive news and information on everything from pending military action to the latest celebrity scandal.

²⁵ As noted *infra*, *Hamling v. United States*, 418 U.S. 87, 105-106 (1974), expressly recognized that there was no constitutional or practical problem with jurors, in appropriate cases, applying contemporary standards of communities other than their own.

²⁶ Moreover, even if a particular local community may happen to have comparatively restrictive standards, jurors from such communities can recognize and apply a standard other than their own if told to do so. (Again, as *Hamling* clarified, a jury may be asked to apply the standards of another community if a case is transferred, e.g., on a motion for change of venue.) Just as in the course of a trial, lay jurors can become familiar with and apply concepts, procedures or regulations previously unknown to them, so too can properly instructed jurors working with different communities' standards apply them in an obscenity case.

²⁷ For example, Janet Jackson's notorious "wardrobe malfunction" at the 2005 Superbowl was simultaneously viewed on television by millions from every American community (and later was then repeatedly viewed again and again by millions on the Internet). Another example, exclusive to the Internet, is of a notorious
(continued...)

Consequently, should this Court agree with the majority of Supreme Court justices who have concluded that *Internet* obscenity should be measured by *national* community standards, that would be a relatively easy legal ruling to implement; it would not be terribly difficult to find a local jury with a reasonable understanding of — or at least an ability to apply — those standards. Certainly, experts could assist jurors in ascertaining those standards, but most jurors will have at least a *general* sense of those standards at the outset. Moreover, the Supreme Court long ago made clear that jurors, if so directed, may constitutionally apply the standards of communities other than their own.

Specifically, in *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974), and in the context of a prosecution of a traditional brick-and-mortar business mailing allegedly obscene materials into a targeted community, the Supreme Court observed that although local community standards should apply to such prosecutions, it was also permissible, in appropriate cases, for jurors to apply community standards *other than their own*. After recognizing that the jurors in that case could apply their own local community standards, given that the offense occurred in the same jurisdiction from which the jurors were drawn, the Court nonetheless advised:

²⁷ (...continued)
photo of the pubic area of entertainer Britney Spears captured by a paparazzo as the actress was exiting a vehicle. That photo was on thousands of websites, and viewed by millions, within a short period of time after it was taken. Comments concerning that photo (and the propriety of its being published) were equally widely available on the Internet. All this material makes a national community standard much more "knowable" in each local community, regardless of whether that national standard is congruent with each local standard.

"But this is not to say that a district court would not be at liberty to admit evidence of standards existing in some place *outside* of this particular district, if it felt such evidence would assist the jurors in the resolution of the issues which they were to decide."

418 U.S. at 105-106 (emphasis added).

Clearly the Court contemplated that, in appropriate cases, jurors could be presented with evidence with which to assist them in evaluating the standards of a broader or different community beyond their own. Moreover, as made clear by six of the Justices in *dictum* in *Ashcroft I*, prosecutions of those having sexually explicit materials on Internet sites is precisely the type of case where such broader community standards should be employed.

Finally, perhaps the simplest reason for concluding that national standards should apply is that, in the past, there was nowhere near the level of national sharing of information and opinions that there is today. The Internet has been called "the most participatory form of mass speech yet developed."^{28/} According to the Court, the Web is a "unique and wholly new medium of worldwide human communication."^{29/}

In part because of the highly participatory nature of the Internet itself, and also because of the ubiquitous nature of network programming and cable

²⁸ *Reno v. American Civil Liberties Union*, 521 U.S. 844, 863 (1997) (quoting *American Civil Liberties Union v. Reno*, 929 F.Supp. 824, 883 (E.D. Pa. 1996)).

²⁹ *Reno v. American Civil Liberties Union*, 521 U.S. at 850.

television, national standards are far more ascertainable than in the past.^{30/} Consequently, although national standards may, in the past, have occasionally been considered to be too inherently "unknowable" compared to local standards,^{31/} today, given the total saturation of nationwide network entertainment, news, opinions and commentary, as well as the ubiquitous availability of the same information to hundreds of millions of people simultaneously over the Internet, there is no longer any validity to the assertion that national standards are significantly less knowable than local standards.

³⁰ And, again, another component is that this information is now received and shared not only via computer, but also through cell phones, PDA's, iPods, MP3 players, podcasts, Bluetooth devices, gaming consoles, and countless other electronic gadgets and media.

³¹ Contrast, e.g., *Miller*, which, in the context of a "brick and mortar" medium had rejected national standards as being too "hypothetical and unascertainable" (413 U.S. at 31), with Justice Harlan's plurality opinion in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639 (1962), concluding that national community standards should apply to all federal obscenity prosecutions. 370 U.S. at 488. Justice Harlan had come to that conclusion because of what he saw as "the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards." *Id.*

III

THE UNPRECEDENTED NATURE OF THE INTERNET MEDIUM REQUIRES STANDARDS THAT ARE SENSITIVE AND SUITABLE TO PRE- SERVING ITS UNIQUE CHARACTERISTICS

As many of the Supreme Court justices (indeed, a *majority*) expressly noted in *Ashcroft I*, each mode of expression has its own unique characteristics, and therefore must be accessed for First Amendment purposes by the standards best suited to it. For example, Justice Stevens found significant distinction between online communications and those sent through the mail, or over the telephone lines, because in the latter two circumstances the sender could avoid destinations with the most restrictive standards.^{32/} *Ashcroft I*, 535 U.S. at 602 (Stevens, J., dissenting). In previous cases, he observed, local community standards were upheld based on the sender's ability to tailor his messages to the communities it chose to serve, thus creating a permissible burden on the speaker to comply.^{33/} However, the sender of Internet transmissions must necessarily display his message "to all of the 176.5 million Americans who have access to the Internet" if he chooses to display that message to even one.

³² Of course, unlike *both* mailed communications and telephonic communications, there simply is no "sender" *at all* in the Internet context. The viewer goes to the website electronically and *gets* the material, whether the actual website is situated down the block or entirely across the world. No web publisher reaches out to the specific locale of the consumer.

³³ *Id.* at 605.

Id. Accordingly, he concluded that this “fundamental difference in technologies,” requires a difference in the rules applicable to that particular medium:

"In light of this fundamental difference in technologies, the rules applicable to the mass mailing of an obscene montage or to obscene dial-a-porn should not be used to judge the legality of messages on the World Wide Web." *Id.* at 606.

Likewise, Justices Kennedy, Souter, Ginsburg and O'Connor agreed that the standards for controlling the content of traditional mail-order businesses and even phone-sex businesses should not apply to Internet-based businesses due to the uniqueness of that medium. *See, e.g.*, 535 U.S. at 594-596 (Kennedy, Souter and Ginsburg, JJ., concurring),^{34/} and 535 U.S. at 587 (O'Connor, J., concurring)^{35/}

³⁴ Justice Kennedy, in a concurring opinion joined by Justices Souter and Ginsburg, stated:

"It is true, as Justice Thomas points out, . . . that requiring a speaker addressing a national audience to meet varying community standards does not always violate the First Amendment. *See Hamling v. United States*, 418 U.S. 87, 106, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974) (obscene mailings); *Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115, 125-126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989). These cases, however, are of limited utility in analyzing the one before us, because each mode of expression has its own unique characteristics, and each 'must be assessed for First Amendment purposes by standards suited to it.' *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). Indeed, when Congress purports to abridge the freedom of a new medium, we must be particularly attentive to its distinct attributes, for 'differences in the characteristics of new media justify differences in the First Amendment standards applied to them.' *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969)." *Id.* at 594-95.

³⁵ Justice O'Connor stated:

"I agree with Justice Kennedy that, given Internet speakers' inability to control the geographic location of their audience, expecting them to bear the burden of controlling the recipients of their speech, as we did in *Hamling* and *Sable*, may be entirely too much to ask, and would
(continued...)

IV

APPLYING LOCAL COMMUNITY STANDARDS WOULD HAVE A DEVASTATING CHILLING EFFECT ON INTERNET EXPRESSION – SIMPLY TOO HIGH A COST TO BE CONSISTENT WITH APPLICABLE FIRST AMENDMENT PROTECTIONS

As discussed above, a clear majority of the Justices of the Supreme Court in *Ashcroft I* rejected the notion of applying local community standards to sexually oriented materials on the Internet. A majority of *those* judges concluded that application of local community standards in the Internet context would have too great a chilling effect on protected expression to be consistent with the requirements of the First Amendment. In all, five of the nine Justices concluded that use of nationwide standards, at least in the context of COPA, was *not* inherently unascertainable or unworkable, and a sixth, Justice Stevens, found COPA facially unconstitutional no matter *how* applied. Only three Justices^{36/} found that use of local community standards would be permissible in a prosecution under COPA.

³⁵ (...continued)
potentially suppress an inordinate amount of expression." *Id.*

³⁶ Counsel recognize that one of the six justices (Justice O'Connor) is no longer on the Court. However, her departure leaves five Justices in support of or without opposition to a national standard for Internet obscenity.

All six Justices gave the same reason for insisting upon national, rather than local, standards: the chilling impact which applying local standards would have on Internet expression. *See, e.g.*, 535 U.S. at 587 (O'Connor, concurring opinion), finding that use of local standards "would potentially suppress an inordinate amount of expression"; 535 U.S. at 590 (Breyer, concurring opinion), stating that "[t]o read the statute as adopting the community standards of every locality in the United States would provide the most puritan of communities with a heckler's Internet veto affecting the rest of the Nation"; 535 U.S. at 593 (concurring opinion of J. Kennedy, joined by Justices Souter and Ginsburg), concluding that subjecting Internet expression to local community standards "in effect subjects every Internet speaker to the standards of the most puritanical community in the United States" and stating that "[t]his concern is a real one." Finally, Justice Stevens dissented, 535 U.S. at 603, because he would have held COPA unconstitutional because "'the "community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message.'"

Based on these opinions, it is clear that, at least where Internet-based speech is involved, it would be error of constitutional dimension to apply local standards, as there is simply too great a risk that such prosecutions will chill vast amounts of expression by others not before the court. Speakers would inevitably be fearful of having the constitutionality of their expression evaluated by the least tolerant communities in America and would then self-

ensor to avoid the risk of prosecution in such jurisdictions. The resultant reduction in Internet available fare might please some, but given the inability of webmasters to limit geographical availability, others all over the country and the world would be deprived of constitutionally protected expression. This is a significant concern.^{37/}

V

WHILE NATIONAL STANDARDS ARE BOTH APPROPRIATE AND PERMISSIBLE, DEFENDANT IS ENTITLED AT LEAST TO STATE-WIDE COMMUNITY STANDARDS.

For all the reasons above, the materials charged in this case should be evaluated under *national* community standards rather than local ones. However, in the alternative, defendants move the Court, as a matter of policy, fairness, and the overwhelming weight of authority, to require that the jury at least apply *state-wide* community standards. While such a standard might not be adequate, in many states, to be used as a substitute for national standards, Florida is a sufficiently diverse state that it may well be that the

³⁷ For example, in *Elrod v. Burns*, 427 U.S. 347, 373-374, 96 S.Ct. 2673, 2690, 49 L.Ed.2d 547 (1976), the Supreme Court held that even *temporary* interferences with the dissemination of constitutionally protected expression constitute injury which is "irreparable." *A fortiori*, where as here, a challenged statutory interpretation has the potential of effecting a *permanent* censorship, such a concern mandates use of a statutory interpretation that protects constitutional values.

diversity of standards within this state fairly represents the diversity of standards within the nation as a whole.^{38/}

Moreover, since the United States Supreme Court, in *Miller*, and the Florida Supreme Court in *Davidson*, have *both* expressly *approved* of use of a state-wide community standard, the use of such a standard is the absolute *minimum* to which defendants should be entitled in an internet-based obscenity prosecution. It will at least reflect a sufficient breadth and diversity of experience and viewpoint to dilute the potential for First Amendment damage which is the inevitable byproduct of exclusive reliance solely on local standards in an Internet-based case.

In short, insuring that *at least* full state-wide standards apply will provide *some* barrier to a type of concern analogous to the one described in *Butler v. Michigan*, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412 (1957), where the Supreme Court struck down a law that "prohibited distribution of a book to the general public on the basis of the undesirable influence it may have upon youth." 352. U.S. at 381. The Court concluded that the impermissible effect of the enactment was "to reduce the adult population of Michigan to reading only what is fit for children." *Id.* at 383. By analogy, the use of anything less than *at*

³⁸ Unlike many other states in the country with a stagnant or dwindling population, individuals are moving to Florida from throughout the country, at the rate of 1000 per day. See <http://www.dmv.org/fl-florida/new-to-florida.php> under heading "Fun Facts and Figures." Flagler County, Florida, is the fastest growing county in the nation. See U.S. Census Bureau News; <http://www.census.gov/Press-Release/www/releases/archives/population/006563.html>.

Florida is a true melting pot, and thus representative of the views and opinions of individuals throughout the nation. Therefore, many of the concerns presented by using the community standards of a less diverse state are not as pointed given Florida's unique makeup.

least a full state-wide community standard would be to reduce that which is available on the Internet to that deemed acceptable only in the communities with the most restrictive community standards. As the more recent COPA cases teach, that is an approach impermissibly restrictive of expression.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Determine the Nature and Scope of the Community has been provided via U.S. Mail to **Russell Edgar, Esquire**, State Attorney's Office, Post Office Box 12726, Pensacola, Florida 32575, **M. James Jenkins, Esquire**, 1211 West Garden Street, Pensacola, Florida 32501, and **Clinton Couch, Esquire**, 3 West Garden Street, Suite 352, Pensacola, Florida 32502, this 5th day of April 2007.

A handwritten signature in black ink, appearing to read 'L. Walters', is written over a horizontal line. The signature is stylized with a large loop and a long horizontal stroke extending to the right.

LAWRENCE G. WALTERS