

LAW OFFICES

ROSS & HARDIES

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

888 SIXTEENTH STREET, N.W.  
WASHINGTON, D.C. 20006-4103  
202-296-8600

TELECOPIER  
202-296-8791

150 NORTH MICHIGAN AVENUE  
CHICAGO, ILLINOIS 60601-7567  
312-558-1000

PARK AVENUE TOWER  
65 EAST 55TH STREET  
NEW YORK, NEW YORK 10022-3219  
212-421-5555

580 HOWARD AVENUE  
SOMERSET, NEW JERSEY 08875-6739  
908-563-2700

STEPHEN R. ROSS

December 7, 1992

HAND-DELIVERED

Ms. Donna R. Searcy  
Secretary  
Federal Communications Commission  
Room 222  
1919 M Street, N.W.  
Washington, D.C. 20554

DEC 7 1992

RECEIVED  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.

Re: Indecent Programming and Other Types of  
Materials on Cable Access Channels

Dear Ms. Searcy:

Enclosed on behalf of InterMedia Partners are one original and nine copies of InterMedia's Comments in the above-referenced proceeding.

Please address any questions concerning this letter to the undersigned.

Cordially,



Stephen R. Ross

SRR/sdb  
Enclosures

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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DEC - 7 1992

In the Matter of )  
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Implementation of Section 10 of )  
the Cable Consumer Protection and )  
Competition Act of 1992 )  
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Indecent Programming and Other )  
Types of Materials on )  
Cable Access Channels )

FEDERAL COMMUNICATIONS COMMISSION  
COMMUNICATIONS AND INFRASTRUCTURE

MM Docket No. 92-258

COMMENTS OF INTERMEDIA PARTNERS

Stephen R. Ross  
Kathryn A. Hutton

Ross & Hardies  
888 - 16th Street, N.W.  
Suite 300  
Washington, D.C. 20006  
(202)296-8600

Counsel for InterMedia Partners

Dated: December 7, 1992

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## SUMMARY OF ARGUMENT

InterMedia Partners believes that the so-called "voluntary" prohibition of indecent material and other types of programming on cable television leased access and public, educational and governmental ("PEG") channels, violates the First Amendment of the Constitution. Nevertheless, InterMedia believes that it is compelled to ban such programming in order to avoid potential liability for the exhibition of certain programming which are shown on channels it does not control. Any rules established by the FCC must provide cable operators flexibility to adopt workable program policies. This includes permitting cable operator to: (1) require appropriate certification and indemnification; (2) terminate a user's access to a channel if that user violates the operator's program policy; (3) require that certain programs be placed on a "blocked" leased access channel; and (4) pre-screen and prohibit the exhibition of any program that the operator reasonably believes is obscene, indecent or solicits or promotes unlawful conduct.

InterMedia recognizes that the FCC is obligated to implement the 1992 Cable Act, and in particular Section 10 of the Act. Therefore, in order to promote the public interest and to establish a consistent body of case law, the FCC must assert exclusive jurisdiction over the enforcement of any regulations promulgated pursuant to Section 10. Specifically, the FCC must preempt state and local regulation of program content, establish a national standard for defining indecency, and adjudicate disputes

among cable operators, programmers, leased access channels lessees, and PEG users.

Finally, the FCC must recognize and make some accommodation in its rules for the added time and expense that will be required to technically "block" leased access channels which may exhibit indecent programming. The cable operator should not be required to absorb the costs of implementing Section 10. Moreover, the FCC must consider these costs in its ratemaking proceeding on leased access channels.

Before the  
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Washington, D.C. 20554

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COMMENTS OF INTERMEDIA PARTNERS

I. Introduction

InterMedia Partners ("InterMedia"), by its attorneys, hereby submits these comments in response to the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking ("NPRM") in the above-referenced proceeding.

InterMedia owns and operates cable systems throughout the United States. InterMedia currently provides commercial leased access channels pursuant to Section 532 of the Communications Act of 1934, as amended (47 U.S.C. § 532) ("the Communications Act"), and public, educational and governmental ("PEG") channels pursuant to the requirements of InterMedia's various franchise agreements. InterMedia is obligated to lease access channels to individuals pursuant to 47 U.S.C. § 532(a). Franchising authorities have a similar interest in promoting the use of PEG channels.

The purpose of the instant proceeding is to promulgate regulations so that cable system operators may take all necessary and lawful steps to limit their liability for program content on leased and PEG access channels; channels over which operators have

virtually no control. Accordingly, InterMedia has a direct interest in the outcome of this proceeding and submits the following comments in response to the FCC's NPRM.<sup>1/</sup>

**II. "Voluntary" Prohibition of Indecent Programming on Leased and PEG Access Channels**

**A. Threat of Litigation Does Not Make Programming Policies "Voluntary"**

Section 10(a)(2) of the Cable Consumer Protection and Competition Act of 1992 (hereinafter "1992 Cable Act") permits cable operators to "voluntarily" establish a "written and published policy of prohibiting programming" that the cable operator "reasonably believes" contains obscene and/or indecent programming on leased access channels. Section 10(c) allows operators to "voluntarily" prohibit "sexually explicit conduct" and "material soliciting or promoting unlawful conduct" on PEG channels.

In fact, because Section 10(d) eliminates cable operators' statutory immunity from liability for the transmission of obscene programming on leased and PEG access channels, such policies are hardly "voluntary." InterMedia anticipates that the practical result of Section 10 will be that cable systems will establish policies which ban all "questionable" programming altogether, applying the policy broadly in order to avoid liability. If the cable operator does not prohibit potentially

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<sup>1/</sup> While InterMedia is commenting in this proceeding, it wishes to make clear that it firmly believes these provisions violate the First Amendment of the Constitution, and InterMedia supports the efforts of Time Warner and others to strike them down in Federal Court.

obscene and indecent material, the alternative is to rely on the lessee's or PEG user's judgement as to what is indecent or obscene.<sup>2/</sup> Clearly, there is a conflict in interest for the lessee/PEG user to self-censor its program material. Moreover, the "deep pockets" of cable operators are a likely target for lawsuits. Given the serious consequences of violating the Communications Act or state statute, cable operators will feel obligated to take significant precautions.

As an example of the consequences, many franchise agreements specify that a violation of the Communications Act, or any state or federal criminal statute, is a material violation of the franchise. If a PEG user violates an operator's policy of prohibiting obscene or indecent material, the operator may be liable for violating the Communications Act and may also be required to defend a federal or state criminal obscenity prosecution. Similarly, if a leased access channel lessee exhibits "indecent" programming in violation of the operator's policy banning such material, the operator could be liable for violating the Communications Act by failing to place the program on a blocked channel.

**B. InterMedia's Policy Prohibiting Indecent Material on Leased Access Channels**

Given the present statutory language of the 1992 Cable Act, InterMedia feels that it is necessary to ban all indecent

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<sup>2/</sup> Obscenity is based on local values under Miller v. California, 413 U.S. 15 (1973). Operators, such as InterMedia will use a "highest" common denominator approach to avoid litigation.

programming material from its leased access channels. InterMedia outlines below the steps that it believes are necessary to insure that it complies with the difficult provisions of the 1992 Act. Commission approval of such policies and practices in its Report and Order and in final rules adopted in this proceeding, is vital to preserve cable service. Moreover, as discussed below, the FCC must preempt state and local regulations or actions that interfere and conflict with the purpose of this proceeding.

Effective December 4, 1992, InterMedia will require lessees to certify that they will not carry obscene or indecent programming. InterMedia will review, at the lessee's request, or in certain circumstances, on its own initiative, any program material which might conceivably be construed as obscene or indecent, and advise the lessee within 14 days whether it may cablecast the programming.<sup>3/</sup> A determination by InterMedia that a particular program is obscene or indecent will be the final determination of the issue. If a lessee transmits any material on a leased access channel which InterMedia reasonably believes violates its policy, the lessee's access to the channel will be terminated immediately, and that lessee will be prohibited from acquiring any leased channel capacity from InterMedia in the future.

To effectively implement such policy, InterMedia will require most lessees of leased access channels to obtain insurance,

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<sup>3/</sup> InterMedia will request pre-screening if it has reasonable belief that the program is obscene or indecent.

similar to broadcaster's liability insurance, which will name InterMedia as a beneficiary.<sup>4/</sup> Proceeds from the insurance policy would be used by InterMedia in the event of a lawsuit arising out of the transmission of obscene or indecent material.

In deciding to implement this policy, InterMedia considered several alternatives. InterMedia could require lessees to post a bond sufficient to cover the cost of possible fines and forfeitures. However, bonds are difficult to collect and do not provide for attorney's fees to defend potential lawsuits. InterMedia also considered and rejected as too severe a requirement that lessees provide an irrevocable letter of credit to cover anticipated costs of liability.

InterMedia recognizes the public policy goals behind promoting the use of leased access channels. There is a likelihood that implementing the programming policy outlined above will deter or even prevent the use of leased access channels by some individuals and companies. However, InterMedia presumes that Congress considered carefully the impact of Section 10, and weighed the competing public policies of promoting diversity of viewpoint

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<sup>4/</sup> If a lessee cannot demonstrate sufficient balance sheet strength to support an indemnification, InterMedia will require the lessee to obtain broadcaster's liability insurance. It has been InterMedia's experience that many potential lessee's are highly under-capitalized. Thus, insurance is necessary in lieu of a bare indemnity.

with the concerns over children's access to obscene and indecent material on leased channels.<sup>5/</sup>.

**C. InterMedia's Policy Prohibiting  
Certain Programming on PEG Channels**

Similar to its policy with respect to leased access channels, InterMedia believes for the reasons stated above, that it is necessary to ban all "obscene" and "indecent" programming on its PEG channels in order to protect itself from potential liability for program material that it does not control.<sup>6/</sup> 1992 Cable Act §10(c). InterMedia will also prohibit material which it reasonably believes solicits or promotes unlawful conduct. Although the Commission indicated in the NPRM that it believes Congress intended "unlawful conduct" to refer only to prostitution, InterMedia will interpret and apply this restriction broadly to cover a greater range of possible criminal activities, until the FCC or the Courts limit the broad statutory language of Section 10(c).

At the request of any PEG user, InterMedia will review any program material (within 14 days) to determine whether such

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<sup>5/</sup> Placing indecent programming on a special, scrambled leased channel is not a realistic alternative unless, of course, the program schedule of a commercial lessee contains repeated, indecent offerings. Scrambling a normally unscrambled channel requires a significant amount of time and labor in most systems operated by InterMedia.

<sup>6/</sup> InterMedia agrees with the Commission's tentative conclusion that "sexually explicit conduct" was intended to refer to the same material defined as "indecent." Therefore, InterMedia will interpret "sexually explicit conduct" the same as it would interpret "indecent" material, unless the Commission's final rules indicate otherwise.

material complies with InterMedia's policy. In addition, InterMedia reserves the right to preview any material which it reasonably believes may violate its policy. InterMedia's determination as to whether a particular program complies with its policy will be the final determination.

InterMedia operates a cable system where the public access channel is programmed and controlled by an independent public access corporation. InterMedia will require the corporation to obtain the same type of insurance policy as it will require for leased access channel lessees.<sup>7/</sup> Such an insurance policy will name InterMedia as a beneficiary and its proceeds will be used by InterMedia to defend itself in any action arising out of the exhibition of obscene or indecent material on the public access channel.

All individual users, and where applicable, the access corporation, will be required to certify that no material that violates InterMedia's policy will be exhibited.<sup>8/</sup> Moreover, each individual user and the access corporation, will be required to indemnify InterMedia for any liability arising out of the transmission of any obscene or indecent material. In the event that either the corporation or an individual user of InterMedia's PEG channels violates the policy, InterMedia will immediately, and

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<sup>7/</sup> Because of potential liability, InterMedia can no longer delegate all authority over the channel to the corporation.

<sup>8/</sup> See discussion at p. 14-16 *infra* regarding cable operators' limited liability where the access channel users certify they will comply with the cable operator's policies.

permanently, terminate the violator's access to all InterMedia's PEG channels.

**D. Censorship and Prior Restraint Concerns  
Require Strong FCC Involvement**

Notwithstanding the 1992 Cable Act, indecent material is constitutionally protected speech, and attempts to ban such material on cable television have been struck down in the courts. Community Television of Utah v. Wilkinson, 611 F.Supp. 1099 (D.C.Utah 1985). InterMedia is concerned that screening out potentially indecent programs, material containing "sexually explicit conduct," and "material soliciting or promoting unlawful conduct," could raise claims of unconstitutional prior restraint.<sup>9/</sup>

A regulatory or statutory requirement that cable operators ban indecent programming is very likely to be unconstitutional.<sup>10/</sup> While Senator Helms' discussion in the Congressional Record on the passage of S.12 argues that a

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<sup>9/</sup> "The schemes that have been invalidated by the Supreme Court as prior restraints on speech 'had this in common: they gave public officials the power to deny use of a forum in advance of actual expression." Dial Information Services v. Thornburgh, 938 F.2d 1535, 1543 (2nd Cir. 1991), citing, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975).

<sup>10/</sup> Apparently, Senator Helms conceded that unless the ban on obscene and indecent material is implemented voluntarily, it will not withstand constitutional scrutiny. See January 30, 1992 CONG. REC., p. S646. Moreover, in F.C.C. v. Midwest Video Corp., 440 U.S. 689, 695, n.4 (1979), the Supreme Court noted with approval that the Court of Appeals for the District of Columbia Circuit stayed the FCC's 1977 regulation which required cable operators to prohibit the transmission of obscene and indecent material on access channels. "The [Court of Appeals] disapproved the requirement on the belief that it imposed censorship obligations on cable operators." Id.

"voluntary" prohibition of indecent material by cable operators is not a "state action" which triggers First Amendment concerns, that issue is clearly open.<sup>11/</sup> However, until the courts address the issue, the FCC must assert exclusive jurisdiction over any prior restraint issues surrounding prohibited uses of leased and PEG access channels.

For example, InterMedia's policy prohibiting obscenity and indecency on leased access channels provides that: (1) the channel may not be used for the transmission of such programming; (2) if the lessee violates InterMedia's policy, access to InterMedia's cable system will be immediately terminated; and (3) parties who violate InterMedia's policy will be barred from obtaining channel capacity in the future. Given InterMedia's concerns over questions of prior restraint, InterMedia urges the Commission to assert exclusive jurisdiction over disputes concerning permitted uses of leased access capacity. The same applies to PEG access channels -- prohibiting the exhibition of certain questionable material could raise prior restraint issues by PEG users. Accordingly, the FCC should establish a policy of

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<sup>11/</sup> January 30, 1992, CONG. REC., p. S646 - S649. Senator Helms cites Dial Information Services, supra, for the proposition that the Constitution permits cable operators to voluntarily ban indecent programming. However, the telephone companies in Dial Information Services did not ban the transmission of indecent messages. Rather, the dial-a-porn providers were required to notify the telephone company which messages were indecent so that the telephone company could activate the presubscription provision. Furthermore, it has yet to be adjudicated as to whether a "voluntary" ban imposed by cable operators, which this statute permits and in essence mandates, is a state action for purposes of Constitutional analysis.

adjudicating any such disputes which would preempt state or local consideration of such claims. The special relief procedures set forth in Section 76.7 of the Commission's rules should be utilized to resolve such disputes.

III. The FCC Must Define "Indecent Programming" According to a National Standard and Preempt State Regulation

A. Preemption of State Regulation

InterMedia submits that the only workable definition of "indecent" is one which sets a national standard and preempts state prosecution of cable television programmers and operators for the transmission of indecent programming.

Federal preemption of state and local law is required where Congress has expressed its intent to "occupy the field" in a particular area or an "actual conflict" between federal and state law exists. In the field of cable television, the Supreme Court has already observed that the FCC has expressly preempted state regulation of all operational aspects. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984).<sup>12/</sup> While the Supreme Court in Capital Cities did not explicitly consider whether state indecency regulations were preempted, the Court determined that Oklahoma's control over program content which banned alcohol advertisements on cable systems interfered with the FCC's federal regulatory scheme

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<sup>12/</sup> Federal regulations preempt state law as effectively as federal statutes if the agency decision to preempt "represents a reasonable accommodation of conflicting policies that are within the agency's domain." Id. at 700, citing, U.S. v. Shimer, 367 U.S. 374, 383 (1961).

of promoting diversity of programming. Accordingly, the Court held that Oklahoma's statute was preempted.

Subsequent to the Supreme Court's decision in Capital Cities, Congress enacted the Cable Communications Policy Act of 1984 which established a comprehensive regulatory scheme for the cable television industry. The 1984 Act was held to preempt Utah's Cable Television Programming Decency Act. Community Television of Utah, supra. There, the District Court in Utah observed that state statutes that attempted to apply an indecency standard may not be constitutionally applied to cable television.<sup>13/</sup> The 1984 Cable Act was also found to expressly preempt Puerto Rico's authority to bring criminal obscenity prosecutions against cable programmers or cable operators for programming transmitted on leased access channels. Playboy Enterprises v. Public Serv. Com'n. of Puerto Rico, 698 F.Supp. 401 (D.Puerto Rico 1985), aff'd., 906 F.2d 25 (1st Cir. 1990).

The breadth and scope of the 1992 Cable Act, which is much more comprehensive than the 1984 Cable Act, again demonstrates that Congress intends to occupy the field of cable television. State statutes which attempt to ban all indecent programming inherently conflict with the FCC's comprehensive regulatory scheme to promote diversity of information, and with the Congressional

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<sup>13/</sup> Id. at 1105, citing H.R.Rep. No. 934, 98th Cong. at 69-70, U.S.C.C.A.N. 1984 at p. 4706-4707. The House Committee Report to the 1984 Cable Act also the following cases to support its statement: Community Television of Utah v. Roy City, 555 F.Supp. 1164 (D.Utah 1982); Home Box Office, Inc. v. Wilkinson, 531 F.Supp. 987 (D.Utah 1982); Cruz v. Ferre, 571 F.Supp. 125 (S.D.Fla. 1983).

mandate to make available and encourage the use of leased and PEG channels.

Further, while the operator's immunity from prosecution for obscene programming has been terminated under the 1992 Act, Section 638 still protects the cable operator from state liability stemming from the transmission of indecent and other types of programming on the leased and PEG channels.<sup>14/</sup> The Playboy case, noted above, is still valid precedent to support preemption of any state or local action aimed at regulation of program content on PEG or leased access channels, other than obscene material.

Furthermore, for the reasons stated above, any definition of "sexually explicit conduct" and "material soliciting or promoting unlawful conduct" that the FCC establishes for PEG channels must also preempt state and local regulation and actions.

Therefore, to apply national standards uniformly and to establish a consistent body of case law, the FCC must adjudicate all disputes arising over program content. InterMedia again suggests that the FCC use its special relief procedures set forth in Section 76.7 of the Commission's rules (47 C.F.R. §76.7) to adjudicate such disputes.

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<sup>14/</sup> Section 638, as revised by the 1992 Act, states in pertinent part: ". . . cable operators shall not incur any such liability for any program carried on any channel designated for public, educational, governmental use or on any other [leased access] channel . . . , unless the program involves obscene material."

**B. Definition of "Indecent"**

The FCC has requested comment on an appropriate definition of "indecent" programming, noting that "each medium of expression presents special First Amendment problems."<sup>15/</sup> Specifically, the FCC's questions whether to include a "community standards" test in any definition applicable to cable systems. In other words, the FCC has suggested a national standard. Clearly, the most appropriate forum for identifying and evaluating whether programming is indecent is before the FCC. This question of definition again brings into play the need for federal preemption over state and local regulations or actions.

For the reasons stated above, InterMedia believes that the FCC should not include a community standards test, but adopt and assert exclusive jurisdiction over implementing a national standard for evaluating indecency. Therefore, InterMedia submits that the national definition for indecency should be any material that "describes or depicts sexual or excretory activities or organs in a patently offensive manner."<sup>16/</sup>

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<sup>15/</sup> NPRM, at ¶ 7, citing, F.C.C. v. Pacifica Foundation, 438 U.S. 726, 748 (1978).

<sup>16/</sup> In applying this standard, the FCC should take into account the fact that, with respect to leased access channels, the programmer may have certified that the program is not indecent. Consequently, the failure to prohibit or place on a designated channel lies with the lessee, not the cable operator.

**IV. Requirements for Permitting Indecency on Leased Access Channels**

**A. Cable Operators Must be Able to Require Programmers to Certify and Indemnify the Operator for Indecent Programs**

If a cable operator chooses to permit indecent material on leased access channels, the operator must place all such material on a single channel which will be "blocked" upon the request of the subscriber under the 1992 Act. In order to effectively implement this provision, programmers must certify to the cable operator which programs are indecent so that they will be placed on the blocked channel. The operator must be able to rely on the representations of the program supplier for the purpose of identifying which programs contain indecent material. Such reliance would exonerate the operator from liability for failure to place indecent material on the blocked channel. Moreover, the operator must have the authority to permanently terminate the leased access channel lease for misrepresentations regarding program content. Otherwise, the operator will be required to engage in pre-screening programs and, perhaps, other time consuming and expensive practices to second guess the programmers.<sup>17/</sup>

Obviously, a cable operator who relies on programmer certifications cannot be held liable for administrative sanctions stemming from a failure to block unannounced indecent material. In

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<sup>17/</sup> The added costs and expense associated with monitoring programs and blocking channels must be among the factors the Commission considers in determining reasonable rates for leased access channels when the Commission initiates its rate making proceeding for leased channels.

this context, cable operators are no different than MDS operators and telephone common carriers, who are not liable for the transmission of obscene material, when they lack actual knowledge of the illegal transmission. Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, 2 FCC Rcd. 2819 (1987). As the Commission has observed, "there must be a high degree of involvement or actual notice of an illegal use [of the carrier's facilities] and failure to take steps to prevent such transmission before any liability is likely to attach." Id. at 2820. In considering the predicament of MDS operators' potential liability to the use of their facilities for the transmission of obscene material, the Commission concluded that

[w]e are reluctant to place MDS common carriers in the uncertain predicament of watching all programming and assessing, in each instance, whether to engage the legal machinery for interpretative ruling under the Humane Society procedures. This uncertainty and expense are clearly not in the public interest. . . . Unless an MDS common carrier has actual notice that a program has been adjudicated obscene . . . it will not be subject to adverse agency action.

Id. The same considerations apply in the instant proceeding.<sup>18/</sup> Cable operators who lease channels do not control the program selection. By implementing policies which prohibit the use of cable facilities for the transmission obscene or indecent material,

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<sup>18/</sup> In fact, the Commission noted in its Order that "[w]e see no constitutionally significant difference between cable television service and MDS service so far as the regulation of indecent speech is concerned." Id. at 2821, n.4. In many cases, cable operators provide more channels than MDS operators and, thus, have a greater exposure.

and by terminating access to the channel in the event its policy is breached, the cable operator has taken all reasonable steps to comply with the law. The alternative to allowing operators to rely on the certification of programmers, would be to require 24-hour per day pre-screening and monitoring of all programming on all leased access channels, and to require that operators petition the appropriate United States Attorney for a declaratory ruling as to the legality of particular programs. As the Commission has already observed in the MDS area, "this uncertainty and expense are clearly not in the public interest." Id.

Accordingly, the Commission must adopt rules which permit cable operators to require that programmers certify either: (1) that they will not transmit obscene or indecent material pursuant to the cable operator's written policy prohibiting such transmissions; or (2) that they will not transmit obscene material and will notify the operator at least 14 days in advance of the exhibition of indecent material so that such program may be either prohibited or transmitted on the blocked access channel. The Commission's rules must also provide that cable operators are not liable for reliance on the certification of the programmer for the transmission of obscene or indecent material of which the operator had no actual knowledge.

**B. Cable Operators Must be Allowed to Require That Certain Programs be Placed on the Blocked Access Channel**

Under Section 10, the program provider, not the cable operator, determines whether a particular program is indecent. The

FCC has asked whether this provision prohibits cable operators from requiring that a program which it believes is indecent, be carried on the designated indecency channel.

The cable operator must be permitted to require any programming which it reasonably believes contains indecent material to be placed on the blocked channel. First, since the 1992 Act permits the operator to ban indecent programming, there is no rationale for asserting that the operator does not have the authority to choose to move the programming to the blocked channel. Second, because the operator is now subject to potential liability for the transmission of obscene or indecent programming, the operator must be allowed to require that potentially indecent programming be placed on the blocked access channel.

As discussed above, cable operators should not be liable for the content of programming of which they have no actual knowledge. Moreover, if the operator, upon reasonable grounds, believes that a lessee may transmit programming in violation of its policy, the operator must be permitted to prohibit the transmission of any programming where pre-screening is refused by the lessee. If the lessee can request pre-screening, the operator must be given adequate time to review the programming without disrupting its normal business activities. The operator should have at least 14 days to make such a determination. Further, the cable operator's determination as to whether a specific program is obscene or indecent must constitute the final decision with respect to whether the program is banned or placed on the blocked channel.

Such a procedure is the only workable process because there is an inherent conflict of interest where the program supplier determines, in the first instance, which programs may be obscene or indecent. Obviously, all program suppliers/lessees will seek to maximize its audience, and R-rated and NC-17 rated movies are very popular. Engaging in self-censorship which will reduce the lessee's potential audience is contrary to its interests. On the other hand, the cable operator will be more impartial with respect to audience share on leased access channels because the lessee will likely pay the operator on a durational basis, e.g., monthly or hourly payments based on the type of service to be offered.<sup>19/</sup> Moreover, cable operators, particularly MSOs, are likely to have the resources and experience to evaluate whether the program in question may be indecent.

For the foregoing reasons, the cable operator must have the final word in insuring that certain programs it deems indecent are prohibited or are placed on the blocked access channel. The operator must also be allowed to require the submission of certain programs for pre-screening. Moreover, the operator must be able to terminate access to the channel in the event that the operator determines that a user has violated its program policy. The FCC must assert preemptive authority to review any disputes involving programmers and the cable operators, particularly on questions of

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<sup>19/</sup> Leased access channels generally garner no measurable audience so a ratings based system of payment is not used by InterMedia.

indecent, given the need to build uniform case law at the national level.

**V. Channel Blocking Requirements on Leased Access Channels**

InterMedia intends at present to prohibit obscene and indecent programming on any leased access channel. However, it is clearly possible that case law will accord protected status to indecent program material, prohibiting InterMedia from exercising prior restraint. In that case, the cable operator needs flexibility in selecting the method of channeling and blocking the indecent programming. Consequently, with respect to the Commission's adoption of regulations to limit indecent programming to a single channel, and blocking that channel unless the subscriber requests access, InterMedia respectfully requests that the following procedures be adopted.

Following the adoption of final FCC rules, the operator should be given at least one hundred eighty (180) days to implement an appropriate blocking mechanism.<sup>20/</sup> Sufficient time is required to provide notice to all subscribers that a certain channel has been selected as the channel on which indecent material may appear at any time. The subscriber would then be given the opportunity

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<sup>20/</sup> Program guides will have to be altered if the channel selected for such programming is different from the one utilized for leased access programming. Equipment will have to be ordered and subscribers notified of the scrambling. It is likely that a number of subscribers will request access to the blocked channel and processing such requests will take a considerable amount of time.

to inform the cable operator of their election whether or not to receive the channel.

This type of notification is necessary so that the operator will know how many subscribers do not wish the channel blocked. Depending on the mix on subscribers wishing to view the channel and subscribers who do not request access, blocking technically may require that many subscribers must be visited to place a trap to block out the particular channel. The technical process of installing the necessary equipment will take a considerable amount of time, personnel and money. The Commission must make it clear that the operator can charge the lessee for the actual cost of blocking the signal.

In addition, the method of technically blocking of the signal should be left to the cable operator's discretion. In most cases, the video signal will be interfered with or eliminated. However, often there are technical difficulties in eliminating the audio signal. The vast majority of cable systems use either set-top descramblers or filter "traps" which selectively block or allow access to individual channels. Among descramblers, nearly all modify the video signal in some way (either by removing synchronizing pulses and/or inverting the black/white sense of the picture information. Neither of these techniques blocks the audio information. Thus, few cable systems currently using set-top descramblers have the technical ability to block the audio signal. While it is possible that some manufacturer will come out with a converter which does accomplish this, cable operators would have to