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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

MM Docket No.
92-258

TO: The Commission

REPLY COMMENTS OF THE MOTION PICTURE ASSOCIATION
OF AMERICA, INC.

The Motion Picture Association of America, Inc. ("MPAA") respectfully submits its reply to comments filed in the above-referenced proceeding.

MPAA represents seven leading U.S. producers of motion picture and television programming. As program providers, MPAA's members are potential users of leased access facilities, directly or indirectly.

In the instant proceeding, the Commission proposes to adopt regulations dealing with, inter alia, restricting access by children to "indecent programming" on leased access channels of cable systems, as mandated by Congress in the Cable Consumer Protection and Competition Act of 1992 ("1992 Act"). We confine these reply comments to that portion of the proceeding.

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We begin by declaring our agreement with the nearly universal view of the commenting parties that the entire censorial regime imposed by Section 10 of the 1992 Act and to be implemented in this proceeding is unconstitutional. The unobjectionable goal of protecting the child audience from exposure to unsuitable materials simply cannot justify these new highly intrusive and speech-restrictive provisions. Children are already protected under federal and state obscenity laws under "harmful to minors" provisions.¹ Additionally, children in households with cable television have been protected for years by the federal requirement

¹ The exhibition of material, including any program delivered on a cable television system, to a minor may be proscribed only if it is "harmful to minors," which requires a finding that the program depicts nudity, sexual contact, sexual excitement, or sadomasochistic abuse in a manner which "predominantly appeals to the prurient, morbid, or shameful interests of minors, which is patently offensive to prevailing standards in the adult community concerning what is suitable for minors and which is utterly without redeeming social importance for minors." Ginsberg v. New York, 390 U.S. 629 (1968).

Regulations pertaining to restricting an adult's access to material delivered via cable television face similar constitutional scrutiny: that materials can only be prohibited "if taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value..." Miller v. California, 413 U.S. 15, 21 (1973). The more recent U.S. Supreme court ruling in Pope v. Illinois, 481 U.S. 497 (1987), affirmed the Miller test, specifying that the proper inquiry in an obscenity prosecution is whether a "reasonable person," as opposed to the "community," would find that the material possesses serious value.

that lockboxes be provided to subscribers upon request.²

Pending the inevitable court challenges that the operation of Section 10 will generate, the Commission must take every step necessary to minimize the harm that the statute and new regulations will cause to the dissemination of First Amendment-protected speech. The Commission must provide to cable operator/lessors and to programmer/lessees the greatest possible clarity and certainty in the implementation of the requirements of Section 10. While the Commission cannot cure the overbreadth of the statute through interpretation, it must at least seek to mitigate the harm.

Furthermore, the Commission must interpret the requirements of this section in a manner not inconsistent with Congress' other expressed intention: to promote a diversity of viewpoints through leased access.³ Congress has again expressed its commitment to leased access through requirements in Section 9 of the 1992 Act that are intended to encourage leased access use. By promoting unwarranted censorship or self-censorship, or by burdening leased access users with unjustified costs or potential liability, these new rules could have the effect of chilling the use of leased

² 47 U.S.C. Sec. 544(d)(2)(A).

³ The First Amendment rationale for leased access is summarized in the comments of the Alliance for Community Media et al. at 3 ff.

access channels, which is plainly unconstitutional.⁴ It would be unfortunate indeed were the Commission to interpret its obligations in a way that discourages the freedom of expression that leased access was intended to foster, and precipitates a constitutional challenge.

I. Definition of "Indecent Programming"

In attempting to define "indecenty," the Commission is once again confronted with an extraordinarily difficult, delicate and ultimately futile challenge. Recent controversies over alleged "indecent" broadcast programming suggest the grave dangers inherent in attempting to regulate constitutionally-protected speech, and show the need for great clarity and certainty in any regulations adopted by the Commission. The potential financial liabilities, harm to reputation, and harm to First Amendment interests that could flow from violations of such regulations are extremely serious.

These considerations compel the adoption of a narrow, uniform and workable definition of "indecent programming" which should govern both in the context of (i) any "voluntary policy" on non-carriage of "indecent programming" that a cable operator may choose

⁴ The Supreme Court has ruled many times that laws that, by creating the fear of legal consequences, promote self-censorship violate the First Amendment as much as laws that directly ban certain speech. See Smith v. California, 361 U.S. 147, 154 (1959).

to adopt and (ii) what programming a cable operator who does not elect to bar "indecent programming" must relegate to "blocked" channels. The importance of uniformity is recognized by the National Cable Television Association ("NCTA"), which urges that the definition of "indecent" governing what a cable operator may choose to prohibit and the definition for purposes of determining what programming may be relegated to a "blocked" channel "should be the same."⁵

We concur with the view of Time Warner Entertainment Company, L.P. ("TWE") that the definition should incorporate a community standard "for the cable medium," that "the [appropriate] standard is that of the 'average cable viewer' on a nationwide basis...", and that the determination of whether any content is "patently offensive" requires judgment "within the context of the whole program and the merit of the work."⁶

Any definition of "indecent programming" must also recognize

⁵ NCTA at 7. We note the valuable role that NCTA has played in promoting the adoption of voluntary uniform industry standards in such areas as customer service, and believe such an effort would be appropriate in this context. The cable industry should be encouraged to adopt consistent industry-wide policies as to both certification requirements and voluntary exclusion of "indecent programming" in order to give fair notice to those who would use leased access facilities and to avoid a content-based balkanization that could render leased access useless for those seeking a national or regional audience.

⁶ TWE at 6-8.

the distinct technological and commercial differences between cable television and other electronic media. Cable is neither so ubiquitous, readily accessible or intrusive as the broadcasting or telephone media. Moreover, as noted above, the cable industry is already under an obligation to provide "lockboxes" to parents upon request. In view of these and other factors, we believe a narrower definition of "indecency" than is applied to those media can be fully justified.

Any adjudicatory body attempting to apply this definition must also consider how the content in question compares with other content on non-leased access channels. Any new regulations must create a presumption that any program material of a kind or type similar or identical to that which might appear on a non-leased access channel, and which would not be found "indecent," should not be deemed "indecent" for purposes of the leased access regulations. Absent such a standard, one must presume that the Congress has chosen to discriminate against leased access programming based on the identity of the programmer, not based on the alleged injurious nature of the program content for a child audience, which would only compound the constitutional infirmity of the new rules.

Finally, the Commission must "clarify that all state and local franchise authority regulations, as well as specific franchise agreement provisions, that are inconsistent with the Act and the implementing regulations are preempted."⁷

⁷ Continental Cablevision at 6.

In summary, the Commission must adopt a national standard of indecency, must ensure that the definition is narrow, workable and non-restrictive of permissible speech as possible, and must preempt state and local regulation of content based on the same or similar concerns about the child audience. The Commission should also encourage the cable industry to promote uniformity in application of these standards. While a definition incorporating these elements would not necessarily pass constitutional muster, it would at least be somewhat more consistent with Supreme Court standards than that proposed in the Notice of Proposed Rulemaking.

II. The "Single Channel" Requirement

In the instant proceeding, the Commission must interpret what Congress meant when it gave the cable operator the option of putting "indecent" programming on a "single channel." We support the argument by Time Warner Entertainment Company, L.P., that

Congress' clear intention in passing this provision was to limit children's access to indecent programming, and not necessarily to limit the amount of indecent programming to that which may fit on one channel. The Commission, therefore, should make clear that cable operators may, if they choose, place indecent commercial use programming on more than one channel as long as any channel that is designated for indecent programming is blocked.

Even if the Commission were not persuaded by that rationale, there are technological developments which may require a more

⁸ TWE at 9.

expansive view. Many cable operators are now on the verge of introducing signal compression technologies which could increase the video carriage capacity of a standard 6 MHz channel by anywhere from four to ten times. As such technologies are introduced, the Commission should give the cable operator greater latitude in satisfying the spirit of the statute. Thus, even if the Commission determines that by "single channel" Congress meant a single 6 MHz block of spectrum, the Commission should presume that the cable operator who confines "indecent" programming to such multiple compressed channels (i.e., the several video channels compressed within the space of the single 6 MHz channel), where each of the compressed channels is otherwise subject to blocking, is operating within the intent of the statute.

III. Notice and Indemnification Requirements

We begin by reiterating our strenuous opposition on constitutional grounds to the entire censorship scheme imposed by Section 10 of the 1992 Act. Regulations requiring a First Amendment-protected speaker to self-censor or that impose, directly or indirectly, substantial potential liabilities for such protected speech constitute a direct prior restraint. However, for the purpose of assisting the Commission to mitigate the First Amendment harms of Section 10, we offer the following comments.

Each cable operator should have in place within a reasonable period of time its voluntary policy on the carriage of "indecent

programming," and its compliance plan for carriage of such programming on "blocked" channels. We believe an acceptable time period would range from 120-180 days from the effective date of the new regulations.

Once the operator has taken the technical and other steps to accommodate requests for access to such a channel, the lessee should face no further delay. If the absolute right of a cable operator to voluntarily bar all "indecent programming" from its system is indeed constitutional, and if an operator chooses not to exercise this right, it should be prepared to carry any non-obscene programming on its "blocked" channels on very limited notice. The seven days' notice proposed by the Commission should be an absolute maximum. Lessees should also be permitted to provide "blanket notification" for multiple or regularly-scheduled programs.

The cable operator should be given a reasonable period of time to satisfy subscriber requests for blocking of service. However, the time for satisfying such requests should have no bearing on the availability of the leased access channel to the lessee. If an operator wishes to ensure that subscribers are given satisfactory notice of their right to block certain channels, the operator can provide notice to existing subscribers during the 120-180 day implementation period described above, or to new subscribers at the time of sign-up.

To further mitigate the effects of unconstitutional self-censorship, the Commission must take additional steps.

First, a lessee should be permitted, but should not be

required, to provide written notice to the cable operator of any programming which the lessee believes may be found to be "indecent."⁹ Requiring that such certification be in writing would amount to a Fifth Amendment violation.¹⁰

Second, the Commission can better satisfy the purposes of the Act while reducing the damage to constitutional rights by permitting any lessee simply to request carriage on a "blocked" channel of any program.¹¹

The cable operator has the absolute right not to carry any "indecent programming" on its leased access channels and, in adopting such a policy, will in fact bear editorial responsibility for its decision to exclude. If the cable operator waives that right, the operator must then ensure, based on information received from the lessee, that any "indecent" leased access programming is

⁹ In the event that written notice is provided, the time period for record retention should not be more than 30 days from date of carriage, and the time period within which a complaint may be filed against an operator or programmer should be no longer than the record retention period.

¹⁰ We do not here address questions of certification of, or liability for, carriage of "obscene" programming because the MPAA member companies neither produce nor distribute programming that would violate any constitutionally valid definition of "obscenity."

¹¹ We believe that such an approach is as consistent with the requirements of the statute as the recommendation by Time Warner Entertainment (and discussed above) that the Commission interpret the "single channel" requirement more broadly.

relegated to a "blocked" channel. This can be achieved without requiring the lessee to "certify" that programming is "indecent" -- which will likely prove an impossible task -- by simply allowing any lessee to request carriage on a "blocked" channel of any programming whatsoever.

The cable operator can alleviate any remaining risk by requiring indemnification from all lessees against any liability flowing from the transmission of obscene or indecent programming, or permitting lessors and lessees to determine by contract who may bear certain specific costs of compliance with Section 10. The Commission must ensure that such requirements are not unreasonable and do not exist for the primary purpose of discouraging legitimate use of leased access channels. The Commission must also take any such requirements fully into account in establishing terms and conditions for leased access use, under regulations to be adopted pursuant to Section 9 of the 1992 Act.

Any disputes between lessors and lessees as to the requirements of these new regulations should be subject to expedited review by the Commission.

Finally, we support the position of cable industry commenters that cable operators should "retain the flexibility to use any reasonable method of blocking subscriber access that satisfies the goals of Section 10," including partial blocking of mixed-use channels.¹²

¹² See, e.g., Tele-Communications, Inc. at 12 ff.

IV. Sufficiency of Notice of Proposed Rules

The record in this rulemaking demands that the Commission move with great caution in adopting rules which will impact First Amendment-protected speech. Due to the extraordinary constitutional delicacy of the issues at hand, and despite the tight statutory timeline imposed on the agency, the Commission cannot conclude the instant proceeding without subjecting a final set of proposed rules, and its constitutional analysis underlying such rules, to an additional round of public comment. Respect for the First Amendment demands no less.

Respectfully submitted,

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DATED: December 21, 1992

CERTIFICATE OF SERVICE

I, Sara Smithson, do hereby certify that I have, on this 21st day of December, 1992, sent a copy of the attached "Reply Comments of the Motion Picture Association of America, Inc." in the Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992: Indecent Programming and Other Types of Materials on Cable Access Channels" (MM Docket No. 92-258) by first class United States mail, postage prepaid, to the following:

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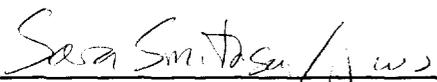
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