

association, is sufficient for invalidation of section 15 on overbreadth grounds.

*Id.* It is also worth noting that, in striking down a Utah indecency law that applied to cable television, the court pointed out that the law was overbroad in that it applied to such R-rated films as *The Godfather*, *Being There*, *Coming Home*, *Annie Hall* and *Coal Miner's Daughter*. *HBO, Inc. v. Wilkinson*, 531 F. Supp. 987, 997 n.18 (D. Utah 1982).

Because the Commission's informal understanding of what constitutes indecency in the television context is fundamentally flawed it is necessary to examine its indecency decisions case by case. The government has taken the position in litigation that "the FCC's rulings on indecent programming provide guidance as to what type of programming falls within the definition of indecent." 59/ In particular, it has suggested that the "official FCC documents that cable operators may consult to obtain guidance" are the "published broadcast indecency decisions." 60/

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59/ Answer to Interrogatory No. 5, *supra* note 42

60/ *Id.* (Interrogatory No. 6 and answer) (emphasis added). See also Response to Interrogatory No. 10 ("the FCC has provided a definition of what it considers indecent programming . . . and has issued published indecency decisions in particular contexts"). As noted below, however, the broadcast standard is not relevant to the cable television medium.

**1. The Very Few Published Decisions on Video Programming Provide No Meaningful Guidance as to the Meaning of “Indecency”**

The Commission does not reveal the basis for its current claim that “the definition of indecent programming in the video programming context is well established,” *Notice* at ¶ 9, but it could not possibly have come from the individual cases. Indeed, of the 38 indecency forfeiture decisions published in the FCC Record since the FCC adopted the generic definition in 1987, only 2 -- or about 5 percent -- involved video programming. <sup>61/</sup> The remaining cases largely involve disc jockeys bantering on radio programs, which is not very illuminating in the television context. The only radio decisions that seem remotely applicable are those instances in which the Commission approved playing the sound track of actress Meg Ryan faking an orgasm in the film *When Harry Met Sally*. <sup>62/</sup> Moreover, none of the published decisions relate to indecency in the context of pay television.

There also is one judicial decision that addresses the substance of the indecency standard, but it stands in direct conflict with another Commission ruling. For example, in *Gillett Communications of Atlanta v. Becker*, 807 F. Supp. 757 (N.D.

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<sup>61/</sup> See list of FCC Published Indecency Decisions. Exhibit 12.

<sup>62/</sup> See *Letter to Steven M. Staab re: Complaint Against KRFX-FM*, (August 5, 1991) (Attached as Exhibit 13). See also *Letter to Cullen M. Miculek* (May 22, 1992) (Attached as Exhibit 14). The sound of an orgasm, according to the Commission, even when presented out of context, evidently is not indecent. However, these decisions were issued as informal letter rulings by the staff, and their precedential value is uncertain, as discussed below.

Ga. 1992), the court held that the videotape “Abortion in America: The Real Story” was indecent. The tape was aired on television stations as a political advertisement by a bona fide candidate for public office. The court found that the tape contained “graphic depictions and descriptions of female genitalia, the uterus, excreted uterine fluid, dismembered fetal body parts, and aborted fetuses.” *Id.* at 763. Accordingly, it held that the political advertisement should be “channeled” to late night safe harbor hours.

The FCC disagreed, at least as to the designation of the material as indecent. It evaluated similar political advertisements and found that the “graphic depictions of aborted fetuses” did not fit within the definition of indecency. The Commission added that the importance of the political speech at issue supported this determination. *Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act*, 9 FCC Rcd. 7638, 7643-44 (1994). Although the FCC concluded that the *Gillett* court “erroneously applied the indecency standard,” *id.* at 7644 n.12, both the court decision and the FCC ruling remain good law, thus rendering their import uncertain. And, despite its “no indecency” finding, the Commission ruled that the TV stations could channel the political programming to late night hours if they believed in good faith that “advertisements containing graphic abortion imagery” are “harmful to children.” *Id.* at 7648.

In 1988, the Commission ruled that a Kansas City television station violated the indecency rules by broadcasting in prime time an uncut R-rated movie entitled *Private Lessons*. However, this decision is of limited precedential value for

several reasons. First, the FCC never released a published decision that described the subject matter at issue, or that explained the reasons for its judgment. Instead, the Commission issued a News Release that briefly set forth its reasoning. It was accompanied by a fact sheet that proclaimed, "FCC Takes Strong Stance on Enforcement of Prohibition Against Obscene and Indecent Broadcasts." 63/ As explained in the Commission's News Release:

The movie included nudity and scenes depicting sexual matters which were dealt with in a pandering and titillating manner. These scenes were neither isolated nor fleeting. The story line of the seduction of a 15-year-old boy by an older woman, together with the inclusion of explicit nudity, would have commanded the attention of children and the sexual references would have been readily understood by children who tuned into the program.

See Exhibit 15. No official explanation -- other than the press release -- was ever issued. 64/

Second, the FCC eventually vacated the proposed \$2,000 forfeiture against KZKC because judicial decisions undermined the FCC's confidence that it could penalize an evening broadcast. Again, the published decision named the film

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63/ See FCC News Release, "KZKC(TV), Kansas City, MO, Apparently Liable for \$2,000 Fine for Indecent Broadcast" (June 23, 1988) (Attached as Exhibit 15). The Commission stayed the proceeding shortly thereafter. See *Kansas City Television, Ltd.*, 4 FCC Rcd. 7653 (1988).

64/ Because the FCC never released the full text of an initial order, no "official" action was taken against KZKC. See *MCI v. FCC*, 515 F.2d 385 (D.C. Cir. 1975).

*Private Lessons*, but contained no description of its contents, nor any explanation of the Commission's indecency determination. *Kansas City Television, Ltd.*, 4 FCC Rcd. 6706 (1989).

Third, even while the Commission was publicizing its condemnation of *Private Lessons*, it declined to take action against the same station for a prime time broadcast of the film *My Tutor*. In fact, the complaints against the two films were contained in the same letter to the FCC.<sup>65/</sup> The complainant characterized *My Tutor* as a film "which totally revolves around the sexual exploits of three male high school students." The complaint describes the film as follows:

During the summer the young man dreams about having sex with his 30 year old tutor. His dreams, shown in the film, consist of him kissing her breasts and fondling her. The tutor, however, finally initiates sex with the young man. Several bedroom scenes ensue with foreplay and the sex act under the sheets. The film also includes several scenes with nudity of the female breasts and buttocks, a woman orally copulating a man while in the car and terms [such] as "f--" and "blow job."

*Id.* The letter contained one page with a scene-by-scene breakdown of what the complainant considered to be objectionable material in both *My Tutor* and *Private Lessons*. *Id.* In a separate letter to the Commission, Ms. Burk complained about

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<sup>65/</sup> See Letter from Treva Burk, Secretary, American Family Assn. to Chairman Dennis Patrick (June 10, 1987) (Attached as Exhibit 16).

KZKC's practice of broadcasting unedited R-rated movies such as these two films. 66/

If there is a distinction between these films for purposes of the FCC's indecency rules, it certainly is not evident from material in the Commission's files. Moreover, an independent published source suggests that, if anything, the film *My Tutor* contains far more sexually explicit material and nudity than does *Private Lessons*. A book, *The Bare Facts*, analyzes the two films' nude scenes as follows:

| <i>Private Lessons</i> (Indecent)  | <i>My Tutor</i> (Evidently Decent)  |
|--|---|
| Meredith Baer . . . . . Miss Phipps  | Caren Kaye . . . . . Terry Green  |
| Ed Begley, Jr. . . . . Jack Travis   | ** 0:25 -- Breasts, while walking into swimming pool.   |
| Pamela Bryant . . . . . Joyce  | ** 0:52 -- Breasts, while in the pool with Matt Lattanzi.   |
| * 0:03 -- very brief right breast, changing in the house while Billy and his friend peep from outside. | *** 0:55 -- Right breast, while making love in bed with Lattanzi.                                 |
| Sylvia Kristel . . . . . Mallow  | Matt Lattanzi . . . . . Bobby Chrystal  |
| * 0:20 -- Very brief breasts sitting up next to the pool when the sprinklers go on.                    | Graem McGavin . . . . . Sylvia  |
| ** 0:24 -- Breasts and buns, stripping for Billy. Some shots might be a body double.                   | *** 0:21 -- in white bra, then breasts in back seat of a car in a parking lot with Matt Lattanzi. |
| ** 0:51 -- Breasts in bed when she "dies" with Howard Hesseman   | Shelly Taylor Morgan . . . . . Louisa   |
| * 1:28 -- Breasts making love with Billy. Some shots might be a body double.                           | Francesca "Kitten" Natividad . . . . . Anna Maria   |
|  | *** 0:10 -- Breasts in room with Matt Lattanzi, then lying in bed.                                |
|  | Katt Shea . . . . . Mud Wrestler  |
|  | * 0:48 -- Brief breasts when a guy rips her dress off.  |
|  | Jewel Shepard . . . . . Girl in Phone Booth   |
|  | * 0:40 -- Brief left breast in car when Matt Lattanzi fantasizes about making love with her.      |

66/ See Letter from Treva Burk, Secretary, American Family Assn. to Edyth Wise (January 26, 1988) ("We hope that the punishment that the FCC renders to KZKC will be equivalent and proportional to the flagrant violations that were committed when the 'R' films were shown.") (Attached as Exhibit 17).

*The Bare Facts* rates nude scenes in movies according to the following categories:

\* **Yawn.** Usually too brief or hard to see for some reason.

\*\* **Okay.** Check it out if you are interested in the person.

\*\*\* **Wow!** Don't miss it. The scene usually lasts for a while.

Based on its analysis of the two movies, *My Tutor* contains three scenes in the “**Wow**” category, while *Private Lessons* contains none. *My Tutor* contains two scenes in the “**Okay**” category, the same as *Private Lessons*. And *My Tutor* contains two scenes in the “**Yawn**” category, while *Private Lessons* contains three. See Craig Hosoda, *The Bare Facts* 768, 817 (1996). There simply is no distinction between these films for purposes of enforcing the FCC’s indecency policies.

The only other published decision involved the broadcast of a sex education program entitled “Teen Sex: What About the Kids?” *Application for Review of the Dismissal of an Indecency Complaint Against King Broadcasting Co.*, 5 FCC Rcd. at 2971. As noted earlier, the program included the use of “sex organ models to simulate the use of various birth control devices.” *Id.* at 2971 n.2. The FCC characterized it as an “explicit method of teaching sex education,” but held that the program was “not presented in a pandering, titillating or vulgar manner.” *Id.* at 2971. The Commission added that “in light of the instructive and clinical context in which the material was presented, the Commission could not find that the material in question, taken as a whole, lacks serious literary, artistic, political or scientific value, as required by the third prong of the *Miller* test.” *Id.* at n.4.

The *King Broadcasting* decision, while laudable, does not provide any guidance for programmers of video entertainment. It is unclear whether the Commission would extend its consideration of “merit” outside the purely educational context. And although the Commission noted that it examined the work “as a whole” for whether it contained “serious literary, artistic, political or scientific value,” it has held repeatedly in other indecency cases that it is not bound by the constraints of *Miller v. California*.

Even if there were more than a handful of published decisions that involved television programming, they still would not provide sufficient guidance to facilitate compliance with Section 505. To be useful, the Commission’s case law must give cable operators or programmers some way to separate that which is considered decent from that which is not. See, e.g., *HBO, Inc. v. Wilkinson*, 531 F. Supp. at 994-998; *Bella Lewitzky Dance Found.*, 754 F. Supp. at 781. But the published decisions are, with very few exceptions, the situations in which the Commission issued a forfeiture for the broadcast of indecent material. Decisions in which the Commission exonerated broadcasters are almost never published. Playboy can find only three such published decisions. 67/

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67/ Of the 38 indecency decisions published in the FCC Record since the Commission adopted the generic definition in 1987, only 3 found the material in question to be “not actionably indecent.” See *KING-TV*, 5 FCC Rcd. at 2971 (broadcast portions of a sex education class including explicit sexual demonstrations *was not actionably indecent*); *National Public Radio*, 6 FCC Rcd. 610 (1991), *aff’d on other grounds*, *Branton vs. FCC*, 993 F.2d 906 (D.C. Cir. 1993), *cert. denied*, 114 S.Ct. 1610 (1994) (NPR newscast quoting John Gotti saying the word “fuck” ten

[Footnote continued]

This failure to publish cases finding “no indecency” is devastating. At various times licensees have responded to indecency complaints by referring to the published orders and arguing that their conduct is “less indecent” than examples the Commission previously sanctioned. But the Commission has repeatedly and uniformly rejected such defenses, stating that “[w]hether or not the material here at issue is less graphic than that previously found indecent by the Commission, we do not accept constraints on our discretion to pursue violations less egregious than others may have been.” 68/ In short, the Commission has acknowledged that its published orders do not provide sufficient information to enable licensees to understand the indecency standard or to conform to it, because they do not say what programming is not indecent.

The government has promised to provide guidance as to the proper interpretation of its indecency rulings, but, so far, no “indecency primer” has been forthcoming. The pledge was made as part of a February 1994 settlement

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[Footnote continued]

times in seven sentences considered not indecent); *WFLA(AM), Tampa, FL*, 7 FCC Fcd. 1826 (1992) (use of profane language to describe a competitor considered not actionably indecent). See list of published FCC decisions at Exhibit 12.

68/ *Letter to Michael J. Faherty, WIOD(AM)*, 6 FCC Rcd. at 3704, 3705 (1989). See also *KLOL(FM)*, 8 FCC Rcd. at 3228 (“while these broadcasts may be less vulgar than some the Commission has sanctioned, this contention proves too little”); *Goodrich Broadcasting, Inc.*, 6 FCC Rcd. 2178 (1991) (“Material which is indecent is not the less so, nor is it rendered immune to our enforcement authority, simply because it is less graphic or egregious than material we have heretofore found actionable.”); *Guy Gannett Publishing Co.*, 5 FCC Rcd. 7688, 7689 (1990) (same).

agreement in *Evergreen Media Corp. v. FCC*, Civil No. 92 C 560 that was signed by attorneys from both the FCC and the Department of Justice. See Settlement Agreement, attached as Exhibit 18. As part of the agreement, the government made a commitment to publish guidelines as to the meaning of the term "indecent" within 9 months. This clarification of the Commission's indecency standards was due in November 1994, but so far nothing has been produced. The government has only revealed that "the deadline for issuance of 'industry guidance' . . . has been extended by mutual consent of the parties." <sup>69/</sup> There has been no indication of when -- or if -- any such guidelines will be released.

## **2. Cases Finding "No Actionable Indecency" Constitute a Secret Body of Law**

The Commission's published cases make clear that compliance with indecency requirements is virtually impossible without understanding what the government believes is "decent." But there is a trick. The FCC's cases finding "no actionable indecency" constitute a secret body of law. These decisions are almost exclusively reached as informal letter rulings and are not routinely disseminated to the public. <sup>70/</sup> There is no systematic way to find or compile the Commission's

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<sup>69/</sup> Answer to Interrogatory No. 7, *supra* note 42.

<sup>70/</sup> In the litigation the government was asked whether the FCC issues "substantive but unpublished rulings as to whether general and/or specific programming is indecent which defendants contend cable operators could obtain guidance for determining whether programming is within the scope of Section 505." The government declined to provide such rulings, claiming that it would be excessively burdensome, but it acknowledged that "the FCC issues unpublished

[Footnote continued]

informal indecency rulings. Even if they can be located, these decisions are hopelessly inconsistent and are of uncertain precedential value.

The informal decisions are located in individual complaint files in the Cable and Mass Media Bureaus. There are thousands of such files. The government has confirmed that the Cable Services Bureau has on file over 33,000 informal written complaints about cable television service generally, and that it “cannot identify which of the remaining tens of thousands of files pertain in any way to [potentially indecent] programming, except by reviewing each file individually. 71/ The same problem exists for the tens of thousands of files the Commission maintains for all the broadcast stations in the United States. In addition, the Commission has no systematic policy for coordinating information on indecency complaints between the Mass Media and Cable Services Bureaus. 72/

The Commission has suggested that members of the public may inspect public files during business hours. 73/ But there is no subject matter index

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[Footnote continued]

dispositions of indecency complaints.” Answer to Interrogatory No. 8, *supra* note 42.

71/ Answer to Interrogatory No. 2, *supra* note 42.

72/ Declaration of Elizabeth A. Bartley, Legal Assistant of Hogan & Hartson L.L.P., attached as Exhibit 19.

73/ Answer to Interrogatories No. 2 and 6, *supra* note 42. Such hours are 12:30 p.m. to 4:30 p.m. Monday through Friday in the Cable Services Bureau and 9 a.m. to Noon, 1:00 p.m. to 4:30 p.m. Monday through Friday in the Mass Media Bureau.

by which the thousands of files could be reviewed. <sup>74/</sup> Searching for an informal indecency ruling literally is like looking for a needle in a haystack. But the needle must also be relatively new: Commission staff have advised members of the public that the agency archives its complaint files in an offsite storage facility after three years. <sup>75/</sup>

Any researcher who is sufficiently persistent to penetrate this maze is not likely to be rewarded with greater insight into the Commission's definition of indecency. The informal rulings almost never contain any analysis as to why the staff deemed a particular complaint as invalid. The typical boilerplate response to an unsuccessful complaint reads as follows:

We have thoroughly reviewed your complaints and supporting materials. On the basis of that review, we conclude that the broadcast material identified in your complaint is not actionably indecent.

Usually, the complaint itself provides the only detailed description of the programming at issue. Consequently, the government has acknowledged that:

[N]early all of these [informal dispositions] are cases where the Commission dismissed the complaint finding that the material complained of was not actionably indecent, but providing little or no detailed analysis of the basis for its decision. <sup>76/</sup>

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<sup>74/</sup> Response to Request for Admissions No. 11, *supra* note 42 (“defendants admit that the FCC does not have a subject matter index that may be reviewed by the public”); Declaration of Elizabeth A. Bartley, attached as Exhibit 19.

<sup>75/</sup> Declaration of Elizabeth A. Bartley, attached as Exhibit 19.

<sup>76/</sup> Answer to Interrogatory No. 6, *supra* note 42 (emphasis added).

In other words, the informal dispositions provide no reliable guidance at all, even if they could be located.

Despite the scant substantive insight that may be gleaned from the informal rulings, the government has identified them as a possible source of guidance for compliance with Section 505. But as with other FCC indecency pronouncements, the informal rulings only add to the confusion. Perhaps most perplexing is the Commission's dismissal of complaints against television stations that broadcast uncut R-rated films comparable to *Private Lessons*.

In 1987 and 1988, a group called "Watchman Responsible Against Pornography" mounted a campaign against television stations in Minneapolis-St. Paul, Minnesota. <sup>77/</sup> The complaints contained detailed descriptions of the material that was alleged to be indecent and were accompanied by tapes of the broadcasts. In one letter, the group complained about the licensee's policy (as promoted in local billboard, TV and newspaper advertisements) of broadcasting its 8 p.m. movies "uncut and unedited." <sup>78/</sup>

Although it is not possible to characterize the movies as being all of the same genre, many were what is known as "teen sex comedies," and almost all were

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<sup>77/</sup> This series of complaints and the FCC responses, are attached as Exhibit 20.

<sup>78/</sup> See Letter from Jan Schiefelbein to Donald O'Connor, Manager, Station KTMA, December 4, 1987. Exhibit 20.

rated R. <sup>79/</sup> The typical complaints against the films focused on displays of nudity, sex, adult language and violence. For example, complaints against *The Rose* cited “foul language (‘fuck,’ ‘shit’ and’ God-damn’), references to sex orgies, homosexual situations, and countless crude sexual remarks.” <sup>80/</sup> Complaints against *Angel* cited adults “soliciting sex with children (age 14) . . . the sexual kissing of a corpse and implied necrophelia.” <sup>81/</sup> In Martin & Porter’s, VIDEO MOVIE GUIDE 1996, the rationale for the MPAA ratings in certain cases was described as follows: *Angel* received its rating for “nudity, violence, suggested sex, and profanity.” *Heartbreakers* received its rating for “simulated sex and profanity.” *The Last American Virgin* received its rating for “sex.” *Porky’s Revenge* received its rating for “profanity, suggested sex, and nudity.”

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<sup>79/</sup> Movies listed in the complaints included *Porky’s Revenge*, *Angel*, *The Last American Virgin*, *Losin’ It*, *Zapped*, *Rock ‘n Roll High School*, *Seniors*, *The Rose*, *The Wild Life*, *Exterminator*, *Animal House*, *California Suite*, *Heartbreakers*, *Hell Squad*, *Shamus*, *The Beach Girls*, *Savage Sisters*, *Happy Birthday to Me*, *Don’t Answer the Phone*, *The Lunch Wagon*, *Six Pack Annie*, *Hollywood Knights*, *Hollywood Hot Tubs*, *Revenge of the Cheerleaders*, *Terror School Train*, *Prime Cut*, *Videodrome*, *S.O.B.*, *Sextette*, *Easy Rider*, *This is Spinal Tap*, *The Graduate*, *Seniors*, *weekend Pass*, *Private School*, *P.O.V. -- Rate it X*, and *Bachelor Party*. See Exhibit 20.

<sup>80/</sup> Letter from Teresa A. Leick to Gail Brekke, General Manager, KITN, March 15, 1988; Letter from Jan Schiefelbein to Gail Brekke, General Manager, KITN, February 26, 1988. Complaints to the stations were forwarded to the FCC and were encompassed within the staff’s ruling. See Exhibit 20.

<sup>81/</sup> Letter from Robert P. Heinrich, Director, Clean Up Project of Minnesota, to Donald O’Connor, Manager, KTMA (September 22, 1988). See Exhibit 20.

For reasons that were not disclosed, the Commission informed the complainants that the FCC had “thoroughly reviewed your complaints and supporting material,” and concluded that “the broadcast material identified in your complaints is not actionably indecent.” Letter from Edyth Wise, Chief, FCC Complaints and Investigations Branch, to Jan Schiefelbein, Watchman Responsible Against Pornography (October 26, 1989). See Exhibit 20.

Perhaps the only category of informal complaints that can be said to provide some guidance are those relating to alleged indecent programs on cable television. In such cases, the Commission typically informed the complainants that the FCC lacks constitutional authority to regulate “indecency” on cable television. For example, in response to a 1993 complaint against TCI for “bleeding” of audio and video signals from Spice, the Commission stated:

The federal courts have indicated that, because a cable viewer must affirmatively choose to subscribe to cable, and because a lockbox is available to restrict children’s access to sexually explicit cable services, the government may not impose additional restrictions on the provision of indecent programming on origination cable channels. 82/

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82/ Letter from Roger Holberg, Acting Chief, Complaints and Investigations Branch, to Thomas J. Brandt (Oct. 2, 1993). This document was produced by the government in its Answer to Interrogatory No. 2, *supra* note 42. It is attached as Exhibit 21.

The Commission provided the same response to a complaint about sexually oriented music videos that were transmitted on Video Jukebox, a cable television service. <sup>83/</sup> Whatever guidance that could have been drawn from these cases is now clouded, because the government's current litigation position is in conflict with the FCC's previously consistent policy.

The bottom line is that a cable operator that devotes substantial time and resources seeking to comply with Section 505 by diligently searching the Commission's files is almost guaranteed to know less about what the FCC considers indecent than would an operator who makes no effort at all. The Commission should use this proceeding as an opportunity to reform this irrational state of affairs.

### C. The FCC's Indecency Policies Invite Political Favoritism

Another vice of vague regulations of speech is that they grant censors "unbridled discretion." <sup>84/</sup> With respect to content controls in general, Chairman Hundt has pointed out "the potential for abuse . . . inherent in vague, ominous, and

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<sup>83/</sup> The videos included *Gett Off*, by Prince, *Funk Me*, by H.W.A., *Like a Virgin*, by Madonna, *Dis-moi, Dis-moi*, by Mitsou, *Justify My Love*, by Madonna, *The Principles of Lust*, by Enigma, *Oochie Oochie*, by McBrains and *Pop That Coochie* by 2 Live Crew. See *Letter from Edyth Wise, Chief, FCC Complaints and Investigations Branch, to Janna G. Blackley* (April 27, 1992), attached as Exhibit 22.

<sup>84/</sup> See, e.g., *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 132 (1992). Cf. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 762-69 (1988); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (vague statutes permit those implementing them "to pursue their personal predilections") (citation omitted).

empty standards that can be manipulated in a pernicious manner by an ill-motivated Commission.” <sup>85/</sup> For this reason, the U.S. District Court for the District of Utah struck down an indecency statute for cable television because it was too similar to the discredited *Hicklin* doctrine -- “a standard that permitted a judge to get out of the formula any value judgment that he chose to put in.” *HBO, Inc. v. Wilkinson*, 531 F. Supp. at 993 n.9.

The laxness of the indecency standard invites political manipulation both at the policy and decisional levels. For example, shortly after he left his job as White House Communications Director in 1987, Patrick Buchanan wrote a public memo to the President that was calculated to bolster the ties between the Republican party and the religious right:

As even the National Council of Churches now backs the Administration’s campaign against pornography and obscenity, the President should become more visibly involved; and demand of that toothless lion, the FCC, that it begin pulling the licenses of broadcasters who flagrantly abuse the privilege. A single license jerked would instantly depollute the airwaves of this garbage, which the Supreme Court has ruled is not protected speech. <sup>86/</sup>

The concept that the FCC indecency rules could be gerrymandered for political advantage is not farfetched. For example, in 1986 Chairman Mark Fowler

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<sup>85/</sup> Chairman Reed E. Hundt, Speech at Brooklyn Law School, *supra* note 22.

<sup>86/</sup> Patrick Buchanan, *A Conservative Makes a Final Plea*, NEWSWEEK, March 30, 1987 at 23, 26.

conducted a series of meetings with representatives of Morality in Media and the National Decency Forum to discuss the Commission's indecency policies. 87/ Thereafter, the Commission's General Counsel assisted potential complainants select appropriate targets for filing complaints, and warned them away from programs that presented greater legal risks. In one letter, General Counsel Jack Smith wrote to Reverend Donald Wildmon:

[A]s we discussed on the phone today I do not believe [a complaint against TV station WPTY] presents the kind of airtight case that you want to push at this time. We are inquiring into a couple of other cases which we think may be more clear violations. I think you should agree with our reasoning on this matter. 88/

As it turned out, one of the stations selected for an enforcement action when the FCC initiated its new, harsher indecency policy was KPFK, a Pacifica station. At the time the Commission was sifting through the thousands of complaints seeking a target for the new "get tough" policy, it just so happened that KPFK was arranging the first gavel-to-gavel radio coverage of the Iran-Contra hearings, and was

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87/ These events have been detailed in John Crigler and William J. Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U. L. REV. 329, 345-346 (1989). The description was based on documents brought to light through a Freedom of Information Act request.

88/ Letter from John B. Smith, General Counsel, FCC, to Donald Wildmon, Executive Director, National Federation for Decency (Sept. 19, 1986), quoted in Crigler and Byrnes, *supra*.

generally critical of the Reagan Administration policies toward Central America. 89/

There is no way to know whether any of these events is necessarily linked. But it is undeniable that vague, overly broad regulations of speech create the possibility for such abuse. Chairman Hundt has suggested that President Nixon may have used vague broadcast licensing standards to threaten the renewal of television stations owned by the Washington Post in retaliation for critical Watergate coverage. Without a clear standard, Chairman Hundt has maintained, licensee's will wonder if an adverse Commission decision may have been a form of pay-back "against an anti-government slant." 90/ He concluded that "[t]he cost of a vague or clandestine implementation of the public interest standard can be frighteningly high." 91/

Given this serious potential for abuse, the Commission should take this opportunity to provide more clear and precise standards. As the U.S. District Court for the District of Utah noted in striking down indecency rules directed at cable television, 'the First Amendment shields us from governmental excesses, no

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89/ Crigler and Byrnes, *supra* note 87.

90/ Chairman Reed E. Hundt, Speech at Brooklyn Law School, *supra* note 22. Some have suggested that the FCC's decision to allow broadcasters to channel anti-abortion ads to late night could have been politically motivated.

91/ Chairman Reed E. Hundt, Speech at Brooklyn Law School, *supra* note 22.

matter who occupies governmental offices. *Community Television of Utah v. Roy City*, 555 F. Supp. at 1170.

## II. THE COMMISSION SHOULD CLARIFY WHAT CONSTITUTES A NETWORK THAT IS “PRIMARYLY DEDICATED” TO SEXUALLY-ORIENTED PROGRAMMING

There is no basis for the Commission’s assumption that Section 505 is “clear” regarding what networks are “primarily dedicated” to sexually oriented programming. The Commission makes this statement twice in the NPRM, *Notice* at ¶¶ 6, 9, and the government has asserted in litigation that the term “primarily dedicated” does not require a definition beyond its “plain meaning.” <sup>92/</sup> But the term has a “plain meaning” only if it is self-defining or there is an adequate legislative record from which to infer congressional intent. Neither is the case here.

Section 505 is supported by virtually no legislative record. The measure was added by amendment to the Senate telecommunications bill long after hearings were concluded and the committee report submitted. *Compare* S. Rep. No. 23, 104th Cong., 1st Sess. 60 (1995) *with* 141 Cong. Rec. S8166 (statement of Sen. Feinstein). The House telecommunications bill contained no comparable provision, and the Conference Committee adopted the Feinstein amendment without comment. *See* H.R. Conf. Rep. No. 458, 104th Cong. 2d Sess. 192 (1996).

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<sup>92/</sup> Answer to Interrogatory No. 4 in Defendants’ Responses to Plaintiff Playboy Entertainment Group, Inc.’s First Requests for Admissions and Interrogatories, *Playboy Entertainment Group, Inc. v. United States*, Civil Action No. 96-94.

At no point in the legislative history were hearings held, debate engaged, or congressional findings entered with respect to Section 505 or the channels to which it should apply. It was adopted without discussion, and its scope defined only by the sponsor's statement that "[t]he full blocking requirement would apply to those channels primarily dedicated to adult sexually oriented programming, such as the Playboy and Spice channels." 141 Cong. Rec. S8167 (1995).

When the question is broadened to ask what Congress -- and not just Senator Feinstein -- intended, the answer is not, as the FCC suggests, all that "clear." For example, the last time Congress acted to control unintended access to what it deemed "sexually explicit" cable programming, it did not have Playboy in mind. The 1992 Cable Act required prior notice to subscribers before any transmission of a free preview on a premium channel of any films that were rated R or above. 93/ The U.S. District Court for the District of Columbia struck down the provision as being unconstitutional -- and for good reason -- but its enactment provides a clue about the congressional intent surrounding such measures.

The government's purpose in enacting the prior notice provision in 1992 was the same interest it purports to serve with Section 505: to "keep[] a non-subscribing family from being offended by unsolicited movies," to keep "soft

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93/ The District Court for the District of Columbia invalidated the requirement, finding that no congressional findings supported the provision and that it imposed an impermissible burden on speech. *Daniels Cablevision*, 835 F. Supp. at 9.

core pornography” out of homes unless invited, and to prevent young children from being “exposed to these movies without the knowledge of their parents.” 138 Cong. Rec. S589 (daily ed. January 29, 1992) (statement of Senator Helms) (“HBO and Cinemax, for example, end up peddling their garbage where and when it is not wanted.”)

It simply is a fact of life that virtually all premium film services supply subscribers with a steady diet of R-rated and unrated films in prime time. <sup>94/</sup> See, e.g., 138 Cong. Rec. S589 (statement of Senator Helms) (“A great many of the movies presented on movie channels are R-rated.”). For example, the FCC has found that “a significant number of R-rated movies are shown on cable.” *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd. at 5308-09. This conclusion was based on an analysis of MPAA ratings for 1,309 movies shown on premium cable services from December 26, 1987 through January 12, 1990 which found that 51 percent of the films were rated R. *Id.* at 5308. A survey of listings for just the week of February 10-16, 1996 of services such as HBO/Cinemax, Showtime/The Movie Channel, Viewer’s Choice/Hot Choice and

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<sup>94/</sup> As noted above, the MPAA ratings cannot be used as a proxy for any legal classifications of programming such as “indecent” or “obscene.” But they do provide a good indication of the “close enough for government work” approach that has been used in this area.

Action Pay-Per-View reveals that many of their programs are R rated and unrated, and include programming produced by Playboy. 95/

These facts underscore two important points: the congressional intent of Section 505 cannot simply be assumed by the FCC, and the statutory terms are not self-defining. The Commission must undertake a thorough analysis of the meaning of the relevant statutory terms before it adopts any final rules. Playboy takes no position on which networks might fall within a reasoned definition, nor does Playboy believe that the FCC can prevent Section 505 from being declared unconstitutional. It would have been better for the Commission to stay these proceedings pending the outcome of the litigation. But so long as the question has been raised, it is incumbent upon the FCC to articulate and support its conclusions. Additionally, now that the Commission maintains that there are shadings of difference between the various terms employed in Section 505, including “sexually oriented,” “adult,” “sexually explicit,” “primarily dedicated” and “indecent,” it is imperative that the agency define all its terms.

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95/ See Affidavit of James English, attached as Exhibit 23. Playboy produces and/or licenses programming that airs both on its own networks, as well as other premium services such as Showtime/The Movie Channel and HBO/Cinemax, Viewer’s Choice, and Action Pay-Per-View.

### **III. THE COMMISSION MUST CLARIFY AND DRASTICALLY NARROW THE SCOPE OF SECTION 505 BY RESTRICTING THE DEFINITION TO “INDECENCY” TO ENCOMPASS ONLY “OBSCENITY”**

For reasons Playboy has expressed in its lawsuit, Section 505 is unconstitutional on its face. The First Amendment problems become more pronounced as the Commission seeks to extend the scope of indecency regulation as that term was used in *Pacifica* to cover pay television. Nevertheless, the Commission has an obligation to try to make it more constitutional than it is. It could do so by narrowing the definition of “indecency” in the context of cable television to mean the same thing as “obscenity.”

#### **A. The Commission Must Define “Indecency” Based On the Community Standards of the Cable Television or Other MVPD Medium**

The Commission has defined indecency for purposes of Section 505 as “any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable or other MVPD medium.” *Notice* at ¶ 6. Although the Notice does not ask the question, the Commission must analyze and articulate its findings as to whether programming that is “patently offensive” when measured by contemporary community standards for “the broadcast medium” would not be offensive when measured by the “contemporary community standards for the cable or other MVPD medium.” If it conducted such an inquiry, the Commission probably would discover that the public is likely to have a more expansive view of acceptable programming

in the subscription video context. After all, one of the reasons people subscribe to cable television is to obtain access to uncut films. 96/

Such an analysis also would be consistent with the Commission's articulated view of the law, since the concept of "indecenty" historically has been tied to the medium in question. As noted, broadcasting rules apply "contemporary community standards for the broadcast medium," while dial-a-porn rules apply "contemporary community standards for the telephone medium." See *In re Regulations Concerning Indecent Communications by Telephone*, 5 FCC Rcd. 4926, 4927 (1990). The scope of permissible governmental action in each case has been determined by the nature of the medium.

For example, far less intrusive regulations were allowed by the courts in the telephone context than for broadcasting because telephone customers have a greater degree of control over the technology. Courts found this to be true even though telephones are more prevalent -- both inside and outside the home -- than are television sets. The differing nature of telephone technology has led courts to reject broadcast-type "safe harbor" hours as a means of "channeling" sexually explicit phone messages to late night hours. *Carlin Communications, Inc. v. FCC*, 749 F.2d 113, 120-122 (2d Cir. 1984) ("*Carlin I*"). And it led the Second Circuit to

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96/ The Commission has noted that "cable television . . . provides adults with access to programming designed for mature audiences" and that "cable offers a significant number of unedited movies for home viewing." *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 4 FCC Rcd. at 8364, 8367 & n.47.