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May 11, 2004

RECEIVED & INSPECTED

MAY 12 2004

FCC - MAILROOM

The Honorable Michael K. Powell, Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

RE: In the Matter of COMPLAINTS AGAINST VARIOUS BROADCAST
LICENSEES REGARDING THEIR AIRING OF THE "GOLDEN GLOBE
AWARDS" PROGRAM -- File No. EB-03-IH-0110

Dear Chairman Powell:

The Center for Creative Voices in Media writes to you in support of the Petition for Reconsideration filed in the above-titled matter on April 19, 2004 by the ACLU, AFTRA, et. al, regarding the Commission's reversal of an Enforcement Bureau order involving a live telecast of the Golden Globe Awards, which overruled well-established Commission precedent to announce a broad new policy, applicable to all broadcasters, that significantly expands its regulation of programming content.

The over one hundred thousand writers, directors, producers, performers, and others who create programming for American radio and television are extremely concerned about the chilling effect that this Commission's new policy has on their ability to produce and perform challenging, controversial, original, and important works that might later be judged by the Commission to have violated these substantially broadened, vague, and unpredictable indecency standards.

Our concerns are not hypothetical or far-fetched. Yesterday's front page story in The New York Times (attached), "Eye on F.C.C., TV and Radio Watch Words," cites numerous instances of producers and stations altering seemingly unobjectionable and inoffensive creative content to avoid any possibility of running afoul of the Commission's opaque new standards. When the producers of the acclaimed PBS series "Masterpiece Theater" feel obliged to water down that highly-respected show's language for fear of an FCC enforcement action, then clearly the chilling of free and appropriate expression is real, it is pervasive, and it is contrary to the free expression rights and interests of not only America's creative artists, but the American audience.

This chilling of free and appropriate expression was an obvious response to the new, significantly expanded regulation of creative content by the Commission, as articulated in the Golden Globes decision. Despite this, many within and without the Commission nevertheless supported its new policy on the grounds that it is necessary to protect – and in the best interests of -- America's children.

Regrettably, nothing could be further from the truth. Government censorship is not the way to protect children from inappropriate television. The right to express what some consider offensive speech is the price Americans pay for freedom of political speech and we cannot afford to risk losing that freedom. It is not in the best interests of America's children to "protect" them from expression that is itself protected by the First Amendment -- unobjectionable and appropriate creative works that are challenging, controversial, original, and important. Unfortunately, these protected and salutary works – the very works so many parents want their children to watch -- now risk being left on the cutting room floor as a result of the Commission's new policy.

Attached is an article written by CCVM Advisory Board Member Peggy Charren, founder of Action for Children's Television, winner of the Peabody Award and the Presidential Medal of Freedom, and one of America's best known and most respected advocates for quality children's television programming. While the article, "Government Censorship is Not the Solution, Education Is," first appeared a decade ago, in Hofstra Law Review Vol. 22:863 (1994), it could not be more timely today, which is why Ms. Charren joins us in signing this letter. There, she wrote,

"The problem, as our country has painfully learned in the past, is that a little censorship goes a long way – toward imposing someone else's arbitrary standards on all of us, toward removing any controversial material from the public eye, and toward erasing precious First Amendment freedoms. What is a parent to do? Even parents who strongly support the principle of free speech may be hard-pressed to support its practice when it comes to shielding young people from violence and mayhem. But if censorship is not the answer, what is?

With television, as with most issues in our children's lives, perhaps our most important role is to guide youngsters to make thoughtful choices of their own. Just as we try to teach our children the merits of good nutrition versus a diet of junk food, we can try to help them choose a "nutritious" television diet, low on "junk" and high on food for thought. We can let them know how we view violence: when we think violence is justified, when another response is more appropriate. We can point out all the disparities between violence on the screen and violence in the real world, helping them to understand that violence hurts.

For parents who decide that reasoned guidance is not enough, especially for the youngest of television watchers, there are several devices on the market that give mothers and fathers the option of blocking out programming they deem unsuitable."

Today, with the V-chip, and cable and satellite boxes that can block programs and channels, there are even more technological options for parents and others to avoid television programming some might find offensive for their children or themselves. And there are always the low-tech alternatives of changing the channel or turning the television off.

Creative media artists understand the Commission's desire to address complaints, some well-founded, about indecent programming. We do not write to you to support "indecent" programming. Rather, we write to support the preservation of creative, original, challenging, controversial, non-homogenized decent and appropriate programming, which is already in scarce supply, and is severely endangered by the Golden Globes decision. The Golden Globe "cure" for indecent programming is proving worse than the disease. It goes too far and is by no means the least restrictive alternative available for the problem of indecent programming. It does not serve the public's interest – including the interest of America's children -- in a vibrant and diverse media. Therefore, we support the Petition for Reconsideration of the Commission's decision in Golden Globes.

As you and the Commission work through these difficult issues, we invite you to call upon us, as we are ready, willing, and able to productively and meaningfully assist the Commission in formulating a policy that addresses concerns about truly indecent programming while not chilling protected creative expression.

The Center for Creative Voices in Media is a nonprofit 501(c)(3) organization dedicated to preserving in America's media the original, independent, and diverse creative voices that enrich our nation's culture and safeguard its democracy. CCVM's Board of Advisors is made up of numerous winners of Oscars, Emmys, Tonys, Peabodys, and other awards for creative excellence, as well as respected media scholars.

We look forward to your response.

Sincerely,



Peggy Charren
Member, CCVM Board of Advisors



Jonathan Rintels
Executive Director

Attachments

Cc; Commissioner Michael J. Copps
Commissioner Kathleen Q. Abernathy
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein
Jonathan Cody, Legal Advisor to Chairman Michael K. Powell
Jordan Goldstein, Legal Advisor to Commissioner Michael J. Copps
Stacy Robinson Fuller, Legal Advisor to Commissioner Kathleen Q. Abernathy
Catherine Crutcher Bohigian, Legal Advisor to Commissioner Kevin J. Martin
Johanna Mikes Shelton, Legal Advisor to Commissioner Jonathan S. Adelstein

GOVERNMENT CENSORSHIP IS NOT THE SOLUTION, EDUCATION IS

*Peggy Charren**

People generally think of me as a child advocate but, lately, I have spoken out more often as a staunch defender of free speech. This switch came about because children are being used as the excuse for censorship. Today, many child advocates, members of Congress and media regulators do not seem to understand that censorship is a slippery slide to disaster in a Constitutional democracy. For twenty-five years, I have been trying to get the Federal Communications Commission ("FCC") to fulfill its obligation to ensure that broadcast licensees obey the laws that govern broadcasting as applied to children.

The record shows that, in large part, commercial television has abdicated its educational role and concentrated on its ability to amuse. Unfortunately, it is often used to showcase violence, profane language, and sexual innuendo. Many adults, frustrated and angry with this type of television fare watched by children, want the government to ban G.I. Joe's guns and Ninja Turtles' weapons or to censor language and lyrics not suitable for young adults. During the 1970s and 1980s, the religious right and conservative Republicans tried to excise sex from the television screen. Today, Democratic members of Congress have introduced legislation designed to do away with violence on television.

But government censorship is not the way to protect children from inappropriate television. The right to express what some consider offensive speech is the price Americans pay for freedom of political speech and we cannot afford to risk losing that freedom. We have to teach our children that violence is not the solution to problems and we have to use the "off" button more often. Parents can turn off what is bad for children, but they cannot turn on what is missing from television's service to kids.

* Founder, Action for Children's Television. Editor's note: This article was originally presented at a live Symposium on Television and Violence at the Hofstra University School of Law in April 8, 1994.

Although the government has no place *limiting* television options, it does have a role to play in *increasing* diversity in programming. The FCC's *Children's Television Report and Policy Statement*,¹ published in 1974, emphasized that broadcasters have a special obligation to serve children and to develop and present programming which will serve the unique needs of the child audience. The FCC defined programs that could be considered educational or informative:

There are many imaginative and exciting ways in which the medium can be used to further a child's understanding of a wide range of areas: history, science, literature, the environment, drama, music, fine arts, human relations, other cultures and languages, and basic skills such as reading and mathematics which are crucial to a child's development.²

This is the statement that the FCC should be making again in 1994 and these are the ideas that broadcasters and their lawyers should keep in mind in interpreting the Children's Television Act of 1990.³

As licensed public trustees, broadcasters have historically been required to serve the public interest. The Children's Television Act breaks new ground by specifying that service to children is part of this obligation and that the child audience deserves special consideration.

Under the new law, stations must limit the amount of advertising on children's television (ten and one-half minutes per hour on week-ends and twelve minutes per hour during the week, limits many people think should be significantly lower), and must broadcast programs that meet children's educational and informational needs. The law also establishes a process by which citizens can hold local stations accountable for meeting the mandate of this law.⁴

A 1992 report by the Center for Media Education on industry compliance with the 1990 law pointed out that stations claimed the *Jetsons*, *Super Mario Brothers*, *Leave It To Beaver*, *G.I. Joe* and many similar shows were specifically designed to educate children.⁵ When I commented that "if their lawyers weren't drunk, they must be

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2. *Id.*

3. 47 U.S.C. § 303a (1990).

4. *Id.*

5. Joe Flint, *Study slams broadcasters' kid act compliance*, BROADCASTING, Oct. 5, 1992, at 40; *TV broadcasters hit on children's TV programming*, COMMUNICATIONS DAILY, Sept. 30, 1992, at 2.

sick," *Time Magazine* responded, "Not necessarily. Regulators in the Reagan administration once tried to cut funds for school lunch programs by classifying catsup as a vegetable."⁶

It does seem abundantly clear that almost everyone in the commercial television business is still trying to figure out how to benefit from children, instead of how to be beneficial to children. This approach is particularly offensive given the following facts: in the United States, one in four of television's youngest viewers is poor, one in five is at risk of becoming a teenage parent, and one in seven is likely to drop out of school.⁷ Fifty percent of the children born this year will live in a single-parent family before reaching the age of eighteen.⁸ And fifty percent of the women who work full time—20 million mothers—have children under six years old.⁹

Instead of focusing on ways to evade the public interest requirements, I believe communications lawyers should urge their clients to fulfill the spirit as well as the letter of the law. Everyone understands that along with its obligations, public trusteeship confers important advantages—advantages that have consistently prompted broadcasters to reject the spectrum usage fee and to come out on the side of the trusteeship model. The issue that vexes those of us concerned with television choices is that broadcasters are not behaving like trustees when it comes to kids. Adults get much better service than young audiences do.

During the 1960s and 1970s, the FCC played a significant role in getting broadcasters to provide choices for children. Through the decade of the 1980s, however, we had to listen to the drip, drip, drip of the Reagan/Bush trickle down theory of communications: What is good for the industry is good for children! That irresponsible doctrine helped to turn commercial television programming for young audiences into thirty minute commercials that make a mockery out of the legal obligation of stations to serve the public interest.

The response of CBS is typical of what happened to kids' shows across the country, and taught me one of the most important lessons in twenty five years of trying to bring more choices to children's television: When Washington talks, broadcasters listen. During the

6. *School of Hard Knocks*; Some stations have pretty liberal definitions of educational television. *TIME*, Oct. 12, 1992, at 29.

7. CHILDREN'S DEFENSE FUND, *THE STATE OF AMERICA'S CHILDREN* (1993).

8. *Id.*

9. *Id.*

1970s, CBS, in response to FCC concern, hired twenty people in its news department to produce informational programs for young audiences: *In the News*, *Thirty Minutes*, *What's an Election All About*, *What's Congress All About*, as well as other specials about government followed. This was in addition to the network's *Children's Film Festival* on Saturday mornings, an hour-long show featuring children's films from around the world, and *Captain Kangaroo* which aired Monday through Friday. As soon as deregulation became the order of the day, CBS got rid of the twenty news people and canceled all these quality educational programs. In comments to the now more broadcaster friendly FCC, CBS described one of its children's shows as a program which deals with recognizable young human beings in basic situations rather than the way out world of the traditional animated cartoon. What a strange way to describe one episode I saw that dealt with the capture of a frozen caveman who later chases the main character's friends, each trying to capture the other until the caveman falls into a giant clam and is discovered to be a professor intent on stealing another scientist's invention.

Television cannot solve all of the problems of growing up poor and unskilled in America. It can certainly do its part, however, to motivate kids to learn and it can teach them a great deal about how the world works and how to participate in a democratic society. Each year, public broadcasting puts a big chunk of its meager resources into this kind of service to children. And each year, especially since 1980, broadcasters resist every attempt to get them to do likewise.

I think there is a question here that transcends the legalistic game-playing that is the focus of discussions about television's role with respect to the effects of television violence on children. It goes beyond issues about the costs broadcasters would rather not incur for programs that may win awards but may not win advertisers. The question is: "Who really cares if a generation of kids is not adequately prepared to function as effective adults?" I will remind you who cares. For starters, the CEOs of every major industrial corporation, most of whom are panicked that they cannot find workers who can read manuals, compute basic mathematical calculations or assess electronic diagrams—and right behind them are all the other people who run the country. They care that the nation might be brought to a standstill by growing population of untrained job applicants who will never be able to earn a decent salary, uninformed voters who will not be able to make sensible political decisions, and uneducated parents who will not be able to do right by their children.

Even as I talk about the need for more terrific programming for kids, I see myself as an ally of broadcasters in fiercely protecting their right to freedom of editorial speech. Action for Children's Television was the lead plaintiff in the indecency case decided recently by the U.S. Court of Appeals.¹⁰ We were on the side of the dirty words! Not only am I against the idea that television should be cleansed of "bad" programs, I do not believe concerned parents must get rid of the television set. I like television! But I believe the television industry and families have to take more seriously the challenge of managing it properly.

The violence debates usually focus on making adult television suitable for children and ignore strategies to make children's television productive for children. The problem, as our country has painfully learned in the past, is that a little censorship goes a long way—toward imposing someone else's arbitrary standards on all of us, toward removing any controversial material from the public eye, and toward erasing precious First Amendment freedoms. What is a parent to do? Even parents who strongly support the *principle* of free speech may be hard-pressed to support its *practice* when it comes to shielding young people from violence and mayhem. But if censorship is not the answer, what is?

With television, as with most issues in our children's lives, perhaps our most important role is to guide youngsters to make thoughtful choices of their own. Just as we try to teach our children the merits of good nutrition versus a diet of junk food, we can try to help them choose a "nutritious" television diet, low on "junk" and high on food for thought. We can let them know how we view violence: when we think violence is justified, when another response is more appropriate. We can point out all the disparities between violence on the screen and violence in the real world, helping them to understand that violence hurts.

For parents who decide that reasoned guidance is not enough, especially for the youngest of television watchers, there are several devices on the market that give mothers and fathers the option of blocking out programming they deem unsuitable. These devices range from key-operated safety locks that keep the television set off entirely to programmable units that can be set to block selected channels. The next step is to ensure that these options are available to all who want

10. Action for Children's Television v. FCC, 11 F.3d 170 (D.C. Cir. 1993).

them, at a cost all can afford. The press has smirked that such parental control devices "take the fun out of being a kid." But television would be a lot less fun for children and adults alike if every show with a shred of controversy were forced off the air by those who want to "clean up" television.

To sum up, there are a number of ways to deal with the violence in our neighborhoods, with children killing children in kindergarten, without banning television speech.

1. Congress should pass a really strong gun-control bill. Use the national focus on violence to get guns off our streets and out of the hands of children and teenagers.

2. Congress should enact legislation to fully fund day care. Young children do not watch television violence during quality child care.

3. Congress should increase funding for Public Broadcasting System ("PBS") children's programming. Public broadcasting provides access to innovative, age-specific, cost-effective educational alternatives to television violence. With its willingness to tackle hard-to-handle topics and make them understandable to children, PBS has made television learning in school and at home a high adventure.

4. Parents should turn off what is terrible and turn on what is terrific. Although some adults may wish the government would get rid of shows deemed too violent for children to see, that would be unacceptable, unconstitutional censorship. Parents who help children make informed television choices should check out imaginative alternatives available in home video.

5. Educators should teach children how television works. Young viewers can learn to analyze story lines, listen for bias, create non-violent solutions to conflict situations, discover who controls decision-making and produce their own videos.

6. Communities should organize to improve television service to children in their area. Citizens should use the requirements of the children's television legislation to remind local stations that kids are entitled to the kind of choices available in a good children's library.

7. Commercial broadcasters and cablecasters should stop promoting violent programs and movies when children are likely to be watching. Keep violent promotions and advertising off of sports programs, children's shows and situation comedies that attract young children.

8. Congress should enforce the Children's Television Act. They should make sure the Federal Communication Commission specifies minimum station service of one hour per day of regularly scheduled

children's programming specifically designed to educate.

9. Commercial broadcasters should stop undermining the Children's Television Act. The new law states that each station must carry enough educational children's programming to justify its license.¹¹ Giving children something wonderful to turn on is the better alternative to just warning parents what to turn off.

If new rules and FCC guidelines are not enough to guarantee television industry compliance with the Congressional mandate to serve children, I propose an alternative solution: The FCC should initiate the necessary steps to relieve broadcasters of their public service obligation to children and instead charge the industry a small percentage of its revenues. That money should then be allocated to the Public Broadcasting System to add money used for programs specifically designed to educate children. Fortunately PBS knows precisely what that mandate means. I believe a reasonable amount would be one hundred million dollars annually, which is less than one percent of revenues of the television broadcast industry.

As former United States Supreme Court Chief Justice Warren Burger has written:

A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot.¹²

It is obvious that commercial station service to young audiences is still capricious at best. The good news is that the Clinton Administration has put the health and education at the center of its concerns. I believe that broadcasters will get the message they need to hear from this administration's FCC.

11. 47 U.S.C. § 303a (1990).

12. *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1003 (1966) (Chief Justice Burger was then a Judge on the United States Court of Appeals for the D.C. Circuit).

The New York Times

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May 10, 2004

Eye on F.C.C., TV and Radio Watch Words

By JACQUES STEINBERG

The reverberations from this year's fiasco of a Super Bowl half-time show are reaching every corner of the broadcasting world, and not even the viewers of "Masterpiece Theater" are immune.

The producers of "Masterpiece Theater," intent on staying in the good graces of a Federal Communications Commission increasingly vigilant for instances of indecency, took a step last month they never had before. They chose not to make available to PBS member stations an unexpurgated version of the critically acclaimed British series "Prime Suspect," and instead sent out two edited versions: one with all of the salty language edited, and another with only some of the possibly offending words excised.

Taking similar cues from regulators, an Indianapolis radio station pre-empted words like "urinate," "damn" and "orgy" from going out over the air during a recent broadcast of Rush Limbaugh's talk show.

And classic rock radio stations have felt compelled to prune their playlists, striking songs like Elton John's "The Bitch Is Back" and "Bitch" by the Rolling Stones.

Television and radio broadcasters say they have little choice but to practice a form of self-censorship, swinging the pendulum of what they consider acceptable in the direction of extreme caution. A series of recent decisions by the F.C.C., as well as bills passed in Congress, have put them on notice that even the unintentional broadcast of something that could be considered indecent or obscene could result in stiffer fines or even the revocation of their licenses.

"If you're asking if there has been overcaution on the part of broadcasters today, I think the answer is yes," said Jeff Smulyan, the chairman and chief executive of Emmis Communications, which owns 16 television stations and 27 radio stations in Chicago, Los Angeles, New York and other cities. "Everyone is going to err on the side of caution. There is too much at stake. People are just not sure what the standards really are."

The uncertainty over standards, Mr. Smulyan said, has convinced station executives to hire at least two paralegals whose responsibilities will include deleting potentially offensive material on live broadcasts before those words can be heard by the audience, using technology that delays the airing of those programs by an interval of several seconds.

Among those who will be subject to that legal backstop is the Chicago radio host known as "Mancow," who mixes celebrity interviews with racier fare.

Michael J. Copps, an F.C.C. commissioner who has been one of the strongest critics of media companies, acknowledged that some broadcasters appeared to be overreacting. But, he said, "I applaud the effort at self policing."

He also disputed the notion that the commission's standards on indecency were too vague. "I think most of the things we're dealing with right now are pretty clear, from the standpoint of being indecent," he said. "There's enough stuff out there that shouldn't be on."

Still, Mr. Copps said that the broadcasters themselves could resolve any ambiguities they perceive by drafting and adopting what he described as a "voluntary code of broadcaster conduct."

James P. Steyer, founder and chief executive of Common Sense Media, a nonpartisan organization that advocates better programming aimed at children and families, said that "a few extreme, silly examples" of media companies being perhaps too cautious were far preferable to what he considers the "completely unregulated environment" of the recent past.

Complaints about indecency on the airwaves are not uncommon in election years, although they often grow fainter once the first Tuesday in November goes by.

This year, the exposure of Janet Jackson's right breast during a Super Bowl halftime show seen by tens of millions of viewers provided something of a gift to a Republican administration seeking to shore up its standing with conservatives, as well as with those who complain that media companies have grown large in recent years while facing little government scrutiny.

Two recent rulings by the F.C.C. have had a particularly chilling effect on broadcasters. Last month, the agency proposed levying nearly \$500,000 in fines on six radio stations owned by Clear Channel Communications for broadcasting a 20-minute snippet of Howard Stern's program dealing mostly with sexual talk. (Clear Channel has since stopped carrying Mr. Stern's program.)

And in March, the commission overturned an earlier ruling and found that NBC had violated decency standards by broadcasting a single vulgarity uttered by Bono, the lead singer of U2, during the Golden Globes in 2003.

Meanwhile, the House passed a bill in March that would increase fines on transgressing broadcasters to \$500,000 a violation, up to a maximum of \$3 million, from \$27,500 a violation.

In a petition filed last week with the F.C.C. protesting the Bono decision, PBS and its stations argued that the process of determining what might run afoul of the F.C.C. was both costly and time-consuming.

For example, on an internal Web site used by PBS executives, a station manager posed the question last month of whether WGBH, the public television station in Boston, should edit an episode of "Antiques Road Show." The station manager was worried about displaying a photograph of a nude celebrity — in this case, Marilyn Monroe, as depicted a half-century ago. It was only after reviewing and debating the footage that the show decided to let the image remain.

But in the case of "Prime Suspect," the mystery series with Helen Mirren on PBS, the producers of "Masterpiece Theater" believed that more extreme action was warranted.

In the past, "Masterpiece Theater" has occasionally sent stations two versions of an episode — one as it appeared on British television, and another that deleted a particularly strong expletive, said Rebecca Eaton, executive producer of "Masterpiece Theater."

But in response to the recent commission rulings, Ms. Eaton said, the producers decided to create a version of last month's episode that was more heavily edited for profanity than any in the past, as well as a version that received some lighter editing.

In a petition filed last month with the F.C.C., a group representing other media organizations objected to a portion of the Bono decision in which the commission said it would now consider any use of the vulgarity in question to have a sexual connotation, regardless of the context. (Bono used that graphic expletive as an adjective in accepting an award.) That directive, the petitioners wrote, had sent radio stations scurrying to remove or edit songs with profanities that involve "neither sexual nor excretory references."

A similar scouring has been going on at WABC Radio in New York, home to a stable of politically conservative talk-show hosts — including Mr. Limbaugh and Sean Hannity. Phil Boyce, the station's program director, recently posted a sign on the control room door that urged his technicians not to resist the urge to press the so-called "dump" button, in which a host's words are pre-empted on tape delay before the audience ever hears them.

"You will never be criticized for dumping something that may not have needed to be dumped. But God forbid we miss one and let it slip up," Mr. Boyce wrote.

Last week, a WABC technician heeding that warning used the "dump" button to prevent the word "parachute" from being heard. The technician did so because a host had tripped over the second half of the word in a way that made it sound as if he had stepped in something offensive, Mr. Boyce said.

A similarly vigilant technician had his finger on the "dump" button at WIBC-AM, an Emmis station in Indianapolis, during its broadcast of Mr. Limbaugh's syndicated program on March 3 — one day after Emmis informed its employees that the broadcast of material it deemed offensive could result in their suspension or firing.

In an e-mail message to the station's program director, the assistant program director wrote that the delay was used 11 times that day for Mr. Limbaugh's program. "I can only guess we are erring on the side of safety given that I don't know of any instance a licensee has ever been fined or cited for airing Rush unedited," the assistant program director wrote, "but we'll continue to do these cuts until we're directed otherwise."

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*Peggy Charren**

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5. Joe Flint, *Study slams broadcasters' kid act compliance*, BROADCASTING, Oct. 5, 1992, at 40; *TV broadcasters hit on children's TV programming*, COMMUNICATIONS DAILY, Sept. 30, 1992, at 2.

sick," *Time Magazine* responded, "Not necessarily. Regulators in the Reagan administration once tried to cut funds for school lunch programs by classifying catsup as a vegetable."⁶

It does seem abundantly clear that almost everyone in the commercial television business is still trying to figure out how to benefit from children, instead of how to be beneficial to children. This approach is particularly offensive given the following facts: in the United States, one in four of television's youngest viewers is poor, one in five is at risk of becoming a teenage parent, and one in seven is likely to drop out of school.⁷ Fifty percent of the children born this year will live in a single-parent family before reaching the age of eighteen.⁸ And fifty percent of the women who work full time—20 million mothers—have children under six years old.⁹

Instead of focusing on ways to evade the public interest requirements, I believe communications lawyers should urge their clients to fulfill the spirit as well as the letter of the law. Everyone understands that along with its obligations, public trusteeship confers important advantages—advantages that have consistently prompted broadcasters to reject the spectrum usage fee and to come out on the side of the trusteeship model. The issue that vexes those of us concerned with television choices is that broadcasters are not behaving like trustees when it comes to kids. Adults get much better service than young audiences do.

During the 1960s and 1970s, the FCC played a significant role in getting broadcasters to provide choices for children. Through the decade of the 1980s, however, we had to listen to the drip, drip, drip of the Reagan/Bush trickle down theory of communications: What is good for the industry is good for children! That irresponsible doctrine helped to turn commercial television programming for young audiences into thirty minute commercials that make a mockery out of the legal obligation of stations to serve the public interest.

The response of CBS is typical of what happened to kids' shows across the country, and taught me one of the most important lessons in twenty five years of trying to bring more choices to children's television: When Washington talks, broadcasters listen. During the

6. *School of Hard Knocks*; Some stations have pretty liberal definitions of educational television, *TIME*, Oct. 12, 1992, at 29.

7. CHILDREN'S DEFENSE FUND, *THE STATE OF AMERICA'S CHILDREN* (1993).

8. *Id.*

9. *Id.*

1970s, CBS, in response to FCC concern, hired twenty people in its news department to produce informational programs for young audiences: *In the News*, *Thirty Minutes*, *What's an Election All About*, *What's Congress All About*, as well as other specials about government followed. This was in addition to the network's *Children's Film Festival* on Saturday mornings, an hour-long show featuring children's films from around the world, and *Captain Kangaroo* which aired Monday through Friday. As soon as deregulation became the order of the day, CBS got rid of the twenty news people and canceled all these quality educational programs. In comments to the now more broadcaster friendly FCC, CBS described one of its children's shows as a program which deals with recognizable young human beings in basic situations rather than the way out world of the traditional animated cartoon. What a strange way to describe one episode I saw that dealt with the capture of a frozen caveman who later chases the main character's friends, each trying to capture the other until the caveman falls into a giant clam and is discovered to be a professor intent on stealing another scientist's invention.

Television cannot solve all of the problems of growing up poor and unskilled in America. It can certainly do its part, however, to motivate kids to learn and it can teach them a great deal about how the world works and how to participate in a democratic society. Each year, public broadcasting puts a big chunk of its meager resources into this kind of service to children. And each year, especially since 1980, broadcasters resist every attempt to get them to do likewise.

I think there is a question here that transcends the legalistic game-playing that is the focus of discussions about television's role with respect to the effects of television violence on children. It goes beyond issues about the costs broadcasters would rather not incur for programs that may win awards but may not win advertisers. The question is: "Who really cares if a generation of kids is not adequately prepared to function as effective adults?" I will remind you who cares. For starters, the CEOs of every major industrial corporation, most of whom are panicked that they cannot find workers who can read manuals, compute basic mathematical calculations or assess electronic diagrams—and right behind them are all the other people who run the country. They care that the nation might be brought to a standstill by growing population of untrained job applicants who will never be able to earn a decent salary, uninformed voters who will not be able to make sensible political decisions, and uneducated parents who will not be able to do right by their children.

Even as I talk about the need for more terrific programming for kids, I see myself as an ally of broadcasters in fiercely protecting their right to freedom of editorial speech. Action for Children's Television was the lead plaintiff in the indecency case decided recently by the U.S. Court of Appeals.¹⁰ We were on the side of the dirty words! Not only am I against the idea that television should be cleansed of "bad" programs, I do not believe concerned parents must get rid of the television set. I like television! But I believe the television industry and families have to take more seriously the challenge of managing it properly.

The violence debates usually focus on making adult television suitable for children and ignore strategies to make children's television productive for children. The problem, as our country has painfully learned in the past, is that a little censorship goes a long way—toward imposing someone else's arbitrary standards on all of us, toward removing any controversial material from the public eye, and toward erasing precious First Amendment freedoms. What is a parent to do? Even parents who strongly support the *principle* of free speech may be hard-pressed to support its *practice* when it comes to shielding young people from violence and mayhem. But if censorship is not the answer, what is?

With television, as with most issues in our children's lives, perhaps our most important role is to guide youngsters to make thoughtful choices of their own. Just as we try to teach our children the merits of good nutrition versus a diet of junk food, we can try to help them choose a "nutritious" television diet, low on "junk" and high on food for thought. We can let them know how we view violence: when we think violence is justified, when another response is more appropriate. We can point out all the disparities between violence on the screen and violence in the real world, helping them to understand that violence hurts.

For parents who decide that reasoned guidance is not enough, especially for the youngest of television watchers, there are several devices on the market that give mothers and fathers the option of blocking out programming they deem unsuitable. These devices range from key-operated safety locks that keep the television set off entirely to programmable units that can be set to block selected channels. The next step is to ensure that these options are available to all who want

10. Action for Children's Television v. FCC, 11 F.3d 170 (D.C. Cir. 1993).

them, at a cost all can afford. The press has smirked that such parental control devices "take the fun out of being a kid." But television would be a lot less fun for children and adults alike if every show with a shred of controversy were forced off the air by those who want to "clean up" television.

To sum up, there are a number of ways to deal with the violence in our neighborhoods, with children killing children in kindergarten, without banning television speech.

1. Congress should pass a really strong gun-control bill. Use the national focus on violence to get guns off our streets and out of the hands of children and teenagers.

2. Congress should enact legislation to fully fund day care. Young children do not watch television violence during quality child care.

3. Congress should increase funding for Public Broadcasting System ("PBS") children's programming. Public broadcasting provides access to innovative, age-specific, cost-effective educational alternatives to television violence. With its willingness to tackle hard-to-handle topics and make them understandable to children, PBS has made television learning in school and at home a high adventure.

4. Parents should turn off what is terrible and turn on what is terrific. Although some adults may wish the government would get rid of shows deemed too violent for children to see, that would be unacceptable, unconstitutional censorship. Parents who help children make informed television choices should check out imaginative alternatives available in home video.

5. Educators should teach children how television works. Young viewers can learn to analyze story lines, listen for bias, create non-violent solutions to conflict situations, discover who controls decision-making and produce their own videos.

6. Communities should organize to improve television service to children in their area. Citizens should use the requirements of the children's television legislation to remind local stations that kids are entitled to the kind of choices available in a good children's library.

7. Commercial broadcasters and cablecasters should stop promoting violent programs and movies when children are likely to be watching. Keep violent promotions and advertising off of sports programs, children's shows and situation comedies that attract young children.

8. Congress should enforce the Children's Television Act. They should make sure the Federal Communication Commission specifies minimum station service of one hour per day of regularly scheduled

children's programming specifically designed to educate.

9. Commercial broadcasters should stop undermining the Children's Television Act. The new law states that each station must carry enough educational children's programming to justify its license.¹¹ Giving children something wonderful to turn on is the better alternative to just warning parents what to turn off.

If new rules and FCC guidelines are not enough to guarantee television industry compliance with the Congressional mandate to serve children, I propose an alternative solution: The FCC should initiate the necessary steps to relieve broadcasters of their public service obligation to children and instead charge the industry a small percentage of its revenues. That money should then be allocated to the Public Broadcasting System to add money used for programs specifically designed to educate children. Fortunately PBS knows precisely what that mandate means. I believe a reasonable amount would be one hundred million dollars annually, which is less than one percent of revenues of the television broadcast industry.

As former United States Supreme Court Chief Justice Warren Burger has written:

A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot.¹²

It is obvious that commercial station service to young audiences is still capricious at best. The good news is that the Clinton Administration has put the health and education at the center of its concerns. I believe that broadcasters will get the message they need to hear from this administration's FCC.

11. 47 U.S.C. § 305a (1990).

12. *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1003 (1966) (Chief Justice Burger was then a Judge on the United States Court of Appeals for the D.C. Circuit).



May 10, 2004

Eye on F.C.C., TV and Radio Watch Words

By JACQUES STEINBERG

The reverberations from this year's fiasco of a Super Bowl half-time show are reaching every corner of the broadcasting world, and not even the viewers of "Masterpiece Theater" are immune.

The producers of "Masterpiece Theater," intent on staying in the good graces of a Federal Communications Commission increasingly vigilant for instances of indecency, took a step last month they never had before. They chose not to make available to PBS member stations an unexpurgated version of the critically acclaimed British series "Prime Suspect," and instead sent out two edited versions: one with all of the salty language edited, and another with only some of the possibly offending words excised.

Taking similar cues from regulators, an Indianapolis radio station pre-empted words like "urinate," "damn" and "orgy" from going out over the air during a recent broadcast of Rush Limbaugh's talk show.

And classic rock radio stations have felt compelled to prune their playlists, striking songs like Elton John's "The Bitch Is Back" and "Bitch" by the Rolling Stones.

Television and radio broadcasters say they have little choice but to practice a form of self-censorship, swinging the pendulum of what they consider acceptable in the direction of extreme caution. A series of recent decisions by the F.C.C., as well as bills passed in Congress, have put them on notice that even the unintentional broadcast of something that could be considered indecent or obscene could result in stiffer fines or even the revocation of their licenses.

"If you're asking if there has been overcaution on the part of broadcasters today, I think the answer is yes," said Jeff Smulyan, the chairman and chief executive of Emmis Communications, which owns 16 television stations and 27 radio stations in Chicago, Los Angeles, New York and other cities. "Everyone is going to err on the side of caution. There is too much at stake. People are just not sure what the standards really are."

The uncertainty over standards, Mr. Smulyan said, has convinced station executives to hire at least two paralegals whose responsibilities will include deleting potentially offensive material on live broadcasts before those words can be heard by the audience, using technology that delays the airing of those programs by an interval of several seconds.

Among those who will be subject to that legal backstop is the Chicago radio host known as "Mancow," who mixes celebrity interviews with racier fare.

Michael J. Copps, an F.C.C. commissioner who has been one of the strongest critics of media companies, acknowledged that some broadcasters appeared to be overreacting. But, he said, "I applaud the effort at self policing."

He also disputed the notion that the commission's standards on indecency were too vague. "I think most of the things we're dealing with right now are pretty clear, from the standpoint of being indecent," he said. "There's enough stuff out there that shouldn't be on."

Still, Mr. Copps said that the broadcasters themselves could resolve any ambiguities they perceive by drafting and adopting what he described as a "voluntary code of broadcaster conduct."

James P. Steyer, founder and chief executive of Common Sense Media, a nonpartisan organization that advocates better programming aimed at children and families, said that "a few extreme, silly examples" of media companies being perhaps too cautious were far preferable to what he considers the "completely unregulated environment" of the recent past.

Complaints about indecency on the airwaves are not uncommon in election years, although they often grow fainter once the first Tuesday in November goes by.

This year, the exposure of Janet Jackson's right breast during a Super Bowl halftime show seen by tens of millions of viewers provided something of a gift to a Republican administration seeking to shore up its standing with conservatives, as well as with those who complain that media companies have grown large in recent years while facing little government scrutiny.

Two recent rulings by the F.C.C. have had a particularly chilling effect on broadcasters. Last month, the agency proposed levying nearly \$500,000 in fines on six radio stations owned by Clear Channel Communications for broadcasting a 20-minute snippet of Howard Stern's program dealing mostly with sexual talk. (Clear Channel has since stopped carrying Mr. Stern's program.)

And in March, the commission overturned an earlier ruling and found that NBC had violated decency standards by broadcasting a single vulgarity uttered by Bono, the lead singer of U2, during the Golden Globes in 2003.

Meanwhile, the House passed a bill in March that would increase fines on transgressing broadcasters to \$500,000 a violation, up to a maximum of \$3 million, from \$27,500 a violation.

In a petition filed last week with the F.C.C. protesting the Bono decision, PBS and its stations argued that the process of determining what might run afoul of the F.C.C. was both costly and time-consuming.

For example, on an internal Web site used by PBS executives, a station manager posed the question last month of whether WGBH, the public television station in Boston, should edit an episode of "Antiques Road Show." The station manager was worried about displaying a photograph of a nude celebrity — in this case, Marilyn Monroe, as depicted a half-century ago. It was only after reviewing and debating the footage that the show decided to let the image remain.

But in the case of "Prime Suspect," the mystery series with Helen Mirren on PBS, the producers of "Masterpiece Theater" believed that more extreme action was warranted.

In the past, "Masterpiece Theater" has occasionally sent stations two versions of an episode — one as it appeared on British television, and another that deleted a particularly strong expletive, said Rebecca Eaton, executive producer of "Masterpiece Theater."

But in response to the recent commission rulings, Ms. Eaton said, the producers decided to create a version of last month's episode that was more heavily edited for profanity than any in the past, as well as a version that received some lighter editing.

In a petition filed last month with the F.C.C., a group representing other media organizations objected to a portion of the Bono decision in which the commission said it would now consider any use of the vulgarity in question to have a sexual connotation, regardless of the context. (Bono used that graphic expletive as an adjective in accepting an award.) That directive, the petitioners wrote, had sent radio stations scurrying to remove or edit songs with profanities that involve "neither sexual nor excretory references."

A similar scouring has been going on at WABC Radio in New York, home to a stable of politically conservative talk-show hosts — including Mr. Limbaugh and Sean Hannity. Phil Boyce, the station's program director, recently posted a sign on the control room door that urged his technicians not to resist the urge to press the so-called "dump" button, in which a host's words are pre-empted on tape delay before the audience ever hears them.

"You will never be criticized for dumping something that may not have needed to be dumped. But God forbid we miss one and let it slip up," Mr. Boyce wrote.

Last week, a WABC technician heeding that warning used the "dump" button to prevent the word "parachute" from being heard. The technician did so because a host had tripped over the second half of the word in a way that made it sound as if he had stepped in something offensive, Mr. Boyce said.

A similarly vigilant technician had his finger on the "dump" button at WIBC-AM, an Emmis station in Indianapolis, during its broadcast of Mr. Limbaugh's syndicated program on March 3 — one day after Emmis informed its employees that the broadcast of material it deemed offensive could result in their suspension or firing.

In an e-mail message to the station's program director, the assistant program director wrote that the delay was used 11 times that day for Mr. Limbaugh's program. "I can only guess we are erring on the side of safety given that I don't know of any instance a licensee has ever been fined or cited for airing Rush unedited," the assistant program director wrote, "but we'll continue to do these cuts until we're directed otherwise."