



June 25, 2007

The Honorable Daniel K. Inouye
Chairman
Commerce, Science and Transportation Committee
United States Senate
508 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Inouye:

The American Advertising Federation, the American Association of Advertising Agencies, and the Association of National Advertisers, Inc. are writing to express our deep concern about and opposition to sweeping proposals to extend the FCC's authority to regulate broadcast indecency to include depictions of violence. Among other things, we believe that neither the FCC nor Congress have begun even to address the many difficult policy and constitutional issues that would necessarily attend such a vast expansion of the Commission's authority over programming content. A thorough review of the evidence and growing body of case law demonstrates conclusively that the First Amendment problems of such a radical change in the law would be insurmountable.

On April 25, the Federal Communications Commission issued its long-awaited report entitled *Violent Television Programming And Its Impact of Children*, __ FCC Rcd. ___, FCC 07-50 (rel. April 25, 2007). The FCC stated that, "[g]iven the findings in this *Report*, we believe action should be taken to address violent programming," and that Congress could craft rules to regulate "excessively violent" television programming consistent with judicial precedent. The FCC, however, did not attempt to define what it meant by "violent programming," as it promised to do. Instead, it merely acknowledged that "developing a definition would be challenging" and concluded only that "we believe Congress could do so." The Commission's admission that the task is "challenging" is a vast understatement, and its *Report* provides no basis for believing that Congress could do what the agency evidently could not. However, all existing precedent demonstrates that rules regulating images of violence on television would not survive judicial scrutiny.

We believe the FCC's superficial analysis failed to provide Congress with the guidance it requested in 2004 and neglected even to answer the questions set forth in the *Notice of Inquiry*. Moreover, the *Report*, while ostensibly unanimous, did not reflect the views of a unified agency. In this regard, Commissioners Jonathan Adelstein and Robert McDowell both issued skeptical assessments of the bottom line conclusions. As

Commissioner Adelstein acknowledged, “[t]he difficult question is precisely which violent programming, if any, the government can regulate in the interest of protecting children. That question – the most challenging Congress faces – *is never answered here.*” He compared the *Report* to “a financial consultant who advises a client that he could win the lottery” in that it “discusses an optimal conclusion but does not provide a complete analysis or a sound plan.” Commissioner McDowell similarly discounted the *Report*, saying “I am disappointed that this Report does not provide more than a cursory mention of these important legal issues.” He added that “today’s parents have at their disposal more choices in parental controls and blocking technologies than ever before. Never have parents been more empowered to choose what their children should and should not watch.” With this fact in mind, Commissioner McDowell called it “unfortunate” that “this *Report* does not sufficiently brief Congress on the full range of tools available or what can be done to mobilize parents in this pursuit.”

It is a particular shortcoming of the Commission’s violence *Report* that the FCC’s ultimate analysis fails to reflect the extensive record the agency compiled in response to the *Notice of Inquiry*. The agency sought – and received – numerous comments from interested parties, yet its final *Report* did little more than restate its original questions in the form of conclusions. A reader of the FCC’s *Report* would not know, for example, that each of the FCC’s original questions prompted the submission of a great deal of data and critical analysis, and almost none of it was reflected in the final product.

Because Congress is now considering whether to embark on the dangerous and unconstitutional path of regulating images of violence, it is imperative that it be fully informed of the daunting hurdles it would need to overcome, such as the fact that no attempt to regulate programming that depicts violence has ever survived constitutional scrutiny. As the United States Court of Appeals for the Seventh Circuit has observed, “violence on television ... is protected speech” and that “[a]ny other answer leaves the government in control of all the institutions of culture, the great censor and director of which thoughts are good for us.” *American Booksellers Association, Inc. v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986). Moreover, in striking down restrictions on renting to minors videotapes that depict violence, the Eighth Circuit confirmed that violent video programming is entitled to “the highest degree of First Amendment protection.” *Video Software Dealer’s Association v. Webster*, 968 F.2d 684, 689 (1992).

Since the FCC *Report* avoided discussing these critical issues, we are forwarding along with this letter a copy of the comments submitted to the FCC on our behalf.¹ The comments were written by well-known First Amendment attorney Robert Corn-Revere of Davis Wright Tremaine LLP and include an analysis of the relevant social science

¹ A copy of the comments, including the appendix and exhibits, is attached to the original copy of this letter. The comments otherwise may be accessed online at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516732888, and the appendix and exhibits may be accessed at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516732889.

data by the noted expert Jonathan Freedman, Professor of Psychology at the University of Toronto.

The comments make a number of points, including the following:

- Any attempt by the Commission to regulate such programming would face insurmountable First Amendment hurdles. As the Tennessee Supreme Court has noted, “*every court* that has considered the issue has invalidated attempts to regulate materials solely based on violent content, regardless of whether that material is called violence, excess violence, or included within the definition of obscenity.” (See pp. 28-65 of the attached comments)
- Regulation of televised violence would impose either wholesale censorship or an incomprehensible standard. As one study reported, if all violence were eliminated, viewers would be unable to watch historical dramas like *Roots*, theatrical films like *Schindler’s List*, or a documentary on World War II. If, on the other hand, Congress or the Commission attempted to distinguish “good” depictions of violence from “bad” depictions, the resulting vague standard would impermissibly chill speech and would give the government too much discretion to curb disfavored expression. (See pp. 41-55)
- A failure to adequately define “violence” is fatal to any attempt to impose regulations in this area. What exactly is meant by the term “violent programming” bears on every aspect of the inquiry, from the amount of such programming that exists, to questions of its purported impact, and to whether the Congress or the FCC could adopt any regulations that are consistent with the First Amendment. (See pp. 1-4)
- Reports of studies and media effects from “violent programming” have been vastly misrepresented and exaggerated. Professor Freedman published an exhaustive review of all of the research on this topic and concluded that “evidence does not support the hypothesis that exposure to film or television violence causes children or adults to be aggressive.” Nor do claims of “desensitization” have any demonstrated connection to real world violence. (See pp. 5-20 & appendix)
- Actual experience with real-world aggression and violent crime provides an important reality check against claims that pictures of violence produce aggressive acts in real life. By almost any measure, we are living in a less violent society than in years

past. Violent crime rates declined about 55 percent between 1994 and 2003, and a September 2004 Justice Department report found that the crime rate is at its lowest level since it began conducting the survey in 1973.² (See pp. 21-24)

- Regulation is unnecessary where technology provides individuals with the capacity to select which programs they wish to receive or exclude. As the Commission itself has observed, the modern media marketplace has greatly evolved, and “new modes of media have transformed the landscape, providing more choice, greater flexibility, and more control than at any other time in history.” (See pp. 24-28)
- In addition to the V-chip that was implemented pursuant to the Telecommunications Act of 1996, myriad market-based technologies give television viewers a high degree of control over programming. These marketplace developments empower individuals and parents to accept or reject programming of their choice. Some types of parental controls are provided along with video service. Satellite customers have access to parental control technology, and analog cable subscribers can use their set-top boxes, or can lease or purchase a “lockbox” to lock specific channels so that the programming cannot be viewed.³ Digital cable subscribers can use their digital cable box to restrict viewing by rating, by program title, by time or date, or completely lock out certain channels or programs. Such blocking options allow parents to control programming in their homes without infringing others’ rights.⁴ (See pp. 24-28)

² Since these comments were submitted to the FCC there have been minor variations in the crime statistics, but they were insufficient to alter the trend toward reduced violence. For example, the FBI’s Uniform Crime Report indicated a 1.3 percent increase in violent crime in 2005-2006, but the amount of forcible rape declined by 1.9 percent and aggravated assault dropped by 0.7 percent. Overall, despite recent minor upward fluctuations in some categories, the FBI reported a 3.4 percent decrease in violent crime over the past five years and a 17.6 percent decrease over the past 10 years. FBI, Crime in the United States (www.fbi.gov/ucr/05cius/offenses/violent_crime/index.html).

³ The cable industry has adopted a program in which any subscriber who currently lacks the technical capability to block unwanted programming may upgrade his or her equipment without charge to incorporate parental controls.

⁴ Two thirds of parents “closely monitor” their children’s media use, according to a new study released by the Kaiser Family Foundation on June 19, 2007. KFF, PARENTS, CHILDREN & MEDIA (June 2007 at 7. While 43 percent of parents surveyed are aware that their television sets come equipped with V-chip technology, according to Kaiser, almost half of those parents (46 percent) report having used the V-chip. Significantly, of those parents who have used the V-chip, 89 percent found it to be useful in blocking shows they don’t want their children to watch (and 71 percent described it as “very useful”). In addition, the Kaiser report found that 44 percent of parents say they have used other parental controls on their televisions, such as those provided by their cable or satellite companies. It also found that the vast

Without fully addressing these critical issues, the Commission's *Report* blithely assumes that the broadcast indecency standard simply could be expanded to include programming that depicts violence. While the Commission was unable even to propose what a definition of violent depictions might include, it suggested that Congress could define which violent imagery should be considered "patently offensive to contemporary community standards" when viewed "in context." However, the *Report* did little more than present its bare conclusion that Congress could dramatically expand content regulation. The FCC, however, is wrong. No judicial precedent supports the conclusion that programs that depict violence could be regulated as the Commission now suggests.

Even if the *Report's* analysis is limited to the broadcast medium, its conclusion flies in the face of the June 4, 2007 decision by the United States Court of Appeals for the Second Circuit in *Fox Television Stations v. FCC*, ___ F.3d ___, 2007 WL 1599032 (2d Cir. June 4, 2007). Although the case was not decided on First Amendment grounds, the court devoted over nine pages to discussing the constitutional implications of any attempt to expand the definition of indecency beyond its original narrow construction. The court explained that "[w]e can understand why the Networks argue that FCC's 'patently offensive as measured by contemporary community standards' indecency test coupled with its 'artistic necessity' exception fails to provide the clarity required by the Constitution, creates an undue chilling effect on free speech, and requires broadcasters to 'steer far wider of the unlawful zone.'" *Id.* at *15 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). Citing the Supreme Court's decision in *Reno v. ACLU*, the Court said: "we are hard pressed to imagine a regime that is more vague than one that relies entirely on consideration of the otherwise unspecified 'context' of . . . broadcast indecency." *Id.* at *15. The Commission's unsupported assumption that Congress could expand the scope of the indecency rule to depictions of violence considered to be "patently offensive" in context is flatly inconsistent with the court's constitutional analysis.

Our three associations, representing a broad spectrum of the advertising community, strongly believe that the Committee should reject outright the FCC's invitation that it participate in this radical and unconstitutional effort to expand the regulation of programming content.

majority of parents who have used any of the media ratings find them useful. Importantly, the Kaiser report found that most parents are confident that they already do enough to monitor their children's media use.

Sincerely,

Daniel L. Jaffe
Executive Vice President
Association of National Advertisers
1120 20th Street, NW, Suite 520-S
Washington, DC 20036
(202) 296-1883
djaffe@ana.net

Richard F. O'Brien
Executive Vice President
American Association of Advertising Agencies
1203 19th Street, NW, Fourth Floor
Washington, DC 20036
(202) 331-7345
dobrien@aaaadc.org

Jeffrey L. Perlman
Executive Vice President
American Advertising Federation
1101 Vermont Avenue, NW, Suite 500
Washington, DC 20005
(202) 898-0089
jperlman@aaf.org

The Association of National Advertisers leads the marketing community by providing its members insights, collaboration and advocacy. ANA's membership includes 355 companies with 8500 brands that collectively spend over \$100 billion in marketing communications and advertising. The ANA strives to communicate marketing best practices, lead industry initiatives, influence industry practices, manage industry affairs and advance, promote and protect all advertisers and marketers. For more information, visit www.ana.net.

The American Association of Advertising Agencies (AAAA), founded in 1917, is the national trade association representing the American advertising agency business. Its nearly 500 members, comprised of large multi-national agencies and hundreds of small and mid-sized agencies, maintain 2,000 offices throughout the country. Together, AAAA member advertising agencies account for nearly 80 percent of all national, regional and local advertising placed by agencies in newspapers, magazines, radio and television in the United States. AAAA is dedicated to the preservation of a robust free market in the communication of commercial and noncommercial ideas. More information is available at www.aaaa.org

The American Advertising Federation (AAF), headquartered in Washington, D.C., acts as the "Unifying Voice for Advertising." The AAF is the oldest national advertising trade association, representing 50,000 professionals in the advertising industry. The AAF has a national network of 200 ad clubs located in ad communities across the country. Through its 215 college chapters, the AAF provides 6,500 advertising students with real-world case studies and recruitment connections to corporate America. The AAF also has 130 blue-chip corporate members that are advertisers, agencies and media companies, comprising the nation's leading brands and corporations. For more information, visit the AAF's Web site at www.aaf.org