Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	
FCC Seeks Comment on Adopting	)	GN Docket No. 13-86
Egregious Cases Policy	)	
	)	

COMMENTS OF THE WRITERS GUILD OF AMERICA, WEST, INC.

Emily Sokolski
Research Analyst

June 19, 2013

Writers Guild of America, West, Inc.
7000 West Third Street
Los Angeles, CA 90048
(323) 782-4660

Introduction

Writers Guild of America, West, Inc. (WGAW) is pleased to submit the following comments in response to the Federal Communication Commission's (FCC) Public Notice, "FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More Than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy," released on March 28, 2013, GN Docket No. 13-86.

WGAW is a labor organization representing more than 8,000 professional writers working in film, television and new media, including news and documentaries. Virtually all of the entertainment programming and a significant portion of news programming seen on television and in film are written by WGAW members and the members of our affiliate, Writers Guild of America, East (jointly, "WGA"). Increasingly, video programming produced for initial distribution over the Internet is also written by WGA members.

The broadcast of indecent, obscene and profane content was first prohibited in the Radio Act of 1927. The rule was incorporated into the Communications Act of 1934 and the U.S. Code in 1948.[1] Despite these early prohibitions, the Commission did not articulate a definition of indecency until 1970, when station WUHY in Philadelphia aired an expletive-laced interview with Jerry Garcia.[2] In 1978, the Supreme Court upheld the Commission's authority over indecent content in *Pacifica v. FCC* on the basis that broadcast was an exceptional medium that was "uniquely pervasive" and "uniquely accessible to children."[3] The difference between the broadcast medium and a book, as the Commission held in *WUHY* (1970), or a subscription television service, *Harriscope* (1988), was that the individual makes an express decision in

[1] 18 U.S.C. §1464.
[2] WUHY-FM, E. Educ. Radio, Philadelphia, Notice of Apparent Liability, 24 FCC 2d 408 (1970).
[3] *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978).

exploring those mediums by purchasing a book or subscribing to cable. [4] Since consumers did not have to pay to access broadcast television or radio, the rationale for regulation was that such content flows almost unbidden into the home, violating an individual's right to privacy.

Video distribution has changed radically since 1978. Today 90% of television households watch television through a multichannel video programming distributor (MVPD) rather than through an over-the-air broadcast signal.[5] Descriptive ratings and blocking technologies have allowed parents to become informed gatekeepers who can restrict access to or avoid content they find inappropriate. More than 51 million households can now time-shift television content with a digital video recorder (DVR), making regulations based on set hours of the day a relic of a different era.[6] Given these changes and the rise of alternative forms of video programming that are not subject to the same regulations, we believe the Commission should consider phasing out application of indecency regulations, particularly to programming broadcast during primetime hours. Absent such action, the Commission must provide clear guidelines on what constitutes indecent material. We believe the Commission should state that use of nonsexual nudity is not indecent. We also believe that the use of expletives in a non-excretory context should not be considered indecent. The Commission should indicate whether there continues to be a presumptive ban on the use of certain words.

Clarification is necessary because inconsistent rulings on indecency complaints have created uncertainty for broadcasters. Fear of violating this nebulous and changing standard has

---

[4] Harriscope of Chicago, Inc., Memorandum Opinion and Order, 3 FCC Rcd 757, 760 n.2 (1988).
[5] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 14th Report, MB Docket 07-269 (rel. July 20, 2011) at ¶210-211. 2011 data, broadcast only homes were 9.6% of television households.
[6] Nielsen, "The Cross-Platform Report: Q1 2013," June 2013, p. 14, available at http://www.nielsen.com/us/en/reports/2013/the-cross-platform-report--a-look-across-screens.html.

discouraged networks and their affiliates from airing culturally significant material that may have mature themes. This has a detrimental impact on WGAW members, who create television programming. A clearly defined policy will help broadcasters make content decisions without fear of violating the law.

Changes in Television Distribution Challenge the Need for Regulation

The Supreme Court has long held that indecent speech is protected by the First Amendment. In *Cohen v. California* (1971), the Court upheld the notion that offensive speech can have expressive value. Justice Harlan, writing for the majority, famously commented that "one man's vulgarity is another's lyric." Significantly, the Court placed the burden of offense on the audience and not on the speaker, ruling that it was the prerogative of those offended to avert their eyes. However, broadcast television has been treated differently.[7] In 1978, 7 years after *Cohen*, the Court ruled in *Pacifica* that "indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of their own home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[8] The Court held that broadcast was a "uniquely pervasive" format that was "uniquely accessible to children" and that government regulation was necessary to limit the reach of questionable content in the home.

The pervasiveness of broadcast television was certainly true in 1978 when 87% of television households relied on over-the-air broadcasts and only 13% (9.4 million) of television households subscribed to cable.[9] However, the technological advances that have occurred in the

[7] *Cohen v. California*, 403 U.S. 15 (1971)
[8] *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978).
[9] National Cable & Telecommunications Association, Industry Data, http://www.ncta.com/industry-data

34 years since *Pacifica* have radically altered the television landscape. Satellite, wireline and online video distributors have fragmented over-the-air audiences. Significantly, only 9.6% of television households (10.97 million) in 2011 were broadcast only.[10] The means of access has a bearing on the rationale for indecency regulation. In *Harriscope*, the Commission declined to extend indecency regulations to subscription television systems. The Commission noted that by virtue of subscribing, consumers invite that content into their home. While broadcast networks may continue to draw large primetime audiences, 90% of television households are accessing that content through an MVPD. Thus, the distinction between broadcast and cable for the purposes of indecency regulation is largely artificial. In addition, the majority of viewers now watch cable programming, with roughly 60% of adults aged 18 to 49 watching primetime programming offered by cable networks instead of broadcast television.[11] It is no longer the case that the reach of broadcast is unique to the television medium.

The Telecommunications Act of 1996 mandated additional changes that have given parents more control over the content their children watch. Descriptive content ratings and the V-chip allow parents to filter out programs they find inappropriate. With these tools, consumers can easily opt out of being confronted by indecent content. The development of such individual control over content suggests that overbroad regulations restricting indecent content may be unnecessary, particularly during primetime hours. To ensure the continued protection of children, the Commission could maintain indecency regulations for content aired during daytime hours while lifting the restriction on primetime programming, beginning at 7:00 pm. WGAW is not advocating for gratuitously salacious forms of expression, but we do believe that mature themes have a place in broadcast television. If non-sexual nudity and strong language serve a storytelling

---

[10] *Supra* 4

[11] Benjamin Swinburne, "April C3 PT 18-49 Ratings," Morgan Stanley Research, May 21, 2013, p.1.

purpose then the Commission should allow broadcasters to incorporate these elements into programming aimed at adult audiences.

The Lack of Clarity on Indecency Standards has a Chilling Effect on Content

The Commission's inconsistent rulings on indecency, particularly in the last decade, have created confusion among broadcasters. This uncertainty has had a chilling effect, leading some broadcasters to edit material, broadcast such material only after 10:00 pm, or refrain from airing questionable content at all. This has a detrimental impact on creators and can stifle exploration of important issues. For example, the FCC sanctioned broadcasters in 2001 for airing a spoken word piece from performance artist Sarah Jones that addressed misogyny in hip hop music and again in 2006 for a Martin Scorsese documentary, *The Blues,* which featured occasional profanities. Both programs explored important cultural experiences but were censured for language that was an important part of expressing that experience. Leading to further confusion, the Commission reversed its ruling on Sarah Jones' performance, finding the content was not indecent, but only after Jones sued. Acting out of an abundance of caution, broadcasters may choose not to air content that has serious social and artistic merit because it includes mature elements.

In addition, indecency regulations that require subjective analysis of content may have the unintended consequence of bias.[12] Former FCC Commissioner Nicholas Johnson, who was a member of the Commission when the FCC first articulated indecency rules in *WUHY*, foresaw how subjectivity in the FCC's regulations could lead to the promotion of dominant viewpoints.

[12] Brief for Fox as Amicus Curiae, *ACLU, et al., Federal Communications Commission, et al., v. Fox Television Stations*, et al., 132 S. Ct. 2307 (2012). Amicus brief available from ACLU at http://www.aclu.org/files/assets/10-1293_bsac_american_civil_liberties_union.pdf .

Notably, in the 1970's dissenting viewpoints were often from a youth culture that felt alienated by the war and the white establishment. In his dissent to the *WUHY* case, Commissioner Johnson wrote: "What the Commission decides… is that the swear words of the lily-white middle class may be broadcast but that those of the young, the poor, or the blacks may not."[13] FCC rulings that expletives in *Saving Private Ryan* did not violate indecency regulations while expletives in *The Blues,* a documentary largely about African-American culture, were indecent suggest that this fear may have been realized.[14] Commissioner Cox, also dissenting in *WUHY*, noted that WUHY was oriented towards radicalized college students and wrote: "While I hold no brief for flooding the air with the views of members of these groups, I think it may be dangerous if we do not understand what they are trying to say—even if it sometimes involves the monotonous use of four letter words."[15] Continuing a policy of subjective analysis of indecent content is likely to limit exploration of diverse topics and experiences.

Conclusion

Given the dramatic changes in the video distribution market that have occurred since *Pacifica*, the time has come to update indecency regulations. There is an artistic and expressive role for expletives and nudity in broadcast television programming. While such content may be offensive to some, program information, ratings and blocking tools now available give individuals control over what they want to see. These advancements diminish the need for overbroad indecency regulations, which have had a chilling effect on content creators. We urge

[13] In Re WUHY-FM, E. Educ. Radio, Philadelphia, Notice of Apparent Liability, 24 FCC 2d 408 (1970), Jackson dissent.
[14] Brief for Fox as Amicus Curiae, *ACLU, et al., Federal Communications Commission, et al., v. Fox Television Stations*, et al., 132 S. Ct. 2307 (2012). Amicus brief available from ACLU at http://www.aclu.org/files/assets/10-1293_bsac_american_civil_liberties_union.pdf .
[15] *Supra* 13

the Commission to phase out application of indecency regulations in primetime hours. Absent such action, the Commission must make clear what it considers to be indecent content. We urge the Commission to state that use of nudity or expletives in a non-sexual or non-excretory context is not considered indecent.