

Remarks of Commissioner Deborah Taylor Tate
First Amendment Center, 30th Anniversary of *Pacifica*

June 26, 2008

I. Introduction

Good morning. I am so very honored to be at this inaugural event today, and perhaps it can become an annual one. Thank you, Gene, for that kind introduction. Gene and I have been talking about this event and I am glad to finally be able to participate here at the Newseum—especially since Mr. Overby, my first boss, is its “father” in many respects. This stunning, architectural structure on Pennsylvania Avenue - no matter how beautiful - pales in comparison to the principles and philosophies it embodies. Certainly it is no less than a Taj Mahal to our greatest gift to mankind—our democratic nation and the pillars upon which it is built, one of which we honor today: the First Amendment.

I am also honored to share the stage today with my good friend and colleague, the former Chairman of the FCC, Dick Wiley. He led the Commission by following his principles and his heart.

Before I begin, I want to show you a video that will perhaps put into perspective the kinds of issues the FCC considers when it comes to enforcing our indecency regulations. Throughout this day we will have an excellent intellectual, analytical

conversation about indecency—in the abstract. So I thought it might be good to begin the day with a quick set of clips compiled by Common Sense Media that show exactly what our children are watching on television. I apologize for any content which may be offensive. [VIDEO—I must provide a quick disclaimer. A portion of the material in these clips is actually from cable programming, rather than broadcast.]

II. History: *Pacifica*

I must start my remarks with a nod to the renowned comic George Carlin, whose untimely death coincided with this timely discussion of one of the most influential decisions ever handed down by the U.S. Supreme Court, a case that Mr. Carlin instigated with his “Seven Dirty Words” monologue. It is also timely given the Amicus Brief filed by the Parents Television Council just two weeks ago in the pending Supreme Court case, asking the Court to consider whether *Pacifica* is still good law, and whether 18 U.S.C. 1464 still means what it says.

FCC v. Pacifica provides the judicial foundation for the Commission’s indecency enforcement. In that case, the U.S. Supreme Court concluded that Section 326 of the Communications Act, which forbids censorship, “does not limit the Commission’s authority to impose sanctions on licensees who engage in obscene, indecent, or profane broadcasting.” It is fitting that the First Amendment Center has gathered us together today to contemplate, discuss, and debate the regulation of indecency and violence—the subject of court cases from *Pacifica* in 1978 to today’s

pending cases in the Third Circuit (regarding Janet Jackson's wardrobe malfunction) and the U.S. Supreme Court (regarding "fleeting expletives"). Because these latter cases are currently before the courts, I will not comment further on their merits, but look forward to hearing from this esteemed group and the Courts.

a. Safe Harbor

The Commission's approach regarding the regulation of indecent material has been, and continues to be, a measured one in my estimation-- one that balances the protection of the First Amendment, with the protection of our nation's most valuable natural resource-- our children. The Supreme Court has repeatedly held that the government may regulate speech in order to promote a "compelling government interest," if it chooses the "least restrictive means" available. In furtherance of establishing the "least restrictive means," the Commission has established a "safe harbor" from 10 pm - 6 am – in accordance with the directive of the DC Circuit Court.

b. Not Censorship

On the front page of the First Amendment Center's website is a quote by Justice Clarence Thomas, which is quite appropriate, "A theory deeply etched in our law [is that] a free society prefers to punish the few who abuse the rights of free speech after they break the law -- rather than to throttle them and all others beforehand."

The Supreme Court in *Pacifica* emphasized this same ideal, holding, "The prohibition against censorship unequivocally denies the Commission any power to edit

proposed broadcasts in advance . . . The prohibition, however, has never been construed to deny the Commission the power to review the content of completed broadcasts in the performance of its regulatory duties.” The FCC’s regulation of broadcast indecency is consistent with the First Amendment’s guarantee of Free Speech and the Communication Act’s prohibition on broadcast censorship – rather than screening broadcasts in advance, and handing out “Get Out of Jail Free” cards, or engaging in witch-hunts for indecent material, the Commission reviews complaints, based on actual broadcasts, from the public— American citizens. Complaints are regularly filed online at www.fcc.gov. We received over 500,000 regarding the Janet Jackson Super Bowl incident alone.

Everyone in this audience is well aware that the role of the FCC is not to act as a censor; in fact, the Commission is statutorily barred from doing so. Yet the Commission’s legal authority to sanction broadcasters that air indecent material is firmly settled. It was further strengthened recently by Congress in 2006 with the passage of the Broadcast Decency Enforcement Act which raised the maximum fines from \$32,500 per incident to \$325,000 per incident—a tenfold increase. Congress clearly believed it was time to take action and not only send a message, but put some teeth into it.

II. Violence

In addition to decency, many have suggested the Commission should also regulate excessively violent programming. Indeed, over the last ten years, the depiction of violent acts on television has increased 45% during the 8 pm hour, 92% at 9 pm and an astounding 167% at 10 pm. Just last year, at Congress's request, the FCC issued a report on violence and its effects on children, which found that "exposure to violent programming may desensitize the child's innate negative emotional response to violence, thus making aggressive acts easier to commit or tolerate." And if you don't agree with the FCC's Report, just ask parents. Eighty-one percent believe violence on television contributes to violent behavior in children.

Even Judge Edwards of the D.C. Circuit, who actually disagreed with the FCC's indecency regulations because he saw no evidence of harm to children, said, "There is significant evidence suggesting a causal connection between viewing violence on television and antisocial violent behavior," and referenced several studies by renowned psychologists. There have actually been over a 1,000 studies on this subject, according to an article in yesterday's *Chicago Tribune*.

However, the bottom line is, *until* Congress acts, the Commission will not go down this road. I will continue to encourage broadcasters to self-solve these problems by voluntarily reducing the amount of violence, as well as the level of indecency, increase the presence and accessibility of ratings, and provide more parental tools. If

the industry response is parental tools, then those tools, for instance, content ratings, must be understandable if parents are to be able to rely on them.

IV. Market Demands Wholesome Programming

The market continues to demonstrate that there is indeed a demand for family-friendly programming. Such content is not only good for families; it is also good for the bottom line.

- Disney is one of the few NYSE stocks going up during this slowdown (June 2006: \$29/share, June 2008: \$33/share)
- The Disney Channel's High School Musical 2 was viewed by the largest cable television audience of all time - with 10 million viewers.
- The Hallmark Channel, which shows only G-rated programming, is one of the top ten cable networks nationally.
- Nickelodeon, a network dedicated solely to children's programming, had its strongest finish in several years in 2007, bringing in just under \$1 billion.
- In 2007, Nick at Nite was up 35% in total viewers, Hallmark was up 22%, Toon Disney was up 19%, and ABC Family was up 6%.

While the FCC doesn't have jurisdiction over the motion picture industry, that sector's current trends also demonstrate the increasing demand for wholesome entertainment.

- In 2007, 7 G- or PG-rated films earned \$100 million or more.
- 3 PG films made it to the top ten, while only one R rated film did.
- G-Rated movies averaged more than 438% better revenue than R-Rated.

And it's not only children watching family-friendly programs. Shows like NBC's *Deal or No Deal*, CBS's *Greatest American Dog*, and Scripps Network's Food Channel all garner large audiences comprised of viewers of all ages. I just mentioned *High School Musical 2*— over half the audience was over 14. Clearly, high-quality, family-friendly programming is not just for kids.

V. Advertisers

Beyond its popularity among families, wholesome programming is also sought by advertisers. Over \$2 billion per year is spent on ads aimed at kids. In fact, many advertisers will go out of their way to avoid having their spots run on TV shows featuring coarse language. In a recent survey, 54% of media buyers and planners said that violence in programming would raise a red flag, up from 37% last year. As a result, the family-friendly cable networks have seen a big boost in ad spending. Last year, ad spending on most family-friendly outlets outpaced the average for all cable networks. Total spending was up 26% on Nick at Nite and 32% on TV Land compared to the average 10% among all cable networks.

To ensure there is enough family friendly programming for advertisers seeking this content, Procter & Gamble led 40 advertisers in the creation of the Association of National Advertisers' Family Friendly Programming Forum. This group represents approximately 30% of all U.S. ad dollars. Among other things, this organization provides funding for family-friendly scripts and holds an annual symposium which brings together networks, writers, producers, and press. Over \$1 billion is spent on media advertising to children, mostly on television. \$4.5 billion is spent on youth-targeted programs including contests and coupons. Clearly, advertisers know that families and children influence the market and contribute to their bottom line.

VI. Level of Media Consumption

Let me briefly touch on the level of media consumption, which goes directly to the pervasiveness in our culture and homes. The statistics are not new – in general, the average American household has the television set turned on 8 hours and 11 minutes per day. Over 80% of children ages 8-18 watch television everyday; and on average, watch 4 hours per day. It is time (past time!) to take a fresh look at the content our children are consuming and the impact it is having on their lives. As the *Pacifica* court found, “the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home...” This is precisely why we regulate broadcasters but not cable operators. Subscribers “invite”

cable by purchasing programming, while broadcast television and radio come into our homes for free.

VII. Responsibility to Families

It is this “uniquely pervasive presence” that I believe requires us and the industry to consider the importance of children viewing positive, wholesome images. The vulgarity and coarseness children see and hear on our airwaves elicits more consumer complaints to the FCC than any other subject. No matter where I go, this is the number one issue critics discuss with me. Last year, the FCC received over 150,000 indecency complaints. Almost 70% of parents say they are very concerned about sex and violence on television and they support limits on content. Eighty-seven percent of parents with children under 18 years old want more programming appropriate for everyone in the family. I don’t know of another issue in America, certainly not the presidential race, healthcare, or the energy crisis, where there is that kind of overwhelming consensus. Parents have described an explosion of inappropriate content for kids, teenagers, and families – 88% report seeing a huge increase in the amount of sex and violence on television over the last five years.

VIII. Industry Efforts

Let me be clear: Parents have a responsibility to parent. Yet while they are clearly the first line of defense, that does not mean an industry which reaps \$73 billion in annual revenue from American families can sit idly by; they must help parents by

providing the tools and education necessary to assist parents in making smart decisions. While the current age-based rating system, with general content descriptors warning of violence, language, sexual situations and suggestive dialogue is a positive step, it has proven to be insufficient to protect our children. For example, I recently learned that “FV”, which I thought stood for “family viewing,” actually stands for “fantasy violence.” If someone at the FCC can make this mistake, I fear that millions of parents may as well. Surveys show that more than half of all Americans do not know their television is equipped with a V-Chip and two-thirds have never used it.

Another marketplace solution available to broadcasters who wish to protect children and families is the right to reject rule, which networks and affiliates have recently come to a more comprehensive agreement on. That rule was employed by my own local NBC affiliate in Nashville, which refused to air *The Book of Daniel*, after an outpouring of community complaints. Clearly this affiliate, and seven others, made a decision measured by “contemporary community standards.”

The industry has an important role to play in knowing and understanding the positive and negative impact they have on our children. I continue to call on the industry to implement reliable ratings, consistently and accurately. I would like to see broadcasters readopt a “family hour;” during which there is no violent, indecent, or profane content- period. Eighty-seven percent of families are asking you, the industry, to do more.

My own personal involvement in this issue goes beyond reviewing complaints or watching video clips, as I have opened a dialogue with the industry—from New York to Los Angeles, from heads of Standards and Policies divisions at major networks, to actually observing their “bleepers” on live T.V. shows, to discussions with writers, producers and advertisers. For the most part I believe those I’ve met with not only want to comply with the law, but also want to produce award-winning content to entertain, inform, humor and even inspire their audience. Perhaps we need a more structured dialogue, regarding what efforts are being undertaken, and what new technologies are being employed and how to better educate parents. On the other hand, perhaps the networks should reach out to experts to better understand current research regarding the effects of media on our children—from the 10 million children who are obese or at risk of becoming obese, to the impact of watching excessively violent programming at very young ages. I have tried to bridge the chasm between a market-driven, regulatory philosophy and the practicalities of the media business.

Like my fellow Tennessean, Alex Haley said, “Find the good and praise it.” I try not to issue a challenge without applauding those who have stepped forward. ABC offers *Extreme Makeover: Home Edition*, Fox has *American Idol*, and PBS has PBS Sprout Kids. Ion Media, based in my home state of Tennessee, has the qubo network, which developed the popular “Veggie Tales” series that provides wholesome children’s programming, and, in furtherance of its mission, has even committed not to air any ads

for unhealthy foods on its programs. There are some true leaders in this industry whose continued efforts, I believe, could assuage the need for Congressional or Commission intervention.

IX. Internet Safety

While it's not the subject of today's event, in this digital age of true cross-platform convergence, I want to mention one other related issue about which I continue to be greatly concerned – protecting our children on the internet. Recently, in *U.S. v. Williams*, the Supreme Court echoed this concern for children's safety by upholding a child pornography law. Because the media and television industry is quickly morphing into other platforms and technologies, I voice my concern for the safety of our children in the online world, where PCs, game box, blackberries, and cell phones abound—one that we have long referred to as a virtual world, when in actuality it is indeed our kids very real world, 24 hours a day, 7 days a week. With children as young as 6 being marketed to by mobile phone providers, I am taking this discussion to every industry and sector of America as well as to our international colleagues as this must be a global dialogue regarding the safety, security, and welfare of our children in this digital age.

X. Conclusion

As the *Pacifica* Court found, “broadcasting is uniquely accessible to children, even those too young to read.” Media is also the window through which other cultures see America—indeed most of our video is seen by millions around the world. Sesame

Street is now seen in 120 countries – and look at the positive impact it has had on pre-school age children globally. There are implications far beyond a debate about dirty words or court decisions. These affect our children’s minds, our own societal mores and norms, and how we are viewed by our friends and enemies around the world. So while we celebrate our freedoms, let’s remember that with those freedoms come tremendous responsibilities—ones I take very seriously.

There are many and varied ways in which we can impact public policy as it regards the health, safety, and welfare of our children, and I plan to take advantage of every opportunity-- from enforcement of current law, to market-based solutions, to advocacy, to the bully pulpit. Thank you for this platform today and for encouraging an open, honest dialogue so that we may protect what we hold most dear: our democratic principles, as well as our children. We all must take responsibility to educate, empower, inspire, and challenge them to become the next generation of leaders of the greatest nation on earth. The future of democracy depends on it.