Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Applications of Comcast Corporation,	)	MB Docket No. 10-56
General Electric Company, and NBC	)	
Universal, Inc., to Assign and Transfer	)	
Control of FCC Licenses	)	

COMMENTS OF MORALITY IN MEDIA

Comcast's Obscenity Problem

A. Introduction

In *Miller v. California*, 413 U.S 15, 23 (1973), the Supreme Court held that "obscene material is unprotected by the First Amendment" and went on to say (at 34-35):

> The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a "misuse of the great guarantees of free speech and free press"..."The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people"...*But the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter*. [Italics added]

A year later, in *Jenkins v. Georgia*, 418 U.S. 153 (1974), the Court provided guidance as to the meaning of "hardcore:" In reversing Appellant's obscenity conviction for showing the film *Carnal Knowledge* in a movie theater, the Court stated (at 160-161):

> Even though questions of appeal to the "prurient interest" or of patent offensiveness are "essentially questions of fact," it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is "patently offensive"... [W]e made it plain that under that holding no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct...

> We also took pains in *Miller* to "give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced," that is, the requirement of patent offensiveness...These examples included "representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated," and "representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals"...
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> ...Nothing in the movie falls within either of the two examples given in *Miller* of material which may constitutionally be found to meet the "patently offensive" element of those standards, nor is there anything sufficiently similar to such material to justify similar treatment. While the subject matter of the picture is, in a broader sense, sex, and there are scenes in which sexual conduct including "ultimate sexual acts" is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There is no exhibition whatever of the actors' genitals, lewd or otherwise, during these scenes. There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the *Miller* standards. Appellant's showing of the film "Carnal Knowledge" is simply not the "public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain" which we said was punishable in *Miller*.

Unlike the "R-rated" and critically acclaimed film, *Carnal Knowledge*, which aired in theatres in 1971, films shown on Comcast's pay-pornography channels (e.g., Spice:Xcess, and ClubJenna) do constitute the "public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain."

Gone even are the days when mainstream cable operators, video stores and hotels limited their selection of pornographic films to what became known as "cable version" films. "Cable version" films do not include most genital shots. It is Morality in Media's position, however, that obscenity laws can constitutionally be applied to "cable version" videos; and in 1991, a distributor of "cable version" videos pled guilty to interstate transportation of obscene videos. A News Release (available from Morality in Media) issued by the U.S. Attorney's Office for the Northern District of Florida, stated in part:

> [T]he corporation pled guilty to a shipment of 37 obscene video tapes from the corporation's office in Chicago, Illinois, to a video store in Tallahassee, Florida, on September 25, 1990. Some of the sexually explicit tapes in the shipment were what have come to be known as "cable version" videos, which are typically made at the same time as their more explicit counterparts, but are shot using different camera angles so that the "cable version" videos do not normally depict close-ups of actual penetration. "Cable

> version" videos are carried by some hotel chains and are made available on a "pay per view" basis in hotel rooms. According to the Child Exploitation and Obscenity Unit with the Department of Justice, [this] case represents the first time a defendant has been convicted on federal obscenity charges stemming in part from "cable version" videos.

As far back as the late 1990s, cable operators began showing films which depicted actual penetration of the vagina, mouth and anus. As reported in *Daily Variety* (John Dempsey, "Spice turns up porn heat, with Hot outlet," 7/15/97):

> The Spice Network – facing big revenue losses because of a federal law that in effect blocks out adult channels on cable systems from 6 a.m. to 10 p.m. – has created an even more explicit channel called Spice Hot... A test in Columbus, Ohio, showed buy rates for the channel increased dramatically when scenes depicting sexual penetration were included... One executive from a cable competitor of Spice...said Spice's new channel is "asking for trouble." A local district attorney..., the executive said, might decide to grab a few headlines by hauling Spice Hot into court on obscenity charges.

In May 2000, the Supreme Court in *U.S. v. Playboy*, 529 U.S. 803, overturned the reasonable and much needed federal law mentioned above that would have required cable TV operators to either *completely* scramble the signals for pay porn channels (so that the signals wouldn't "bleed" into TV sets of nonsubscribers) or to air the scrambled signals only from 10 p.m. to 6 a.m. A description of programming that was then bleeding uninvited into homes can be found in the Government's Brief (at p.5, n.2) in the *Playboy* case:

> A useful summary of the nature of the programming at issue in this case was provided by the marketing vice-president of Spice, which operates several sexually explicit programming services similar to those operated by appellee Playboy. He testified... regarding a document that provides "content guidelines" used for the Spice and Spice Hot Networks. According to the document...the Spice network depicts such activities as "female masturbation/external," "girl/girl sex," "oral sex/cunnilingus," "explicit language," "wide shot penis/flaccid" and "wide shot vagina"... *[P]rogramming on the even more explicit Spice Hot network depicts* "female masturbation with penetration," "male masturbation," "medium shot penis/erect," "oral sex/fellatio," "vaginal penetration/objects," "vaginal penetration/penis," and "vaginal penetration/tongue." [Italics added]

In foolishly overturning the law, however, the *Playboy* Court did not also hold that the program content was not obscene. Not that the views of individual Justices are determinative, but in his concurring opinion Justice Thomas wrote (at p. 829):

> It would seem to me that, with respect to at least some of the cable programming affected by § 505 of the Telecommunications Act of 1996, the Government has ample constitutional and statutory authority to prohibit its broadcast entirely. A governmental restriction on the distribution of obscene materials receives no First Amendment scrutiny...Though perhaps not all of the programming at issue in the case is obscene as this Court defined the term in Miller v. California..., one could fairly conclude that, under the standards applicable in many communities, some of the programming meets the *Miller* test. If this is so, the Government is empowered by statute to sanction these broadcasts with criminal penalties.

There is a false perception that because federal and state obscenity laws are not often enforced, distribution of obscenity must be legal. But it isn't. It's still a crime

There is a related false perception that obscenity laws are not enforced because these laws are for all practical purposes unenforceable. Skeptics said the same thing back in the 1980s when distribution of hardcore pornographic videos was proliferating and cable TV operators began offering "adult" channels. But under President Reagan's leadership the U.S. Justice Department "switched gears" from a see-no-evil-in-obscenity policy to an aggressive anti-obscenity enforcement program. This "switch" resulted in *many* successful obscenity prosecutions against commercial distributors of hardcore pornography, including one that distributed obscene materials via satellite TV. See, J. Crowley, "Satellite network pays fine for hardcore porn broadcasts," *Associated Press*, 11/29/90.

While the George W. Bush administration was in large measure a disappointment when it came to enforcement of federal obscenity laws, it did prove that these laws can still be successfully enforced against commercial distributors of hardcore adult pornography. For example, in June 2008, a federal District Court jury in Tampa, Florida convicted "Max

Hardcore," a California based pornographer, of 10 counts of distributing obscene materials. And, as *St. Petersburg Times* staff writer Abbie VanSickle observed in a May 31 article: "In terms of finding a conservative community sympathetic to prosecutors," Tampa was not "an obvious choice" because of the area's ties to adult entertainment.

It remains to be seen whether the Obama administration will follow in the footsteps of the see-no-evil-in-obscenity policy implemented by the Clinton administration or will build upon the limited progress made by its predecessor, but even if the Obama administration turns its back on the floodtide of obscene materials pouring into our nation's communities, homes and children's minds, obscenity laws can still be enforced successfully at the state level. For example, in 2008 a jury in Virginia found an "adult" video store and its owner guilty of violating the state obscenity law. Also in 2008, individuals connected with the operation of a pornographic website pled guilty in Florida to state RICO-obscenity charges.

There is yet another false perception that obscenity laws are not often enforced because the public doesn't want them enforced. To test the latter assumption Morality in Media commissioned Harris Interactive to ask a question about enforcement of federal obscenity laws in two different national opinion polls, with the following results:

In 2005, the question asked and overall breakdown of responses were as follows:

> The Supreme Court has held that obscene material is not protected by the First Amendment and that obscenity laws can be enforced against commercial distributors of hardcore pornography. During the past decade, hardcore pornographic videotapes and DVDs, films on pay TV channels, and Internet websites have proliferated. Soon, cell phones that combine voice with pictures will make it even easier to access hardcore pornography. Recently, the Justice Department established a task force to prosecute obscenity crimes, and the FBI recruited additional agents to investigate these crimes. Do you support or oppose this new effort to enforce federal obscenity laws?
>
> **77% Total Support**
> **19% Total Oppose**

In 2008, the question asked and overall breakdown of responses were as follows:

During the past 15 years, hardcore pornographic materials have proliferated in the form of videotapes and DVDs sold in sexually oriented and mainstream video stores, films distributed on cable, satellite and hotel TV systems, and still pictures and video disseminated on the Internet. Were the next president to do all in his or constitutional power to ensure that federal obscenity laws are enforced vigorously against commercial distributors of hardcore pornography, would you support or oppose the President in this matter? Would you be strongly (support/oppose) or just somewhat (support/oppose)?"

75% Total Support
19% Total Oppose

And finally, there is the perception that it is not the responsibility of the Federal Communications Commission to determine whether a broadcaster or cable operator has violated federal obscenity laws. Section 151 of Title 47, U.S. Code, however, states that the FCC "shall execute and enforce the provisions of this chapter," and 47 U.S.C. 559 ("Obscene programming") is still part of Chapter 5. In 1988, Congress also added a new Section 1468 to Chapter 71 of Title 18, U.S. Code, which is specifically aimed at distribution of obscene materials on cable and satellite TV. The broadcast indecency law, 18 U.S.C. 1464, is also in Chapter 71. See also, *Monroe Communications Corp. v. FCC*, 900 F.2d 351 (D.C. Cir. 1990).

Submitted on June 21, 2010 by:

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