Before the Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	MB Docket No. 04-261
Violent Television Programming	)	
And Its Impact on Children	)	

Comment on Notice of Inquiry

Dear Commissioners,

These comments are submitted on behalf of the members of The Media Coalition, Inc. in response to the Federal Communications Commission Notice of Inquiry dated July 28, 2004. Attached are three documents pertinent to our comments on the state of research about the effects of viewing television with violent content. The Media Coalition was established in 1973; its members are trade associations representing most of the book and magazine publishers, movie, recording and video game manufacturers, booksellers, librarians, and recording and video retailers in the United States.

The Notice of Inquiry seeks comment on a broad range of complex research and legal issues relating to regulating television programming with violent content. The members of the Media Coalition understand that children today are exposed to a broader range of media than ever before. We recognize the concerns of some parents that their kids may be consuming media that they feel is inappropriate. While recognizing these concerns, we think it is important to make clear that any regulation of speech based on content is immediately suspect. Generally, government regulation of speech based on its violent content is not permissible. Also, minors have a First Amendment right to see and hear all media. While we acknowledge that television may be regulated in ways that are impermissible for other media, this does not give the FCC unlimited authority to restrict content on broadcast media in a manner that would be unconstitutional in other media. Further, the legal rationale for allowing greater restrictions on speech on broadcast television does not apply to cable or satellite. The television rating system is voluntary; if it were government mandated, it likely would be unconstitutional. The use of the voluntary rating system in conjunction with the V-Chip is a less restrictive means than the "safe harbor" for preventing children from viewing certain types of material. Finally, the debate about the effect on minors of viewing or listening to depictions or descriptions of violence is anything but conclusive. Different researchers often look at the same data but reach very

different conclusions. It is clear that there is little correlation between the availability of media and actual crime statistics.

REGULATION OF SPEECH WITH VIOLENT CONTENT IS UNCONSTITUTIONAL

Speech is presumed to be protected by the First Amendment unless it falls into a few very narrow categories. As the Supreme Court stated in Free Speech Coalition v. Ashcroft: "As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity and pornography produced with children." 535 U.S.1382, 1389 (2002). The Court has never approved the restriction of speech based solely on violent content. Indeed, as shown below, federal courts consistently have rejected government attempts to do so.

Regulation of Speech with Violent Content Violates the First Amendment

The courts consistently have held that speech with violent content is protected by the First Amendment and may not be banned or restricted either for adults or minors. The case law includes a growing number of decisions striking down restrictions on violent media that were enacted based on rationales similar to those offered in the Notice of Inquiry.

- Interactive Digital Software Association v. St. Louis County, 329 F.3d 954 (8th Cir. 2003) enjoining enforcement of a county ordinance that barred the sale or rental of video games with violent content.
- American Amusement Machine Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001), cert. denied, 122 S.Ct. 462 (2001) enjoining enforcement of a city ordinance that limited minors' access to violent video games.
- Video Software Dealers Association v. Maleng, No. C03-1245L (D. Wash. July 15, 2004) barring enforcement of a state law that barred dissemination to minors of video games that included violence against "peace officers."
- Bookfriends v. Taft, 233 F.Supp.932 (S.D. Ohio 2002) deeming speech with violent content as fully protected by the First Amendment and enjoining enforcement of Ohio's "harmful to juveniles" law that would have criminalized dissemination to a minor of speech with violent content.
- Eclipse Enterprises Inc. v. Gulota, 134 F.2d 63 (2d Cir. 1997) finding unconstitutional a law barring the sale to minors of trading cards of notorious criminals.
- Davis-Kidd Booksellers, Inc. v. McWherter, 886 S.W. 2d 705 (Tenn. 1993) striking down a restriction on the sale to minors of material containing "excess violence."
- Video Software Dealers Assn. v. Webster, 968 F.2d 684 (8th Cir. 1992) held that "unlike obscenity, violent expression is protected by the First Amendment."

Distinguishing "Good" Violence from "Bad" "Excessive" or "Gratuitous" Violence

The impossibility of distinguishing "acceptable" from "unacceptable" violence is a fundamental problem with government regulation in this area. The evening news is filled with images of real violence in Iraq and Afghanistan routinely perpetrated by the "bad" guys. Often this horrific violence goes unpunished. Some of our most celebrated literature, cinema, and music is filled with graphic depictions of violence. Books including the Bible, Shakespeare's *Titus Andronicus* and Truman Capote's *In Cold Blood*, movies such as *Saving Private Ryan* or *Bonnie and Clyde* and music from opera to country are filled with depictions or descriptions of violence that at times is horrific. It would be virtually impossible for the government to create a definition that would allow "acceptable" violence but would restrict "unacceptable" violence. As noted above, no court has been satisfied that the government has solved this problem.

Differential Treatment of Television With Respect to Sexual Content Does Not Extend to Violent Content

Previous Supreme Court decisions have allowed some regulation of sexually explicit content and certain language on broadcast television that could not be regulated in other media. However, there is no basis for extending this greater regulation for television to speech with violent content. Further, the regulatory regime imposed on broadcast television would not apply to cable or satellite television. The Supreme Court noted in Reno v. ACLU that regulation of broadcast television was predicated on "the history of extensive regulation for the broadcast medium . . . , the scarcity of available frequencies at its inception . . . , and its 'invasive' nature . . . ." 521 U.S. at 897. These justifications for imposing greater restrictions on indecency on broadcast television do not apply to television media that can be received only by taking the affirmative steps of ordering the service and paying a monthly fee and that, unlike broadcast television, are neither scarce nor invasive.

Government-Mandated/Enforced Rating Systems Are Unconstitutional

The Notice of Inquiry suggests that a potential way to address concerns about television with violent content would be to make changes to the existing rating schemes used in conjunction with the V-Chip. While voluntary ratings exist to help parents determine what is appropriate for their children, a FCC mandated rating system or government enforcement of an existing rating system would have a profound chilling effect on the distribution of constitutionally protected material. Even government pressure on industries to change or amend a voluntary rating regime veers alarmingly close to a government-mandated system. Courts in nine states have held it unconstitutional for the government to enforce the Motion Picture Association of America's rating system or to financially punish a movie that carries specific rating designations. In MPAA v. Specter, 315 F. Supp. 824 (E.D. Pa. 1970), the court enjoined enforcement of a Pennsylvania statute that penalized exhibitors showing movies unsuitable for family or child viewing, as determined by CARA ratings. In Eastern Federal Corporation v. Wasson, 316 S.E. 2d 373 (S.C. 1984), the court ruled that a tax of 20% on all admissions to view movies rated

either "X" or unrated was an unconstitutional delegation of legislative power to a private trade association. See also Swope v. Lubbers, 560 F.Supp.1328 (W.B. Mich, S.D. 1983) (use of M.P.A.A. ratings was improper as a criteria for determination of constitutional protection), Drive-In Theater v. Huskey, 435 F.2d 228 (4th Cir. 1970) (sheriff enjoined from prosecuting exhibitors for obscenity based on "R" or "X" rating).

"Safe Harbor" Regulations Are Not the Least Restrictive Means

The Notice of Inquiry suggests a "safe harbor" regulation as a possible way to limit the viewing by minors of programming with violent content by restricting the broadcast of such content to hours when minors are less likely to be watching television. With the voluntary use of the V-Chip as an option, the "safe harbor" restriction would not be the least restrictive means to address the FCC's concern. The V-Chip allows parents to make individual decisions for their children based on their age, maturity, and the nature of the television content, but it does not impose this decision on viewers outside of the household. A "safe harbor," on the contrary, would prevent adults from watching programs with violent content during prime viewing hours. Also, it would deny parents any flexibility to permit different viewing by a 17-year-old as opposed to an 8-year-old. It would not allow parents to make their own decisions for their children. Finally, unlike the V-Chip, parents cannot turn off the "safe harbor" regulation. In two recent cases the Supreme Court has found that a limited technological solution is preferable to a broad governmental prohibition unless the less restrictive means would not be as effective. The fact that some or even many parents choose not to use the technological solution is not proof that it is less effective. United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 825 (2000); Ashcroft v. ACLU, 542 U.S. ___ (2004).

The Rights of Minors to See and Listen to First Amendment-Protected Material

While parents have great influence over what media their kids read, hear, or view, and while minors do not enjoy the protection of the First Amendment to the same extent as adults, the U.S. Supreme Court has ruled that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected material to them." Erzoznick v. City of Jacksonville, 422 U.S. 212-13 (1975). In Ginsberg v. New York, 390 U.S. 629 (1968), the Court established a three-part test for determining whether material is "harmful to minors" and may, therefore, be banned for dissemination to minors. The Ginsberg test is specifically limited to sexually explicit material; it does not contemplate regulation of violent content as "harmful to minors."

Other Resources Are Available to Educate Parents

For those parents who are concerned about their children's viewing habits, there are many resources available to help them determine whether material is appropriate for their kids. In addition to the television rating system, many organizations, including religious institutions and advocacy organizations,

review and rate media for the specific types of content they consider objectionable. Also, many newspapers and television listing magazines include ratings or comments about programming that some might find objectionable.

RESEARCH DOES NOT SUPPORT THE CONCLUSION THAT MEDIA CAUSES ACTUAL ANTI-SOCIAL BEHAVIOR

The rationale for restricting access to media with violent content is the belief that it causes actual violence. We do not think the current research supports this conclusion. We have attached three documents that address the present research: an amicus brief submitted in the IDSA v. St. Louis County case by 33 media scholars, *Shooting the Messenger: Why Censorship Won't Stop Violence* by Judith Levine, and the article *Media Violence Myth* by Pulitzer Prize-winning author Richard Rhodes that was published in a significantly shortened version in *Rolling Stone* magazine. These documents address the state of existing research regarding the effects of media with violent content. They review multiple problems with the conclusions ascribed to recent research suggesting that there is any meaningful link between media violence and actual violence. We will highlight some of the arguments they make.

Very Complex Problem With Many Factors, Research Is Inconclusive at Best

As noted in the Notice of Inquiry, the causes of violence are myriad and complex. The National Research Council's comprehensive 1993 report, *Understanding and Preventing Violence*, offered a matrix of the risk factors for violent behavior. Media with violent content is omitted entirely as a factor. The Surgeon General's lengthy 2001 report *Youth Violence: A Report of the Surgeon General* extensively explored the causes of youth violence. The authors briefly addressed the impact of consumption of media on children's behavior. They concluded that despite a "diverse body" of research, it was not possible to come to a conclusion about the effect of media consumption on minors in either the short- or long-term.

Researchers often look at the same data and reach starkly different conclusions about what it means. Certain researchers have consistently concluded that their data has shown a connection between media violence and real violence. Other researchers have reviewed the same data and disagreed with these conclusions. Some of the reasons researchers have reached different conclusions are explored in some depth in the attached materials.

No Correlation Between Media Violence and Actual Crime Statistics

There is a long history of blaming the media for increases in crime. At one time or another, books, movies, opera, jazz, blues, rock and roll, heavy metal and rap music, comic books and video games all have been accused of causing anti-social or violent behavior among minors (and adults). Crime

statistics do not support these claims. Despite the explosive growth of media, crime statistics have not risen correspondently. In the past decade the media has grown enormously, but crime in general and youth crime in particular has declined steadily in much of the country.

Conclusion

We recognize the challenges that parents face in raising their children in the information age. Nevertheless, restrictions on broadcast, cable or satellite television that has violent content is contrary to the First Amendment. There is no basis for treating television differently than other media with respect to violent content, nor is there a basis for imposing or enforcing a rating system or creating a safe harbor for violent television programs. Furthermore, the basis for these restrictions is uncertain; the research does not support the claims that media violence leads to actual violence. We believe it is best to leave to individual parents the responsibility to determine what their kids see.

Thank you for allowing us to share our views with the Commission.

The members of Media Coalition are:

The American Booksellers Foundation for Free Expression
The Association of American Publishers
The Comic Book Legal Defense Fund
The Freedom to Read Foundation
The Entertainment Software Association
The Interactive Entertainment Merchants Association
The Magazine Publishers of America
The Motion Picture Association of America
The National Association of Recording Merchandisers
The Publishers Marketing Association
The Recording Industry Association of America
The Video Software Dealers Association.