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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF GENERAL COUNSEL

In the Matter of)
)
Implementation of Section 505 of)
the Telecommunications Act of 1996)
)
Scrambling of Sexually Explicit Adult)
Video Service Programing)

CS Docket No. 96-40

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COMMENTS OF NATIONAL CABLE TELEVISION ASSOCIATION, INC.

The National Cable Television Association, Inc. ("NCTA") hereby submits its comments on the Notice of Proposed Rulemaking in the above-captioned proceeding. NCTA is the principal trade association for the cable industry -- cable operators, programmers, and equipment manufacturers -- in the United States.

INTRODUCTION AND SUMMARY

In this proceeding, the Commission proposes rules to implement Section 505 of the Telecommunications Act of 1996 (the "1996 Act"), which deals with the right of cable subscribers to prevent their children from viewing cable channels primarily dedicated to sexually-oriented programming, even in partially scrambled form. The cable industry recognizes that right and shares the concerns of parents and communities regarding children's access to such channels.

Cable operators generally take care to ensure, when they introduce and provide such channels, that parents and communities are not only aware of the presence of such channels on the system but also are aware of the ways by which access to such channels may be fully

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blocked. Indeed, the NCTA's Board of Directors last year adopted a resolution and guidelines confirming the industry's recognition "THAT CERTAIN CUSTOMERS MAY WANT THE ABILITY TO CONTROL ACCESS BY MINORS TO CERTAIN PAY AND PAY-PER-VIEW CHANNELS WITH PRIMARILY SEXUAL PROGRAMMING CARRIED ON CABLE TELEVISION."¹

The guidelines reflect cable operators' commitment, for example, to "voluntarily cause the reception of the audio and video signals of any primarily sexually-oriented premium channel to be blocked upon any customer's request, at no charge to the customer, so that the signals are not intelligible in the customer's home." They also commit the industry to deploy, "as quickly as technologically and economically feasible," addressable converters that will ensure that when a primarily sexually-oriented premium channel is offered by a system, the video and audio portions of the channel are fully blocked unless a subscriber chooses to purchase the channel. And they confirm the established practice of operators to "inform franchising officials that a primarily sexually-oriented premium channel is carried and make them aware of the steps being taken to enable only those expressly wishing to view such programming to do so."²

The 1996 Act includes two provisions that address these issues. First, Section 504 of the 1996 Act adds a new Section 640 to the 1934 Act, which requires cable operators, upon

¹/ NCTA Resolution, adopted February 9, 1995. (*See* Affidavit of D. Brenner, Exhibit 5, Brief of Playboy Entertainment Group, Inc. in *Playboy Entertainment Group, Inc. v. United States*, Civ. Action No. 96-94/96-107-JJF, 1996 U.S. Dist. LEXIS 2959 (D. Del. 1996)).

²/ *Id.*

request by a subscriber, to “fully scramble or otherwise fully block the audio and video programming” of *any* channel that the subscriber has not purchased and does not want to receive.³ Second, the 1996 Act goes a step further with respect to channels that are “primarily dedicated to sexually-oriented programming.” Specifically, Section 505 of the 1996 Act adds a new Section 641 to the 1934 Act, requiring that

[i]n providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.⁴

Section 505 imposes no deadline by which operators must implement such full scrambling or blocking. Instead, recognizing that full scrambling or blocking is very expensive and may not be feasible or cost-effective for some systems,⁵ it imposes an alternative restriction on systems that have not implemented it:

Until a multichannel video programming distributor complies with the [scrambling and blocking] requirement set forth in subsection (a), the distributor shall limit the access of children to the programming referred to in that section by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it.⁶

^{3/} 1996 Act, § 504.

^{4/} *Id.*, § 505.

^{5/} See generally *Playboy Entertainment Group, Inc. v. United States*, Civ. Action No. 96-94/96-107-JJF, 1996 U.S. Dist. LEXIS 2959, at *13-16 (D. Del. 1996), citing Affidavits of Walter F. Ciciona and Wayne Hall.

^{6/} *Id.*

Thus, a principal task of the Commission in implementing this provision of the 1996 Act is to determine the hours when a “significant” number of children are likely to view sexually explicit or indecent programming on partially scrambled or blocked channels. The Commission has proposed -- and has adopted as an interim rule -- that systems that do not fully block or scramble sexually explicit or indecent material on channels primarily dedicated to sexually-oriented programming may not carry such material between the hours of 6 a.m. and 10 p.m. The Commission proposed this time period because it is the same period during which broadcasters are prohibited by the Commission’s rules from broadcasting any indecent material -- and it said it was “aware of no relevant differences here that would justify a different . . . rule.”^{7/}

The statute does not define “indecent” or “sexually explicit adult” programming. The Commission proposes to use the same definition of indecent programming that it has adopted for purposes of its leased access and public, educational and governmental access rules -- *i.e.*, “programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium.”^{8/} And because “sexually explicit adult programming” is, according to the Commission, “a subset of indecent programming,”^{9/} it concludes that no definition of that term is necessary. The Commission believes that there is no need for clarification or definition with respect to whether a channel is “primarily dedicated to sexually-oriented programming,”

^{7/} *Order and Notice of Proposed Rulemaking* (“Notice”), ¶ 5.

^{8/} *Id.*, ¶ 9, citing 47 C.F.R. §§ 76.701(g), 76.702.

^{9/} *Id.*

and proposes simply to rely on the good faith judgment of cable operators and other MVPDs to decide whether the term applies to a particular channel.

The Commission's treatment of sexually explicit programming as a subset of indecent programming, is reasonable. So, too, is the Commission's reliance on cable operators to determine whether a channel is primarily dedicated to sexually-oriented programming. However, the Commission's tentative conclusion that there are no relevant differences between the "safe harbor" for broadcast indecency and the time period during which a significant number of children are likely to view indecent programming on partially scrambled cable channels primarily dedicated to sexually-oriented programming is unreasonable.

While children might unintentionally come across indecent material on broadcast channels at any time when they are watching television, they are unlikely to view sexually explicit material on partially scrambled channels unless they intentionally seek it out. And they are unlikely to seek out and watch such programming at times when they are under the supervision of their parents or other adults. The hours during which a significant number of children are likely to engage in such intentional and unsupervised viewing of partially scrambled sexually-oriented channels on cable do not include all the hours during which they are likely to be watching any television at all.¹⁰

^{10/} The issue of an appropriate "safe harbor" may become moot in light of the facial challenge to the constitutionality of Section 505 that is currently pending in the United States District Court for the District of Delaware. That court has temporarily enjoined enforcement of Section 505, finding that there are "serious and substantial questions" as to its permissibility under the First Amendment. *See Playboy Entertainment Group, Inc. v. United States, supra*, U.S. Dist. LEXIS 2959, at *23. Even if the court ultimately holds that Section 505 is not facially unconstitutional, any "safe harbor" that the Commission selects will still, of course, be subject to First Amendment scrutiny and will survive such scrutiny only if it is

(continued...)

THE “SAFE HARBOR” WITH RESPECT TO PARTIALLY SCRAMBLED CABLE CHANNELS SHOULD BE MORE PERMISSIVE THAN THE “SAFE HARBOR” FOR BROADCAST CHANNELS.

The Commission’s proposal to require that sexually explicit and indecent programming on cable channels primarily dedicated to sexually-oriented programming be restricted to the hours between 10 p.m. and 6 a.m. unless the channels are fully blocked or scrambled for non-subscribers is based entirely on the supposedly “closely analogous” Commission rule that “prohibits the licensee of a radio or television broadcast station from broadcasting between 6 a.m. and 10 p.m. any material which is indecent.”^{11/} The Commission correctly points out that the “safe harbor” for broadcast indecency was “based on an extensive administrative record” and was upheld as reasonable and constitutionally permissible by the United States Court of Appeals for the District of Columbia Circuit.^{12/} But its suggestion that there are “no relevant differences” between that safe harbor and the appropriate safe harbor for purposes of partially scrambled adult-oriented cable channels is unreasonable.

Cable is, of course, a subscription service which, unlike broadcasting, is available only in the homes of those who choose to purchase it. Moreover, the programming at issue here appears on channels primarily dedicated to sexually-oriented programming, which individual cable subscribers may choose to have fully blocked at no charge by their cable operators.

^{10/} (...continued)

“narrowly tailored” to achieve the statutory purpose of preventing significant viewing by children of scrambled, indecent material on cable channels primarily dedicated to sexually-oriented programming. *See, e.g., Action for Children’s Television v. FCC*, 58 F.3d 654 (D.C.Cir. 1995) (en banc), *cert. denied*, 116 S.Ct. 701 (1996).

^{11/} Notice, ¶ 5.

^{12/} *Id.*, citing *Action for Children’s Television, supra*.

Finally, the programming at issue is partially scrambled and is only viewable, if at all, in grossly distorted form. Because of these relevant distinctions, the hours when a significant number of children are likely to view scrambled, sexually explicit programming on cable differ substantially from the hours when a large number of children are likely to view indecent broadcast programming.

What the D.C. Circuit found was that “[t]he data on *broadcasting* that the FCC has collected reveal that large numbers of children view *television* or listen to the radio from the early morning until late in the evening.”^{13/} First of all, the number of children that are likely to watch any *cable* channel at any time is substantially lower than the number likely to watch broadcast programming, simply because the number of households receiving cable television is substantially lower than the number receiving broadcast television. The Commission contends that there are no meaningful differences in “the demographics regarding those who receive cable and those who watch broadcast television over the air” because cable service is now “available to a majority of homes” and “is subscribed to by 65% of homes passed.”^{14/} But if, in fact, cable service is received by fewer than two-thirds of the households that can receive broadcast channels (either over-the-air or via cable), it follows that the number of children likely to be viewing non-broadcast cable channels at any time is, for that reason alone, significantly lower than the number likely to be watching broadcast programming.

Even in homes receiving cable service, the number of children likely to be watching partially scrambled adult-oriented channels at any time is likely to be only a very small

^{13/} *Action for Children’s Television, supra*, 58 F.3d at 665 (emphasis added).

^{14/} Notice, ¶ 8.

fraction of the number likely to be viewing unscrambled broadcast and cable programming. First of all, many cable systems simply do not carry adult-oriented channels, either because they have no pay-per-view capabilities at all, or because they simply choose not to include such channels as part of their service. Furthermore, even if a system does carry such channels, it is virtually certain that children watching television at home with -- or near -- their parents will not be viewing such unscrambled channels. This is not programming that is likely to intrude on children and their parents by surprise, as might be the case with respect to indecent programming on broadcast channels. The D.C. Circuit, in upholding the Commission's safe harbor for broadcast indecency, noted that "[a]s the Supreme Court observed in *Pacifica*, '[b]ecause the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.'"^{15/} But viewers are unlikely to be in the midst of watching a scrambled, generally unviewable channel -- especially one that is primarily dedicated to sexually-oriented programming, to which they have chosen not to subscribe -- and be surprised by a glimpse of nudity or an offensive utterance.

Nor is "children's grazing"^{16/} -- with or without their parents -- likely to result in unexpected and unintended exposure to offensive material. Most television receivers now enable viewers to skip over unviewable or unwanted channels when they scan channels. Many, if not most, subscribers who have chosen not to purchase particular premium services

^{15/} *Action for Children's Television*, *supra*, 58 F.3d at 666, quoting *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978).

^{16/} *Id.*

or pay-per-view offerings -- especially, sexually-oriented services -- are likely to exclude such scrambled services from the channels to be scanned when they “graze” for programming. Moreover, it is often the case that all the premium and pay-per-view channels on the system are located on channels beyond those that contain the non-premium tiers of services. Many subscribers choose to purchase no premium services at all (or choose not to purchase such services over additional outlets in their children’s rooms), in which case there will be no occasion for grazing in that upper range of channels.

In sum, unlike broadcast programming that may occasionally contain indecent material, partially scrambled cable channels devoted primarily to sexually-oriented programming are likely to be viewed only by children who, in circumstances in which they are unsupervised by their parents or other adults, seek out and intentionally tune to such programming. The hours in which such intentional and unsupervised viewing is likely to occur to any significant degree are clearly only a subset of the hours during which a significant number of children are likely to be watching any television at all.

For example, no such viewing is likely to exist during the hours when most children are in school and “presumably subject to strict adult supervision.”^{17/} In *Action for Children’s Television, supra*, the Court rejected the argument that the risk of harm to minors that would result from broadcasting indecent material during school hours was slight, noting that “the Government’s concerns . . . extend to children who are too young to attend

^{17/} *Id.*

school.”^{18/} The cable industry’s concerns extend to such children, as well. As a safeguard against the unintentional viewing of sexually-oriented channels by children even when those channels have been purchased by subscribers, NCTA’s guidelines provide that “[o]perators will use reasonable efforts to position primarily sexually-oriented premium channels on channels well away from program networks which carry specific program blocks targeted at children.”^{19/} In any event, whatever the risk that pre-school children might be exposed to inappropriate and offensive material on broadcast or unscrambled cable channels, it should be obvious that children of that age are much less likely to engage in the unsupervised viewing of *scrambled*, sexually-oriented channels -- intentionally or unintentionally -- over cable television. Therefore, the Commission should determine that a significant number of children are not likely to view sexually explicit or indecent programming on such channels during the hours when most children are in school.

Nor is there likely to be a significant amount of intentional, unsupervised viewership of such channels in the evening hours when adults are likely to be present in most homes. We recognize, of course, that children and their parents do not always -- or even usually -- watch television together, and that parents do not always know what their children may be watching in another room.^{20/} Even so, it is much less likely that children will be watching

^{18/} *Id.*

^{19/} NCTA Resolution, *supra*.

^{20/} *Action for Children’s Television, supra*, at 661.

scrambled, sexually explicit programming than that they will be watching other channels during the hours “when parent and child are under the same roof.”^{21/}

While it may be that a bare majority of children -- 54 percent, according to one recent survey cited by the D.C. Circuit^{22/} -- have television sets in their own rooms, a majority do *not* have access to *cable* channels on those sets. As noted above, fewer than two-thirds of the homes passed by cable actually subscribe. Moreover, many cable subscribers do not choose to have additional outlets in all their children’s bedrooms.

Furthermore, the fact that a bare majority of children -- 55 percent, according to the same survey -- “watched television alone or with friends, but not with their families”^{23/} does not mean that their parents, when they are at home, completely ignore their children or are oblivious to what they are watching. It would be difficult for children to watch partially scrambled programming of any sort without raising parental suspicions, and it would be difficult for parents in nearby rooms to be oblivious to the unscrambled audio portions of sexually explicit and indecent programming. Only children whose parents never stopped by their children’s rooms in the evening hours might safely watch or listen to scrambled sexually explicit channels without the deterrent effect of possible detection by their parents. The number of such children is surely substantially fewer than the number who watch any television programming at all during the evening hours, alone or with their parents -- and, indeed, it is likely to be relatively insignificant.

^{21/} *Id.*

^{22/} *Id.*

^{23/} *Id.*

Indeed, the number of children who choose to watch scrambled sexually explicit programming is likely to be a relatively insignificant percentage of the number watching television at *any* time of the day, *with or without* the threat of parental detection.

Nevertheless, if there is any time period in which a materially larger number of children are likely to watch such channels it is during the hours when they are not in school but their parents are not at home -- *i.e.*, weekday afternoons between approximately 2 p.m. and 8 p.m.

CONCLUSION

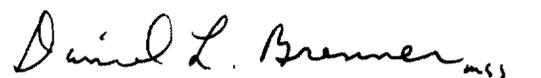
The Commission's task in this proceeding is to determine the hours during which a *significant* number of children are likely to view sexually explicit or indecent programming on partially scrambled cable channels primarily dedicated to sexually-oriented programming. It will always be possible, at any hour of the day, that *some* children may view such programming, even if it is unlikely that a significant number would view it at that hour. Parents who wish to prevent their children from viewing such channels during such hours may, of course, request full-time blocking, and cable operators will do so pursuant to Section 504 (and pursuant to NCTA's guidelines) at no charge.

For purposes of Section 505, however, the Commission should reject its tentative conclusion that the hours during which a significant number of children are likely to view sexually explicit or indecent programming on partially scrambled channels primarily dedicated to sexually-oriented programming are the same hours during which a large number of children are likely to be watching broadcast television. Even though a large number of children may be watching television during the evening hours (and on weekends) when many parents are

home, it is unlikely that a significant number will view sexually explicit or indecent programming on partially scrambled cable channels during those hours.

Accordingly, the Commission should consider allowing the provision of sexually explicit programming on partially blocked or scrambled cable channels primarily dedicated to sexually-oriented programming prior to 10 p.m. -- for example, between the hours of 8 p.m. and 6 a.m. on weekdays, and all day on weekends. And, because a significant number of children are unlikely to view such partially scrambled programming during the hours when schools are generally in session, the Commission should consider allowing the provision of such programming before 2 p.m. during the months when most schools are in session.

Respectfully submitted.

A handwritten signature in cursive script that reads "Daniel L. Brenner" followed by a subscript "ms". The signature is written in black ink and is positioned above a horizontal line.

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