[US] District Court upholds legislation designed to protect children from sexually explicit adult cable programming

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A U.S. federal district court has rejected a request for a preliminary injunction and upheld the constitutionality of section 505 of the Communications Decency Act of 1996 ("CDA"), enacted 8 February 1996 (see IRIS 1996-3: 7-10), as Title V of the comprehensive Telecommunications Act of 1996. The purpose of section 505 of the CDA was to prevent children from viewing sexually explicit adult programming ("adult programming") through "signal bleed", the incomplete scrambling of the video or audio portion of a program. The CDA requires cable operators to either fully scramble both the video and audio portions of adult programming or restrict transmission of such programming to times that children are less likely to see it (a practice known as "time channeling"). In a previous rulemaking, the Federal Communication Commission ("FCC") has established the period between 10 p.m. and 6 a.m. as a "safe harbor" when children are less likely to view the material.

The plaintiffs, Playboy Entertainment Group, Inc. and Graff-Pay-Per-View Inc. are content providers that distribute adult programming over "premium" and "pay-per-view" cable channels. (Premium channels are those which a subscriber pays an additional monthly charge to receive on top of basic cable service, while pay-per-view channels are unscrambled only for the length of an individual pre-ordered program.) The plaintiffs requested a judgment enjoining the enforcement of section 505 of the CDA based on the assertion that enforcement of the CDA violated their First and Fourteenth Amendment rights and would cause the plaintiffs irreparable financial harm. The plaintiffs argued that customers would be less likely to order the programming provided by the plaintiff if cable operators chose to time channel the plaintiffs programming in order to avoid costly scrambling techniques. In Playboy v.

United States , decided 8 November 1996, the court found that the plaintiffs failed to meet their burden of proof of financial harm since the evidence demonstrated that most pay-per-view orders involved programming shown around the "safe harbor" hours.

The plaintiffs claimed that the CDA violated their First Amendment rights because it did not meet the U.S. judicial precedent for content-based regulation -- that such legislation addresses a "compelling interest" through means "narrowly

tailored" for that purpose. The court had little trouble finding that keeping adult programming from children was a substantial government purpose. And despite evidence that many scrambling techniques were prohibitively expensive to many cable operators, the court found that section 505 was a permissible limitation on constitutionally protected speech because all cable programmers had the option of using time channeling. Since most orders for adult programming occurred during the "safe harbor" hours, the court found that the CDA had been properly designed to keep adult materials away from children while still allowing adults to view constitutionally protected speech.

The plaintiffs also claimed that the CDA violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution as it required scrambling of channels dedicated solely to adult programming, but not in cases were sexually explicit scenes made up only a small part of the programming on a particular channel. The court noted that the cause of secondary effects that the CDA was designed to prevent were primarily traced to the sex-dedicated networks, thus making it reasonable for Congress to focus on those networks in enacting section 505 of the CDA. Finally, the court rejected the assertions that the CDA contained constitutionally vague terminology in regulating "indecent" programming. The court noted that U.S. case law, including precedent cited explicitly in the CDA itself, had clearly established the boundaries of "indecent" materials.

United States District Court for the District of Delaware, Playboy v. U.S., 8 November 1996, 945 F. Supp. 772 (1996).