Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of Section 505 of the Telecommunications Act of 1996	)	CS Docket No. 96-40
	)	
	)	
Scrambling of Sexually Explicit Adult Video Service Programming	)	
	)	
	)	
Repeal of Section 76.227	)	

ORDER

Adopted: November 19, 2001 **Released:** November 21, 2001

By the Commission: Commissioner Copps issuing a statement

1. By this *Order*, we repeal Section 76.227 of the Commission's rules, 47 C.F.R. § 76.227, because the underlying statutory provision, Section 641 of the Communications Act of 1934, as amended,[1] was found to be unconstitutional by the United States Supreme Court.[2] We also terminate the pending rulemaking in CS Docket No. 96-40, *Implementation of Section 505 of the Telecommunications Act of 1996: Scrambling of Sexually Explicit Adult Video Service Programming*, Order and Notice of Proposed Rulemaking, which was initiated to implement Section 641 of the Act.[3] These actions finalize the staff recommendations considered by the Commission earlier this year in the 2000 Biennial Regulatory Review.[4]

2. Section 641 requires that any multichannel video programming distributor, including any cable television operator, "providing sexually explicit adult programming or other

[1] 47 U.S.C. § 561. Section 641 was added by Section 505 of the Telecommunications Act of 1996 (Pub. L. No. 104-104, 110 Stat. 56 (1996)).

[2] *U.S. v. Playboy Entertainment Group*, 120 S. Ct. 1878 (2000).

[3] 11 FCC Rcd 5386 (1996) ("Scrambling Order").

[4] *See 2000 Biennial Regulatory Review*, Report and Order, CC Docket No. 00-175, 2001 WL 38123, __ FCC Rcd __ (2001) ¶ 72. ("[W]e accept staff's recommendation that we consider . . . .(2) the elimination of the rules based on section 505 of the 1996 Act, including section [76.227], related to incompletely scrambled sexually-oriented programming that were found to be unconstitutional by the recent Supreme Court decision in *United States v. Playboy Entertainment Group* . . . .").

programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming" either "fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel of programming does not receive it," or, alternatively, not provide that programming "during the hours of the day (as determined by the [Federal Communications] Commission) when a significant number of children are likely to view it."[5] The provision addressed concerns regarding "signal bleed" of channels that are devoted to sexually explicit adult programming. Signal bleed may occur when a multichannel video program distributor partially scrambles or otherwise partially blocks the signal on sexually explicit channels in an effort to prevent clear reception for those subscribers that do not pay for such channels. When sexually explicit material is offered on an analog service tier, some images and sounds may be clearly identifiable if the scrambling technology is inadequate.

3. Section 640 of the Communications Act, a companion to Section 641, also was enacted as part of the Telecommunications Act of 1996.[6] Section 640 provides that, "upon request by a cable service subscriber, a cable operator shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it."[7] One important difference between Section 641 and Section 640 is that the operator has a mandatory obligation to block programming to *all* households under Section 641, rather than to individual households as provided in Section 640. Further, Section 640 applies only to cable operators while Section 641 applies to all multichannel video programming distributors ("MVPDs"), including satellite carriers[8] and open video system operators.

4. On March 5, 1996, the Commission issued an Order and Notice of Proposed Rulemaking to implement the new statutory language of Section 641 as well as to ask questions concerning the definition of certain terms contained in that provision.[9] At that time, the

[5] 47 U.S.C. § 561. This provision concerns only indecent programming and not material that is obscene, which is not permitted on cable television systems in any instance. *See* 47 U.S.C. § 559 ("Obscene Programming. Whoever transmits over any cable system any matter which is obscene or otherwise unprotected by the Constitution of the United States shall be fined under title 18, United States Code, or imprisoned not more that 2 years, or both.")

[6] 47 U.S.C. § 560.

[7] *Id.*

[8] We note that direct broadcast satellite carriers use digital technology to provide programming to subscribers. Digital technology enables MVPDs to block sexually explicit programming in its entirety without any signal bleed.

[9] *See Scrambling Order.* Some of the questions raised in the proceeding included: (1) the hours of the day when children are likely to be exposed to partially scrambled signals; (2) the proper definition of the term "indecency" for these purposes; (3) the appropriate definition of the phrase, "channel primarily dedicated to sexually oriented programming;" and (4) the differences in technology between MVPDs that might require the adoption of differing rules for different entities. *See id.* at 5387-88.

Commission adopted a rule incorporating Section 641(a).[10] The Commission also established an interim rule implementing Section 641(b), providing that the programming described in subsection (a) may not be provided between the hours of 6 a.m. and 10 p.m. if not fully scrambled or fully blocked.[11] The Commission did not address Section 640 in that proceeding.[12]

5. In 1996, Playboy Entertainment Group ("Playboy") brought suit against the government asserting that Section 641 was unconstitutional under the First Amendment. A three judge district court panel agreed with Playboy, finding that Section 641 was not the least restrictive means to advance the government's interest in protecting children from exposure to sexually-related material.[13] Indeed, the district court concluded that Section 640 provides a less restrictive alternative means to protect those who wish to block out unwanted programming.[14] On that basis, the district court issued a permanent injunction barring enforcement of Section 641.[15]

6. On direct appeal by the government, the Supreme Court ruled that the scrambling, blocking, and time shifting requirements of Section 641, implemented by the Commission, violate the First Amendment.[16] The Court concluded that Section 641 was not the least restrictive means to protect individuals from exposure to sexually explicit programming. The Court held that compliance with the scrambling limitation of Section 641 silenced "protected speech for two-thirds of the day in every home in a cable service area, regardless of the presence or likely presence of children or of the wishes of the viewer."[17] Like the district court below, the Court concluded that Section 640 provides a less restrictive method for protecting children from exposure to explicit materials.[18] The Court further found that the government failed to show that the alternative protection under Section 640 would be so ineffective as to justify the more restrictive requirements of Section 641.[19]

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[10] "Blocking of indecent sexually-oriented programming channels. (a) In 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." 47 C.F.R. § 76.227(a).

[11] 47 C.F.R. § 76.227(b).

[12] *Scrambling Order* at 5386, n. 9. The docket was voluntarily held in abeyance during the litigation period.

[13] *Playboy Entertainment Group v. U.S.*, 30 F. Supp.2d 702 (D. Del. 1998).

[14] *Id.* at 713.

[15] *Id.* at 717-719.

[16] *U.S. v. Playboy Entertainment Group*, 120 S. Ct. 1878 (2000).

[17] *Id.* at 1886.

[18] *Id.* at 1888.

[19] *Id.* at 1892-93.

7. Given the Court's decision regarding the unconstitutionality of the underlying statutory provision, we hereby repeal Section 76.227 of our rules. We also terminate our pending rulemaking proceeding in CS Docket No. 96-40. We undertake these ministerial actions without the issuance of a Further Notice of Proposed Rulemaking because we believe that a further proceeding is unnecessary in light of the Supreme Court's decision in *Playboy v. FCC*.[20]

8. We note that parents and others concerned about the availability of partially scrambled sexual content may rely on advances in technology to secure their households from undesirable programming. Specifically, we note that the phenomenon of signal bleed is present generally where the cable wire is directly connected to the television receiver. Signal bleed is circumvented when addressable analog set top boxes or digital set top boxes are connected to the set.[21]

9. The Act provides several legal remedies, working in tandem with available technology, for those who object to certain content made available over a cable system. First, as Section 640 requires, a cable operator must block programming, using any means, if such a request is made by a particular subscriber.[22] Second, a cable subscriber may obtain a lock-box from the local cable operator if he or she wants to selectively block unwanted material.[23] Finally, subscribers may purchase television sets equipped with V-Chips that enable individuals to block television programs, including sexually explicit content, assigned a particular rating by the video programmer.[24]

10. Accordingly, **IT IS ORDERED** that Section 76.227 of the Commission's rules, 47 C.F.R. § 76.227, **IS REPEALED** upon publication of this *Order* in the Federal Register.

11. **IT IS FURTHER ORDERED** that the Commission's rules **ARE AMENDED** as

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[20] *See* 5 U.S.C. § 553(b)(B)(notice requirements inapplicable "when the agency for good cause finds….that notice and public procedure are impracticable, unnecessary, or contrary to the public interest").

[21] The Supreme Court alluded to this point when it stated that, "market-based solutions such as programmable televisions, VCR's, and mapping systems (which display a blue screen when tuned to a scrambled signal) may eliminate signal bleed at the consumer end of the cable." *U.S. v. Playboy Entertainment Group*, 120 S. Ct at 1890. International banking firm and media industry analyst, ABN-AMRO, estimate that there are approximately 93.6 million analog and digital set top boxes currently deployed in the United States. ABN-AMRO 2001 estimates; *see also* Yankee Group Annual Technologically Advanced Survey, October 2000.

We note that as cable operators add digital tiers of service to their systems, they appear to be voluntarily migrating sexually explicit programming to such tiers. *See* Andrea Figler, *Playboy Feels Digital Pain*, CABLE WORLD, August 13, 2001 at 8. *See also*, Sally Beatty, *Cable Operators Find New Profit in Pornography*, WALL STREET JOURNAL, November 28, 2000 at B1.

[22] 47 U.S.C. § 560.

[23] 47 U.S.C. § 544(d)(2) ("In order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber.").

[24] *See generally*, 47 U.S.C. § 303(x).

set forth in Appendix A.

12. **IT IS FURTHER ORDERED** that CS Docket No. 96-40 **IS TERMINATED**.

13. These actions are taken pursuant to Sections 4(i), 4(j) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 303.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A
Rule Changes

Parts 76 of Chapter 1 of Title 47 of the Code of Federal Regulations are amended to read as follows:

Part 76-MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for Part 76 is revised to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 317, 325, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 571, 572, and 573.

2. Section 76.227 is removed and reserved.

STATEMENT OF COMMISSIONER MICHAEL J. COPPS

In the Matter of: Implementation of Section 505 of the Telecommunications Act of 1996; Scrambling of Sexually Explicit Adult Video Programming

Today, as we must, we take steps to conform our rules to the parameters established in a 5-4 decision of the Supreme Court. Nevertheless, that the Court found the statute overly broad does not obviate our responsibility to protect children from indecent and obscene programming.

Right now, as the Court's minority pointed out, the alternatives available to parents are woefully inadequate. It is incumbent upon us to take whatever steps we can, consistent with the First Amendment, to protect our children from sexually explicit programming in their homes.

I urge the Commission to commence a proceeding to determine how, consistent with the objectives of Congress as well as the decision of the Supreme Court, we can protect children from being exposed to sexually explicit programming without their parents' knowledge.