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105TH CONGRESS, *1st Session* | SENATE | S. RPT. 105–89

CHILDREN'S PROTECTION FROM VIOLENT PROGRAMMING ACT

R E P O R T

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 363

SEPTEMBER 25, 1997.—Ordered to be printed

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED FIFTH CONGRESS

FIRST SESSION

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(II)

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Mr. MCCAIN, from the Committee on Commerce, Science, and Transportation, submitted the following

R E P O R T

[To accompany S. 363]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 363) "A Bill to amend the Communications Act of 1934 to require that violent video programming is limited to broadcast after the hours when children are reasonably likely to comprise a substantial portion of the audience, unless it is specifically rated on the basis of its violent content so that it is blockable by electronic means specifically on the basis of that content", having considered the same, reports favorably thereon with amendments and recommends that the bill (as amended) do pass.

PURPOSE OF BILL

The purpose of the bill is to protect American children from the harm caused by viewing violence on television.

BACKGROUND AND NEEDS

I. SUMMARY

Each year, over 20,000 people are murdered in the U.S.—one person is killed every 22 minutes. While France has a murder rate of two homicides per 100,000 people; the U.S. has 9.4. The U.S. murder rate is four times the rate of Europe and 11 times higher than that of Japan. The U.S. homicide rate is rising 6 times faster than the population. Violence is the second leading cause of death for Americans between the ages of 15 and 24, and is the leading cause of death for African-Americans of that age group.

39–010

The growth of violence in our society has prompted Congress to look for as many solutions as possible to reduce the extent of this problem. Congress first began to examine the link between television and violence with hearings in the 1950s. Concern arose again in the late 1960s and early 1970s after the wave of urban unrest caused some to question the effect of television on violent behavior. In 1972, the Surgeon General released a study demonstrating a correlation between television violence and violent behavior and called for Congressional action.

Each time the issue was raised in Congress, however, the industry continually promised to regulate itself while at the same time urging against Congressional action. In 1975, Richard Wiley, Chairman of the Federal Communications Commission (FCC), announced that he had reached an agreement with the broadcasters that made Congressional action unnecessary. This agreement provided that the television industry would voluntarily restrict the showing of violent shows during the "family hour." This practice fell out of use in the 1980s.

During the 1980s, the amount of violence on television increased substantially. One study found up to 32 acts of violence on television on children's programming. The increase in violence coincides with an increase in the amount of time children spend watching television. Children spend, on average, 28 hours per week watching television, which is more time than they spend in school.

During the 1990s, Congress passed legislation allowing television industry representatives, without violating antitrust laws, to meet, consider, and jointly agree upon voluntary ratings standards. However, in 1993, the Department of Justice concluded that meetings by industry representatives to discuss and develop a voluntary ratings standard did not violate antitrust laws. Therefore, a legislative exemption from anti-trust laws was not needed.

In 1996, Congress passed legislation requiring television sets to be equipped with an electronic device, the V-chip, that would allow parents to block certain programming. The legislation also encourages the video programming and distribution industry to establish rules for rating video programming containing sexual, violent, or other indecent materials and to broadcast signals containing these ratings. In January of 1997, the industry developed an age-based ratings proposal and the FCC subsequently requested comment on the industry proposal.

Between 200 and 3000 independent research studies have now been conducted that demonstrate a causal link between viewing violent programming and aggressive behavior. Several national organizations, including the National Institutes for Mental Health, the American Psychological Association, and the National Parent-Teacher Association have supported a safe harbor approach in addressing television violence. More recently, these groups have opposed the industry's proposal to use an age-based ratings system.

S. 363, the "Children's Protection from Violent Programming Act", requires the FCC to prohibit the distribution of violent video programming during hours when children are reasonably likely to comprise a substantial portion of the audience unless video programming is specifically rated on the basis of its violent content so that it is blockable by electronic means based on its content. S. 363

adopts a similar approach to television violence that the courts have upheld for broadcast and cable "indecency". The provisions in S. 363 apply to broadcast television, cable television (except for premium channels or pay-per-view programs), and other distribution media such as satellite television.

This safe harbor is necessary to protect children from the effects of violent television if a content-based ratings system is not implemented. Age-based ratings systems like the one proposed by the industry do not allow parents to block programming based on violent content, thereby rendering ineffective any technology-based blocking mechanism designed to limit violent video programming. If programming is not rated specifically for violent content, and therefore, cannot be blocked on the basis of violent content, then restricting the hours when violent video programming is shown is the least restrictive and most narrowly tailored means to achieve a compelling governmental interest. The bill thus meets the "strict scrutiny" test set down by the Supreme Court for "content-based" regulation.

II. HISTORY OF CONGRESSIONAL CONCERN

Congress has expressed concern over the amount of violence on television for over forty years. Studies conducted in the 1950s showed that violent crime increased significantly early in that decade, and some researchers believed that the spread of television was partly to blame. In response, Congress held hearings concerning violence in radio and television and its impact on children and youth in 1952 and 1954. In 1956, one of the first studies of television violence reported that 4-year-olds who watched the "Woody Woodpecker" cartoon were more likely to display aggressive behavior than children who watched the "Little Red Hen." After the broadcast industry pledged to regulate itself, and after the FCC testified against censorship, no action was taken.

The urban riots of the 1960s again raised concern about the link between television violence and violent behavior. In response to public concern, President Lyndon B. Johnson established the National Commission on the Causes and Prevention of Violence. The Commission's Mass Media Task Force looked at the impact of violence contained in entertainment programs aired on television and concluded that (1) television violence does have a negative impact on behavior and (2) television violence encourages subsequent violent behavior and "fosters moral and social values about violence in daily life which are unacceptable in a civilized society." [1]

In 1969, Senator John Pastore, Chairman of the Subcommittee on Communications of the Senate Committee on Commerce, petitioned the Surgeon General to investigate the effects of TV violence. In 1972, Surgeon General Jessie Steinfeld released a study [2] demonstrating a correlation between television violence and violent behavior and called for Congressional action. The five-volume re-

[1] U.S. National Commission on the Causes and Prevention of Violence. To Establish Justice, To Insure Domestic Tranquility. Final Report of the National Commission on the Causes and Prevention of Violence. Washington, U.S. Govt. Print. Off., December 1969, p. 199.

[2] U.S. Dept. of Health, Education, and Welfare. The Surgeon General's Scientific Advisory Committee on Television and Social Behavior. Television and Growing Up: The Impact of Televised Violence. Report to the Surgeon General. U.S. Public Health Service. Washington, U.S. Govt. Print. Off., 1972, p. 279.

port concluded that there was a causal effect from TV violence, but primarily on children presupposed to be aggressive. The then-FCC Chairman, Dean Burch, declined to regulate violence, saying that the FCC should not "make fundamental programming judgments."

Several more hearings were held after the release of the Surgeon General's report in the 1970s. Despite studies showing an increase in violent programming, little regulatory or Congressional action was taken. Discussions continued regarding the relationship between violence in society and what was shown on television. The continued concerns prompted Congress to request the FCC to study possible solutions to the problems of television violence and sexually-oriented materials.

On February 20, 1975, under the direction of then-Chairman Wiley, the FCC issued its Report on the Broadcast of Violent and Obscene Material. The report recommended statutory clarification regarding the FCC's authority to prohibit certain broadcasts of obscene and indecent materials. However, with regard to the issue of television violence, the FCC did not recommend any congressional action because the industry had recently adopted a voluntary "family viewing" period.[3] The Television Code, however, fell out of use in the 1980s.

During the 1980s, no further measures were taken either by Congress or by the FCC to restrict television violence. However, during this period, over 200 studies were conducted demonstrating a causal link between viewing violent scenes and engaging in aggressive behavior. In addition, the growth of media outlets, especially cable television, led to an increase in the amount of violence on television.

During the 101st Congress, then-Senator Paul Simon (D–IL) introduced the Television Program Improvement Act. That Act allowed television industry representatives, without violating antitrust laws, to meet, consider, and jointly agree upon implementing voluntary standards that would lead to reducing violence depicted in television programs. It was signed into law as Title V of the Judicial Improvements Act of 1990. Industry discussions led to the release, in December 1992, of joint standards regarding the broadcasting of excessive television violence. In June 1993, the networks adopted a policy that, before and during the broadcasting of programs that might contain excessive violence, the following announcement would be made: "Due to some violent content, parental discretion is advised." The Independent Television Association, the trade group representing many of the television stations not affiliated with one of the networks, adopted a similar voluntary code.

Despite these efforts by the industry, there were many in Congress that felt the voluntary code did not adequately address the concerns of parents over television violence. In October 1993, the Senate Commerce Committee held a hearing on television violence to consider a variety of legislative proposals. Attorney General Janet Reno testified that all the legislation currently pending before the Committee, including S. 1383, the Children's Protection From Violent Programming Act of 1993 (Hollings-Inouye), S. 973,

[3] On February 4, 1975, the National Association of Broadcasters (NAB) Television Code Review Board adopted a code implementing a family viewing period between 7 to 9 p.m., viewer advisories, and warnings to publishers of the advisories.

the Television Report Card Act of 1993 (Dorgan), and S. 943, the Children's Television Violence Protection Act of 1993 (Durenberger), would be constitutional. The major broadcast networks and other industry representatives argued that the amount of violent programming had declined. The industry representatives also requested more time to implement proposed warning labels before the Congress considered legislation. No further action was taken on the bills in the 103rd Congress.

Senator Simon's legislation provided an antitrust exemption for three years until 1993. In 1993, he requested the views of the Department of Justice on the antitrust implications of the collective efforts of the television industry to address the effects of violence on television. In her response, Sheila Anthony of the Department of Justice stated that the Department did not believe that the continuance of industry meetings to develop a ratings standard presented a substantial antitrust risk.[4] Industry members were free to meet and develop a ratings standard.

During floor consideration of S. 652, the Telecommunications Competition and Deregulation Act of 1995, the Senate adopted an amendment based on S. 332, the Children's Media Protection Act of 1995, offered by Senators Conrad and Lieberman. The amendment required all new television sets to be equipped with a programmable chip that would allow parents to block out specific programs. In addition, the amendment required the establishment of a ratings commission if the industry failed to set up a voluntary ratings system within one year. The Senate adopted the amendment by voice vote, but after a motion to table, the amendment was defeated by a vote of 73–26.

On July 11, 1995, the Committee held its second hearing on television violence to consider pending measures, including S. 470, the Hollings safe harbor legislation. S. 470 (104th Congress) was identical to S. 1383 (103rd Congress). The Committee subsequently reported S. 470 without amendment on August 10, 1995 by a recorded vote of 16 yeas and 1 nay, with two Senators not voting. Senator Hollings wrote to then-Majority Leader Dole, and subsequently to Majority Leader Lott, requesting floor time for S. 470. However, due to several holds placed on the legislation, the full Senate did not consider S. 470 during the 104th Congress.

As part of the 1996 Telecommunications Act, the 104th Congress adopted legislation concerning the V-chip and ratings system. Based upon those provisions, manufacturers of television sets with a 13-inch or larger screen must install an electronic device each set manufactured after 1998. This device, dubbed the "V-chip" for violence, could be programmed to block programming with certain ratings. To make the V-chip work, the 1996 Act encouraged the video programming industry to "establish voluntary rules for rating video programming that contains sexual, violent, or other indecent material about which parents should be informed before it is displayed to children," and to broadcast voluntarily signals containing these ratings.

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[4] Letter to Paul Simon, Senator, from Sheila Anthony, Assistant Attorney General, DOJ, (November 29, 1993).

On February 29, 1996, all segments of the television industry created the "TV Ratings Implementation Group" ("ratings group"),[5] headed by Motion Picture Association of America (MPAA) President Jack Valenti. The group submitted its voluntary ratings proposal to the FCC on January 17, 1997. The FCC issued a Public Notice on February 7, 1997, seeking comment on the ratings group's plan. Pursuant to the 1996 Act, the FCC must "consult with appropriate public interest groups and interested individuals from the private sector" about the industry's voluntary plan, and then determine if the plan is "acceptable" to the FCC.

If the FCC finds the ratings scheme unacceptable, it must, by law, appoint an advisory committee of industry representatives and "appropriate public interest groups" to provide "guidelines and recommended procedures" for an alternative ratings scheme. The 1996 Act did not provide a timetable within which the FCC must determine whether the ratings system is acceptable. Press accounts report that the industry has threatened to sue if the FCC rejects its proposal.

III. RESEARCH ON TV VIOLENCE

Research has consistently shown a link between viewing violence on television and violent behavior. Following the Surgeon General's 1972 report, significant research was conducted detailing the correlation between viewing violent television and later aggressive behavior. Several of the leading medical associations published similar conclusions, including the American Medical Association, the American Psychological Association, the American Pediatric Association, and the American Academy of Pediatrics.[6]

For instance, a study by Tanis Williams supports the conclusion that there is a direct correlation between television violence and aggressive behavior in children. Williams, a researcher at the University of British Columbia, studied the impact of television on a small rural community in Canada that received television signals for the first time in 1973. The researchers observed forty-five first and second graders for signs of inappropriate aggressive behavior. Two years later, the same group was observed and it was found that the aggressive behavior in the children increased by 160 percent as compared to a control group that saw no noticeable increase in aggressive behavior.[7]

In 1982, the National Institute of Mental Health (NIMH) produced a new report entitled Television and Behavior: Ten Years of Scientific Progress and Implications for the Eighties. In contrast to the Surgeon General's 1972 report, the NIMH concluded that TV violence affects all children, not just those predisposed to aggression. The 1982 report reaffirmed the conclusions of the earlier studies stating:

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[5] The Implementation Group included members from the broadcast networks; affiliated, independent and public television stations; cable programmers; producers and distributors of cable programming; entertainment companies; movie studios; and members of the guilds representing writers directors, producers, and actors.

[6] Centerwall, Brandon S., Television and Violence: The Scale of the Problem and Where to Go From Here. JAMA, v. 267, no. 22, June 10, 1992, p.3059.

[7] Centerwall, Brandon. Television and Violent Crime, Public Interest, No.111, Spring 1993. p.56.

After 10 more years of research, the consensus among most of the research community is that violence on television does lead to aggressive behavior by children and teenagers who watch the programs. This conclusion is based on laboratory experiments and on field studies. Not all children become aggressive, of course, but the correlations between violence and aggression are positive. In magnitude, television violence is as strongly correlated with aggressive behavior as any other behavioral variable that has been measured. The research question has moved from asking whether or not there is an effect to seeking explanations for the effect. [8]

Not all research, though, supported this conclusion. In 1982, NBC sponsored a study of the issue and reported there was no correlation. In addition, a 1984 analysis of all the available studies by Jonathan L. Freedman, of the Department of Psychology at the University of Toronto, concluded that the published studies did not support the hypothesis that viewing habits of children resulted in subsequent changes in behavior in children. The Congressional Research Service (CRS) reports that both the NBC study and the Freedman studies have been discounted by additional research. In fact, a re-analysis of the NBC study revealed a direct correlation between viewing violence and harmful behavioral changes in children.

More recent research adds credibility to the findings of the National Institute of Mental Health. Two of the most widely publicized empirical studies adopt two different methodologies, but arrive at the same result. In one of the studies, Dr. Leonard Eron followed a group of children in upstate New York State and examined them at ages 8, 19 and 30. The study found that the more the participants watched TV at age 8, the more serious were the crimes of which they were convicted by age 30, the more aggressive was their behavior when drinking, and the harsher was the punishment which they inflicted on their own children. Similar experiments were conducted in Australia, Finland, Israel, and Poland, and the outcome was the same in each experiment.

Another study was conducted by Dr. Brandon Centerwall, a Professor of Epidemiology at the University of Washington. He studied the homicide rates in South Africa, Canada and the United States in relation to the introduction of television. In all three countries, Dr. Centerwall found that the homicide rate doubled about 10 or 15 years after the introduction of television. According to Dr. Centerwall, the lag time in each country reflects the fact that television exerts its behavior-modifying effects primarily on children, whereas violent activity is primarily an adult activity. Dr. Centerwall concludes that "long-term childhood exposure to television is a causal factor behind approximately one-half of the homicides committed in the United States." This report [9] concerning the harmful impact of viewing television violence on preadolescent children found that extensive exposure to television violence could lead to chronic effects extending into later adolescence and adulthood.

These studies explore the link between violent television and violent behavior. However, violent behavior may not be the only harm

[8] The NIMH Report, p.6.
[9] Centerwall, p. 3059–3063.

caused by television violence. The American Psychological Association (APA) believes that the harm caused by violent television is broader and includes fearfulness and callousness:

> Viewing violence increases fear of becoming a victim of violence, with a resultant increase in self-protective behaviors and increased mistrust of others;
>
> Viewing violence increases desensitization to violence, resulting in calloused attitudes toward violence directed at others and a decreased likelihood to take action on behalf of the victim when violence occurs (behavioral apathy); and
>
> Viewing violence increases viewers' appetites for becoming involved with violence or exposing themselves to violence.

IV. THE GROWTH OF TV VIOLENCE

According to several studies, television violence increased during the 1980s both during prime-time and during children's television hours. Children between the ages of 2 and 11 watch television an average of 28 hours per week. According to a University of Pennsylvania study, in 1992 a record 32 violent acts per hour were recorded during children's shows. The APA estimates that a typical child will watch 8,000 murders and 100,000 acts of violence before finishing elementary school.

A similar story exists for prime-time programming. The National Coalition on Television Violence (NCTV), a monitoring and advocacy group, found that 25 percent of the prime-time shows in the 1992 fall season contained "very violent" material.

In August 1994, the Center for Media and Public Affairs released the results of a new survey showing an increase in the amount of violence on a single day of television in Washington, D.C. As it did in 1992, the Center monitored 10 channels of programming (six broadcast channels and 4 cable programs) on a single day in April. The Center found a 41 percent increase in television violence over the findings of its 1992 study. The Center counted 2,605 violent scenes in that day, an average of almost 15 scenes of violence per channel per hour. Life-threatening violence increased by 67 percent and incidents involving gun play rose 45 percent. The Center found that the greatest sources of violence on television came from "promos" for upcoming shows and movies, which were up 69 percent from 1992. Only toy commercials saw a reduction in violence; violence in toy commercials dropped 85 percent.

Sponsors of these studies believe that there are several reasons for this increased TV violence. One cause is the increase in "reality shows", such as Top Cops, Hard Copy, and A Current Affair. These shows describe or provide tape footage from actual police activity, including efforts to subdue suspects resisting arrest. Another reason is the increase in violence shown on the nightly news programs, which may in part result from the increase in violent acts in society. A very significant factor is the increase in cable programming that seeks smaller, niche audiences. According to one study, 3 of the top 4 most violent channels were cable channels, while the three major network affiliates and the public broadcasting affiliate were at the bottom of the list—the 144 music videos on MTV included almost as much violence as the three network affiliates combined.

Some believe that the most violent programs are cartoons. The inclusion of fantasy or animated characters in the compilation of violent programming is controversial. Some observers believe that cartoon violence should be distinguished from "real-life" violence that may glamorize violence. Many child psychologists, however, believe that young children are especially vulnerable to violent programs because they are unable to distinguish between fantasy and reality.

Violence continues to be prevalent on television. In March of 1997, the Center for Communications and Social Policy released a new study on television violence. The study concluded that there has been no meaningful change in the presentation of violence on television during the last two years. Researchers identified over 18,000 violent incidents in a sample of 2,000 hours drawn from 23 cable and broadcast channels during the 1995–96 television season. Over half of all violent incidents still fail to show the victim suffering any pain. Long-term negative consequences from violence are portrayed in only 16 percent of programs this year, compared to 13 percent last year. Programs that employ a strong anti-violence theme remained extremely rare, holding constant at 4 percent of all violent shows last year. The report urges that television ratings be content-based rather than age-based and warns parents that the age-based ratings system is likely to attract children to restricted programs and more aggressive children are most vulnerable to this effect.

V. ANECDOTAL EVIDENCE OF THE EFFECT OF TV VIOLENCE

In addition to the research, there are several compelling examples of the effects of television on children. In May 1979, Johnny Carson used a professional stuntman to "hang" Carson on stage. After a "noose" was placed around Carson's neck, he was dropped through a trap door and emerged unharmed. The next day, a young boy, Nicholas DeFilippo, was found dead with a rope around his neck in front of a TV set tuned to NBC. The parents of the child sued NBC for negligence, but lost their suit. Twenty-six people died from self-inflicted gunshot wounds to the head after watching the Russian Roulette scene in the movie "The Deer Hunter" when it was shown on national TV.

"Beavis and Butt-head", a cartoon which used to air every day at 7:00 p.m. on MTV, is a parody of two young teenagers and their view of daily life. The two characters engage in what some observers view as irresponsible activity, including cruelty to animals. In particular, the show occasionally has the two characters suggesting that setting objects on fire is "cool". It has been alleged that the cartoon's depiction of unsafe fireplay led one 5-year-old in Ohio to set his family's mobile home on fire, causing the death of his 2-year-old sister in 1993. Although MTV denies any connection, it has removed all references to fire in future episodes, and has rescheduled the program to 10:00 p.m.

VI. RESPONSE BY THE TELEVISION COMMUNITY

Although the broadcast community now admits that there is some link between violent television and violent behavior, the broadcasters join with the other sectors of the industry in believing

that these findings exaggerate the importance of television violence. They argue, for instance, that the Eron and Centerwall studies contain methodological problems because they fail to take into account other factors that may contribute to the violent behavior. They argue that income level, socioeconomic status, and especially the amount of supervision by parents have a greater impact on violent behavior than television. One study noted that an increase in violent behavior by children also was found after children watched Sesame Street, perhaps the most successful educational television show. They note that the homicide rate for white males in the U.S. and Canada stabilized 15 years after the introduction of television and did not increase in the 1980s despite the increase in the amount of television violence.

A. Public service announcements

Efforts undertaken by industry include public service announcements (PSAs). For example, in November 1993, NBC launched a campaign called "The More You Know" focusing on teenage violence and conflict resolution. However, the amount of time spent on PSAs have decreased during the last few years.

In speeches before the Cellular Telecommunications Industry Association and the National Association of Broadcasters, Reed Hundt, Chairman of the FCC expressed concern about the diminishing time being spent on PSAs. In 1993, the Big Four Networks averaged 12 seconds of PSAs per prime-time hour, but by November of 1996 that number was down to 6.2 seconds.[10] Time spent on PSA's is being eroded, in part because broadcasters are spending more time on commercials and promotionals. Of approximately 15 minutes of prime-time that the networks devote to commercials, credits, promotions and PSAs, PSAs are accorded only a few seconds. Over the past two years, promotional time at the broadcast networks has increased more than 25 percent and in 1996, both CBS and NBC hit all time highs in the amount of promotional time spent per prime-time hour.[11]

B. Common television code

In December 1992, three networks (ABC, NBC, and CBS) adopted a common set of "Standards for the Depiction of Violence in Television Programs." Some observers have criticized these efforts because the standards adopted by the networks appear weaker than networks own standards.

C. Warning labels

In June 1993, the networks also decided voluntarily to place "warning" labels before any show which the networks believed to contain violent material. The three networks committed that, before and during the broadcasting of various series, movies, made-for-TV movies, mini-series and specials that might contain excessive violence, the following announcement would be made: "Due to some violent content, parental discretion is advised." The warning label has been tested for the past two years. The warning is also

[10] Richard Katz, Television: Networks Hit on PSA Loads, (Mediaweek, April 14, 1997).
[11] Kyle Pope, Networks' Self-promotion Ads Irk FCC (The Arizona Republic, April 11, 1997).

included in advertising and promotional material for certain programs and is offered to newspapers and magazines that print television viewing schedules.

A similar advisory program was adopted by the Independent Television Association (INTV—the trade group representing many of the 350 television stations not affiliated with one of the three networks). All the station members of INTV have adopted this voluntary code.

Despite the institution of warning labels, studies demonstrated significant rises in the level of violence on television. As stated above, there was a 41 percent increase in the level of television violence between 1992 and 1994. In 1994, there were 2,605 violent scenes in a day, an average of almost 15 scenes of violence per channel per hour. There has been no significant change in the presentation of violence in the last two years.

D. Industry's proposed ratings system

Pursuant to the Telecommunications Act of 1996, the industry proposed a ratings system in December of 1996. The voluntary ratings system, called the "TV Parental Guidelines," consists of the following six age-based ratings categories, which resemble the Motion Picture Ratings System:

TV–Y ALL CHILDREN.—This program is designed to be appropriate for all children. Whether animated or live-action, the themes and elements in this program are specifically designed for a very young audience, including children from ages 2–6. This program is not expected to frighten younger children.

TV–Y7 DIRECTED TO OLDER CHILDREN.—This program is designed for children age 7 and above. It may be more appropriate for children who have acquired the developmental skills needed to distinguish between make-believe and reality. Themes and elements in this program may include mild physical or comedic violence, and may frighten children under the age of 7. Therefore, parents may wish to consider the suitability of this program for their very young children.

TV–G GENERAL AUDIENCE.—Most parents would find this program suitable for all ages. Although this rating does not signify a program designed specifically for children, most parents may let younger children watch this program unattended. It contains little or no violence, no strong language and little or no sexual dialogue or situations.

TV–PG PARENTAL GUIDANCE SUGGESTED.—This program may contain some material that some parents would find unsuitable for younger children. Many parents may want to watch it with their younger children. The theme itself may call for parental guidance. The program may contain infrequent coarse language, limited violence, some suggestive sexual dialogue and situations.

TV–14 PARENTS STRONGLY CAUTIONED.—This program may contain some material that many parents would find unsuitable for children under 14 years of age. Parents are strongly urged to exercise greater care in monitoring this program and are cautioned against letting children under the age of 14 watch unattended. This program may contain sophisticated

themes, sexual content, strong language and more intense violence.

TV–M MATURE AUDIENCE ONLY.—This program is specially designed to be viewed by adults and therefore may be unsuitable for children under 17. This program may contain mature themes, profane language, graphic violence and explicit sexual content.

All television programming except for news and sports will be rated. The ratings will be assigned in most cases by broadcast and cable networks and producers. The ratings will appear before each program, with the ratings icons appearing for 15 seconds at the beginning of each program in the upper left-hand corner of the television screen. The rating will also be encoded for each program, once the FCC sets a technical standard, which will enable the use of the "V-chip."

The ratings group has announced that it will supply the guidelines and explanations to newspapers and other program listings, including TV Guide and cable's Prevue Channel. At this point, however, it is unclear whether the newspapers will print the descriptions in full.

VII. RESPONSE TO THE INDUSTRY'S PROPOSED RATINGS SYSTEM

The industry plan has been criticized for focusing on age groupings instead of content. The 1996 Act envisioned that the ratings system, and consequently, the encoded programming, would allow parents to block specific programming content they found objectionable. Under the proposed age-based ratings system, parental groups argue that parents are unable to block specific programming. Critics claim that an age-based advisory approach places the entertainment industry in the position of making the judgment about program suitability, as opposed to merely describing the content and then allowing parents to apply their own values to judge the suitability of such content for their child. According to proponents of the V-chip, of greatest relevance to the current debate is the fact that the current V-chip ratings framework confounds or intermingles three types of sensitive portrayals: violence, sexual material, and adult language. Thus, it prevents parents from blocking a specific program based on whether a show actually contains any violent depictions that the parent may find unsuitable for their child.

Over 800 comments were filed with the FCC and of those only 26 approved of the industry rating proposal and almost all of the approving comments were submitted by network-affiliated TV stations. In addition, a number of members of Congress submitted a joint letter to the FCC expressing their opposition to the rating system.

The National PTA, the American Medical Association (AMA), the American Academy of Pediatrics (AAPA), the National Education Association (NEA), Children Now, the American Psychological Association (APA), the Coalition for America's Children, the Children's Defense Fund, the American Academy of Child & Adolescent Psychiatry (AACAP), the Center for Media Education, and the Public Broadcasting Service have opposed using movie-type ratings systems. Instead, these groups have advocated ratings based on

program content, with programs rated separately for sex, violence, and language ("S,V,L"). These groups have criticized the age-based ratings system as too vague and broad for parents to decide what is right for a child to watch on television. In addition, the groups state that the ratings raise more questions than they answer, such as how to differentiate "between a war documentary and a violent made-for-t.v. movie," or what level of sexual content a particular program contains.

The AACAP has been particularly critical of the ratings system, stating that:

> Programs portraying graphic and realistically appearing violence, sex, horror, adult language, and illegal behavior without social consequences increase the risk of dangerous behaviors and aberrant emotional and intellectual development by children and adolescents. * * * An age-based system, such as the one now being proposed, carries the risk of missing significant developmental variations in young people.

A survey by the National PTA found that 80 percent of parents want separate ratings for sex violence and language content—not a single summary rating for programs. Another survey, by the Media Studies Center, found that 73 percent of Americans support a TV rating system based on program content, versus 15 percent that support a system like the movie system which is based on age.

The ratings group argues that the industry's guidelines are sufficient to meet the 1996 Act's standard for the ratings system. They state that the guidelines the industry adopted meet that test because they place programs into categories based on specific levels of sexual content, violence, and strong or profane language. Proponents of the plan insist that they will continue to study the system and modify it as necessary (although Jack Valenti has reported that he will sue the FCC if it finds the ratings group's plan as "unacceptable"). A principal concern of the broadcast industry is that content-based ratings which address sexual content and violence would deter sponsors from buying advertising time slots during programs rated as containing violent or sexual content.

Other groups, such as Children Now and the AACAP, also criticize the fact that the industry will self-rate its shows, particularly noting that the lack of standards and appraisal protocols for raters to use in reviewing programs would result in inconsistencies. Some inconsistencies between programs' ratings have developed. For example, NBC assigned the TV–14 rating to "The Tonight Show with Jay Leno," while CBS assigned the TV–PG rating to "The Late Show with David Letterman." Another criticism includes the ambiguity of what constitutes a "news" show, which would not be rated. Some of the most violent and sexually suggestive programming is presented by pseudo news programs like "A Current Affair" and reality-based programs like "Cops."

The ratings group responds that self-rating was "the only feasible way in which the 2,000 hours of television programming distributed every day could be rated." The television industry also claims that the amount of violent programming has been reduced in recent years, demonstrating its commitment to self-regulation.

Opponents also criticize the rating icon appearing on the television screen as being too small, too transparent, and as not lasting long enough to be seen. The ratings group further argues that the 1996 Act does not require the industry to place the icons on television; instead, they voluntarily placed the icons on TV.

Supporters of the ratings group's system advocate giving the ratings plan a chance. President Clinton suggested that the public should withhold judgment on the system for 10 months; if it doesn't work out, then perhaps it could be revised. Similarly, the American Association of School Administrators (AASA) supports the ratings group's plan, as "an important first step," but will "be sensitive to how the guidelines are working for parents and how the entertainment industry is applying them." The AASA had suggested that a council of advisers be set up, with members of the industry and child advocacy groups, to meet annually. The ratings group did set up the council, but without the child advocacy groups. The 1996 Act requires the FCC to act if the industry does not establish acceptable "voluntary rules for rating video programming that contains sexual, violent, or other indecent material about which parents should be informed before it is displayed to children."

Responding to criticism leveled at the new ratings system, the Newspaper Association of America (NAA) wrote to the ratings group requesting to keep simple the "symbols" of the system to be inserted into the newspaper, because making them exceedingly lengthy or cumbersome would create "artificial barriers to newspaper printing" of the symbols.

VIII. ACTIONS IN OTHER COUNTRIES

In 1994, the Canadian broadcasters, under pressure from the Canadian Government, instituted a new voluntary Code Against Violence for television that took effect this year. The code bans shows with gratuitous violence and limits those shows that include scenes of violence suitable for adults only to the hours after 9 p.m. The code places limits on children's shows by requiring that violence not be a central theme. Also, it stipulates that, in children's programs, violence not be shown as a preferred way of solving problems and that the consequences of violence be demonstrated. In addition Canada is working to develop a ratings system that can be used with the V-chip which was invented in Canada.

Other countries that have adopted rules restricting violence to certain hours of the day include Australia, France, Italy and New Zealand.

VIII. CONSTITUTIONAL ANALYSIS

Some have questioned whether limiting the distribution of violent programming to certain hours of the day would be consistent with the First Amendment of the Constitution. Attorney General Janet Reno responded to some of these questions when she testified in October, 1993, that the safe harbor approach in S. 1383 (the

predecessor to S. 363) and the other bills before the Committee at that time were constitutional.[12]

There are several exceptions to the First Amendment. According to a study by the Congressional Research Service (CRS),[13] the Supreme Court has allowed Government regulation of obscenity, indecency, child pornography, and speech that creates a "clear and present danger". In addition, CRS notes that the courts provide only limited First Amendment protection to commercial speech, to defamation, and to speech that can be harmful to children. CRS further notes that "even speech that enjoys the most extensive First Amendment protection may be restricted on the basis of its content if the restriction passes 'strict scrutiny'".[14] Finally, CRS notes that the courts will allow certain time, place and manner restrictions.

While no court has ruled specifically on the constitutionality of the approach taken by S. 363, there appears to be many lines of decisions that would support the constitutionality of the safe harbor approach to television violence. S. 363 could fall within the ambit of the clear and present danger exception, the limitations on commercial speech and speech harmful to children, the strict scrutiny test, and/or a regulation of time, place and manner. The following discussion focuses on the recent opinion concerning broadcast indecency and the "strict scrutiny" test as examples of the lines of analysis that appear to support the constitutionality of the safe harbor approach. This discussion is not exhaustive, and there may well be arguments to justify the legislation which do not appear below.

A. Safe harbor under an ACT IV case analysis

A Court of Appeals decision in ACT IV[15] to uphold the safe harbor for broadcast indecency provides, perhaps, the best indication that the courts would uphold the safe harbor approach for television violence.

In 1992, Congress enacted legislation sponsored by Senator Robert Byrd to prohibit the broadcast of indecent programming during certain hours of the day. The Byrd amendment allowed indecent broadcasts between the hours of midnight and 6 a.m., except that public broadcast stations that go off the air at midnight or before were permitted to air indecent broadcasts between the hours of 10 p.m. and 6 a.m.[16]

On June 30th, 1995, the U.S. Court of Appeals for the District of Columbia Circuit, sitting en banc, upheld the constitutionality of

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[12] Testimony of Attorney General Janet Reno, Hearing on S. 1383, the Children's Protection from Violent Programming Act of 1993, et al., before the Senate Committee on Commerce, Science and Transportation, October 20, 1993, pp. 30, 42.

[13] "Freedom of Speech and Press: Exceptions to the First Amendment", Henry Cohen, American Law Division, Congressional Research Service, April 7, 1992, Revised July 6, 1993.

[14] "Strict scrutiny" requires the government to show that the restriction serves to promote a compelling Governmental interest and is the least restrictive means to further the articulated interest. See, Sable Communications of California v. Federal Communications Commission, 492 U.S. 115, 126, (1989) (Sable).

[15] Action for Children's Television, et al. v. FCC, et al., 58 F.3d 654 (D.C. Cir. 1995) cert. denied 116 S.Ct. 701 (1996).

[16] Congress had already prohibited obscene and indecent broadcasts many years earlier. Section 1464 of Title 18 of the U.S. Code prohibits the broadcast of any obscene, indecent, or profane language by means of radio communication. This section was enacted as part of Section 326 of the Communications Act of 1934 and was moved into Title 18 in 1948.

the Byrd amendment in ACT IV. The court found, in a 7 to 4 opinion, that the safe harbor approach, also called "channeling", satisfied the two-part "strict scrutiny" test.[17]

The court found that the Government met the first prong of the test by establishing that the Government had a "compelling governmental interest" in protecting children from the harm caused by indecency. The court found two compelling governmental interests, and left open the possibility of a third.[18] First, the court found that "the Government has a compelling interest in supporting parental supervision of what children see and hear on the public airwaves."[19] The court cited Ginsberg v. New York, 390 U.S. 629, 638, for the proposition that Government has a "fundamental interest in helping parents exercise their 'primary responsibility for [their] children's well-being' with 'laws designed to aid [in the] discharge of that responsibility."[20] Second, the court found that "the Government's own interest in the well-being of minors provides an independent justification for the regulation of broadcast indecency." It quoted the Supreme Court again in New York v. Ferber, 458 U.S. 747, 756–57 (1982) for the proposition that

> * * * a State's interest in safeguarding the physical and psychological well-being of a minor is compelling. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens. Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights."[21]

The court found that the legislation met the second prong of the test because it uses the "least restrictive means" to accomplish that governmental interest. Here, the court noted that, in choosing the hours during which indecency would be banned, the Government must balance the interests of protecting children with the interests of adults. "The question, then, is what period will serve the compelling governmental interests without unduly infringing on the adult population's right to see and hear indecent material."[22]

After reviewing the evidence compiled by the FCC, the court upheld the determination that a ban on indecent programming during the hours of 6:00 a.m. to 10:00 p.m. satisfied the balance and was the least restrictive means. The court noted that, to the extent that such a ban affected the rights of adults to hear such programming, "adults have alternative means of satisfying their interest in indecent material at other hours in ways that pose no risk to minors [such as renting videotapes, computer services, audio tapes, etc.]."[23] The court stated further that, "[a]lthough the restrictions

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[17] While the court upheld the safe harbor approach implemented by the Byrd amendment, it found that the different treatment of certain public broadcast stations and other stations was unjustified. The court thus directed the FCC to modify its rules to apply a consistent safe harbor of 6 a.m. to 10 p.m. for all broadcast stations.

[18] The court found it unnecessary to address the FCC's contention that there is also a compelling Governmental interest in protecting the home against intrusion by offensive broadcasts. ACT IV, at 13.

[19] ACT IV, at 661.

[20] ACT IV, at 661.

[21] ACT IV, at 661.

[22] ACT IV, at 665.

[23] ACT IV, at 666.

burden the rights of many adults, it seems entirely appropriate that the marginal convenience of some adults be made to yield to the imperative needs of the young."[24]

The reasoning of the court in ACT IV appears to apply equally to S. 363. As with indecency, the Government has a compelling interest in protecting the moral and psychological well-being of children against the harm of viewing television violence. Also as with indecency, restricting television violence to certain hours of the day balances the rights of adults to watch violent programming with the interests of protecting children. Adults have other ways of obtaining access to violent programming just as they have other ways of obtaining indecent materials. Thus, the decision upholding the safe harbor for indecency appears to provide strong support for finding a safe harbor for violence to be constitutional.

B. The strict scrutiny test

The strict scrutiny test is one of the most difficult, if not the most difficult test used to analyze the constitutionality of a First Amendment limitation. The ACT IV court as discussed above, used a strict scrutiny analysis in determining constitutionality. The following discussion further assesses the safe harbor approach under strict scrutiny, not because of the certainty that this is the test that will be applied, but because, if the safe harbor approach can pass the strict scrutiny test, it could certainly pass any lesser standard of review. Regulation will pass the strict scrutiny test if the regulation is narrowly tailored to meet a compelling government interest.

There is good reason to believe that S. 363 would pass the "strict scrutiny" test, and not just because of the results of the strict scrutiny analysis under the ACT IV case. In some respects, the constitutionality of a safe harbor approach for violence could be easier to sustain than for indecency. As opposed to the indecency issue, Congress has developed a long and detailed record to justify the legislation. Congress has held hearings to explore various approaches to television violence in every decade since the 1950s. This Committee alone has over 18 days of hearings over the past three decades on this topic, including at least two hearings specifically on the safe harbor approach. The Committee has laid an extensive groundwork for considering the least restrictive means of protecting children from violence on television. By contrast, the Byrd amendment, the legislation at issue in the ACT IV case, was adopted on the Senate floor without any Committee hearings. Furthermore, as Chief Judge Edwards of the D.C. Circuit has acknowledged twice, there is much stronger evidence that viewing violence on television causes harm to children than any proposed harm caused by indecency.[25]

1. The compelling governmental interest

The Government has several compelling interests in protecting children from the harmful effects of viewing violence: an interest

[24] ACT IV, at 667.

[25] "There is significant evidence suggesting a causal connection between viewing violence on television and antisocial violent behavior. . ." (emphasis in original) ACT IV, Edwards, C.J., dissenting, at 671.

in protecting children from harm, an interest in protecting society in general, an interest in helping parents raise their children, and an interest in the privacy of the home. Each of these are discussed below.

i. Harm to children.—Government has a compelling interest in protecting children from the harm caused by television violence. As several witnesses testified, there is little doubt that children's viewing of violence on television encourages them to engage in violent and anti-social behavior, either as children or later as adults. Somewhere between 200 and 3000 independent studies demonstrate a causal connection between viewing violence and violent behavior.[26] These studies have included "field" studies of the effect of television on persons in real life and laboratory studies. While the studies concluded in 1972 by the National Institute of Mental Health (NIMH) concluded that there was a causal relationship between viewing violence and behavior primarily among those children predisposed to violence, more recent research by NIMH and others demonstrates that violent television affects almost all children. Dr. Eron stated in his testimony before the Committee as follows:

One of the places violence is learned is on television. Over 35 years of laboratory and real-life studies provide evidence that televised violence is a cause of aggression among children, both contemporaneously, and over time. Television violence affects youngsters of all ages, both genders, at all socio-economic levels, and all levels of intelligence. The effect is not limited to children who are already disposed to being aggressive, and it is not restricted to the United States.[27]

While it is perhaps axiomatic that children who become violent because of television suffer harm, it is worth noting that such children suffer harm in many ways. For example, they can become anti-social, distant from others, and unproductive members of society, especially if their actions arouse fear in other people. They can suffer from imprisonment or other forms of criminal punishment if their violence leads to illegal behavior.

Violent behavior may not be the only harm caused by viewing violent television. According to the American Psychological Association, viewing violence can cause fearfulness, desensitization, or an increased appetite for more violence.[28] In other words, as with "obscenity" and "indecency", the harm from television violence may result simply from viewing violent material, even if no violent behavior follows such viewing.

ii. Harm to society.—A related compelling Governmental interest is the need to protect society as a whole from the harmful results of television-induced violent behavior. A child who views excessive amounts of television violence is not the only person who suffers harm. As Dr. Eron testified, children who watch excessive amounts of television when they are young are more "prone to be convicted

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[26] Among these are studies conducted by the American Medical Association, the American Psychological Association, the National Institute of Mental Health, the Center for Disease Control, and numerous studies by individual researchers.

[27] Oral Testimony of Dr. Leonard Eron on behalf of the American Psychological Association, Institute for Social of Michigan before the Senate Committee on Commerce, Science, and Transportation, Communications Subcommittee, July 12, 1995. (Testimony of Dr. Eron).

[28] See, Testimony of Shirley Igo.

for more serious crimes by age 30; more aggressive while under the influence of alcohol; and, harsher in the punishment they administered to their own children."[29]

iii. Helping parents supervise their children.—In addition to the Governmental interests in protecting children and society from harm, the courts have also recognized a compelling governmental interest in helping parents supervise what their children watch on television. In Ginsberg, the Supreme Court upheld a New York statute making it illegal to sell obscene materials to children. The Court noted that it was proper for legislation to help parents exercise their "primary responsibility for [their] children's well-being" with laws designed to aid [in the] discharge of that responsibility."[30]

iv. Privacy of the home.—The Government's interest in protecting the privacy of the home from intrusion by violent programming may provide a fourth compelling Governmental interest. The Supreme Court has recognized that "in the privacy of the home * * * the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder".[31] The right to privacy in one's home was recently used to uphold legislation limiting persons from making automated telephone calls to residences and small businesses.[32] Just as subscribers to telephones do not give permission to telemarketers to place automated telephone calls, the ownership of a television does not give programmers permission to broadcast material that is an intrusion into the privacy of the home.

2. The least restrictive means

Opponents of the legislation argue that the safe harbor approach to television violence is not the least restrictive means of accomplishing the goals of reducing the exposure of children to television violence. Some in the broadcast industry, for instance, argue that the industry should be trusted to regulate itself to reduce the amount of violence. Parents should bear the primary responsibility for protecting their children, according to some observers. Others say that the warnings and advisories that many programmers now add to certain shows are a lesser restrictive means of protecting children.

Under S. 363 a safe harbor would be instituted if the FCC does not implement a ratings system that would allow parents to block programming based on its violent content. If a content-based ratings system is not implemented, the safe harbor approach would be the least restrictive means of accomplishing the government's interest. The ideas forwarded above may, indeed, be less restrictive than the safe harbor approach, but they may not accomplish the goal of protecting children from violent television. If a ratings system cannot be successfully implemented then, it is unlikely that the industry will be able to successfully regulate itself and parents would be

[29] Written Testimony of Dr. Eron, p. 2. Dr. Eron further warns that "* * * like secondary smoke effects, * * * don't think that just because you have protected your child from the effects of television violence that your child is not affected. You and your child might be the victims of violence perpetrated by someone who as a youngster, did learn the motivation for and the techniques of violence from television." Written Testimony of Dr. Eron.

[30] Ginsberg v. New York, 390 U.S. 629, 639 (1968).

[31] FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978).

[32] See, [CITE].

able to successfully monitor the programs their children watch on television.

The problem of children's exposure to violence on television is especially acute for residents of inner city neighborhoods. According to Gael Davis of the National Council of Negro Women, who herself was the victim of a random gunshot by an urban youth,

> Violence is the No. 1 cause of death in the African-American community * * * [I]n south central [Los Angeles], * * * [t]he environment is permeated with violence. It is unsafe for children to walk to and from school. We have 80 percent latchkey children, where there will be no parent in the home during the afterschool hours when they are viewing the television. The television has truly become our electronic babysitter. [33]

Many children do not have the benefit of parents willing and able to monitor the television programming they watch. According to William Abbott of the Foundation to Improve Television, "millions of children watch television unsupervised—¼ of our children have but a single parent (the latch-key kids)".[34]

As Shirley Igo noted in her testimony before the Committee on behalf of the National Parent-Teachers Association, the broadcast networks have drastically reduced the amount of educational programming for children.

> * * * it was found that in 1980, the three major networks combined were showing 11 hours of educational shows per week, but by 1990 such programming had diminished to less than two hours per week. Yet, there was more non-educational programming targeted at children than ever before. * * * It is clear to the National PTA and should be clear to members of this Committee that if our collective goal is ro reduce violence on television, voluntary efforts by the industry will not get our nation to achieving that goal. [35]

According to the "strict scrutiny" test, a regulation that limits freedom of speech based on the content must use "the least restrictive means to further the articulated interest." [36] In the absence of a content based ratings system, the safe harbor approach is the only approach that has a significant chance of furthering the compelling governmental interest in protecting American children from the impact of television violence.

i. Industry self-regulation.—As discussed earlier, the television industry has been told to improve its programming by Congress for over 40 years. The first Congressional hearings on television violence were held in 1952. Hearings were held in the Senate in 1954

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[33] Testimony of Gael T. Davis, President, East Side Section, National Council of Negro Women, Hearing on S. 1383, the Children's Protection from Violent Programming Act of 1993, et al. before the Senate Committee on Commerce, Science, and Transportation, October 20, 1993.

[34] Testimony of William Abbott, President, Foundation to Improve Television, before the Committee on Commerce, Science, and Transportation, Hearing on Television Violence, July 12, 1995.

[35] Testimony of Shirley Igo, National PTA Vice-President for Legislation, before the Senate Committee on Commerce, Science, and Transportation, July 12, 1995.

[36] Sable, at 126.

and again in the 1960's, the 1970's, 1980's and 1990's. At each hearing, representatives of the television industry testified that they were committed to ensuring that their programming was safe and appropriate for children. In 1972, the Surgeon General called for Congressional action, but this call was ignored after the broadcast industry reached an agreement with the FCC to restrict violent programs and programs unsuitable for children during the "family hour".

There is substantial evidence, however, that despite the promises of the television industry, the amount of violence on television is far greater than the amount of violence in society and continues to increase. According to one study, "[s]ince 1955, television characters have been murdered at a rate one thousand times higher than real-world victims. Indeed, television violence has far outstripped reality since the 1950s."[37] As noted earlier, the American Academy of Pediatrics recorded a threefold increase in the amount of violence on television during the 1980's. The most recent survey of television in one city found a 41 percent increase in two years.

The incentives of the television industry can be illustrated by a quote from a memo giving directions to the writers of the program "Man Against Crime" on CBS in 1953:

> It has been found that we retain audience interest best when our stories are concerned with murder. Therefore, although other crimes may be introduced, somebody must be murdered, preferably early, with the threat of more violence to come.[38]

In December, 1992, the four broadcast networks released a common code of conduct that many criticized for being weaker than the networks' own code of practices. In any case, the code appears to have had little effect on the amount of violence on television. In December of 1996, the industry proposed a ratings system which has been sharply criticized for being age and not content based.

ii. Warning labels.—Some observers argue that a requirement to put warnings or parental advisories before certain violent programs would be a less restrictive means of satisfying the Government's interest in protecting children. The Committee has received no evidence, however, that such warnings accomplish the purpose of protecting children.[39] In fact, recent reports indicate a continuing increase in the violence on television. Despite the industry's efforts to air such advisories on their own initiative, the National Parent-Teachers Association and the Foundation to Improve Television has supported a safe harbor as a more effective approach. Indeed, there is some reason to believe that advisories may increase the amount of violence on television, if the television industry believes that it has provided notice to parents to protect itself from criticism. Some

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[37] S. Robert Lichter, Linda S. Lichter and Stanley Rothman, Prime Time: How TV portrays American Culture, (Regnery Publishing, Inc., Washington, D.C., 1994), p. 275.

[38] Quoted in Eric Barnouw, The Golden Age [?], p. ?.

[39] The Committee notes that it has received no evidence indicating that the warning labels on music records and compact discs has reduced the exposure of children to inappropriate lyrics.

observers believe that programmers may want a warning label to be placed on a program in order to attract viewers.[40]

Without parental supervision, such warning labels may have the opposite effect of increasing the appetite of children for violent shows. Further, it is difficult to believe that such warnings would be effective in the age of "channel surfing". Warnings that appear once at the very beginning of a program may not be seen by a viewer who does not see the beginning of a program.

iii. Parental responsibility and control technologies.—Some observers believe that parents should bear the primary responsibility for protecting their children from violent programming, and a variety of technologies that are now available to television consumers can assist parents in controlling the programs that their children watch. For several reasons, it is not clear that either of these approaches will be effective.

Even when parents are available and concerned about the television programs that their children watch, they may not be able to monitor their children's television viewing habits at all times. According to one survey, 66 percent of homes have 3 or more television sets, and 54 percent of children have a TV set in their own bedrooms. Children often watch television unsupervised. In fact 55 percent of children usually watch television alone or with friends, but not with their families.[41]

The implementation of the safe harbor approach is contingent upon the FCC not implementing a content-based ratings system to be used in conjunction with the V-chip. If FCC does not move forward with this technology based solution, it is unlikely that other technology based solutions will more appropriately address the issue of children and television violence. In addition, technology based solutions require parents to be able to afford to spend money to purchase the new technologies. Development of some technologies are also uncertain. The developer of the Telecommander technology, for instance, received a patent for his television screening device in 1978, but has not been able to obtain capital to bring the product to market, presumably because of the uncertain demand for the product. There are also questions about the ability of parents to program the technologies effectively. In many households, the children often are more comfortable with the technologies than the parents.[42]

C. Additional issues

1. Definition of violence

Some have raised questions about the definition of violence in S. 363. Some have criticized the legislation for failing to include a definition; others state that it is inherently impossible to craft a defi-

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[40] For example, Ms. Lindsay Wagner, a television actress, testified in 1993 that filmmakers sometimes lobby to get an "R" rating. "We now have a couple of generations that have been reared on violence for fun and many flock to the films with warnings." Testimony of Ms. Lindsay Wagner, Hearing on S. 1383, the Children's Protection from Violent Programming Act of 1993, before the Committee on Commerce, Science, and Transportation, p. 81.

[41] Testimony of William Abbott.

[42] It is worth noting that one of the witnesses at the July 12 hearing before the Committee had difficulty operating the technology that his company had developed. See, Oral Testimony of Mr. Wayne C. Luplow, Vice President, Zenith Electronics Corporation, Hearing on Television Violence before the Committee on Commerce, Science,and Transportation, July 12, 1995.

nition that would not be "overbroad" or "vague" in violation of the constitutional requirements set down by the Supreme Court.

S. 363 adopts the same approach toward "violent video programming" as Congress has previously adopted for "indecency". Section 1464 of Title 18 prohibits the broadcast of indecency but does not contain a definition of the term. In 1975, the FCC adopted a definition of indecency that the courts have found to be proper. While it may be difficult to craft a definition that reflects the context of violence, that is not overbroad, that is not vague, and that is consistent with the research of harm caused to children, these are exactly the tasks that the FCC was created to perform. The FCC can hold its own hearings, seek comment from the industry and the public, review the research in detail in order to come up with a definition.

Some observers cite the case of Video Software Dealers Association v. Webster to support the position that legislation to restrict violent video is unconstitutional. That case, however, concerned a statute that neither contained a definition of violence nor delegated the definition to a regulatory agency. S. 363, by contrast, does not take effect until the FCC issues a definition of violence. In Davis-Kidd Books v. McWherter, the court overturned a statue that contained a definition of violence that was overly vague. While this case demonstrates the difficulty of defining violence, it does not stand for the proposition that violence is incapable of being defined. If the FCC fails to come up with a definition of violent video programming that satisfies constitutional scrutiny, the legislation authorizes the FCC to try again until it does.

2. Applicability to cable television and other broadcast technologies

Other observers question the constitutionality of restricting violence on cable television and other distribution media in addition to broadcasting. They note that Red Lion, Pacifica, and the line of ACT cases pertained only to broadcasting, not to cable or any other form of media.

There are several responses to this argument. First, the "strict scrutiny" test applies to any content regulation, not just those imposed on broadcast stations. The Supreme Court has, for instance, applied the "strict scrutiny" test to telephone communications[43] and to newspapers[44]. These cases indicate that a restriction on violent video programming could, potentially, be imposed on any media if it satisfies the "strict scrutiny" test.[45]

The court's rationale for subjecting broadcasting to a more restrictive treatment includes, the scarcity of broadcast frequencies, the pervasive presence of broadcast, and accessibility of broadcast to children. In recognizing the special status of broadcasting, the Supreme Court, in the National Broadcasting Co. and Red Lion cases, concluded that due to their "scarcity," broadcast frequencies are not available to all who may wish to use them. Therefore, regulation is vital to the development of broadcasting.

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[43] Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989).

[44] Tornillo * * *. [CITE]

[45] The court in ACT IV states, "[W]e apply strict scrutiny to regulations of this kind [concerning indecency] regardless of the medium affected by them * * *". ACT IV, at 12.

The Supreme Court in ACT IV, addressed the pervasive presence of broadcast and its accessibility to children. The Court stated that:

> First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home * * * Second, broadcasting is uniquely accessible to children * * * The ease with which children may obtain access to broadcast material * * * amply justifies special treatment of indecent broadcasting.[46]

The ACT IV court further noted that "broadcast audiences have no choice but to "subscribe" to the entire output of traditional broadcasters."[47]

Just as with broadcast television, non-premium cable service has grown to have a uniquely pervasive presence in the lives of all Americans and is uniquely accessible to children. Over 60 percent of consumers now receive some form of cable service. Because of the "must-carry" rules, almost all of these subscribers now receive their broadcast signals through their cable systems. From the perspective of the viewer, and especially children, there is little if any distinction between the broadcast programs that come in over the cable system and the cable-only programs. Indeed, cable television service has become so important a service to the average American that Congress has required the rates for cable television to be regulated.[48]

Two more recent cases have indicated that it is permissible to regulate other technologies such as cable. The Supreme Court, in Denver Area Educational Telecommunications Consortium[49] addressed the constitutionality of Section 10 of the Cable Television Consumer Protection and Competition Act of 1992. Although the Court struck certain provisions of Section 10, it held that Section 10(a), which permits cable operators to decide whether or not to broadcast indecent programs on leased access channels, is consistent with the First Amendment.

In Playboy Entertainment Group,[50] the District Court of Delaware addressed the constitutionality of Section 505 of the Telecommunications Act of 1996. The court found that regulating cable and the use of the safe harbor approach was constitutional. Section 505 requires a cable television operator to completely scramble or block audio and video portions of any cable channel primarily dedicated to sexually explicit programming. If a cable operator is unable to scramble or block programming it must establish a safe harbor.

In imposing first amendment limitations on cable, the court in Playboy Entertainment Group stated that:

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[46] Pacifica, at 748-750.
[47] ACT IV, at 12.
[48] See, the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (The 1992 Cable Act).
[49] Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 116 S.Ct. 2374 (1996).
[50] Playboy Entertainment Group, Inc. and Graff-Pay-per-view Inc. v. DOJ and FCC, 945 F.Supp. 772 (1996).

> * * * cable television is a means of communication which is pervasive and * * * [t]he Supreme Court has recognized that cable television is as accessible to children as over-the-air broadcasting, if not more so.

Moreover, the Supreme Court in its consideration of freedom of speech under the First Amendment has recognized the need to protect children from sexually explicit material, particularly in the context of a pervasive medium.[51]

The court found the safe harbor approach to be constitutional and stated that "[g]iven the content of adult programming and the pervasive nature of cable television, * * * Section 505 is an acceptable government response intended to prevent exposure of minors to sexually explicit signal bleed."[52]

S. 363 is not intended to apply to premium or pay-per-view channels in recognition of the fact that parents have the choice to subscribe to these channels on an individual basis. This distinction between premium channels and pay-per-view programs, on the one hand, and basic or expanded basic packages of cable programs, on the other, demonstrates the Committee's attempt to balance the rights of children and the legitimate rights of parents to watch the programs that they want to watch. In this way, the legislation avoids unnecessarily interfering with parents' First Amendment rights in order to meet the least restrictive means test.

LEGISLATIVE HISTORY

In October 1993, the Senate Commerce Committee held a hearing on television violence to consider a variety of legislative proposals. Attorney General Janet Reno testified that the legislation currently pending before the Committee, including S. 1383, the Hollings-Inouye legislation establishing a safe harbor for violent programming, would be constitutional. The broadcast networks and other industry representatives argued that the amount of violent programming was less than in previous years. The industry also testified that the industry should be given more time to implement its warning labels before legislation should be considered.

On July 11, 1995, the Committee held its second hearing on television violence to consider pending measures, including S. 470, the Hollings' safe harbor legislation. S. 470 (104th Congress) is identical to S. 1383 (103rd Congress). The Committee subsequently reported S. 470, as introduced, on August 10, 1995 by a recorded vote of 16 yeas and 1 nay, with two Senators not voting. No further action was taken during the 104th Congress.

On February 26, 1997, Senator Hollings with Senators Inouye and Dorgan as co-sponsors, introduced S. 363. S. 363 is similar to S. 470 but allows the Commission to implement a safe harbor if it does not implement a content-based ratings system. On February 27, 1997, the Committee held another hearing on television violence in which S. 363 was addressed. Groups such as the American Psychiatric Association expressed their disapproval of the current aged based rating system proposed by the industry and noted their preference for a content-based ratings system. Kevin Saunders,

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[51] Playboy Entertainment Group at pp. 785-786.
[52] Playboy Entertainment Group at pp. 789-790.

Professor of Law at the University of Oklahoma, testified that violent programming could arguably be considered obscene or indecent and the safe harbor approach is constitutional. [53]

On May 1, 1997, the Committee in open executive session and by a rollcall vote of 19-1 ordered the bill reported with an amendment.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

S. 363—Children's Protection from Violent Programming Act

Summary: CBO estimates that enacting this bill would result in new discretionary spending of about $3 million over the 1998–2002 period, assuming appropriation of the necessary amounts. Because the bill would not affect direct spending or receipts, pay-as-you-go procedures would not apply. S. 363 contains intergovernmental and private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995 (UMRA). CBO estimates that the cost of the intergovernmental mandate would not exceed the threshold established in the law. CBO cannot determine the costs of complying with the private-sector mandate that the bill would impose.

S. 363 would prohibit the distribution of violent programming that cannot be blocked by electronic means in broadcast and cable television during the hours of the day when children are likely to comprise a substantial portion of the viewing audience. The bill would instruct the Federal Communications Commission (FCC) to conduct a rulemaking in order to define violent programming and determine the hours of the day during which violent programming would be prohibited. It would require the FCC to repeal the license of any person who repeatedly violates the regulations and would instruct the FCC to consider compliance with the regulations in its review of an application for renewal of a license. Finally, the bill would require the FCC to assess the effectiveness of the new regulations periodically.

Estimated cost to the Federal Government: Assuming appropriation of the necessary amounts, CBO estimates that implementing S. 363 would result in total costs to the FCC of about $3 million over the 1998–2002 period. Based on information from the FCC, CBO estimates that promulgating the rules required by the bill would cost approximately $300,000 in 1998, primarily for personnel. We estimate that monitoring the complaints regarding violations of the commission's rules on violent programming and reviewing the license applications for compliance would cost about $400,000 in fiscal year 1999, $700,000 in fiscal year 2000, and slightly less in subsequent years. (The rules on the distribution of violent programming would not take effect until mid-1999. Therefore, we expect fewer complaints and lower monitoring costs in that

[53] Testimony of Kevin Saunders, J.D., Ph.D., before the Senate Committee on Commerce, Science, and Transportation, February 27, 1997 at pp. 17 and 7.

year.) In addition, CBO estimates it would cost the FCC about $300,000 in fiscal year 2000 and $200,000 in fiscal year 2002 to assess the effectiveness of the regulations.

Pay-as-you-go considerations: None.

Intergovernmental and private-sector impact: S. 363 would impose a federal mandate on distributors of video programming, such as television networks, broadcast stations, cable operators, and satellite broadcast service providers. That mandate would primarily fall on the private sector, but would also apply to state and local governments that operate public television stations. CBO cannot estimate the total costs of complying with that mandate because we have no basis for predicting the details of regulations that the FCC would be required to issue over the next year, or the response to those regulations by distributors of video programming, viewing audiences and advertisers. The impact on the relatively small number of public television stations operated by state or local governments or by public universities and colleges would be much smaller than the effect on commercial stations. Therefore, CBO estimates that the cost of the intergovernmental mandate would not exceed the threshold established in UMRA ($50 million in 1996, adjusted annually for inflation).

Background—At the close of 1996, the nation had 1,544 broadcast television stations that included 1,181 commercial stations and 363 public stations. Most of the commercial television stations are affiliated with one of the four national networks. Advertising revenues of the broadcast industry totaled nearly $28 billion in 1995. In addition, there are currently approximately 11,200 cable systems with advertising revenues in 1995 totaling over $5 billion. Providers of satellite broadcast services obtain revenues from subscribers.

The Telecommunications Act of 1996 (Public Law 104–104) requires that parents be provided with both programming information and a technological tool to block certain programming. That act also encourages the video programming industry to establish a program rating system and to broadcast signals containing these ratings. In addition, the act requires that television sets manufactured after February 1998 include a V-chip, which would allow viewers to block the display of all programs with a common rating. Currently the television industry is using such a voluntary rating system based on guidelines that consider the age appropriateness and content of programs.

In accordance with the Telecommunications Act, the National Association of Broadcasters, the National Cable Television Association, and the Motion Picture Association of American have submitted this voluntary rating system to the FCC for approval. If the FCC does not accept the industry's rating system, it is required by law to prescribe guidelines and recommendations for a mandatory rating system.

Mandate—S. 363 would make it unlawful for any person to distribute to the public any violent video programming that is not blockable by electronic means during hours when children are reasonably likely to comprise a substantial portion of the audience. The FCC would be required to define violent programming and to determine the hours of the day during which violent programming

would be prohibited. Distributors of video programming would be required to encode any programming telecast during prescribed hours that contains violent content as defined by the FCC. Premium and pay-per-view cable programming would be exempt. In addition, the FCC could exempt some programming, such as news and sports programs. The commission would have to issue final regulations within nine months of the enactment date and they would go into effect one year from that date.

According to representatives of the television industry, compliance with S. 363 would most likely involve the creation of a new rating category and the insertion of the appropriate code to electronically block violent programs during prohibited hours. Alternatively, programs could be shifted to unrestricted time slots, or program content could be altered.

Compliance Costs—Based on industry estimates of the direct costs of establishing the current voluntary system, CBO expects that the incremental costs of creating and applying the proposed violent content code would be relatively small. Satellite operators and local commercial stations could experience significant costs if single-feed networks that transmit programs to all time zones simultaneously choose not to encode programs based on eastern time zone viewing hours.

By far the greatest potential cost would be a loss of advertising revenues. Such losses could result if encoding programs with a signal that allows programs to be blocked electronically, shifting hours of transmission, or changing programming content alters viewership. However, CBO cannot estimate the impact on advertising revenues because there is no basis for predicting the specifics of the FCC's regulations, the distributors' response to those regulations, or the market response to those changes.

Such losses would fall most heavily on broadcast television stations. Depending on the FCC's definition of violence and the consumers' purchases of televisions equipped with a V-chip or converter boxes, the loss of advertising revenue could be significant. The losses of advertising revenues would only have to total 0.3 percent of total industry revenues (over $33 billion) in order for the total cost of this mandate to exceed the statutory annual threshold for private-sector mandates ($100 million in 1996, adjusted annually for inflation). It is possible, however, that if under current law, the FCC rejects the industry's voluntary rating system and imposes a system based more on content, the incremental cost of this mandate would be significantly less than that.

Intergovernment Mandate Costs.—The bill's requirements would apply to public television stations operated by state and local governments. According to the Corporation for Public Broadcasting, state and local governments operate about one-third of the 363 public television stations. In addition, universities and colleges, many of them public, operate another 85 of these stations.

As with commercial stations, CBO estimates the direct costs of creating and applying the proposed violent content code would be small. It is possible, however, that the response of these publicly-owned television stations to the bill's requirements could alter the viewership of their programs. This could in turn decrease the revenues these stations receive from corporate sponsorships of pro-

grams. Because corporate underwriting represents a relatively small portion of these stations' revenues, CBO expects that any decrease in revenues would not exceed the annual threshold for intergovernmental mandates established in UMRA ($50 million in 1996, adjusted annually for inflation).

Estimate prepared by: Federal costs: Rachel Forward; Impact on State, local, and tribal governments: Pepper Santalucia; Impact on the private sector: Jean Wooster.

Estimate approved by: Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported.

The primary impact of this legislation will be on the television networks, broadcast stations, and cable programmers insofar as they must determine when to air certain kinds of programming if these entities do not offer content-specific ratings. Therefore, if broadcasters provide content-specific ratings, then the law will have no impact. For those broadcasters and cable programmers that decide against providing content-specific ratings, the economic impact is likely to be negligible at worst and could be positive. The networks and broadcast stations already have standards and practices departments that review all programs for their content. The legislation would simply require these reviewers to add an analysis of the violent content of programs to the analyses that they currently conduct. To the extent that broadcast and cable programs contain less violence, they are more likely to attract additional viewers, especially younger children and parents, which will enable the broadcasters and cable programmers to sell more advertising time, thus increasing the potential revenues of the industry.

PRIVACY

There will be no impact on personal privacy as a result of this legislation.

PAPERWORK

The paperwork resulting from this legislation will be primarily due to the initial proceeding to define violent programming and determine the hours of the day during which violent programming would be prohibited.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This section cites the short title of the reported bill as the "Children's Protection from Violent Programming Act."

Section 2. Findings

This section provides Congressional findings.

Section 3. Unlawful distribution of violent video programming

This section adds a new section 718 to the Communications Act of 1934.

New section 718(a) makes it unlawful for any person to distribute to the public any violent video programming not blockable by electronic means specifically on the basis of its violent content during hours when children are reasonably likely to comprise a substantial portion of the audience.

New section 718(b) requires the FCC to conduct a rulemaking proceeding, with the objective of issuing final implementing regulations within 9 months after the bill's date of enactment. Under the proceeding, the FCC: (1) is authorized to exempt from the ban in new section 718(a) certain programming, like news and sports, whose distribution does not conflict with the objective of protecting children from the negative influences of violent video programming; (2) is required to exempt premium and pay-per- view cable programming; and (3) is required to define the terms "hours when children are reasonably likely to comprise a substantial portion of the audience" and "violent video programming."

New section 718(c) requires the FCC, after notice and opportunity for hearing, to immediately revoke the license of any person who repeatedly violates the prohibition or the implementing regulations.

New section 718(d) provides that the FCC shall consider a licensee's compliance history with respect to the prohibition and implementing regulations when acting on the licensee's renewal application.

Section 4. Assessment of effectiveness

This section requires the FCC to assess the effectiveness of (1) the prohibition and implementing regulations under new section 718 and (2) the video programming ratings and V-chip requirements of section 303 of the Communications Act of 1934. The FCC is required to report its findings to the Senate Committee on Commerce, Science, and Transportation and the House Committee on Commerce within 18 months after the promulgation of the implementing regulations, and thereafter as part of its biennial regulatory review. If the FCC assessment determines that the measures taken under new section 718 and section 303 are ineffective, the FCC is required to promulgate regulations to provide for a safe harbor regardless of whether blocking capability theoretically exists.

Section 5. Separability

This section provides that if any provision of the legislation or any provision of an amendment made by the legislation, or the application thereof to particular persons or circumstances, is held to be unconstitutional, any remaining provisions or the application thereof to other persons or circumstances shall be unaffected.

Section 6. Effective date

This section provides that the prohibition under new section 718 and regulations promulgated thereunder shall take effect one year after the regulations are adopted.

ROLLCALL VOTES IN COMMITTEE

In accordance with paragraph 7(c) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following description of the record votes during its consideration of S. 363:

At the close of debate on S. 363, the Chairman announced a rollcall vote on the bill. On a rollcall vote of 19 yeas and 1 nay as follows, the bill was ordered reported with an amendment to add findings:

YEAS—19	NAYS—1
Mr. McCain	Mr. Brownback [1]
Mr. Stevens	
Mr. Burns	
Mr. Gorton	
Mr. Lott	
Mrs. Hutchison	
Ms. Snowe	
Mr. Ashcroft	
Mr. Frist[1]	
Mr. Abraham	
Mr. Hollings	
Mr. Inouye[1]	
Mr. Ford	
Mr. Rockefeller	
Mr. Kerry[1]	
Mr. Breaux	
Mr. Bryan[1]	
Mr. Dorgan	
Mr. Wyden	

[1] By proxy

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changed in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

COMMUNICATIONS ACT OF 1934

SEC. 718. UNLAWFUL DISTRIBUTION OF VIOLENT VIDEO PROGRAMMING NOT SPECIFICALLY BLOCKABLE BY ELECTRONIC MEANS.

(a) UNLAWFUL DISTRIBUTION.—It shall be unlawful for any person to distribute to the public any violent video programming not blockable by electronic means specifically on the basis of its violent content during hours when children are reasonably likely to comprise a substantial portion of the audience.

(b) RULEMAKING PROCEEDING.—The Commission shall conduct a rulemaking proceeding to implement the provisions of this section and shall promulgate final regulations pursuant to that proceeding not later than 9 months after the date of enactment of the Children"s Protection from Violent Programming Act. As part of that proceeding, the Commission—

(1) may exempt from the prohibition under subsection (a) programming (including news programs and sporting events) whose distribution does not conflict with the objective of protecting children from the negative influences of violent video programming, as that objective is reflected in the findings in section 551(a) of the Telecommunications Act of 1996;

(2) shall exempt premium and pay-per-view cable programming; and

(3) shall define the term "hours when children are reasonably likely to comprise a substantial portion of the audience" and the term "violent video programming".

(c) REPEAT VIOLATIONS.—If a person repeatedly violates this section or any regulation promulgated under this section, the Commission shall, after notice and opportunity for hearing, immediately revoke any license issued to that person under this Act.

(d) CONSIDERATION OF VIOLATIONS IN LICENSE RENEWALS.—The Commission shall consider, among the elements in its review of an application for renewal of a license under this Act, whether the licensee has complied with this section and the regulations promulgated under this section.

(e) DEFINITIONS.—For purposes of this section—

(1) BLOCKABLE BY ELECTRONIC MEANS.—The term "blockable by electronic means" means blockable by the feature described in section 303(x).

(2) DISTRIBUTE.—The term "distribute" means to send, transmit, retransmit, telecast, broadcast, or cablecast, including by wire, microwave, or satellite.

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