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# The Government Tunes in to Tune Out the Marketing of Violent Entertainment to Kids

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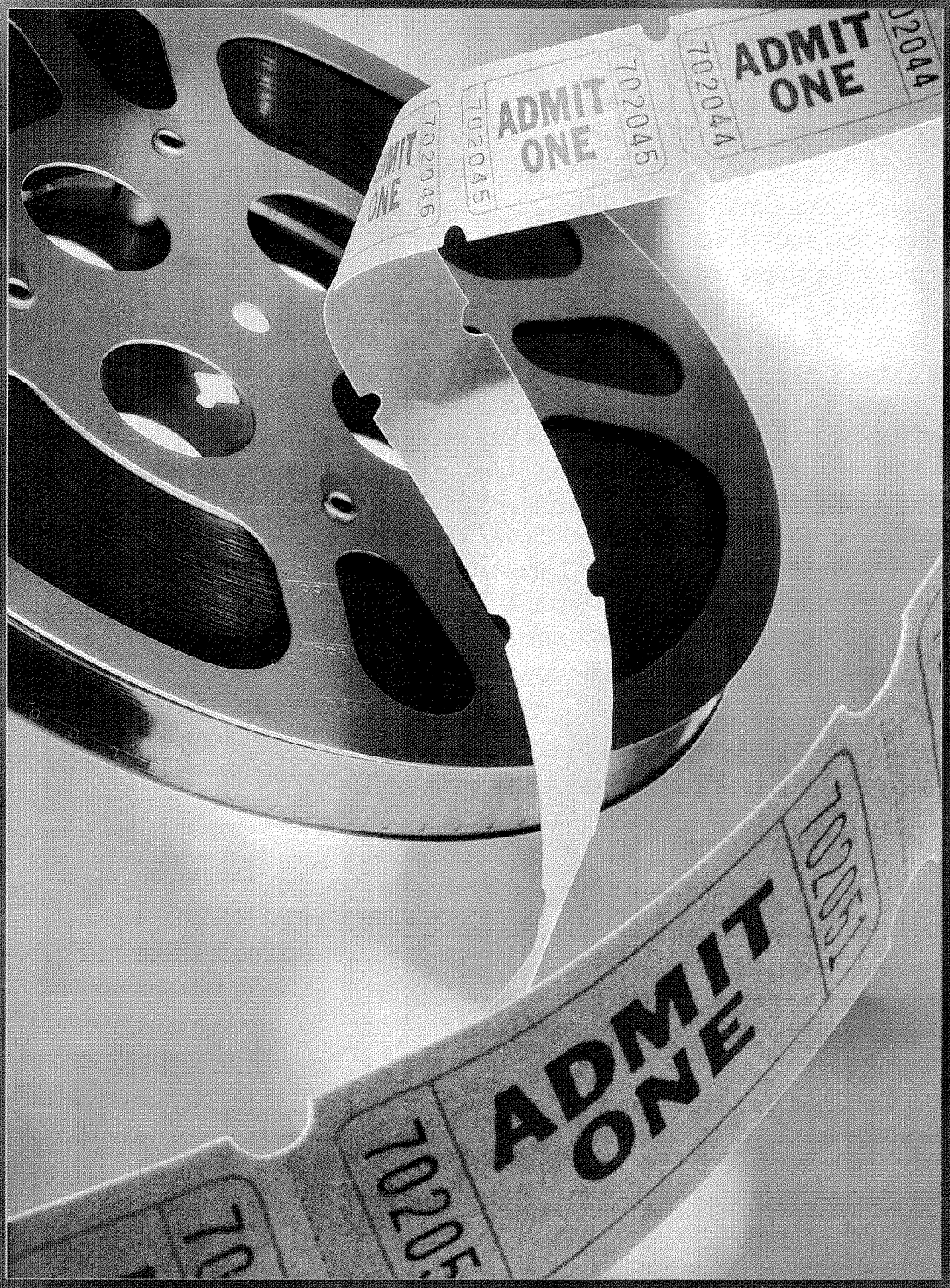
# The Government Tunes in to Tune Out the Marketing of Violent Entertainment to Kids: The Media Violence Labeling Act, the Media Marketing Accountability Act and the First Amendment




Shannon McCoy

FEATURE

## I. Introduction

In 1999, a public outcry resounded throughout the nation following several violent school-related shootings. Pearl, Mississippi ... Paducah, Kentucky ... Jonesboro, Arkansas ... Littleton, Colorado .... In 1990, all were small, unknown American towns. Today, all bear scars of youth violence. Some blame violent movies like *The Basketball Diaries* and *Pulp Fiction* as the catalysts prompting kids to walk into schools and open fire. Others remain unconvinced that violent films are the culprits, admonishing those that place blame on Hollywood.

However, pointing the finger may have merit, just ask Hollywood insiders. Thom Mount, president of the Producers Guild of America, admits that "[i]t is not that violent pictures create more violence, but the constant litany of gratuitous violence is destructive of the fabric of our culture because it lowers our threshold for sensitivity to the issue."[1] Wherever the blame may rest, the unexpected wave of school violence has prompted furious debate in Washington and resulted in the introduction of both the Media Violence Labeling Act ("MVLA") and the Media Marketing Accountability Act ("MMAA"). The Acts mandate government regulation of violent entertainment materials by the creation and enforcement of a uniform labeling system[2] and by prohibiting the marketing of these materials to minors.[3]

Movie violence, and the debate surrounding it, is not a new phenomenon. Politicians, scholars and practitioners have debated the topic ceaselessly throughout the 20th century. However, no practical solution has been found to decrease the amount of violence conveyed through theaters to children. Since its inception in 1922, the Motion Picture Association of America ("MPAA") has launched numerous efforts to filter the violent content of films through progressive rating system changes and enforcement. However, such attempts have proved unsuccessful. Instead of decreasing, the amount of movie violence has exploded within recent years.

Congress should enact laws that both establish a mandatory rating and labeling system and restrict the advertising of violent films to underage children.[4] Government regulation in the form of a movie rating system and a restriction on violent film advertising is necessary to help cure the problem of adolescent violence. Only with such regulation will violent film content be effectively filtered from teen audiences.

This Note examines the recent investigation conducted by the Federal Trade Commission ("FTC" or "Commission") and its 2001 Follow-Up to that inquiry. The September 2000 Report ("Report") concluded that the entertainment industry intentionally and aggressively advertises both R and PG-13 movies to children under the age of 18.[5] As a solution, the FTC recommended self-regulation by the entertainment industry.[6] The 2001 Follow-Up to the Report ("Follow-Up") found that although the movie industry has made progress, a greater effort must be exerted to successfully eliminate the marketing of violent entertainment to children.[7] Both the Report and the Follow-Up demonstrate that self-regulation is not a feasible alternative. If the entertainment industry actually imposed the self-regulatory system suggested by the FTC, the adolescent audience would greatly decrease, thus causing severe cuts in industry profits.

Narrowly tailored government regulation is the answer to this growing problem. In May 2000, the U.S. Senate initiated plans for a mandatory ratings system with the introduction of the MVLA. The Act provides for "an easily recognizable system in plain English for labeling violent content in audio and visual media products and services ... ."[8] The Act creates guidelines for instituting a ratings system and makes it unlawful to sell age-restricted products to underage consumers.[9] The Senate followed the MVLA with the introduction of the Media Marketing Accountability Act in April 2001. The MMAA seeks to "prohibit the targeted marketing to minors of adult-rated media as an unfair or deceptive practice."[10] As the FTC has the power to prosecute entities that engage in unfair or deceptive practices, the MMAA effectively extends the FTC's power to the regulation of entertainment industry marketing.[11]

Ultimately, this Note argues that if enacted both the

> **INSTEAD** *of depending on film studios to self-regulate, Congress should enact legislation that establishes a mandatory rating and labeling system and restricts the advertising of violent films to underage children.*

MMAA and MVLA should survive First Amendment scrutiny. Both Acts regulate commercial activity and are thus properly subject to review under the framework the Supreme Court has devised to evaluate restrictions on commercial speech. Because the Acts directly advance a substantial governmental interest and are not more extensive than necessary to do so, they should withstand constitutional review.

## II. History of the MPAA Ratings System

In 1922, the motion picture industry founded the Motion Picture Producers and Distributors Association, now recognized as the Motion Pictures Association of America.[12] Its leader at the time, Will Hays, enacted the "Hays Production Code," which regulated movie scenes having violence, nudity, profanity or other potentially objectionable elements.[13] Although compliance with the Code was initially voluntary, it became mandatory when the Production Code Administration bestowed its "seal of approval" based on Code standards.[14] The "seal" was vital to a movie's success, as a studio would not distribute unapproved films, and nor would a theater play them. The passing years saw the demise of the Code[15] as studio-owned theaters disappeared in the 1940s and the Supreme Court broadened First Amendment protection to films in *Burstyn v. Wilson*.[16] In 1968, the Code finally disintegrated with *Interstate Circuit, Inc. v. City of Dallas*,[17] where the Supreme Court stated that

> because of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults .... [O]nly the absence of narrowly drawn, reasonable and definite standards for the officials to follow is fatal.[18]

In 1968, the MPAA and the National Association of Theatre Owners ("NATO")[19] developed a new self-regulatory system.[20] In November 1968, the MPAA ratings code was introduced, and it has four categories: "G" for General Audiences (all ages admitted); "M" for Mature Audiences (parental guidance suggested, but all ages admitted); "R" for Restricted (children under sixteen not admitted without an accompanying parent); and "X" (no one under seventeen admitted).[21] From 1968 to present, various changes were made to the Code including: introducing "PG-13" in 1984; changing X to "NC-17" in 1990; and changing the meaning of NC-17 to "no one admitted under 17" in 1996.[22] MPAA members do not distribute a movie without first establishing its corresponding rating.[23]

The Classification and Rating Administration ("CARA") is responsible for rating movies based on the MPAA categories.[24] In order to be a member of CARA a person must (1) be a parent, and (2) have no involvement with the film industry.[25] Loose guidelines exist for classifying a film in a particular category. CARA members vote on a film's rating by considering "language, nudity and sexual content, violence, drug use, and 'other relevant matters' they think most American parents would consider appropriate for viewing by children."[26] Violence in both PG-13 and R-rated films is identically described by CARA as "intense, strong, brutal, graphic, pervasive, and shocking."[27]

## III. The Report and the Follow-Up

### A. *The 2000 FTC Report*

In June 1999, President Clinton[28] asked the FTC and the Department of Justice[29] to conduct an investigation to determine whether the motion picture, music and video game industries actively market violent entertainment material to adolescents.[30] Two specific questions were asked: (1) Do these industries advertise materials they themselves acknowledge are inappropriate for children in locations where the audience is substantially comprised of children, and (2) are "these advertisements intended to attract underage audiences?"[31] The FTC initiated an extensive "study to obtain information regarding the motion picture, music and video game industries' self-regulation efforts and marketing practices."[32] The study examined industry rating and labeling systems, marketing and media plans and companies' actual practices of advertising or conveying violent entertainment to children "in light of [their] self-regulatory systems."[33]

## 1. Problems with the MPAA Scheme

The FTC Report found that three major problems exist with the MPAA self-regulating system. First, although the MPAA conveys a brief explanation for a movie's rating (e.g., Rated R for graphic violence) it is difficult to obtain access to the explanations. The MPAA does not require explanatory phrases in movie advertisements nor do studios include them in their ads.[34] The Report revealed that parents want a more informative rating system.[35] Descriptive indicators sufficiently disclose a movie's violent content. The absence of such phrases makes it more difficult for discerning parents to appropriately determine whether their children should be exposed to a certain film. Explanatory phrases tell consumers why particular movies receive certain ratings by conveying the nature of any violent or graphic material.

In print ads, a reference to a website[36] is given instead of the reasons justifying the rating.[37] However, such references do not appear in all print ads nor do they appear "in advertising other than print ads, such as television commercials or websites promoting individual films."[38] Although film critics often elaborate about a film's language or violence, reviewers may not answer every rating question a viewer may have. In addition, the responsibility to adequately inform the public should fall on the shoulders of the film industry, not film critics.

Second, the MPAA does not efficiently monitor movie advertising. Although the MPAA achieves moderate success in attaching a film's letter rating in all television and radio commercials, print ads and website and movie previews, it is not always successful in ensuring a film's advertisement is appropriate for younger audiences.[39] The MPAA Advertising Administration approves two trailers,[40] one for general audiences ("all audience") and one for restricted audiences, which can only be shown before films with R or NC-17 ratings.[41] The FTC Report found several instances in which an "all audience" trailer contained questionable scenes.[42]

Television trailers have the same flaws. Although the MPAA asserts that "TV spots containing sexual references, violence, blood or profanity are not acceptable,"[43] the Report stated that "television networks sometimes require the deletion of certain scenes or restrict the airing of commercials the MPAA had previously approved for general audiences because the advertisements are too violent."[44] At best, this suggests a miscommunication between television networks and the MPAA. However, the problem more likely stems from the MPAA's relaxed system of rating trailers and enforcing those ratings.[45]

Third, the MPAA self-regulatory system possesses no guiding principle governing marketing to children. The Advertising Administration concerns itself only with content.[46] The only film marketing policies administered are those by major television networks and theaters. The FTC Report found that:

> [A]dvertising for PG-13 films is evaluated on a case-by-case basis, depending on the content of the ad and film. Half the networks have policies limiting the airing of ads for R-rating films ... others evaluate ... ads [individually]. [M]ajor theater chains ... limit trailer placement to feature presentations within one rating of the movie being promoted. The policy allows trailers for R-rated movies to be placed with R and PG-13 features, and trailers for PG-13-rated movies to be placed with R, PG-13, and PG features.[47]

As noted earlier, definitions of violence given in rating explanations are identical for PG-13- and R-rated features, thereby confusing parents as to the extent of violence contained in films. It is not surprising that the FTC found neither the television networks' nor the theaters' advertising procedures particularly effective in "limiting children's exposure to advertising for movies generally rated for older audiences."[48] Under that marketing system, children as young as six viewing a PG movie were subject to "shocking" and "pervasive" violence in a PG-13 movie trailer.[49]

## 2. Marketing Movies to Children

According to the FTC Report, not only do entertainment companies market their materials to children, they do so in an aggressive manner and under questionable circumstances.[50] The industry forcefully markets violent movies to underage youths even when they have been rated as only appropriate for adults. The Report stated that movie studios "routinely" advertise films rated R and PG-13 for violence to underage children.[51] The MPAA approves of this state of affairs, asserting that such films are suitable for children so long as parental guidance is provided.[52] The Report clearly proves this

to be an ineffective system. Of the 44 R-rated films studied by the FTC, 35 (or 80 percent) were aimed at children under the age of 18.[53] Furthermore, "[m]edia plans or promotional reports for 28 of those 44 films (or 64 percent) contain express statements that the film's target audience included children under the age of 17."[54] Although not explicitly mentioning an underage target audience, the Report revealed that media plans for seven other R-rated films significantly mirrored those that did explicitly target children, as the plans promoted R-rated films in high schools via school newspapers or other publications with a substantial under-17 readership.[55]

The FTC examined the five main methods film studios employ in conveying movie advertisements to children: television ads, trailers, promotional and street marketing, radio and print advertising, and Internet marketing.[56] The Commission found a clear need for improvement existing in all channels of communication.[57]

## a. Television Advertising

Like most products, research shows consumers are informed about movies mainly through television.[58] Accordingly, "[o]f the 35 R-rated movies that targeted children under 17, studio media plans indicate that 26 designed at least part of their television campaigns around target audiences including people aged 12 and above."[59] Studios repeatedly market these films on programs that enjoy a predominantly adolescent audience (e.g. *Dawson's Creek*, *MTV's Total Request Live*, and *South Park*). Furthermore, film companies advertise only during key teen-viewership times, such as weekends, after school and before eight p.m.[60]

## b. Trailers

Movie trailers shown as previews are either attached to full-length features or are sent as brief, unattached reels to theaters. Although the MPAA only requires that attached trailers be shown, considerable pressure is exerted by studios on theater owners to also play unattached reels.[61] Because of parents' complaints about inappropriate "all audience" trailers shown to young audiences, most theater chains now "limit trailer placement to within one rating of the feature presentation."[62] However, exceptions to this "one rating" policy abound.

> *Star Wars Episode 1: The Phantom Menace*, rated PG, was regularly preceded by trailers for such films as *The General's Daughter* (rated R for graphic images relating to sexual violence including a strong rape scene ... ), *South Park: The Movie* (rated R for pervasive vulgar language and violent images), and *The Beach* (rated R for violence, language, and drug content).[63]

## c. Promotional and Street Marketing

Various types of promotional activities are used to advertise films, including the passing out of free passes to screen R-rated movies and free merchandise bearing R-rated films' titles or characters. Toys and clothing are also manufactured for violent PG-13-rated films.[64]

## d. Radio and Print Advertising

Radio and print ads provide an effective means of reaching teens. Several teen magazines (e.g., *YM*, *Teen* and *Marvel Comics*) contain print ads for R-rated movies.[65] Furthermore, several studios use publications exclusive to both elementary and high schools to promote R-rated movies.[66]

## e. Internet Marketing

Another channel used to advertise movies to children is the Internet. Although a relatively new invention, the Internet has already become a major marketing tool for film companies.[67]

Children and adolescents comprise the vast majority of Internet users and encounter all types of film advertisements, whether the ads promote G- or R-rated films.[68] A survey conducted recently found that whereas 85 percent of children feel as though they are "keeping up" with computers, only 49 percent of adults feel the same.[69] In addition, 73 percent of children have access to computers at home and 53 percent use computers to learn information about entertainment, sports and hobbies.[70]

Most films released today have an "official" website that contain not only trailers for the film, but also background information on the cast and crew.[71] No age restrictions exist on these websites. Children under the age of 17 may thus easily access violent content found in "all audience" trailers. Films are also marketed on the Internet on banner ads placed on websites frequently visited by teen web users.[72]

### 3. FTC Recommendations

In its initial Report, the FTC recommended that the entertainment industry stop marketing violent materials to underage children and viewed industry self-regulation as the solution.[73] The Commission asked the industry to voluntarily adopt uniform principles that explicitly ban the targeting of children and to enforce them with strict penalties.[74] Specifically, the Report recommended that the movie industry: (1) "establish or expand codes that prohibit target marketing and impose sanctions for violations, (2) improve self-regulatory system compliance at the retail level, and (3) increase parental awareness of the ratings and labels."[75]

## *B. The 2001 FTC Follow-Up*

In January 2001, Congress asked the FTC to conduct a follow-up report to evaluate the industry's response to the initial Report.[76] Specifically, the Commission was asked to examine two main concerns: "(1) whether the industries continue to advertise violent R-rated movies ... and (2) whether rating and label information is included in the teen media or other advertising."[77] Although both the MPAA and NATO set forth 12-point initiatives to address both the FTC's and Congress' concerns, the Follow-Up found that "studios continue[d] to advertise R-rated movies at the times and on the programs that are most effective in delivering those ads to teens viewers" and some advertisement placements "appeared to run counter to at least the spirit of individual commitments made by studios in response to the September 2000 Report."[78] Further, no industry-wide policy had been created.[79] The Follow-Up did, however, find "substantial compliance" with industry pledges regarding the placement of print and trailer advertisements.[80]

After the 2000 Report, the MPAA promised to explore ways to include reasons for various movie ratings in print ads (but not television ads) and provide links to educational websites that provided rating system information from official movie websites.[81] The Follow-Up revealed that "while the motion picture studios include the letter rating in their commercials, and have generally incorporated the reasons for the rating as well, the reasons frequently are difficult or impossible to read."[82] The same proved true for print ads.[83] A wide disparity existed on websites, as some sites conspicuously pointed out and explained a film's rating information, while others offered no rating information at all.[84] Further, many sites listed ratings information in locations difficult for viewers to find—either in small print or in unnoticeable positions.[85]

The Follow-Up concluded that the movie industry had "clearly responded" to the 2000 Report regardless of the many problems uncovered by its investigation. The Follow-Up concluded that industry self-regulation remains the answer.

## IV. Self-Regulation by the Entertainment Industry

The FTC maintains that entertainment industry self-regulation is the solution to decreasing the amount of violent media targeted to children. The FTC recommends that a "well-constructed self-regulatory system can be more prompt, flexible, and effective than government regulation, and can be especially appropriate when government intervention would raise significant First Amendment concerns."[86] As motion pictures are afforded constitutional protection under the First Amendment, the FTC holds the entertainment industry to be the best-positioned party to regulate.[87]

In addition, the FTC recommends that the entertainment industry should "increase consumer outreach, both to educate parents about the meaning of the ratings and to alert them to the critical part the industry assumes parents play in mediating their children's exposure to these products."[88] The Report also placed squarely on parents' shoulders the responsibility to actively learn and become familiar with the rating systems' symbols and explanations.[89]

The principle flaw in the FTC's recommendation of industry self-regulation is the failure to consider the reality of the entertainment business. Money is the key motivating factor. Violence sells, and children are the customers.[90] It is simply not reasonable to claim that the entertainment industry will effectively develop and enforce codes and sanctions that will restrict advertising to children, and thus severely cut their profits.[91] In the right context, industry self-regulation may be more effective and efficient than government regulation.[92] Importantly, because there would be no government involvement, no First Amendment concerns would arise. However, such self-regulatory efforts are only likely to be effective when the benefits from initiating a

regulatory program outweigh its costs. There is a reason why movies like *Scream, I Know What You Did Last Summer*, and *Urban Legends* make 20 times more money than an Elizabethan rendition of *King Lear*. People paid money to see them.

Children under the age of 18 are a primary source of profits for film studios. In 1998, older children, ages 12 to 19, "spent more than $94 billion of their own money" to see movies.[93] Younger kids, ages eight to 12, spent $11.9 billion in 1997, representing a 300 percent increase from 1989.[94] Parents' expenditures to fulfill their children's needs and desires bumps up the initial figure to more than $153 billion.[95] Furthermore, kids' opinions and preferences influence not only their parents' purchasing decisions, but those of their peers as well. A child represents not only a current customer for companies, but also a customer for years to come if brand loyalty is established. Companies go out of their way to do just that.

> AND, importantly, such a scheme will most likely survive First Amendment scrutiny as a permissible restriction on commercial speech.

Although self-regulation may be more "flexible" than formal regulation, film companies will likely exploit that flexibility in a way that maximizes industry profits. The prospect that the film industry will be able to follow its own regulations (rather than those imposed by the government) is weakened substantially in view of the current self-serving scheme. A government penalty would undoubtedly be much more effective in assuring that regulations are followed.

The entertainment industry will not be adequately motivated to commit the resources required for successful self-regulation. Vigorous adherence to a regulatory scheme is imperative, and it is unlikely that the industry would strictly enforce its code. In addition, neither the MPAA nor individual film companies possess the power to enforce a self-enforced code and sanctions resulting from a violation. Thousands of movie theaters exist across the country. It would be extremely difficult for a private organization to enforce compliance by well-known chain theaters (such as Malco, Cinemark, and Regal), not to mention the thousands of smaller, independently owned theaters.

Furthermore, the Report's recommendation of self-regulation is weakened by its own findings. The FTC praised the MPAA's efforts in taking steps to administer and enforce a mandatory rating system. However, the Report concluded that more steps need to be taken by the industry in order to fully establish a workable system. This recommendation fails to appreciate that the industry considers its current efforts sufficient to restrict violent entertainment marketing. Instead of being open to more changes, both the MPAA and the film industry seem content with the strides already made and believes that they have substantially complied with the FTC's recommendations despite the problems that remain unresolved. The Report concluded that the film industry should stop targeting underage children, but, at the same time, admitted that the "motion picture industry ... takes[s] the position that targeting children is consistent with their rating and labeling programs."[96] Without governmental intervention, the film industry is unlikely to voluntarily change a profitable system, which, in their view, complies with MPAA regulations.[97]

## V. Government Regulation of Ratings and Advertising Restrictions

Instead of depending on film studios to self-regulate, Congress should enact legislation that establishes a mandatory rating and labeling system and restricts the advertising of violent films to underage children.[98] In addition, a program in which both the government and the entertainment industry work together to impose mandatory rating and labeling systems should be enacted. Only with such regulations will the marketing of violent entertainment to children be effectively curbed.

First, the government should enact its own mandatory rating and labeling scheme. The present system does not provide adequate information for consumers to make informed decisions about whether movies are appropriate for younger audiences. A revised system should require a clear and conspicuous rating label on every film advertisement. In addition, content descriptors should be clearly shown with the rating, because more specific information fosters better-informed decisionmaking by parents. Second, a code,[99] like the one

recommended by the FTC Report, should be implemented. However, the federal government, not the entertainment industry, should be its administrator.

## VI. Current Regulatory Efforts

### A. Media Violence Labeling Act of 2000

A governmental regulatory scheme has already been devised. In May 2000, the U.S. Senate introduced the MVLA.[100] The Act calls for "[t]he establishment, use, and enforcement of a consistent and comprehensive system in plain English for labeling violent content in audio and visual media products and services (including labeling of such products and services in the advertisements for such products and services)."[101] This legislation instructs entertainment manufacturers and producers to establish a uniform labeling system for violent material not only in movie products, but in electronic game and music materials as well.[102]

The Act strictly prohibits the sale of any product without a rating label or in violation of its accompanying age restriction,[103] thus making it unlawful to show R-rated movies to children under the age of 17 and PG-13 movies to children under the age of 13. The Act calls for entertainment companies to submit a uniform labeling system proposal to the FTC.[104] The Commission will then review the proposal to determine whether it satisfies the Act's requirements.[105] If the proposed system does not satisfy the requirements, the Commission may prescribe and enforce the necessary regulations.[106] State attorneys general are given the responsibility of investigating improper labeling allegations.[107] Severe monetary penalties are imposed for violations of the Act.[108]

The Act does not explicitly ban entertainment companies from targeting children. However, the Act does provide that all advertisements for audio and visual media products must include ratings depicting "the nature, context and intensity of the depictions of violence in the product."[109] The product must also specify a minimum age for purchase or viewing the product.[110] All movies and their advertisements, regardless of the channel through which they are conveyed, must include both an audio and visual explanation of the label before the movie or advertisement is shown.[111] The visual image of the label must appear for at least five seconds.[112]

Although not a complete restriction on targeting children (the marketing plans of entertainment companies are never mentioned), the Act presents a significant first step in decreasing the amount of violent media marketing aimed at underage audiences. The Act demonstrates that the government must regulate, in some capacity, for an efficient and workable labeling system to be effective.

### B. The Media Marketing Accountability Act of 2001

In response to the FTC's Follow-Up report, Congress introduced the Media Marketing Accountability Act ("MMAA") in April 2001. The MMAA effectively makes the targeting of minor audiences for violent entertainment an unlawful "deceptive act or practice" to be regulated by the FTC.[113] The Act states that an entertainment company targets a minor audience when its "(1) [] advertising or marketing: (A) is intentionally directed to minors or (B) is presented to an audience of which a substantial proportion is minors; or (2) the Commission determines that the advertising or marketing is otherwise directed or targeted to minors."[114]

The FTC is charged with defining and determining which audiences are "comprised of a substantial proportion of minors," and thus covered by the Act.[115] However, entertainment companies may protect against unreasonable criteria by establishing a "voluntary self-regulatory system"[116] to be monitored and enforced by the FTC.[117] The Act gives the Commission the power to penalize those who do not comply by providing that it may use its power "in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though ... the Federal Trade Commission Act were incorporated into and made a part of [the] title."[118] Thus, the Commission may issue cease and desist orders and/or levy substantial civil fines for non-compliance.[119]

## VII. First Amendment Concerns

### A. Restrictions on Free Speech

Passage of the MVLA and the MMAA will certainly raise First Amendment concerns. Through the Acts' provisions, the government restricts access to a constitutionally protected activity—freedom of commercial

speech.[120] In order for the Acts to be successfully implemented, First Amendment concerns must be addressed. Thus, government regulation of both a labeling system and a code restricting the advertising of violent products to children must pass constitutional muster.

The First Amendment restricts the government from enacting any law or regulation that would prohibit or stifle individual speech or expression.[121] Generally, the First Amendment applies solely to government interferences with freedom of speech.[122] Traditionally, it has been broadly interpreted to guard against government efforts that tend to repress religious or political views or that impinge on freedom of expression, whether in music, art or literature. It does not generally apply to private activity, such as industry self-regulation. Therefore, the movie industry is free to restrict or limit the advertising of violent materials to youth markets.

In its Report, the FTC clearly stated that its objective was not to recommend or promulgate legislation, but to study whether the entertainment industry directly markets violent materials to children and to analyze the movie, music and video game industries self-regulatory systems.[123] By contrast, the MVLA and the MMAA constitute governmental regulation because they are laws passed by the Congress and involve ongoing participation by a federal agency, the FTC. Therefore, whether the Acts are constitutional depends on whether the governmental restrictions on speech embodied in the MVLA and MMAA are consistent with the Free Speech clause of the First Amendment.[124]

## B. Commercial vs. Non-Commercial Speech: A Distinction with a Difference

Protection for freedom of speech is expansive. When determining whether a speech restriction is constitutional, the Supreme Court first classifies the speech as either commercial or non-commercial.[125] Non-commercial speech includes political and artistic expression. Commercial speech is defined as speech "related solely to the economic interests of the speaker and its audience"[126] or, alternatively, speech that does "no more than propose a commercial transaction."[127] While non-commercial speech restrictions are subject to "strict scrutiny," commercial speech is only given "intermediate scrutiny."[128] The classification of the speech at issue as either commercial or non-commercial is significant in determining whether restrictions imposed on it are consistent with the First Amendment.[129]

## C. The Commercial Speech Doctrine

Commercial speech once was considered to be completely outside the ambit of First Amendment protection. However, in *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.* the Supreme Court overruled its initial position that the "Constitution imposes no ... restraint on government" regulation of commercial advertising.[130] Since that case, commercial speech has been considered protected, but not fully protected, expression.[131]

The Supreme Court has traditionally classified the advertising of products and services as commercial speech. However, when the product or service advertised also receives First Amendment protection special considerations come into play. In *Bolger v. Youngs Drug Prods. Corp.*,[132] a case involving the advertising of contraceptives, the Supreme Court stated that strict scrutiny "may be appropriate in a case where [a company] advertises an activity itself protected by the First Amendment."

Advertisements and promotions for movies should be classified as commercial speech, because such ads are clearly "related *solely to the economic interests* of the speaker."[133] Movie trailers, previews shown on television, print ads and Internet ads are all placed in the stream of commerce to elicit business from those who see such promotions. Film studios promote and advertise films to make money, not merely to express themselves artistically. A movie advertisement thus goes no further than proposing a commercial transaction.[134] Although its content is a synopsis of a film's content, its purpose is to lure moviegoers into theaters.

In 1980, the Supreme Court modified its commercial speech jurisprudence by setting forth a four-part test for determining whether government regulations unlawfully limit or restrict commercial speech.[135] The *Central Hudson* test[136] for determining the constitutionality of restrictions on commercial speech asks:

(1) whether the speech at issue concerns lawful activity and is not misleading;
(2) whether the asserted governmental interest is substantial, and, if so,

(3) whether the regulation directly advances the asserted governmental interest; and
(4) whether it is not more extensive than is necessary to serve that interest.[137]

The government has the burden of both identifying a substantial interest and demonstrating legitimate reasons for the restriction. "[T]he four parts of the test are not entirely discrete. All are important and, to a certain extent, interrelated: Each raises a relevant question that may not be dispositive to the First Amendment inquiry, but the answer to which may inform a judgment concerning the other three."[138]

The *Central Hudson* test was later cast in a new light by the plurality opinion in *44 Liquormart.*[139] In *44 Liquormart*, the Supreme Court invalidated a Rhode Island law that prohibited advertising the price of alcoholic beverages anywhere except inside liquor stores.[140] In a plurality opinion, the Court ruled that truthful, non-misleading commercial messages should receive a "strict," and not "intermediate" level of scrutiny. Furthermore, the plurality stated that "[w]hen a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according [less than full] constitutional protection to commercial speech."[141] However, "there is far less reason to depart from the rigorous review that the First Amendment generally demands" when the commercial speech is truthful and non-misleading.[142] Nevertheless, after *44 Liquormart*, the *Central Hudson* test remains the operative test for reviewing commercial speech regulations, as a Supreme Court majority has yet to abandon it.[143]

## VIII. The Constitutionality of the MVLA and MMAA

The MVLA and the MMAA satisfy each of the four requirements set forth by the Central Hudson test.

### A. Lawful, Non-Misleading Activity

The MVLA and the MMAA pass *Central Hudson*'s threshold requirement that the disputed speech must (1) concern lawful activity and (2) not be misleading. The Acts deal with neither misleading nor untruthful messages. The viewing of adult-rated entertainment material is legal (at least by adults) in the United States, and violent entertainment itself is not deceptive, even though it may be considered offensive.

Although Justice Stevens advocated the imposition of *strict* scrutiny for speech regulations of "truthful, non-misleading commercial messages,"[144] adherence to this rigid standard should be considered in light of the Acts' purposes. The Court has stated that "[w]hen a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review."[145]

As the MVLA seeks to "disclose beneficial consumer information," it should receive "less than strict review." The explicit purpose of the MVLA is to provide consumers, specifically parents, detailed information about the "nature, context, and intensity of depictions of violence" found in motion pictures.[146] The information is intended to aid parents in making informed decisions about what types of movies they allow their children to see. In light of its purpose, the MVLA should be subjected to a more lenient standard.

Like the MVLA, the MMAA seeks to protect consumers in a manner consistent with constitutional protection. The express purpose of the MMAA is to "stop entertainment companies from deceptively marketing adult-rated products to children, and thus to help parents better protect their kids from potentially harmful materials."[147] Therefore, the MMAA seeks to "protect consumers from misleading, deceptive, or aggressive sales practices"[148] and should also be subject to a less than strict standard of review.

### B. Substantial Governmental Interest

The government bears the burden of identifying a substantial interest to be achieved by restrictions on commercial speech.[149] This burden is met here because the Supreme Court has clearly held that states have "a compelling interest in protecting the physical and psychological well-being of minors," and "this interest extends to shielding minors from the influence of literature that is not obscene by adult standards."[150]

The MVLA and MMAA clearly center on a substantial state interest. The Acts help parents ensure that their minor children are not exposed to adult-rated entertainment by (1) providing them the information necessary to make informed decisions about the appropriateness of particular entertainment products containing violent images and (2) prohibiting entertainment companies from undermining the labeling system by directly targeting children.

In support of this argument are the many investigations that have been conducted on the subject. These investigations conclude that a strong correlation exists between exposure to media violence and aggressive behavior.[151] The studies suggest that a child's tendency to brawl with others and display violent behavior increases after viewing violent programs.[152] Rowell Huesmann's study, *The Effects of Media Violence on the Development of Antisocial Behavior*, found that college students' blood pressure rose when viewing violent movies.[153] Five independent reviews[154] have studied the effects of media violence on aggressive behavior and all have concluded that exposure to violent material increases aggressive behavior in some way.[155] Congressional findings affirm that "[m]edia violence can be harmful to children. Most scholarly studies on the impact of media violence find a high correlation between exposure to violent content and aggressive or violent behavior. Additional studies find a high correlation between exposure to violent content and a desensitization to and acceptance of violence in society."[156]

The list of studies and reports conducted on the effects of media violence on human behavior goes on and on. Although the issue of causation is hotly debated,[157] such an immense body of empirical evidence cannot be ignored. The negative effects of failing to adequately protect U.S. children from violent entertainment are undeniable—increased aggression, brutality, violence and crime.

Given the evidence presented in these studies, a substantial government interest exists to justify both the MVLA and the MMAA. The Acts' purposes are to help parents monitor what their children view and foster a healthy society.

## C. Direct Advancement of Asserted Governmental Interest

To meet the third prong of the *Central Hudson* test, the government must show that its commercial speech restriction is part of a significant effort to advance a valid state interest. The government must demonstrate that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[158] A commercial speech regulation "may not be sustained if it provides only ineffective or remote support for the government's purpose."[159]

The MVLA's proposed labeling system directly advances the government's interest in decreasing the amount of media violence to which U.S. children are exposed. The Act seeks to assist parents in determining whether particular entertainment material is appropriate for their children. The labeling system effectively conveys to parents a detailed explanation of the nature and intensity of violent content in a certain movie. In addition, the Act further aids parents in conspicuously including a minimum age requirement for viewers. Movie theaters admitting children under the age requirement will now be held responsible for their actions, thus discouraging underage viewing. The MVLA is clearly the appropriate means for facilitating the government's substantial interest.

Likewise, the MMAA is not "underinclusive." By directly granting the FTC the power to punish companies who voluntarily label their materials as "adult-rated," then turn around and purposefully market those materials to teenagers, the Act advances the government's interest "to a material degree."[160] A company should not be allowed to voluntarily label a product as suitable only for those over the age of 17, then knowingly market that product to an under-17 audience. If entertainment companies are faced with the real possibility of substantial penalties for marketing violent products to children, they will discontinue these marketing practices and instead only target those audiences who are old enough to actually see the movies promoted. Thus, the Act will "[significantly] reduce children's exposure to such displays."[161]

BOTH *the Report and the Follow-Up demonstrate that self-regulation is not a feasible alternative.*

### D. No More Extensive than Necessary

The fourth *Central Hudson* criterion poses the critical question of whether the "prohibition is more extensive than necessary to serve the asserted state interest."[162] In a commercial speech context, the Court has shown renewed interest in this last criterion.[163]

> The government is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest—a fit that is not necessarily perfect but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.[164]

The MVLA's rating system is no more extensive than necessary to further the government's objectives. Many may argue, in agreement with the FTC, that industry self-regulation is a better alternative. However, as previously discussed, such a solution is not feasible. To be effective, self-enforced regulation of a labeling system would severely cut into industry profits. Although the industry may be willing to initiate and administer a uniform labeling system, enforcement of the system would not work, as the similar system in place now has not produced significant improvements. In order to efficiently inform consumers about violent content *and* enforce the accompanying age restrictions, the government must be involved. Thus, the MVLA is the most efficient means for achieving the government's interest.

The last prong of the Central Hudson test is the biggest obstacle facing the MMAA. To survive scrutiny, Congress must show that the MMAA is no more extensive than necessary to achieve its objective. Historically, the Supreme Court has frowned upon total bans on speech and views partial restriction on speech more favorably. For example, in *44 Liquormart* the Court pointed out several less restrictive and equally effective regulations in lieu of a ban on advertising liquor prices, such as increased taxation, purchase restrictions and educational campaigns.[165]

Opponents may argue that the MMAA constitutes an unlawful total ban on speech. In support of their argument they will likely rely on the Court's statement in *44 Liquormart* that "complete speech bans ... are particularly dangerous because they all but foreclose alternative means of disseminating certain information."[166] Justice Stevens, joined by Justices Kennedy and Ginsburg, asserted that "special care" should accompany government efforts to place total bans on truthful, non-misleading commercial speech.[167] However, an outright ban on advertising violent entertainment is not what the MMAA represents.[168] The Act only seeks to prohibit deceptive practices by entertainment companies by forbidding them from voluntarily labeling an adult-rated product, then turning around and marketing that product to the teen market.

This aspect of the MMAA leads to further constitutional analysis, because the MMAA effectively limits the time, place and manner in which adults have access to violent entertainment. The Supreme Court has held that "[t]he utilization of 'narrow tailoring' as the fourth factor for commercial speech restrictions was adapted from standards applicable to time, place, and manner restrictions on political speech."[169] In *ACLU v. Reno*, the Supreme Court held that a speech restriction on children must not unduly burden adult access to the same material.[170] The "burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve."[171] Any less restrictive alternatives here would fail to be as effective as the MMAA. The industry has tried labeling the products, and although such a system has decreased somewhat the sale of adult-rated products to kids, such a system alone does not effectively stop the targeted marketing of the same products to minors. Thus, the entertainment industries' current scheme does not effectively limit children's exposure to violent media products.

The MMAA only seeks to prohibit the intentional marketing of adult-rated entertainment to children, not to adults. Thus, Congress has already attempted to limit the pervasiveness of the statute in order to assure its constitutionality. If any less restrictive provisions were included, the statute would cease to be effective. Therefore, the MMAA most likely satisfies the fourth criterion set forth under *Central Hudson*.

## IX. Conclusion

The direct targeting of violent entertainment to children should be closely regulated. The problem is severe enough to have occasioned a formal FTC study and

follow-up that raised genuine concern over the aggressive marketing tactics employed by entertainment companies in attracting children to their products. Congress and the FTC have expressly concluded that something should be done in order to curb this behavior and have directed the entertainment industry to stop blatantly targeting children. Such graphic content should be restricted from young audiences in light of its negative effects on them in particular, and on society in general. If the film industry and federal government work closely together with the best interests of U.S. children in mind, a workable system can and will be achieved. This system must arise, however, with the government's involvement. And, importantly, such a scheme will most likely survive First Amendment scrutiny as a permissible restriction on commercial speech. JELP

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## Notes

1. Fay Fiore, *Media Violence Gets No Action from Congress*, L.A. TIMES, Nov. 20, 1999, at A1.

2. Media Violence Labeling Act of 2000, S. 2497, 106th Cong. (2000) [hereinafter MVLA].

3. Media Marketing Accountability Act of 2001, S. 792, 107th Cong. (2001) [hereinafter MMAA].

4. This Note does not advocate government regulation of movie content. Instead, it advocates regulation solely aimed at restricting the blatant advertising of violent films directly to children.

5. Federal Trade Comm'n, *Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries: Report of the FTC* 52 (Sept. 2000), *available at* http://www.ftc.gov/os/2000/09/index.htm [hereinafter FTC Report].

6. *Id.* at 54-56.

7. *See generally* Federal Trade Comm'n, *Marketing Violent Entertainment to Children: A Six-Month Follow-Up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries: A Report to Congress* (April 2001), *available at* http://www.ftc.gov/opa/2001/04/youthviol.htm [hereinafter FTC Follow-Up].

8. *See* MVLA (prefatory statement).

9. *Id.*

10. MMAA (prefatory statement).

11. *See generally* Sen. Joseph Lieberman's Press Office Website, *at* http://www.lieberman.senate.gov (last visited Mar. 15, 2002) (discussing the intricacies of the MMAA).

12. Jeffrey A. Jacobs, *Comparing Regulatory Models—Self-Regulation vs. Government Regulation,* 1 J. TECH. L. & POL'Y 4, 5 (1996).

13. *Id.*

14. *Id.* at 6.

15. Some argue that the Code's decrease in importance was also due, in part, to evolving social mores.

16. Burstyn v. Wilson, 343 U.S. 495 (1952) (holding that a film's content is entitled to First Amendment protection); *see also* United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948).

17. *See* Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968).

18. *Id.* at 690.

19. The National Association of Theater Owners ("NATO") is the nation's largest theater owners' organization.

20. MOTION PICTURE ASS'N OF AMERICA, THE VOLUNTARY MOVIE RATING SYSTEM: HOW IT BEGAN, ITS PURPOSE, THE PUBLIC REACTION 2 (1994) [hereinafter VOLUNTARY MOVIE RATING SYSTEM].

21. *Id.* at 3, 9.

22. *Id.* at 4, 8.

23. Rules and Regulations of the Classification and Rating Administration, Art. II § 2(A) (1998).

24. *See* Voluntary Response of the Motion Picture Association of America, Inc., Including Responses of the Classification and Rating Administration and the Advertising Administration, Sept. 21, 1999, at 2 (on file with author).

25. FTC Report, *supra* note 5, at 7.

26. *Id.*

27. *See* Motion Picture Ass'n of America Website, *at* http://www.mpaa.org/moviertngs/search.htm (last visited Feb. 18, 2002).

28. Congress also requested a similar proposal.

29. The Department of Justice supplied financial assistance and technical support, but did not participate in the FTC report analysis.

30. *See* Letter from William J. Clinton, President of the United States, to Janet Reno, Attorney General of the United States, and Robert Pitofsky, Chairman, FTC (June 1, 1999) (on file with author).

31. FTC Report, *supra* note 5, at 1.

32. *Id.*

33. *Id.* at 3.

34. *Id.* at 10.

35. *Id.* at 10-11.

36. *See* Filmratings.com, *at* http://www.filmratings.com. The website is administrated by CARA and contains links to ratings guides, ratings posters and a questions and answers section. In addition, one can enter the name of a movie in the website search engine in order to learn its rating.

37. Jack Valenti, Address at the Annual ShoWest Convention, The "Contradiction Molecule": The Rise of the American Moviegoer—and Other Quirks in Human Behavior, Mar. 7, 2000.

38. FTC Report, *supra* note 5, at 10. The FTC visited the official movie websites for 46 rated films in December 1999 and for 38 rated films in June 2000. At none of these sites were ratings explanations given.

39. *See* Motion Picture Association of America, Inc., MPAA Advertising Handbook 6 (1997) [hereinafter MPAA Handbook].

40. A "trailer" is the brief preview of a movie shown both on television and in theaters before another movie is shown in its entirety.

41. Voluntary Movie Rating System, *supra* note 20, at 10.

42. For example, the Report stated that "the 'all audience' trailer for *I Know What You Did Last Summer* contained verbal references to mutilations (references to decapitation and to a person being 'gutted with a hook'), and a trailer for *Scream 2* contained a verbal reference to mutilation (woman repeatedly stabbed) and several violent scenes involving women (women being pursued by a masked, knife-wielding killer)." FTC Report, *supra* note 5, at 9.

43. *See* MPAA Handbook, *supra* note 39, at 21.

44. FTC Report, *supra* note 5, at 10.

45. *Id.*

46. *Id.* at 11.

47. *Id.* at 12.

48. *Id.*

49. *Id.* at 8, 11, 15-16.

50. *See id.* at 1.

51. *Id.* at 12.

52. *Id.* at 13.

53. *Id.*

54. *Id.* at 13-14.

55. *Id.* at 14.

56. *Id.* at 3.

57. *Id.* at v-vi, 3.

58. *Id.* at 14.

59. *Id.*

60. *Id.* at 14-15.

61. *Id.* at 16.

62. *Id.*

63. *Id.* at 16-17.

64. *Id.* at 16-17 n.98.

65. *Id.* at 18.

66. *Id.* at 17-18.

67. *Id.* at 18.

68. *See* NPR Online, *NPR/Kaiser/Kennedy School Tech Survey, at* http://www.npr.org/programs/specials/poll/technology/technology.adults.html (last visited Jan. 17, 2001).

69. *Id.*

70. *Id.*

71. *See, e.g.*, http://www.sony.com; http://www.universal.com; and http://www.paramount.com.

72. FTC Report, *supra* note 5, at 18.

73. *Id.* at 53.

74. MMAA § 2 (6).

75. FTC Report, *supra* note 5, at 54-55.

76. FTC Follow-Up, *supra* note 7, at 3.

77. *Id.*

78. *Id.* at 6.

79. *Id.* at 5.

80. *Id.* at 7.

81. *Id.* at 8-9.

82. *Id.* at 9.

83. *Id.* at 10.

84. *Id.* at 11.

85. *Id.*

86. *Id.* at 3.

87. *Id.* at 53.

88. *Id.*

89. *Id.*

90. MMAA § 2 (2)-(3).

91. The 1999 Roper Youth Report found advertising to be a primary force in how children spend their money. The study found that teens depend heavily on advertising when making purchasing decisions. Specifically, 28 percent of the children surveyed stated that they watched a movie after seeing it advertised. *See* ROPER STARCH WORLDWIDE, 1999 ROPER YOUTH REPORT 187 (1999).

92. *Id.* at 2. The Report mentioned that both the National Advertising Division of the Council of Better Business Bureaus and the alcohol industry have instituted successful self-regulatory schemes.

93. PETER ZOLLO, WISE UP TO TEENS: INSIGHTS INTO MARKETING AND ADVERTISING TO TEENAGERS 9 (1999).

94. Barbara Kantrowitz & Pat Wingert, *It's Their World: A Guide to Who's Hot*, NEWSWEEK, Oct. 18, 1999, at 62.

95. Teenage Research Unlimited, *Teens Spend $172 Billion in 2001, at* http://www.teenresearch.com/news (last visited Apr. 1, 2002).

96. FTC Report, *supra* note 5, at 53.

97. In addition, whenever self-regulation reigns, antitrust problems potentially arise. A very real possibility exists that several film company competitors may agree on a workable and profitable rating system that would be enforced to their advantage. Although the FTC has dismissed antitrust concerns, such possibilities must still be considered, because the industry has much to lose from a self-imposed regulatory scheme.

98. This Note does not advocate governmental regulation of movie content. Instead, the disputed regulation is solely aimed at restricting blatant advertising of violent films directly to children.

99. FTC Report, *supra* note 5, at 54. The FTC suggested that the motion picture industry, the electronic game industry and the music recording industry use its recommendations to fashion a model code. As set forth by the FTC, a model code should: clearly show both the rating and its explanation wherever a movie ad appears, restrict advertising of R-rated films in media/locations substantially comprised of an under-17 audience, restrict companies from advertsing products associated with R-rated movies to inappropriately young audiences, restrict inclusion of ads for R-rated movies in under-17 publications, websites and television shows and provide for a regulatory agency to continuously monitors ad placements to ensure the standards are met.

100. The MVLA was read twice by Senator John McCain and was then referred to the Committee on Commerce, Science, and Transportation, where it now remains.

101. *See* MVLA § 2(b)(1)-(2).

102. *Id.* § 2(b).

103. *Id.* § 4A(d)-(f).

104. *Id.* § 4A(c)(1)(a).

105. *Id.* § 4A(c)(1)(b).

106. *Id.* § 4A(c)(2)(A).

107. *Id.* § 4A(g)(1).

108. *Id.* § 10A.

109. *Id.* § 4A(b)(1).

110. *Id.* § 4A(b)(2).

111. *Id.* § 4A(b)(5)(A)-(B).

112. *Id.* § 4A(b)(5)(C).

113. MMAA § 101(a).

114. *Id.* § 101(b)(1)-(2).

115. *Id.* § 103(a)-(b).

116. *Id.* § 102(a).

117. *Id.* § 102(b)(1)-(3).

118. *Id.* § 105(a)-(b).

119. *Id.*; *see also* Sen. Joseph Lieberman's Press Office Website, *at* http://www.lieberman.senate.gov/~lieberman/press/01/04/2001426632.html (last visited Mar. 15, 2002).

120. In 1952, the Supreme Court expressly added movies to the category of protected expression, stating unequivocally in *Burstyn v. Wilson* that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments." 343 U.S. 495, 502 (1952); *see also* Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 65 (1981) (stating that "entertainment ... is protected; motion pictures, programs broadcast by radio and television ... fall within the First Amendment guarantee.").

121. U.S. CONST. amend. I.

122. *See, e.g.*, Burstyn v. Wilson, 343 U.S. 495 (1952).

123. FTC Report, *supra* note 5, at 3.

124. *See generally* Thomas B. Nachbar, *Paradox and Structure: Relying on Government Regulation to Preserve the Internet's Unregulated Character*, 85 MINN. L. REV. 215 (2000) (discussing the MLVA's regulation of Internet activities).

125. *See generally* P. Cameron DeVore, *Advertising and Commercial Speech*, 582 PRAC. L. INST. 715 (1999).

126. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 561 (1980).

127. Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (quoting Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973).

128. Reno v. ACLU, 117 S. Ct. 2329 (1997).

129. Although the Supreme Court continues to apply "intermediate scrutiny" to commercial speech, some Justices believe that the heightened "strict scrutiny" standard should be applied to restrictions on truthful commercial speech. *See* 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1507-08 (1996) (four Justices arguing that restrictions on both commercial and non-commercial speech should be subject to strict scrutiny, one Justice arguing that the distinction between commercial and non-commercial speech should be abandoned entirely).

130. Valentine v. Christensen, 316 U.S. 52, 54 (1942), *overruled by* Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

131. *See* 425 U.S. at 748. Although protected, commercial speech does not receive the same amount of protection as does non-commercial speech.

132. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67 n.14 (1983).

133. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 561 (1980).

134. *But see* Daniel A. Farber, *Expressive Commerce in Cyberspace: Public Goods, Network Effects and Free Speech*, 16 GA. ST. U. L. REV. 789 (Summer 2000) (arguing that commercial speech should not be treated as a commodity); *see also* R. H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 2, 14 (1977) (arguing for the elimination of a distinction between commercial speech and economic regulation).

135. *Central Hudson*, 447 U.S. 557. In *Central Hudson*, the Court invalidated a New York Public Service Commission ban prohibiting electric utilities from engaging in promotional advertising designed to stimulate electricity demand. *Id.* at 572.

136. In *Central Hudson*, the Court held the Commission's interests in conserving electricity and guaranteeing fair and efficient rate structures as substantial and deemed the relationship between the government's interests and the advertising restriction as lawful. *Id.* at 567-569. However, the government failed to meet the fourth prong, as it failed to show a more limited speech restriction could not just as easily serve the government's interests. *Id.* at 570-71.

137. *Id.*

138. Greater New Orleans Broad. Ass'n v. United States, 119 S. Ct. 1923, 1930 (1999).

139. 44 Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495 (1996).

140. *Id.*

141. *Id.* at 1507.

142. *Id.* at 1507-11.

143. However, it should be noted that in recent years, the Court has shown less enthusiasm for the *Central Hudson* test. Various justices have offered different perspectives in interpreting the four prongs, and several have attacked the test's validity. Nevertheless, it has remained the operative rule.

144. *44 Liquormart*, 116 S. Ct. at 1507.

145. *Id. See also* Cincinnati v. Discovery Network, Inc. 507 U.S. 410, 426 (1993). In 1986, the Supreme Court decided Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico. 478 U.S. 328 (1986). *Posadas* upheld a Puerto Rican law that prohibited gambling casinos from advertising to residents of Puerto Rico. *Id.* The case was significant, as the Court approved of restrictions on the advertising of products that are not unlawful, but widely thought of as harmful. With *44 Liquormart*, the Court seemingly reversed its direction by holding that, as long as advertising messages were truthful and not misleading, any restrictions imposed on them would receive strict scrutiny. 116 S. Ct. 1495. After *44 Liquormart*, the strictness of the applied standard of review depends more on its application than its verbal formulation.

146. MVLA § 2(b)(1)(A).

147. *See* Sen. Joseph Lieberman's Press Office Website, *at* http://www.lieberman.senate.gov/~lieberman/press/01/04/2001426632.html (providing "A Basic Summary" of the MMAA) (last visited Mar. 15, 2002).

148. *44 Liquormart*, 116 S. Ct. at 1507.

149. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 564 (1980).

150. Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989); *see also* Reno v. ACLU, 117 S. Ct. 2329, 2346 (1997) (stating that "[w]e have repeatedly recognized the governmental interest in protecting children from harmful materials").

151. *See, e.g.*, L. Rowell Huesmann et al., *The Effects of Media Violence on the Development of Antisocial Behavior, in* HANDBOOK OF ANTISOCIAL BEHAVIOR 181 (David Stoff et al. eds., 1997) [hereinafter *Effects of Media Violence*]. *See also* Donald E. Cook et al., Joint Statement on the Impact of Entertainment Violence on Children (July 26, 2000), *at* http://www.aap.org/advocacy/release/janmedi.htp.

152. *See* Barrie Gunter, *The Question of Media Violence, in* MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH 163, 170-71 (Jennings Bryant & Dolf Zillmann eds., 1994).

153. *Effects of Media Violence, supra* note 151, at 184.

154. The five studies were administered by: the National Commission on the Causes and Prevention of Violence; the Surgeon General's Scientific Advisory Committee on Television and Social Behavior; the National Institute of Mental Health Television and Behavior Project; the Group for the Advancement of Psychiatry Child and Television Drama Review; and the American Psychological Association Task Force on Television and Society.

155. John P. Murray, *The Impact of Televised Violence, at* http://www.ksu.edu/humec/impact.htm (last visited Jan. 18, 2001).

156. MMAA § 2(4).

157. *See* Carolina A. Fornos, *Inspiring the Audience to Kill: Should the Entertainment Industry be Held Liable for Intentional Acts of Violence Committed by Viewers, Listeners, or Readers?*, 46 LOY. L. REV. 441 (Summer 2000); Jonathan L. Freedman, *Viewing Television Violence Does Not Make People More Aggressive*, 22 HOFSTRA L. REV. 833 (Summer 1994); Mike Quinlan & Jim Persels, *It's Not My Fault, The Devil Made Me Do It: Attempting to Impose Tort Liability on Publishers, Producers, and Artists for Injuries Allegedly "Inspired" by Media Speech*, 18 S. ILL. U. L. J. 417 (Winter 1994).

158. Edenfield v. Fane, 507 U.S. 761, 771 (1993).

159. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 564 (1980).

160. *Edenfield*, 507 U.S. 771.

161. Bad Frog Brewery, Inc. v. New York Liquor Auth., 134 F.3d 87, 99 (2d Cir. 1998).

162. *Id.* at 100.

163. *Id.* at 101.

164. Greater New Orleans Broad. Ass'n v. United States, 119 S. Ct. 1923, 1932 (1999).

165. *See id.* (quoting 44 Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495 (1996)).

166. *44 Liquormart*, 116 S.Ct. at 1507.

167. *Id.*

168. If the MMAA called for an outright ban on advertising, its constitutionality would be on much shakier ground. The recent case of *United States v. Playboy Entm't Group* addressed this issue. In that case, the Supreme Court held that when the government makes a judgment as to whether media content does or does not fit into a proscribed statute, they engage in content-based regulation and strict scrutiny is applied. 120 S. Ct. 1878 (2000). Therefore, if the government wishes to constitutionally administer outright bans on media advertising, the regulations must overcome strict scrutiny review. All is not lost, however, because when other methods (e.g. the current television rating system) do not effectively yield results and the problem of youth violence continues to escalate, the Court may be willing to accept more drastic measures. *See id.*

169. Bad Frog Brewery, Inc. v. New York Liquor Auth., 134 F.3d 87, 101 n.10 (2d Cir. 1998); *see also* United States v. Edge Broadcasting, 509 U.S. 418, 430 (1993) (citing Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

170. *See* ACLU v. Reno, 521 U.S. 844, 874 (1997).

171. *Id.*