Advertising Entertainment: Can Government Regulate the Advertising of Fully-Protected Speech Consistent with the First Amendment?

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I. INTRODUCTION

The influence of entertainment and popular culture on now infamous teenagers – Michael Carneal, who mimicked *The Basketball Dia-*

ries' school shooting scene and murdered three of his classmates;[1] Benjamin Darrus and Sarah Edmondson, who were inspired to go on a cross-state crime spree by the film *Natural Born Killers*;[2] John Daniel McCollum, who committed suicide after listening to an Ozzy Osbourne record;[3] and Eric Harris and Dylan Klebold, who, infatuated with violent video games such as *Doom* and *Mortal Kombat*, murdered their Columbine high school classmates[4] – renewed concerns about the relationship between youth violence and the violent entertainment products available to young audiences. The increase in youth violence, seemingly influenced by popular culture and the media, prompted politicians and lawmakers to reevaluate the practices of the entertainment industry, which, for the last half-century, have involved self-regulation and internal monitoring. A study by the Federal Trade Commission (FTC)[5] and the Department of Justice found that, in spite of their own

[1] Carneal, a Kentucky high school freshman, pulled out a gun just after a morning prayer meeting at his parochial high school, shot and killed three students and wounded five others. PAUL C. WEILER, 2000 SUPPLEMENT TO ENTERTAINMENT, MEDIA AND THE LAW 17 (2000). Carneal later admitted that he had recently seen the film, *The Basketball Diaries*, and remembered the scene featuring Leonardo DiCaprio as a high school student who daydreams about going into a classroom, pulling out a gun, and shooting the teacher and several students. *Id.* The families of those injured or killed by Carneal sued Carneal's parents, school administrators, and New Line Cinema, the distributor of *The Basketball Diaries*.

[2] In March 1995, Sarah Edmondson, an Oklahoma teen, and her boyfriend, Benjamin Darrus, both eighteen years-old, went on a cross-state rampage paralyzing one person and murdering another. PAUL C. WEILER, ENTERTAINMENT, MEDIA AND THE LAW 70 (1997). Before embarking on their crime spree, Edmondson and Darrus had repeatedly watched Oliver Stone's *Natural Born Killers*, a film about a couple who find fame on a brutally depicted murder spree. *Id.* In 1998, the shooting victim's family filed suit against Time Warner, Inc. and Oliver Stone. *See* Byers v. Edmonson, 712 So.2d 681, 684 (La. Ct. App. 1998).

[3] Nineteen-year-old McCollum committed suicide after repeatedly listening to an Ozzy Osbourne record, *Blizzard of Oz*, which contained songs advocating suicide, including one called "Suicide Solution." McCollum v. CBS, Inc., 202 Cal. App. 3d 989 (1988). A lawsuit brought by McCollum's parents against Ozzy Osbourne and his record company, CBS, alleged negligence, liability and incitement. *Id.* at 993-94. The California Court of Appeal affirmed the trial court's dismissal of the suit on demurrer, holding that the incident in question did not meet the test set forth in *Brandenberg v. Ohio*, 395 U.S. 444 (1969), for incitement. McCollum, 202 Cal. App. 3d at 1007-08.

[4] Perhaps the most striking example of youth violence to date is the April 1999 massacre at Columbine High School in Littleton, Colorado, in which two alienated students, who were steeped in the popular culture of shock-rockers like Marilyn Manson, and violent interactive video games and Internet sites, besieged their high school, killing and wounding students and faculty before committing suicide. *See Massacre at Columbine High*, DENVER POST, April 30, 1999, at A10.

[5] The FTC is a law enforcement agency whose statutory authority covers a broad spectrum of the American economy, including the entertainment industry. The Commission enforces, among other statutes, § 5 of the FTC Act, which prohibits "unfair methods of competition" and "unfair or deceptive acts or practices," thereby giving the Commission responsibilities in both the antitrust and consumer protection areas. The FTC thus fre-

parental guidelines and age-based ratings classifications, entertainment distributors were purposely targeting violent products toward minors,[6] ensuring that children and young adults are exposed to media violence from an early age. Though the strong protections of the First Amendment largely insulate the entertainment industry from government restrictions on the *content* of its product, federal and state regulators began to consider ways to regulate whether minors are able to receive information about these violent products at all.

The FTC study, administered at the request of then President Clinton, examined the marketing practices of the entertainment industry, focusing on the content and placement of trailers and television commercials for PG-13 and R-rated films, and promotions aimed exclusively at children and teenagers.[7] The FTC concluded that the motion picture, television and video game industries consistently targeted young people when marketing entertainment products containing "pervasive and aggressive" violence. This practice thus "undermin[ed] the ratings [the distributors] themselves apply to their products."[8] For example, before Hollywood Pictures released *Judge Dredd*, an R-rated film about urban crime, the studio tested the film before a focus group that included more than one hundred youths aged thirteen to sixteen.[9] Similarly, Columbia Tri-Star's research staff sampled one hundred children ages nine to eleven to evaluate concepts for the "slasher sequel" *I Still Know What You Did Last Summer*.[10] The FTC study revealed that

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quently considers issues involving self-regulatory initiatives, such as those that have been taken to regulate violence and sexual content in the entertainment industry, and seeks to prevent self-regulatory restraints that harm the competitive process by denying consumers the full range of choices or by preventing new forms of competition from emerging. In its consumer protection role, the Commission emphasizes the importance of self-regulation and works with industry groups to develop sound self-regulatory initiatives, often to complement existing laws. Prepared Statement of the F.T.C. on the Antitrust Implications of Entertainment Industry Self-Regulation to Curb the Marketing of Violent Entertainment Products to Children (Sept. 20, 2000).

[6] *Id.*

[7] The precise questions posed to the Commission for study were, "Do the motion picture, music recording and electronic game industries promote products they themselves acknowledge warrant parental caution in venues where children make up a substantial percentage of the audience? And, are these advertisements intended to attract children and teenagers?" *Id.* To answer these questions, the Commission analyzed the promotion of forty-four violent R-rated films and twenty violent PG-13-rated films distributed by nine major studios from 1995-1999. Jonathan Seiden, *Scream-ing for a Solution: Regulating Hollywood Violence; an Analysis of Legal and Legislative Remedies*, 3 U. PA. J. CONST. L. 1010, 1030 (2001).

[8] Statement of Chairman Robert Pitofsky on FTC Youth Violence Report (Sept. 13, 2000).

[9] Seiden, *supra* note 7, at 1031 (citing F.T.C., Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries (2000)).

[10] *Id.*

the movie studios marketed their R-rated films by buying advertising during "television programs that were the highest rated among teens or where teens comprised the largest percentage of the audience."[11] The study also criticized both the content of movie theater trailers as well as the fact that movie trailers for R-rated films appeared before PG-rated films. Perhaps most disturbing were the promotional activities directed exclusively at the youth market. One marketing plan for an R-rated film revealed that:

> Our goal was to find the elusive teen target audience and make sure everyone between the ages of 12-18 was exposed to the film. To do so, we went beyond the media partners by enlisting young, hip "Teen Street Teams" to distribute items at strategic teen "hangouts" such as malls, teen clothing stores, sporting events, Driver's Ed classes, arcades and numerous other locations.[12]

The FTC study recommended that the industry implement improved self-regulation – including modified ratings systems, industry-wide codes precluding young people from gaining access to violent entertainment backed by sanctions for retailers and distributors, and prohibitions on the advertising of violent products in media with a substantial underage audience.[13] Absent significant strides in self-regulation, however, the FTC asserted that it would explore legal alternatives to regulate the entertainment industry's marketing practices:

> If self-regulation does not provide an adequate answer, I see no choice but to explore law enforcement under present statutes - for example my own agency's basic statute that declares deceptive or unfair acts and practices in commerce to be illegal. A legal challenge under our present statute to marketing in a way that is inconsistent with the industry trade associations' rating would involve a new and untested initiative and I have asked the staff of our agency to examine the pros and cons of any such approach. If it turns out that self-regulation does not solve these problems and that current law is inadequate, legislation, respectful of the First Amendment, should be considered.[14]

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[11] *Id.* In fact, MTV, the music network with a core teen demographic, was found to be the largest cable advertising outlet for R-rated films. Studio marketing materials also indicate that the film industry reached young audiences with advertisements that ran during after-school viewing hours as well as on weekends; the times when children predominately watch television. *Id.*

[12] F.T.C., Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices In the Motion Picture, Music Recording & Electronic Game Industries i (2000).

[13] Prepared Statement of the F.T.C. (Sept. 20, 2000).

[14] Statement of Chairman Robert Pitofsky on FTC Youth Violence Report (Sept. 13, 2000).

Although the motion picture studios have taken some steps to change their marketing practices pursuant to the report,[15] Senator Joseph Lieberman has introduced the Media Marketing Accountability Act of 2001[16] that would permit the FTC to bring deceptive advertising charges against companies that market adult material to children.[17] The bill makes unlawful the "targeted advertising or other marketing to minors of an adult-rated motion picture, music recording, or electronic game"[18] and would permit the government to levy fines of as much as $11,000 a day for each violation.[19]

Although most entertainment speech – in particular motion pictures – warrants full First Amendment protection, the Supreme Court has yet to rule definitively on whether advertisements and promotions for this protected speech should be accorded the same degree of First Amendment protection as the products themselves, or whether this type of advertising should instead be treated as ordinary commercial speech, the regulation of which is subject to a lower standard of judicial review. This comment discusses whether, in fact, the FTC and Congress can regulate the advertising and marketing of violent motion pictures, television and music in a way that is consistent with the First Amendment of the United States Constitution. Part II of this paper examines the history of self-regulation in the entertainment industry and government's efforts to shield minors from certain "indecent" images and "profane" language on broadcast television and radio, and most recently on cable and the internet. Part III discusses the pertinent First Amendment doctrine that will inform whether the government can impose regulations on entertainment marketing and shows that the

[15] In September 2000, in response to the FTC Report, the major film studios announced a new twelve-point plan for marketing R-rated movies. This plan prohibits R-rated movies from being advertised along with G-rated pictures or video releases. David E. Rosenbaum, *Studios to Curb Marketing of R-Rated Films to Youth*, N.Y. TIMES, Sept. 27, 2000, at A21. It bans children under seventeen from focus groups for R-rated films unless an adult accompanies them. Doreen Carvajal, *How the Studios Used Children to Test-Market Violent Films*, N.Y. TIMES, Sept. 27, 2000, at A1. Advertisements for movies have also started to carry detailed advisories about their ratings system. *Id.* Some studios have gone even further. Warner Brothers and Twentieth Century Fox announced that they would no longer advertise R-rated films on any television program for which thirty-five percent or more of the audience is under the age of seventeen, and Disney implemented a policy not to advertise R-rated films on any of its networks before 9:00 p.m. *See* Rick Lyman, *Overhaul of R-Rated Movies Gets a C Rating: Confusing*, N.Y. TIMES, Nov. 1, 2000, at A18. These steps are voluntary, however, and the entertainment industry has not set up any type of enforcement mechanism. *Id.*

[16] S. 792, 107th Cong. (2001).

[17] *Id.* at § 101.

[18] *Id.*

[19] *See* Yochi J. Dreazen, *Democrats May Be Goring Their Own Ox As Lieberman, Hollings Target Hollywood,* WALL ST. J., June 20, 2001, at A20.

Supreme Court's recent jurisprudence on both commercial and non-commercial speech has become increasingly speech-protective, rejecting paternalistic regulation of information and relying instead on the distinction between truthful and misleading information. Part IV analyzes whether the courts should treat entertainment marketing as fully-protected or commercial speech, and whether this distinction will, in practice, affect the government's ability to intervene in the industry's practices. Part V concludes that, constitutionality notwithstanding, the government should not be in the business of regulating cultural standards and should instead continue to work with the various self-regulating branches of the entertainment industry to improve the quantity and substance of the information available to parents and audiences about the types of entertainment to which children are exposed.

II. SELF-REGULATION AND THE CULTURE OF INDEPENDENCE IN THE ENTERTAINMENT INDUSTRY

There is currently very little direct state or federal regulation of the entertainment industry with respect to the content of motion pictures, music, television or video games, or the promotion of these products. Instead, these industries self-regulate through private associations comprised of industry members to provide parents and individuals with information about the sexual or violent content contained in an entertainment product. For instance, in 1990 the Recording Industry Association of America (RIAA), a trade association that represents the music industry in America, began to require that all albums containing explicit lyrics or violent imagery include a warning label that reads "Parental Advisory – Explicit Lyrics."[20] The video game industry has adopted a similar, slightly more intricate system with five ratings categories divided by age and classified by the extent to which violence, strong language and sex are portrayed in the game.[21]

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[20] The Parent's Music Resource Center (PMRC) – a group led by Tipper Gore and other politicians' wives including Susan Baker, Beryl Ann Bentsen, and Nancy Thurmond – originally wanted the RIAA to print song lyrics on album covers, and attach labels specifying the type of explicit lyrics – violent, sexual, containing references to drugs and alcohol – to album covers. WEILER, *supra* note 2, at 78. The "Parental Advisory" labels were the result of a compromise between the PMRC and the RIAA. *Id.*

[21] The ratings, determined by the Interactive Digital Software's Entertainment Software Rating Board, include: EC (early childhood, from 3 years up); KA (kids to adult, ages 6 and older and permitting some violence); T (teens, aged 13 and older, and permitting violence and strong language); M (mature, aged 17 and older, and permitting violence and sex scenes); and AO (adults only, permitting graphic sex and violence). PAUL C. WEILER, *supra* note 2, at 90.

Self-regulation through ratings and parental guidelines was pioneered by the motion picture industry which, since its inception, has attempted to negotiate the fine line between First Amendment freedoms of speech and expression and moral responsibility to the film audience. In the early 1930's, the Motion Picture Association of America (MPAA), a trade association comprised of the largest motion picture studios,[22] created the Hayes Office Code, a self-regulatory regime under which the studios agreed that, though films could contain sexual and violent themes, all scenes had to be discreet and all stories had to end with poetic justice served.[23] The Production Code Administration, an intra-industry agency affiliated with the state of California, enforced that system by affixing its seal to approved movies.[24]

In the 1960's, under the pressure of competition from television and foreign films, this system began to unravel and more controversial films began to appear in theaters, prompting strong regulatory responses by local and state authorities.[25] The courts met the new government regulations with much resistance. In *Interstate Circuit v. City of Dallas*,[26] the Supreme Court struck down a Dallas ordinance that made the showing of films "not suitable for young persons" (under sixteen years of age) a misdemeanor, punishable by a fine for up to $200. "Not suitable for young persons" was defined in the ordinance as:

> (1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be . . . likely to incite or encourage crime or delinquency on the part of young persons; or
> (2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be . . . likely to incite or encourage sexual promiscuity on the part of young persons or to appeal to their prurient interest.[27]

The Supreme Court held that this ordinance was unconstitutionally vague, but did not go so far as to hold that the First Amendment's guarantee of freedom of speech prohibited such regulations: "It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. What

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[22] MPAA members include: Disney, MGM/ United Artists, Paramount Pictures, Sony Pictures, Twentieth Century Fox, Universal, and Warner Brothers. *See* http://www.mpaa.org.

[23] See Jacob Septimus, Note, *The MPAA Ratings System: A Regime of Private Censorship and Cultural Manipulation*, 21 COLUM.-VLA J.L. & ARTS 69, 71 (1996). For example, the Code prohibited open mouth kissing; a man and woman in bed, whether married or not had to keep one leg on the floor; verbal profanity was not allowed. *Id.*

[24] Septimus, *supra* note 23, at 71.

[25] WEILER, *supra* note 2, at 79

[26] 390 U.S. 676 (1968).

[27] *Id.* at 681.

does follow at the least . . .is that the restrictions imposed cannot be so vague as to set the censor adrift upon a boundless sea."[28] Furthermore, the Court expressly recognized that "some believe 'motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression,'"[29] and noted the Court's previous indication 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."[30] The Court's language in *Interstate Circuit*, while not explicitly approving government regulation of the motion picture industry, intimated that motion pictures could be subject to government regulation that was sufficiently narrow.

The film industry and the MPAA responded to *Interstate Circuit*'s forewarning and established a new self-administered ratings system designed to provide parental guidelines regarding a film's suitability for children and to discourage government intervention.[31] A Rating Board, composed of seven persons and headed by a chairman, initially decide a motion picture's rating. There are no special qualifications for Board membership, except that "[a member] must love movies, must possess an intelligent maturity of judgment, and have the capacity to put himself or herself in the role of most parents . . . trying to decide whether their young children ought to see a specific film."[32] Each Board member fills out a form specifically rating the film in four categories of overall theme, violence, language, nudity and sex before giving the film an overall rating by majority vote.[33] An appeals process allows film distributors to re-screen the film and present oral argument before a larger panel, comprised of MPAA and National Organization of Theater Owners (NATO) members, who reevaluate the original rating.[34] If the rating is affirmed, the film's producer or distributor may

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[28] *Id.* at 684 (internal quotation marks omitted) (*quoting* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952)).

[29] *Id.* at 690 (quoting Joseph Burstyn, Inc., 343 U.S. at 502).

[30] *Id.* at 690 (quoting Ginsberg v. New York, 390 U.S. 629 (1968)).

[31] The classification includes five main ratings which may be applied to a film:
G – "General Audience. All ages admitted."
PG – "Parental Guidance Suggested. Some material may not be suitable for children"
PG-13 – "Parents Strongly Cautioned. Some material may be inappropriate for children under 13
R – "Restricted. Under 17 requires accompanying parent or adult guardian."
NC-17 – "No Children Under 17 Admitted."
See WEILER, *supra* note 2, at 80.

[32] Jack Valenti, *The Movie Rating System, reprinted in* Swope v. Lubbes, 560 F. Supp. 1328, 1338 (D. Mich. 1983).

[33] Septimus, *supra* note 23, at 73.

[34] *Id.*

re-edit the film according to the specifications of the Ratings Board, or may release the film un-rated.[35] Because the majority of theaters, large video stores, and newspapers will not release or promote un-rated films, motion picture producers and distributors will generally adhere to the MPAA's guidelines.[36]

In addition to rating the actual motion pictures, the MPAA also must approve the content of the marketing materials used by the distributor, including theatrical trailers, posters, print advertisements, radio and television commercials, and press books.[37] The MPAA examines the marketing materials of PG, PG-13 and R films to make sure that they do not contain any of the violent or sexually explicit scenes that caused the feature to be unsuitable for a general audience.[38] The MPAA does not, however, regulate how, where and to whom the movies of its members are actually marketed and advertised. Therefore, while the MPAA may tell a distributor that it cannot show a gun or an explosion in its television commercial for an R-rated movie, it does not mandate that the studio refrain from airing that "clean" commercial on a children's network like Nickelodeon, thereby inducing Nickelodeon viewers to see the full violent feature in the theaters.

The television and radio broadcast industries, by contrast with their other entertainment counterparts, have been subject to considerably more intervention by Congress and the Federal Communications Commission (FCC).[39] As the Supreme Court, in *FCC v. Pacifica Foundation*,[40] the leading case on broadcast indecency, noted, "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection."[41] The *Pacifica* Court justified this treat-

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[35] *Id.*

[36] WEILER, *supra* note 2, at 81.

[37] Valenti, *supra* note 32, at 1338.

[38] *Id.* For example, theatrical trailers "are either designated G, which means they may be shown with all feature films, or R, which limits their use to feature films rated R or NC-17. There will be in G-designated trailers no scenes that caused the feature to be rated PG, R, or NC-17. Each trailer carries at the front a tag which tells two things: (1) the audience for which the trailer has been approved, and (2) the rating of the picture being advertised. The tag for G-rated trailers will have a green background; the tag for R-rated trailers will have a red background. The color is to alert the projectionist against mismatching trailers with the film being shown on the theater screen." *Id.*

[39] The FCC is an independent government agency, directly responsible to Congress. The FCC was established by the Communications Act of 1934 and is charged with regulating interstate and international communications by radio, television, wire, satellite and cable. *See* http://www.fcc.gov./aboutus.html.

[40] 438 U.S. 726 (1978).

[41] *Id.* at 748. *See also,* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969), (rejecting broadcaster's First Amendment challenge to FCC's mandate that licensed broadcast stations offer a right of reply to editorial attacks on the grounds that spectrum scarcity permits government greater leeway to regulate television broadcasts than other expressive mediums).

ment of broadcasting by the "uniquely pervasive presence" that broadcasting has in the lives of all Americans.[42] "Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content."[43] Following *Pacifica*, the FCC and the courts struggled to define the contours of indecency regulation of the television and radio airwaves. The final formulation defined "indecent" broadcasts as using "language or material that depicts, describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs," and allowed the FCC to mandate a "safe harbor" between 6 a.m. and midnight in which "indecent" broadcasts could not be aired. In *Action for Children's Television v. FCC (ACT IV)*,[44] the en banc D.C. Circuit court, after a series of rulings on the issue,[45] upheld this "safe harbor" restriction as constitutional based on the state's compelling "dual interests" in assisting parental supervision of children and in protecting the emotional and ethical well-being of minors.[46] Noting evidence that two-thirds of children live in homes with several television sets, and that one-half have television sets in their bedrooms, the court maintained that "[i]t is fanciful to believe that the vast majority of parents who wish to shield their children from indecent material can effectively do so without meaningful restriction on the airing of broadcast indecency."[47]

Government regulation of indecency on television remains unsettled, particularly with respect to the newer mediums of cable and digital television.[48] Although there may be greater leeway for network television regulation than regulation of cable channels,[49] the Supreme Court

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[42] 438 U.S. at 748.

[43] *Id.*

[44] 58 F.3d 654 (D.C. Cir. 1995).

[45] *See* Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988) ("ACT I") (upholding the FCC's "indecency" standard against vagueness concerns, but striking down a shortened safe harbor period); Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991) ("ACT II") (rejecting a total ban on the broadcast of indecent material); Action for Children's Television v. FCC, 11 F.3d 170 (D.C. Cir. 1993) ("ACT III") (striking down FCC policy extending "safe harbor" period to midnight to all but those programmers who go off the air at midnight, for whom the "safe harbor" would only extend until 10:00 p.m.).

[46] *Action for Children's Television*, 58 F. 3d at 663.

[47] *Id.*

[48] *See* Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994) (refusing to extend *Red Lion* to the cable industry since cable television does not suffer from the inherent spectrum limitations as broadcast television).

[49] *Compare* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (rejecting broadcaster's First Amendment challenge to FCC's mandate that licensed broadcast stations offer a right of reply to editorial attacks on the grounds that spectrum scarcity permits government greater leeway to regulate television broadcasts than other expressive mediums) *with* Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994) (refusing to extend *Red Lion* to the cable industry

recently indicated that indecency regulations imposed on cable television must be relatively narrow to be consistent with the First Amendment. In *United States v. Playboy Entertainment Group*,[50] a divided Court, for the first time, struck down a law that regulated, but did not ban, cable indecency by a vote of 5-4.[51] The Court invalidated provisions of a federal telecommunications law that required cable operators to either to scramble fully sexually explicit programming, or, if they were unable to scramble the programs because of "signal bleed," to confine such programming to late-night hours when children were unlikely to view it.[52] Writing for the Court, Justice Kennedy held that the law was a content-based regulation that could not survive stringent judicial review because a less restrictive alternative—requiring cable operators to block undesired channels for specific households on request – would have been sufficient to achieve the government's goals of protecting minors from indecent programming.[53]

As the case law indicates, until recently, nearly all government regulation of the broadcast industry focused on sexual indecency and profanity, and largely ignored the impact of violent programming on children and teenagers. However, following several high profile incidents of violence involving minors, Congress and the FCC began investigating ways to control violence on television and children's exposure to violent programming. Congress passed, and President Clinton signed into law, the Telecommunications Act of 1996[54] which gave the television industry one year in which to develop its own ratings system before the FCC would intervene,[55] and mandated that the Violence(V)-chip coding system, which allows parents to select what programming their children are exposed to, and blocks violent or indecent programming, be installed in all new television sets before sale.[56] In 1999, Senator Hollings additionally proposed a "safe-harbor" period akin to that

since cable television does not suffer from the inherent spectrum limitations as broadcast television).

[50] 529 U.S. 803 (2000).

[51] *Id.* at 827.

[52] *Id.* at 824-26.

[53] *Id.* at 811-15.

[54] 47 U.S.C § 561 (1994).

[55] In 1997, the television industry introduced a ratings system modeling that of the MPAA. The ratings include: TV-Y for all children; TV-Y7 for older children; TV-G for general audience; TV-PG for parental guidance; TV-14 for parents strongly cautioned; and TV-M for mature audiences only.

[56] For an in-depth discussion of the V-chip – its uses, implications and constitutionality – see J.M. Balkin, *Media Filters, The V-Chip and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131 (1996). The Supreme Court has yet to rule on the constitutionality of the V-chip and, in *Denver Area Educational Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996), expressly declined to do so.

upheld in *ACT IV* for violent programming, which Congress declined to pass.[57]

Despite a great deal of discussion over government regulation of the entertainment industry, the industry, has remained largely self-regulated and self-contained since its inception, particularly with respect to the violent content of products. Even the most heavily regulated branch – the television industry – has, with the advent of cable television, witnessed a shift toward stricter judicial review of indecency bans and increased emphasis on self-regulatory means to police violent programming. Any government regulation of the entertainment industry's marketing practices would therefore be foreign to the independent, self-contained culture to which the entertainment industry has become accustomed.

III. The Protections of the First Amendment and Commercial Speech Doctrines for Entertainment Purposes

The FTC Report on Media Marketing implied that legislative action, consistent with the First Amendment, could be taken to regulate the marketing practices of the entertainment industry. Courts, however, have not yet addressed directly this issue, which turns on whether the First Amendment fully protects entertainment advertising, or if entertainment advertising is instead considered commercial speech, subject to greater government regulation as well as charges of deceptive advertising.

A. *First Amendment Doctrine*

The First Amendment's guarantee that "Congress shall make no laws . . . abridging the freedom of speech,"[58] has long been thought to serve principal values of advancing knowledge, facilitating democracy and self-government, and promoting individual autonomy and self-expression or "freedom of the mind."[59] It was not until the middle of the Twentieth Century, nearly fifty years after motion pictures first appeared in American culture, that it became recognized that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments."[60] In *Joseph Burstyn, Inc. v. Wilson*, the Supreme Court dismissed the idea that the

[57] S. 876, 106th Cong. (1999).

[58] U.S. Const. amend. I.

[59] Charles Fried, Symposium, *Perfect Freedom, Perfect Justice*, 78 B.U. L. Rev. 717, 719 (1998).

[60] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952).

for-profit nature of the film industry removed its products from under the First Amendment's umbrella and held, "[t]hat books, newspapers and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures."[61] Music, radio and television broadcasts, live entertainment, and musical and dramatic works are similarly considered protected expression.[62] As a result, attempts to suppress the content of film, music or other entertaining speech based specifically on its content must be deemed "necessary to serve a compelling state interest and [be] narrowly drawn to achieve that end"[63] – that is, the regulation must survive strict constitutional scrutiny.

However, not all restraints on speech receive heightened First Amendment scrutiny. Government restrictions on the time, place and manner of expression, for instance, are often justified under a lower level of constitutional scrutiny by the interests of public order, safety, privacy and aesthetic values. An early case, *Cox v. New Hampshire*,[64] explained: "[t]he authority of a municipality to impose regulations in order to assure the safety and convenience of the people . . . has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend."[65] *Ward v. Rock Against Racism*,[66] upholding New York City's volume control regulations for public out-door concerts, similarly held that, despite the clear First Amendment protection for music,[67] the interest in tranquility allowed government to impose reasonable restric-

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[61] *Id.* at 501-02.

[62] Schad v. Mt. Ephraim, 452 U.S. 61, 65 (1981). Whether video games are considered protected expression under the First Amendment has yet to be considered by the United States Supreme Court. WEILER, *supra* note 21, Ch. 1 (new draft). In *American Amusement Machine Assoc. v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), a unanimous panel of the Seventh Circuit ruled that "martial arts" video games were fully protected by the First Amendment and invalidated as unconstitutional an Indianapolis ordinance prohibiting children under seventeen from using video game machines with a "visual depiction. . . of realistic serious injury to a human," including, "decapitation, dismemberment, bloodshed, mutilation and maiming." *Id.* at 573. Since the First Amendment status of video games is uncertain, they will not be considered in the sections of this paper pertaining to the First Amendment analysis of entertainment marketing.

[63] Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987).

[64] 312 U.S. 569, 576 (1941) (allowing a local authority to require parade permits 'to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to minimize the risk of disorder').

[65] *Id.* at 574.

[66] 491 U.S. 781 (1989).

[67] *Id.* at 790 ("Music, as a form of expression and communication, is protected under the First Amendment.").

tions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[68]

The first element of the time, place and manner test – that restrictions on speech "are justified without reference to the content of the related speech" – reflects a crucial demarcation in First Amendment jurisprudence between content-based and content-neutral regulations. A content-neutral restriction is defined as one in which expression is not limited "because of its message, its ideas, its subject matter, or its content."[69] In *Kingsley International Pictures Corp. v. Regents*,[70] New York State, acting under a statute prohibiting "immoral" film, denied a license to the film *Lady Chatterley's Lover* because "its subject matter is adultery presented as being right and desirable."[71] The Court held that this regulation was content-based because it regulated that which "advocates an idea," and therefore "struck at the very heart of constitutionally protected liberty."[72] By contrast, the Court deemed the ordinance in *Rock Against Racism* to be content-neutral because it was motivated solely by the city's desire to control noise levels emanating from Central Park and not by a desire to "impos[e] subjective standards of acceptable sound mix" on rock performers.[73] While "[d]eciding whether a particular regulation is content-based or content-neutral is not always a simple task,"[74] the distinction prevents government from "effectively driving certain ideas or viewpoints from the marketplace,"[75] without limiting government's ability to regulate public order and welfare in a non-discriminatory manner.

A variation on the time, place and manner doctrine occurred in *Young v. American Mini-Theatres*[76] and *Renton v. Playtime Theatres*.[77] Both cases addressed "Anti-Skid Row" zoning ordinances that regu-

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[68] *Id.* at 791. (*quoting* Clark v. County for Creative Non-Violence, 468 U.S. 288, 293 (1984)). *See also* Heffron v. Int'l Society for Krishna Consciousness, 452 U.S. 640, 648 (1981).

[69] Police Dep't v. Mosely, 408 U.S. 92, 95 (1972).

[70] 360 U.S. 684 (1959).

[71] *Id.* at 687.

[72] *Id.* at 688.

[73] Ward v. Rock Against Racism, 491 U.S. 781, 792-93 (1989).

[74] Turner Broad. Sys. v. FCC, 512 U.S. 622, 641-43 (1994).

[75] Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105 (1991) (invalidating a statute preventing criminals from profiting off the sale of their story as impermissibly content-based since it only regulated criminals' expression).

[76] 427 U.S. 50 (1976).

[77] 475 U.S. 41 (1986).

lated which neighborhoods in a given city could house adult movie theaters.[78] The impact of the classification was to channel the display of sexually explicit (but not necessarily obscene)[79] motion pictures into limited zones in the city, rather than to ban the material altogether. Despite the fact that these ordinances appeared to be based on the content of the films shown (certainly these regulations did not affect mainstream movie houses), the Supreme Court upheld the provisions as reasonable time, place and manner restrictions. In *Renton*, Chief Justice Rehnquist held that the ordinance was aimed "not at the *content* of the films shown in 'adult motion picture theaters,' but at the *secondary effects* of such theaters on the surrounding community."[80] These secondary effects included crime, decrease in retail trade, depreciation of property values, and effects on the general quality of urban life.[81] Although the Court has frequently declined to extend the secondary effects rationale,[82] this is the closest the Court has come to upholding restrictions on the availability of, and access to, non-obscene motion pictures.

B. *Commercial Speech Doctrine*

When the Supreme Court decided *Burstyn* in 1952, its recognition that the for-profit nature of the motion picture industry did not negate a film's expressive quality was especially crucial, because, at that time, speech that was strictly "commercial" was wholly outside the ambit of First Amendment protections and thereby subject to the legislative deference generally accorded to economic legislation.[83] Commercial speech is defined as speech that "does no more than propose a commercial transaction,"[84] and applies primarily to advertisements and product information. In the 1976 case *Virginia State Board of Phar-*

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[78] *See Young*, 427 U.S. at 52; *Renton*, 475 U.S. at 43.

[79] Obscenity is generally considered to fall outside the First Amendment protection. *See* Miller v. California, 413 U.S. 15, 23-24 (1973) (formulating the standard by which obscenity is to be judged).

[80] *Renton*, 475 U.S. at 47.

[81] *Id.* at 48.

[82] *See, e.g.*, Reno v. A.C.L.U., 521 U.S. 844, 868 (1997) (declining to extend secondary effects rationale to internet or "cyberzoning"); Boos v. Barry, 485 U.S. 312, 321 (1988) (*Renton* does not apply to "[r]egulations that focus on the direct impact of speech on its audience").

[83] *See* Valentine v. Chrestensen, 316 U.S. 52 (1942). In the Post-Lochner Era, courts generally review economic and social regulations under a lower "rational basis" standard of scrutiny. *See* Ferguson v. Skrupa, 372 U.S. 726 (1963); Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955).

[84] Va. State Bd. Of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976).

macy v. Virginia Citizens Consumer Council, Inc.,[85] the Court held that commercial speech warranted some First Amendment protection, but still less than that accorded core First Amendment speech, such as books, newspapers or film.[86] Upholding a challenge to a law proscribing pharmacists from advertising prescription drug prices, the Court noted that society has an interest in the "free flow of commercial information."[87] Four years later, in *Central Hudson Gas v. Public Service Commission*,[88] the Court settled on the following four-part test to determine when commercial speech merits First Amendment protection:

> For commercial speech to come within [First Amendment protection], it at least must concern lawful activity and not be misleading. Next we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.[89]

This test amounts to an intermediate level of scrutiny that permits more government regulation than the strict scrutiny standard applied to traditional subjects of the First Amendment.

Since *Central Hudson*, the Supreme Court has developed a very protective commercial speech doctrine. For a time, one potential exception to this doctrine involved the advertising of vice – that is, activity that is lawful, but nevertheless widely viewed to be detrimental to one's health or moral well-being such as smoking, consumption of alcohol, and gambling. In *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*,[90] for example, the Court upheld a law that prohibited gambling casinos from advertising their facilities to residents of Puerto Rico on the grounds that deterring gambling was a substantial state interest aimed at the "health, safety and welfare of the Puerto Rican citizens."[91] *United States v. Edge Broadcasting Co.*[92] similarly validated a prohibition against the broadcasting of lottery ads, seeming to further carve a vice exception into the commercial speech doctrine. However, this vice exception was subsequently rejected in both *Rubin v. Coors Brewing Co.*,[93] in which Justice Thomas rejected the notion that "the legislatures have broader latitude to regulate speech that pro-

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[85] 425 U.S. 748 (1976).
[86] *Id.* at 771-72.
[87] *Id.* at 763.
[88] 447 U.S. 557 (1980).
[89] *Id.* at 566.
[90] 478 U.S 328 (1986).
[91] *Id.*. at 341.
[92] 509 U.S. 418 (1993).
[93] 514 U.S. 476 (1995).

motes socially harmful activities,"[94] and finally in *44 Liquormart, Inc. v. Rhode Island*,[95] in which the Court explicitly overruled *Posadas*,[96] and invalidated a Rhode Island law that prohibited advertisement of the price of alcoholic beverages "in any manner whatsoever" except by tags or signs inside liquor stores.[97]

Liquormart's plurality applied the *Central Hudson* test narrowly, holding that the regulation in question would not serve the state's interest in decreasing alcohol consumption,[98] and was more extensive than necessary since alternative forms of regulation, such as taxation and education campaigns, would equally serve the State's goal of promoting temperance.[99] In *Liquormart*, the Court further signaled its willingness to expand its protection for truthful, nonmisleading commercial speech by denouncing the paternalist underpinnings of the doctrine: "[Bans] against truthful nonmisleading commercial speech rest solely on the offensive assumption that the public will respond 'irrationally' to the truth. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."[100] Moreover, several of the Justices have gone so far as to suggest abandonment of the *Central Hudson* test and have instead advocated full strict scrutiny for at least some regulations of commercial speech. In *Liquormart*, Justice Thomas in his concurrence asserted that:

> In cases such as this, in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the balancing test adopted in Central Hudson should not be applied. . . . Rather, such an 'interest' is per se illegitimate and can no more justify regulation of 'commercial' speech that it can justify regulation of 'noncommercial' speech.[101]

Justice Kennedy, joined by Justice Scalia and Justice Thomas in *Lorillard Tobacco Co. v. Reilly*,[102] similarly raised questions about the adequacy of the *Central Hudson* test, stating his "continuing concerns that

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[94] *Id.* at 482 fn.2.

[95] 517 U.S. 484 (1996).

[96] *Id.* at 509.

[97] *Id.* at 489.

[98] *Compare with Posadas*, 478 U.S. at 341-42 (holding that a ban on advertising for casino gambling would serve to advance the state's legitimate interest in deterring gambling).

[99] *Liquormart*, 517 U.S. at 504.

[100] *Id.* at 503.

[101] *Id.* at 518 (Thomas, J. concurring).

[102] 121 S. Ct. 2404 (2001).

the test gives insufficient protection to truthful, nonmisleading commercial speech."[103]

It is important to note that, although commercial speech is still considered to warrant a lower level of First Amendment protection than fully-protected speech, the standard for regulations, particularly those that bare the mark of paternalism, seems to now be difficult to surmount. Instead, the dispositive inquiry appears to be whether the commercial speech at issue is "false" or "misleading." Where commercial speech is truthful, a greater level of protection is accorded that speech; where, by contrast, it is false or misleading, commercial speech falls entirely outside the purview of the First Amendment. After many shifts in the case law, the fundamental distinction between fully protected speech and commercial speech may simply be that fully protected speech may mislead its audience in its attempts to persuade, whereas commercial speech is held to a higher standard of truthfulness.

IV. The First Amendment Applied: Can Government Regulate Marketing of Entertainment Products Consistent With The First Amendment?

A. *Is Entertainment Advertising Fully-Protected or Commercial Speech?*

The advertisements for films, television, music – products now considered to be at the core of First Amendment values – occupy a position on the border between fully-protected and commercial speech. Although advertisements are traditionally considered the province of commercial speech, advertisements for films and other protected activity, as opposed to listings of pharmaceutical or liquor prices,[104] may do more than simply "propose a transaction." Trailers and commercials for films and television shows often contain scenes – ostensibly fully-protected speech—from the films or shows themselves; promotions for recording artists may similarly include portions of their music. And while entertainment distributors do create these marketing materials for the express purpose of selling their product, these advertisements can also be viewed as an invitation to be further persuaded or influenced by the ideas and emotions contained in the film or song, of which this is a subset. Any restriction on this subset of speech would necessarily limit the audience for the film or compact disc.

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[103] *Id.* (Kennedy, J. concurring in part and in the judgment).

[104] *See* Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

Although the Supreme Court has never expressly decided whether and to what extent entertainment advertising is protected by the First Amendment, in the early case of *Breard v. City of Alexandria*,[105] the Supreme Court upheld an ordinance prohibiting solicitors from selling magazine subscriptions door-to-door, despite the fact that the magazines themselves clearly were protected speech. Although the Court agreed that "the mere fact that money is made out of the distribution does not bar the publications from First Amendment protection," the Court contended that the act of selling "brings into the transaction a commercial feature" that put the act itself beyond the First Amendment's reach.[106] Though *Breard* is perhaps the most definitive statement the Supreme Court has offered on advertising for protected speech, it may be distinguishable from the entertainment context. Since the Court decided *Breard* in 1951, First Amendment doctrine has been considerably broadened. The recognition of the First Amendment interests in commercial speech, as well as the extension of the doctrine to motion pictures that occurred subsequent to the *Breard* decision, indicate that, if again confronted with the issue, the Court may simply abandon *Breard* as a relic from First Amendment doctrine past.

Thirty-two years after *Breard*, in *Bolger v. Youngs Drugs Products Corp.*,[107] the Supreme Court indicated in dicta that advertisements for core First Amendment speech would be fully protected. In *Bolger*, a case in which advertisements for contraceptives were considered protected as *commercial* speech, Justice Marshall in a footnote added: " [o]f course, a different conclusion may be appropriate in a case where the pamphlet advertises *an activity itself protected by the First Amendment.*"[108] Though not bound by it, lower courts have generally followed this dicta: In *Lane v. Random House, Inc.*, the D.C. Circuit rejected Warren Commission critic Mark Lane's assertion that Random House's promotion of Gerald Posner's book *Case Closed*[109] was commercial speech, and instead held that it would be judged under the same strict level of scrutiny as the book itself. The California Supreme

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[105] 341 U.S. 622 (1951).

[106] *Id.* at 642. *Breard* was decided before the Court decided to give some lower-level protection to commercial speech, therefore the determination that the activity constituted commercial speech was the end of the inquiry here.

[107] 463 U.S. 60 (1983).

[108] *Id.* at 67 (emphasis added). *See also* Murdock v. Pennsylvania, 319 U.S. 105 (1943) (indicating that the advertisement of religious books should not be treated as mere commercial speech, even before special First Amendment protection for commercial speech had been established); Jamison v. Texas, 318 U.S. 413, 417 (1943) (same).

[109] The promotion read "ONE MAN, ONE GUN, ONE INESCAPABLE CONCLUSION."

Court has also noted in several decisions that when commercial solicitation or promotion is for constitutionally protected works, those promotional activities must *not* be viewed as ordinary commercial speech, but must be "protected as an incident to the First Amendment value of the underlying speech or activity."[110] The California Supreme Court further held that the Constitution fully protects "[p]ublicity directed at building audiences" for a First Amendment work such as a seminar, a book, or a movie.[111] Neither the United States Supreme Court in *Bolger* nor the lower courts have attempted to distinguish *Breard* in their discussions of the issue.

Since courts offer little concrete guidance on this question, the analysis, if brought in court, will likely depend on analogies and policy considerations. It has been argued that, while advertisements for entertainment products are, in fact, advertisements, a movie trailer or television commercial is in substance "simply a particular *subset* of the content of the movie itself," used to "highlight the expressive content of a movie," and therefore should be entitled to the same First Amendment treatment as the movie being excerpted.[112] Moreover, the trailer or promotion will likely use portions of the protected speech – either a groups of scenes from a film or a song from an album – directly in the promotional material. In a paper presented to the FTC, Walter Dellinger and Charles Fried analogize movie trailers to book excerpts:

> Trailers thus function in much the same way as a book reading by a book's author, and presumably no one would characterize a restriction of book readings – *i.e.*, one that would limit the author's discretion to read from violent or sexually explicit portions of his or her book – as a regulation of mere "commercial speech" entitled to lesser First Amendment protection.[113]

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[110] People v. Fogelson, 21 Cal.3d 158, 165 n.7 (1978).

[111] Belli v. State Bar of California, 10 Cal. 3d 824, 832 (1974) (when "the activity advertised triggers First Amendment considerations, the advertising itself should do so also"). Similarly, in *Lewis v. Columbia Pictures Indus., Inc.*, the California Court of Appeal affirmed the dismissal of a tort suit alleging liability for gunshot wounds received during a screening of Boyz 'n the Hood and that the defendant's advertising campaign was misleading and therefore likely to incite violence. The court, in an unpublished and therefore nonbinding, opinion held that an advertisement for a movie "goes beyond proposal of a commercial transaction and encompasses the ideas expressed in the motion picture which it promotes; thus it is afforded the same First Amendment protections as the motion picture," and was not commercial speech. *But see* Keimer v. Buena Vista Books, 75 Cal. App. 4th 1220 (1999) (holding that certain advertising statements made on book and videotape covers were commercial speech and therefore could be subject to unfair competition claims concerning the false and misleading nature of the statements).

[112] Walter Dellinger and Charles Fried, *First Amendment Implications of the Federal Trade Commission's Inquiry into the Marketing to Minors of Motion Pictures That Depict Violence: A Paper Presented to the Federal Trade Commission,* 10-11 (Jan. 19, 2001).

[113] *Id.*

Dellinger and Fried further note that, "it is no answer to say that the ultimate purpose of a movie trailer or a book reading (as with any advertisement) is to promote a commercial transaction."[114] If this were the appropriate inquiry, not only film and television, but books, newspapers and magazines, all of which constitute core First Amendment mediums of expression, would be merely "commercial."[115]

However, while the Supreme Court has never expressly held that "commercial speech" and advertising are necessarily synonymous, it can be argued that the purpose of a movie trailer, like any advertisement is solely to "propose a commercial transaction." Whereas, in Dellinger and Fried's example, an author's book reading may help to sell her books, she also may regard a public reading as a type of performance or lecture, designed to convey some ideas that she has also chosen to include in a book. By contrast, a movie trailer or commercial is intended to convey the filmmaker's ideas or vision in part, but this form of "expression" is hard to distinguish from a television commercial for a car or toothpaste, which would surely be treated as commercial speech.[116] Moreover, television commercials are often directed by high-priced directors using expensive sets and original imagery, and thus involves creative expression, but they are nevertheless simply means to induce the audience to make a purchase. This becomes an even finer distinction given the cross-marketing that now occurs in advertising: for example, a commercial for a particular recording artists' new album may also be an advertisement for the store where it is sold; an advertisement for McDonald's may include scenes from a film whose characters will appear in a Happy Meal that week.

Entertainment advertising's place among the speech hierarchy is thus nebulous, and demonstrates that there may ultimately be little, if any, meaningful distinction between fully-protected and commercial speech.[117] Still, while entertainment advertising is difficult to distinguish from, and often overlaps with, more traditional commercial advertising, any restrictions placed on entertainment advertising does far more than economic regulation: it limits the audience for certain ideas that film or music, unlike a car or toothpaste, convey. Therefore, it

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[114] *Id.* at 10.

[115] *Id.* at 10-11.

[116] *See* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) (law banning television commercials advertising alcoholic beverage struck down because advertisements were protected *commercial* speech).

[117] *See* Alex Kozinski and Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990) (arguing that the distinction between commercial and noncommercial speech is a mere legal fiction, and both should be accorded the same First Amendment protection).

would be unwise to artificially segregate entertainment advertising from the speech that advertises for the purposes of First Amendment inquiry.

B. *Entertainment Advertising as Fully-Protected Speech*

If advertising for entertainment products is considered fully-protected speech under the First Amendment, the threshold question would be whether a regulation of this speech should be considered content-based – that is, restricted "because of its message, its ideas, its subject matter, or its content"[118] – or content-neutral.[119] A restriction on marketing of movies that depict violence would single out for discrete treatment a particular category of speech defined solely by reference to its violent content, similar to the treatment of adultery in the *Kingsley Pictures* case discussed above, and would therefore clearly be content-based.

One way to circumvent this analysis, however, would be to argue that these regulations are analogous to the zoning restrictions on adult movie theaters upheld in *Renton*, and therefore are content-neutral, "time, place and manner" restrictions because they are aimed at the "secondary effects" of exposing children to violent entertainment, and not at the expression itself. In other words, restrictions on the speech contained in entertainment marketing would be incidental to the true goal of the prohibition, which is to limit the violent behavior that follows from exposure to violent entertainment. In *Reno v. A.C.L.U.*,[120] however, the Court rejected a similar argument, holding that the Communications Decency Act (CDA) – which "prohibit[ed] the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age"[121] – could not be treated as a content-neutral law under *Renton*'s "secondary effects" rationale.[122] The government in *Reno* argued that the CDA was constitutional because it was, in effect, a "cyberzoning" law, similar to that in Renton, that was aimed at precluding the harmful effects of exposure to indecent speech available to minors over the Internet.[123] The Court distinguished *Reno* from *Renton* on the grounds that "the purpose of the CDA is to protect children from the primary effects of 'indecent' and

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[118] Police Dep't v. Mosely, 408 U.S. 92 (1972).

[119] *See* Turner Broad. Sys. v. FCC, 512 U.S 622, 641-43 (1994).

[120] 521 U.S. 844 (1997).

[121] Communications Decency Act of 1996, 47 U.S.C. § 223 (d) (*quoted in Reno*, 521 U.S. at 860).

[122] *Reno*, 521 U.S. at 867.

[123] *Id.* at 867-68.

'patently offensive' speech, rather than any 'secondary' effect of such speech."[124] Similarly, a regulation that restricted marketing of films that depict violence to minors would aim to protect children and society from the alleged *primary* effect of those films on minors, not from any associated secondary effects. In addition, the zoning ordinance in *Renton* regulated the physical location of the objectionable movie theaters because of the crowds these theaters attracted. The regulation of marketing, by contrast, seems more intimately bound up with the restriction of speech and the effects of certain speech on its audience.[125] It would thus be unlikely that a regulation on entertainment marketing would be considered content-neutral under *Renton.*

A content-based regulation, however, is subject to "the most exacting scrutiny,"[126] which requires that, for a restriction on speech to be upheld, it must be "necessary to serve a compelling state interest and [be] narrowly drawn to achieve that end."[127] Though the Supreme Court has consistently found "a compelling interest in protecting the physical and psychological well-being of minors,"[128] and in protecting the community from violence,[129] the requirement that the law be "narrowly drawn to achieve that interest" puts any attempted regulation of entertainment advertising in constitutional jeopardy. It is highly speculative whether regulations on advertising of violent entertainment to minors will have any affect at all on their physical and psychological well-being. It is even less certain that there is any relationship between on-screen violence and actual violent behavior. Although some studies indicate a correlation between the viewing of violent programming and aggressive childhood behavior,[130] respected psychologists have criticized both the design of and conclusions drawn from this research.[131] Even where a link between a particular entertainment product and a subsequent, isolated act of violence can be found to exist, courts have, on several occasions, held that "no rational person . . . would mistake

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[124] *Id.* at 868.

[125] Boos v. Barry, 485 U.S. 312, 321 (1988) (*Renton* does not apply to "[r]egulations that focus on the direct impact of speech on its audience.").

[126] Turner Broad. Sys. v. FCC, 512 U.S 622, 642 (1994).

[127] Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987).

[128] Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989); *see also* Ginsberg v. N.Y., 390 U.S. 629, 639-40 (1968).

[129] Schall v. Martin, 467 U.S. 253, 264 (1984) (noting the "'legitimate and compelling state interest' in protecting the community from crime").

[130] One such study examined 875 midwesterners who were investigated from childhood through their adult years: the researchers found that childhood television viewing rates were the best index of adolescent aggressive behavior, and of adult criminal behavior. WEILER, *supra* note 2, at 73.

[131] *Id.* at 74.

musical lyrics and poetry for literal commands or directive to immediate action."[132]

The narrow tailoring requirement would also be difficult for the legislature to satisfy, because any ban on marketing to minors would necessarily be overinclusive and restrict at least some speech intended for adults. In *Sable Communications, Inc. v. FCC*,[133] the Supreme Court struck down limitations on Dial-A-Porn services as insufficiently narrowly tailored because the prohibition "had the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear."[134] *Reno v. ACLU* similarly maintained that the CDA "lacked the precision that the First Amendment required" because "in order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another."[135] The Court further held that 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."[136]

If the FTC or Congress were to mandate that trailers for R-rated or PG-13 movies could not be shown before films with lesser ratings, for instance, a significant number of adults who attend PG movies (either on their own or with their children)[137] would be precluded from viewing the two to three-minute trailer, which is generally only available in the theater.[138] Similarly, any restriction on television commercials during certain youth or teen-targeted shows would effect adult viewers as well as young viewers. For instance, many television shows are thought to have a large teen audience, but typically have a high percentage of viewers over 18 who would be deprived of the benefit of

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[132] McCollum v. Columbia Broad. Sys., Inc., 202 Cal. App. 3d 989, 1002 (1988) (refusing to hold record producer liable for teenager's suicide after listening to Ozzy Osbourne record advocating suicide); *see also* Davidson v. Time Warner, Inc., 25 Media L. Rep. 1705 (1997) (quoting same language in *McCollum* to reject tort claim brought against producer of Tupac Shakur's album *2Pacalypse Now* by family of a police officer who was shot by a motorist listening to *2Pacalypse Now* just before the shooting).

[133] 492 U.S. 115 (1989).

[134] *Id.* at 131.

[135] Reno v. ACLU, 521 U.S. 844, 874 (1997).

[136] *Id.*

[137] Note that some adults with children may not even attend movies alone anymore, given the constraints that a pre-teenage or teenage child puts on one's personal time.

[138] This is less true than it use to be: maybe film studios now place their trailers on the internet though, to view these, one would need a good internet connection and some computer savvy that many older adults do not have. By contrast, children would probably be much more likely to download these images, thus rendering any regulation of theater trailers practically moot.

certain advertisements.[139] Some of the regulations that have been proposed for industry self-regulation suggest that any television show with a thirty-five percent under-eighteen audience should be restricted with respect to the advertisements they can air; this number has been criticized as too high, but even this "high" number places unnecessary limitations on what two-thirds of its audience can view.[140] Moreover, restrictions on marketing of films that depict violence could also have the unfavorable effect of inhibiting the ability of parents or adults to monitor the content of films that children wish to view, thereby reducing the likelihood that parents would discuss the impact of movies that depict violence with their children or prevent their children from attending (or prevent them from accompanying their children to) such movies.[141] And, while movie marketing is certainly an effective means of informing youths about products that may harm them, other approaches, such as educational campaigns on the media or on youth violence, may be a less speech-restrictive, but equally, if not more effective, way to counteract the effects of violent lyrics and imagery on minors.

A final concern that a court would likely have with this kind of restriction involves a different form of over-inclusiveness: how does one decide which violence is acceptable and which is dangerous for children. Whereas ratings serve as parental guidelines, any true federal or industry regulation of content or promotions necessitates a subjective judgment to be made regarding what is appropriate for children and teenagers to view; and, unlike profanity or indecency, in which nudity or certain words can be easily identified and omitted from a film or record, violence does not lend itself to these categorical distinctions, and "excessive," "gratuitous," or "inappropriate" violence may be difficult to define. The Eighth Circuit found precisely such a deficiency in a Missouri law prohibiting rental or sale to minors of videos depicting violence, concluding that "the statue is not narrowly drawn to achieve its end without unnecessarily infringing on freedom of expression," as it appeared to apply not only to so-called "slasher videos," but also to "animated violence in many cartoon shows, simulated violence in western and war movies, real violence in the boxing ring, or psychological

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[139] Rick Lyman, *R-Rated Film Curbs Slowly Taking Hold*, PITTSBURGH POST GAZETTE Nov. 2, 2000, at A20 (noting that series such as *Xena: Warrior Princess* and *Buffy the Vampire Slayer*—which were mentioned by some of the critics of Hollywood's R-rated marketing—are watched by far fewer underage teen-agers than many believe, about 18 percent for *Xena* and 26 percent for *Buffy).*

[140] *Id.*

[141] Dellinger & Fried, *supra* note 112, at 24.

violence in suspense stories or 'thrillers.'"[142] Moreover, it is important to recognize that many socially and artistically important films have received PG-13 and R ratings because they contain depictions of violence: *Schindler's List*, Shakespeare's *Henry V*, *The Killing Fields*, *Chinatown*, *The Shawshank Redemption*, *Bladerunner*, *Glory*, *Raging Bull*, *Apocalypse Now*, *Das Boot*, *Platoon*, *The Godfather I* and *II*, *Deliverance*, *The Deer Hunter*, *Hamlet*, *Coming Home*, and *Saving Private Ryan* are among them. Thus, because such broad, over-inclusive consequences would seem to follow, it would be extremely difficult for government to impose any regulations on entertainment marketing that would be sufficiently narrowly tailored to meet strict standards that content-based restrictions on speech mandate.

C. *Entertainment Advertising as Commercial Speech*

If instead we view entertainment advertising as commercial speech, any proposed regulations would come up against the *Central Hudson* intermediate scrutiny test, which requires that the regulation serve a "substantial" governmental interest, "directly advance" that interest, and not be "more extensive than is necessary to serve that interest."[143] Many of the same arguments applicable to the strict scrutiny analysis above would be advanced here, particularly regarding the causal link between violent entertainment products and actual violence and possible less restrictive means to accomplish the same goals. Though *Central Hudson* is a less rigorous standard than strict scrutiny, the Supreme Court has viewed restrictions on commercial speech with increasing skepticism and has even advocated overruling the intermediate scrutiny test in some instances in favor of a stricter test.[144]

Perhaps the closest analogy to entertainment advertising in the commercial speech context is the Supreme Court's treatment of regulations on tobacco advertising.[145] In the case of tobacco, legislatures have, for many years, placed restrictions on both content and placement of tobacco advertising similar to those that have been contemplated for entertainment products, which are similarly justified by an interest in health, safety and well-being of children and society-at-large. These regulations, implemented before *Virginia State Board of Phar-*

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[142] Video Software Dealers Ass'n v. Webster, 968 F.2d 684, 689 (8th Cir. 1992).

[143] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y. , 447 U.S. 557, 566 (1980).

[144] *See* discussion of commercial speech *infra* pp. 22-23.

[145] *See* Ronald D. Rotunda, Symposium, *Should States Sue the Entertainment Industry as They Did Big Tobacco? No: Government Knows That There is Virtually No Link Between Hollywood's Products and Youth Violence*, INSIGHT MAGAZINE, Oct. 30 2000, at 41.

macy accorded First Amendment protection to commercial speech, were initially upheld under "rational basis" scrutiny. However, more recent regulations, reviewed under the commercial speech doctrine, have met with much resistance from the Supreme Court.

In 1970, Congress enacted the Public Health Cigarette Smoking Act of 1969,[146] which prohibited cigarette advertisements on any medium over which the FCC had jurisdiction – television and radio.[147] Though the statute did not meet with much opposition from the tobacco companies at the time,[148] it was challenged prior to the recognition of First Amendment protections for commercial speech, and was thus upheld under "rational basis" scrutiny as having no effect on broadcaster's First Amendment rights since broadcasters would only be deprived of revenue collected from others for broadcasting their commercial messages.[149] By contrast, in last term's *Lorillard Tobacco* case, the Court rejected, under the *Central Hudson* test, even a relatively narrow ban on outdoor tobacco advertisements within 1000 feet of a school or playground that also required that indoor point-of-sale advertising of such products be placed no lower than five feet from the floor.[150] The Court recognized that "[the] State's interest in preventing underage tobacco use is substantial, and even compelling," but, similar to its reasoning in *Reno*, contended that a deleterious effect on minors does not preclude the sale and use of tobacco products by adults, for whom smoking is a legal activity.[151] Striking down the advertising ban, the court held, "[w]e must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their

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[146] 15 U.S.C. § 1335 (2000).

[147] *Id.*

[148] Prior to the Act's passage, the FCC mandated that, for every tobacco advertisement broadcast, an anti-smoking advertisement would be run to counter its persuasive effects. Kennith L. Polin, *Argument for the Ban of Tobacco Advertising: A First Amendment Analysis*, 17 HOFSTRA L. REV. 99, 101 (1988). The District of Columbia Circuit upheld the FCC ruling requiring radio and television stations which carried cigarette advertising to accord significant time to presenting the case against smoking. *See* Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968) (holding that congressional passage of the Cigarette Labeling Act of 1965 does not preempt the field of regulation addressed to the health problem posed by cigarette smoking and, therefore, does not deny the FCC any authority it otherwise had to issue its cigarette ruling). "As one commentator observed, '[g]iven that the health scare was a stronger marginal determinant of cigarette demand than was cigarette advertising, the [tobacco] companies' eagerness to assist the government to end the subsidized anti-smoking advertising was not surprising.'" Hamilton, *The Demand for Cigarettes*, 54 REV. ECON. & STATISTICS 401, 408 (1972) (quoted in *id.* at 101).

[149] Capital Broad. Co. v. Mitchell, 333 F. Supp. 582, 584 (D.D.C. 1971), *aff'd* Capital Broad. Co. v. Acting Attorney General, 405 U.S. 1000 (1972).

[150] Lorillard Tobacco Co. v. Reilly, 121 S. Ct. 2404, 2411 (2001).

[151] *Id.* at 2426.

products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products."[152]

Though the Court in *Lorillard* left open the possibility for narrower restrictions on tobacco advertising, their decidedly speech-protective approach suggests that even products whose harmful effects have been proven cannot, so long as they are legally sold, be kept from the marketplace simply to protect a certain segment of the population. It is likely that this standard, if applied to entertainment products, would be applied even more rigorously given two crucial distinctions between tobacco and violent entertainment: first, the correlation between violent entertainment and actual violent activities is considerably more attenuated than that between tobacco and health risks such as cancer and emphysema;[153] second, whereas selling tobacco products to minors is illegal and punishable by a criminal fine, MPAA ratings restricting minors from certain films are merely guidelines and thus are legally unenforceable.[154] As a result, any restrictions on entertainment advertising as commercial speech would be difficult to enforce under the standard set by *Lorillard.*

D. *Entertainment Advertising as Deceptive Commercial Speech*

Perhaps recognizing the difficulties in regulating advertisements in a manner consistent with the First Amendment, Senator Joseph Lieberman proposed the Motion Picture Accountability Act of 2001 to restrict marketing of "adult-rated" entertainment products to minors on the grounds that this would be "deceptive advertising."[155] As the *Central Hudson* test makes clear, commercial speech that is considered false, misleading or "deceptive," will be stripped of all its First Amendment protections.[156] Senator Lieberman's argument is that, by targeting minors through marketing and advertising of adult-rated entertainment, the distributors of these products are falsely portraying their products as suitable for minors, despite the fact that their own internal ratings

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[152] *Id.*

[153] *See generally* UNITED STATES DEP'T OF HEALTH, EDUC. & WELFARE, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE 28-29 (1964) ("reviewing the smoking habits of 1,123,000 men involved in seven prospective population studies and concluding that cigarette smoking was causally related to certain forms of cancer in men").

[154] *See* Rotunda, *supra* note 145, at 41; *see also infra* p. 37-38.

[155] *See* S. 792, 107th Cong. (2001).

[156] Note that only commercial speech is subject to the threshold question whether it is false or misleading. If entertainment advertising is considered to be fully-protected speech, this inquiry is not relevant.

system has determined otherwise.[157] Particularly with respect to the motion picture industry, this argument may have trouble succeeding because the MPAA mandates that all trailers, commercials and other marketing materials carry its rating at all times, and therefore actively disclaim their suitability for a general audience.[158] Supporters of the Act may argue that the ratings are not explicit enough when countered by certain images or placement among certain products, and that this may ultimately satisfy at least the FTC's standard which asks whether deception is likely among a substantial segment of the purchasing public.[159]

However, and more importantly, the core assumption underlying Senator Lieberman's proposal is flawed, or at least limited, as applied to the entertainment industry. For example, in the motion picture industry, under the industry's self-regulatory system, the only type of film that one could characterize as having been "adult-rated"[160] is one that had received an "NC-17" rating, and thus restricts children under 17 from viewing the film. Films are rarely given an NC-17 rating, however, and they are even less frequently marketed to broad audiences.[161] PG-13 and R-rated films – those that Senator Lieberman's bill seems to target – are not "adult-rated." A film that depicts violence may receive a rating more demanding than the "G" rating, which indicates that a film has been rated for a "General Audience" of any age. But a "PG," "PG-13," or "R" rating does not constitute a statement that the film has been "rated for adults"; it only means that parents and potential audience members should know that some material may be inappropriate for viewing by persons under seventeen years of age without parental guidance or accompaniment. Thus, as Senator Lieberman's bill presents it, it would be nearly impossible for an "adult-rated" film to be deceptively advertised to minors.

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[157] *See* Rotunda, *supra* note 145, at 41. Similar deceptive advertising arguments have been made by plaintiffs and commentators regarding tobacco advertisements. *See* Polin, *supra* note 148, at 113-22.

[158] With respect to music and video games, certainly the outside packaging contains ratings, though television commercials or other marketing materials may not contain the rating or parental advisory. This, of course, would be easy to rectify if Senator Lieberman's bill were to be signed into law.

[159] *See, e.g.,* Rhodes Pharmacal Co. v. FTC, 208 F.2d 382 (7th Cir. 1953) (Seventh Circuit upheld an FTC finding of deceptive advertising when only nine percent of the public interpreted an advertised 'cure' for arthritis to mean that the product actually 'cured' arthritis). Firestone Tire & Rubber Co. v. FTC, 481 F.2d 246 (6th Cir. 1973) (FTC finding of deception was upheld by the Sixth Circuit when only ten to fifteen percent of the public was found to be misled by a tire advertisement).

[160] *See* S. 792, 107th Cong. (2001).

[161] *See* Dellinger & Fried, *supra* note 112, at 3.

V. CONCLUSION

Despite the efforts of Senator Lieberman, the FTC, and other lawmakers, it is unlikely that Congress or the FTC will be able to impose regulations on the marketing practices of the entertainment industry that are consistent with the Supreme Court's protective First Amendment jurisprudence. Though the concerns about the exposure of children and teenagers to violent media are not unfounded, the shaky correlation between violent entertainment and actual youth violence, and the difficulties in defining what constitutes "harmful" violent entertainment in the first place, makes any government regulation, at best, premature and impracticable to administer.As Dellinger and Fried, in their paper to the FTC, question:

> Are we to impanel a "Ministry of Culture" to determine which films that depict violence may be marketed and shown to the public at large, and which may not? We wonder whether such judgments can or should be made by a government that purports to serve a free society, and whether such judgments would be misunderstood.[162]

On the other hand, though continued self-regulation of the entertainment industry by trade organizations seems, based on the past success of organizations like the MPAA, to be the better alternative, giving too much regulatory authority to organizations formally unchecked by the First Amendment might be equally suspect. These trade organizations may be no better equipped than Congress or the FTC to serve as a "Ministry of Culture" and determine what is "harmful" to children, or control the information they receive.

As the Supreme Court recognized in *Virginia State Board of Pharmacy*, there is considerable value to the public in the "free flow of commercial information."[163] Instead of trying to police the marketing efforts of entertainment distributors, both the FTC and trade organizations would be more effective if they instead continued as conduits of information to the public. Trade organizations should offer more detailed descriptions of ratings and content of entertainment products to give parents more control over what their children view. Congress and the FTC should also focus on disseminating information. By continuing to study the effects of violent entertainment on children and by putting out reports such as the one at issue here, government takes advantage of their resources to caution parents about the entertainment industry's practices and provide them with information that can help them to monitor their children's exposure to or understanding of violent en-

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[162] Dellinger & Fried, *supra* note 112, at 4.

[163] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 763 (1976).

tertainment. Moreover, by giving parents and consumers more information about the products to which their children are exposed, government allows parents to make their own determinations about what is culturally acceptable and what is "harmful." It is ultimately their actions and responses to this information that will alter the practices of the entertainment industry for the better, without compromising the values that underlie the First Amendment.