

NOT YET RATED: SELF-REGULATION AND CENSORSHIP ISSUES IN THE U.S. FILM INDUSTRY

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ABSTRACT

There have been efforts to censor their content from the time movies emerged as fixtures of popular culture. In response to growing concerns about government intervention, the film industry created a self-regulatory ratings system. However, there are insufficient incentives for the industry to regulate itself, as ratings play a direct role in box office success. Critics of the ratings system have pointed to increased leniency over time and to the influence of powerful studios over the process as evidence of fundamental flaws in the regulatory scheme. This Article suggests a more effective ratings system would base decisions in social science data to better protect children and inform parents.

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INTRODUCTION

Movies are big business. In 2016, the film industry generated \$11.2 billion in domestic box office receipts with 1.3 billion tickets sold.¹ In the same year, sales from the top twenty DVDs and Blu-rays released totaled around \$1.2 billion.² Since 1995, the Motion Picture Association of America (MPAA) rated 2896 movies PG-13,³ grossing over \$101 billion—nearly 50 percent of the market share.⁴ In considering the financial success of movies, it is nearly impossible to understate the significance of a self-regulatory ratings system. Studies show that the “forbidden fruit effect” often results in increased interest from children where ratings indicate a film contains certain content, particularly violence.⁵ Higher-level MPAA ratings make movies more attractive to children, while some choose to avoid films rated G altogether because of the “baby-ish” stigma.⁶ A study testing six different ratings systems further found that the MPAA system was the only one that attracted children to restricted content.⁷ The film industry has a bottom-line incentive to manipulate the ratings system to obtain the most marketable ratings possible—while including the most stimulating or attractive content possible—regardless of whether the ratings ultimately reflect the appropriateness for the actual targeted audience. This incentive directly conflicts with the stated purpose of the ratings system.

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- 1 *Domestic Movie Theatrical Market Summary 1995 to 2018*, THE NUMBERS, <http://www.the-numbers.com/market> (last visited March 16, 2018) [perma.cc/K5AK-56DW]. Please note that all monetary figures are in terms of U.S. dollars, unless otherwise provided. The domestic box office refers to the North American “movie territory,” including the United States, Canada, Puerto Rico, and Guam. *Id.*
 - 2 *Top-Selling Video Titles in the United States 2016*, THE NUMBERS, <http://www.the-numbers.com/home-market/packaged-media-sales/2016> [perma.cc/Z63R-XTJE] (last visited Apr. 16, 2018).
 - 3 *Domestic Movie Theatrical Market Summary 1995 to 2016*, *supra* note 1 (there are nearly twice as many R-rated movies [4883] in the same time period, but those films only make up 27 percent of the market share).
 - 4 *Id.* In 2016, there were 140 PG-13 movies which composed 49.25 percent of the annual market share, compared to the 285 movies rated PG or R which made up only 49.83 percent of the annual market share combined. *Domestic Theatrical Market Summary for 2016*, THE NUMBERS, <http://www.the-numbers.com/market/2016/summary> [perma.cc/WB8H-NXEA] (last visited Apr. 16, 2018).
 - 5 James T. Hamilton, *Who Will Rate the Ratings?* in *THE V-CHIP DEBATE: CONTENT FILTERING FROM TELEVISION TO THE INTERNET* 133, 140 (Monroe E. Price ed., 1998).
 - 6 *Id.*
 - 7 *Id.*

Almost as quickly as motion pictures rose to popularity, there were statutes and regulations put into place designed to monitor their content.⁸ Over the years, however, these once-popular forms of government censorship and regulation gave way to a self-imposed system of content regulation within the entertainment industry. Since the early 1900s, the Motion Picture Association of America (MPAA)—whose membership is currently composed of the top six movie studios—controls the majority of the output and distribution of films through their voluntary, age-based ratings system.⁹ Chaired by former United States Senator Christopher J. Dodd, the members of the MPAA “aspire to advance the business and the art of filmmaking”¹⁰

This Article addresses how and why Hollywood came to be self-regulated and examines whether that self-regulation is effective, efficient, or desirable. Ratings play a significant role in the financial success of films,¹¹ and studios are economically incentivized to manipulate the ratings system in order to protect their own profitability. In other countries around the world, statutorily authorized organizations are frequently tasked with evaluating and regulating movies to provide an independent and honest accounting of a film’s violent or sexual content. This Article suggests that, while adopting a similar structure may exceed the realm of possibility in the United States given developments in modern First Amendment jurisprudence, adopting certain elements from these organizations—such as reliance on social science data in evaluating and categorizing films—would provide more accurate information and thus enable greater protection of children and consumers.

I. BACKGROUND

A. *Film Industry Regulation in the U.S., Early 1900s*

As movies quickly became fixtures of popular culture, statutes arose to control film content. Beginning in the 1900s, several states and hundreds of cities and municipalities across the United States censored films in order to determine their moral fitness prior to public exhibition.¹² This legally enforceable

8 Just twenty years after the first motion picture appeared in theaters, the Court upheld the right of a state censorship board to restrict film content in *Mut. Film Corp. v. Indus. Comm’n of Ohio*, 236 U.S. 230 (1915).

9 *Our Story*, MPAA (last visited Oct. 28, 2017), <https://www.mpa.org/our-story>. Founded in 1922 by the three biggest production studios at the time, the MPAA’s current members include Twentieth Century Fox, Paramount Pictures, Sony Pictures Entertainment, Universal Studios, Disney, and Warner Bros. Entertainment. *Id.*

10 *Id.*

11 RYAN LAMPE & SHAUN McRAE, THIS PAPER IS NOT YET RATED—SELF-REGULATION IN THE U.S. MOTION PICTURE INDUSTRY 14 (Jan. 2014) (presenting data that suggests unrestricted movies tend to outperform their restricted counterparts) (“Between 2000 and 2011, average United States box office revenue for unrestricted [G, PG, and PG-13] movies was \$67 million, compared with \$34 million for restricted [R and NC-17] movies.”).

12 Laura Wittner-Keller, *Governmental Censorship, the Production Code and the Ratings*

ensorship regime was one of three control mechanisms that would be exercised over the film industry during the twentieth century, but it was the only one supported by the full power of the law. Later forms of control—the Hays Code and our current ratings system—would instead operate under the power and control of a colossal industry.¹³

In 1907, Chicago gave its police chief the power to review movies before public release without any “escape clause” for films with artistic merit.¹⁴ In response, theater operators sued the city, arguing that the ordinance improperly delegated discretionary and judicial powers, deprived film owners of property without due process, and failed to provide standards to guide the chief’s decisions, making the law void for vagueness.¹⁵ In upholding the city ordinance, the court found that “an average person of healthy and wholesome mind knows well enough what the words ‘immoral’ and ‘obscene’ mean and can intelligently apply the test to any picture presented”¹⁶ The court believed the chief could perform this regulatory duty by applying the—apparently—readily-discernable meaning of the words. As such, the court expressed little concern that the chief might struggle to accurately determine or apply the understanding of immorality or obscenity as conceptualized by the general public.¹⁷

Soon after the court held the Chicago ordinance withstood constitutional challenge, cities and states across the United States began to copy the inflexible, legally enforceable, statutory ordinance into their own rule books. In 1911, Pennsylvania legislated a state-wide censorship regime, followed by Ohio and Kansas in 1913, and Maryland three years later.¹⁸ New York, Virginia, Atlanta, Memphis, and other states and individual cities followed within the next ten years, covering the country in a “crazy quilt of censoring bodies.”¹⁹ The censorship statutes were all, except one, framed in the negative—films would *not* be allowed if they contained anything deemed to be obscene, indecent, or immoral—and since the costs of review fell to the distributor, the statutes were also lucrative for the censorship boards.²⁰

The rise in local censorship regimes brought the film industry together in support of a common cause—profit. The purpose behind the organization of the industry was not to protect public morals, but to make money: the movie shown is the one they believed would draw the largest crowd.²¹ Some production companies began hiring censors in an effort to save money by making

System, HOLLYWOOD AND THE LAW 130, 130 (Paul McDonald et al. eds., 2015).

13 *Id.*

14 *Id.* at 131.

15 *Block v. City of Chicago*, 87 N.E. 1011, 1013, 1015 (Ill. 1909).

16 *Id.* at 1015.

17 *Id.* at 1016.

18 Wittern-Keller, *supra* note 12, at 131.

19 *Id.* at 132.

20 *Id.*

21 DONALD YOUNG, MOTION PICTURES: A STUDY IN SOCIAL LEGISLATION 10 (1922).

their films “censor proof.”²² After coming under fire for lacking standards, the National Association for the Motion Picture Industry, representing the majority of the industry’s producers, adopted resolutions condemning the use of film as a means to arouse “bawdy emotions” or pander to a “salacious curiosity.” The organization condemned subject matter such as sex appeal, white slavery, improper attitudes, and underworld vice in a manner closely corresponding to the provisions of Pennsylvania’s and other boards of censorship, but with less specificity—apparently to allow for “artistic expression.”²³ The big studios needed to protect their system of self-regulation, which allowed the large production firms to exercise control over content.

B. *The Hays Code Adopted, 1930s*

The Motion Picture Producers and Distributors of America Incorporated (MPPDA), which changed its name to the Motion Picture Association of America Incorporated in 1945, was founded primarily to combat the increased efforts of censorship by states and municipalities.²⁴ Will H. Hays, former postmaster general, served as the first president of the MPPDA.²⁵ In 1926, the MPPDA began reviewing scripts on an “advisory basis” and, endeavoring to avoid immorality charges by powerful state censorship regimes, created a list of “don’ts” and “be carefals” that was distributed to member firms²⁶ the following year (see Figure 1).²⁷ Hays and six other men²⁸ agreed on the list over lunch at the Hollywood Athletic Club.²⁹ The group noted that their motivation for eliminating certain scenes and titles was that these were of a type “habitually condemned by censoring boards in this country and abroad” and, most importantly, that “audiences observing them in non-censorship states . . . are

22 *Id.* at 12.

23 *Id.* at 13.

24 Michael Conant, *Antitrust in the Motion Picture Industry: Economic and Legal Analysis*, ASPECTS OF FILM 1, 40 (Garth S. Jowett ed., reprt. Arno Press 1978) (1960).

25 *Id.* at 40 n. 27.

26 Motion Picture Producers and Distributors of America, Inc., *Record #341*, MPPDA DIGITAL ARCHIVE 1, 1 (1927) <https://mppda.flinders.edu.au/records/341> [perma.cc/S8NA-3M2U]. Recently consolidated member firms—the “Big Eight”—included Paramount, 20th Century Fox, Loews (later Metro-Goldwyn-Mayer), Universal, Warner Brothers, Columbia Pictures, United Artists, and Radio-Keith-Orpheum (RKO). See JOEL H. SPRING, *IMAGES OF AMERICAN LIFE: A HISTORY OF IDEOLOGICAL MANAGEMENT IN SCHOOLS, MOVIES, RADIO, AND TELEVISION* 50 (SUNY Press 1992) (stating that in 1912, sixty different firms operated in the motion picture industry, but by the 1920s, the Big Eight made 90 percent of movies in the United States).

27 Conant, *supra* note 24, at 40 n. 27.

28 Motion Picture Producers and Distributors of America, Inc., *supra* note 26. Other attendees of the lunch meeting included E. H. Allen from Educational Studios; Paul Bern and Sol Wurtzel, film producers; and Fred W. Beetson, Secretary-Treasurer of the Association of Motion Picture Producers, Inc. *Id.*

29 *Id.*

aroused to demands for censorship.”³⁰ By eliminating these, Hays suggested, the MPPDA could “forestall the demand for further censorship and further develop . . . the repeal of such censorship as now exists.”³¹ Not only did the MPPDA want to avoid sparking the growth of new censorship programs, but they also wanted to get rid of state and local censorship all together.

Figure 1: The “Don’ts and Be Carefuls”³²

The following subjects were not to appear in pictures produced by member firms of the MPPDA:	The following subjects were to be treated with special care to eliminate vulgarity and emphasize good taste:
Pointed profanity, including the words “God,” “Lord,” “Jesus,” “Christ,” (unless used with proper religious reverence), and all other profanities	Use of the flag
Nudity, licentious or suggestive; and any lecherous notice of nudity by characters	International relations
Illegal traffic of drugs	Theft, robbery, safe-cracking, and dynamiting of trains, mines, buildings (due to the effect which a too-detailed description may have upon the moron)
Any inference of sexual perversion	Brutality, possible gruesomeness
White slavery; miscegenation	The technique of committing murder
Sex hygiene and venereal diseases	Actual hangings or electrocutions as legal punishment for a crime
Scenes of actual childbirth, in fact or in silhouette	Sympathy for criminals
Children’s sex organs	Attitude to public characters and institutions; sedition
Ridicule of the clergy	Apparent cruelty to children and animals; branding of people or animals
Willful offense to any nation, race or creed	The sale of women or a woman selling her virtue
	Rape or attempted rape
	Man and woman in bed together
	The institution of marriage
	Surgical operations
	The use of drugs
	Scenes involving law enforcement or law-enforcing officers
	Excessive or lustful kissing, particularly when one character is a “heavy”

30 *Id.*

31 *Id.*

32 *Id.* at 1–3. While a substantial portion of the list has been provided here, for a complete collection of the “Don’ts and Be Carefuls” released by the MPPDA, please visit: <https://mppda.finders.edu.au/records/341> [perma.cc/S8NA-3M2U].

However, the “Don’ts and Be Carefuls” guidelines enjoyed limited success. Film producers—wary of outside interference—were reluctant to adopt the proscriptions.³³ In 1929, producers submitted only 21 percent of scripts for review by the MPPDA.³⁴ The “Don’ts and Be Carefuls” failed to curtail film content, and by the end of 1929 the walls were closing in. State and municipal censorship boards ordered a record number of cuts; President Hoover contemplated antitrust action against the industry; civic organizations clamored for federal control; and censorship legislation was introduced in both Congress and state legislatures.³⁵

In response to increasing Catholic interest in “purifying” movies, a priest and St. Louis University professor, Father Daniel A. Lord, formulated the Motion Picture Production Code in 1930.³⁶ A committee of executives worked alongside Hays and Lord to develop the final version of the Code, which incorporated most of the “Don’ts and Be Carefuls” in a section entitled “Particular Applications.”³⁷ Formally endorsed by studio executives and adopted by the MPPDA, the Code soon became known as the Hays Code.³⁸ The MPPDA loosely enforced this Code for a few years until the Catholic National Legion of Decency launched a campaign against non-conforming films.³⁹

In the wake of the Catholic threats of boycotts, Hays needed someone who could inspire the public trust in the morality of the MPPDA’s censorship arm, the Production Code Administration (PCA). He found his man in Joseph I. Breen—a former journalist, prominent Roman Catholic, and anti-Semite.⁴⁰ The PCA functioned as the censorship arm of the MPPDA, while the Advertising Code Administration (ACA) regulated any associated advertising materials for films subject to the Code. Hays placed Breen at the head of the PCA to improve enforcement of the Hays Code.⁴¹ Member firms that violated

33 LEONARD J. JEFF & JEROLD L. SIMMONS, *THE DAME IN THE KIMONO: HOLLYWOOD, CENSORSHIP, AND THE PRODUCTION CODE* 7–8 (Univ. Press of Ky. 2d ed. 2001). Upon receipt of the guidelines, many producers scrawled “Return to sender” across the outside of the envelope. *Id.*

34 *Id.* at 8.

35 *Id.* at 8–9.

36 *Id.* at 9–10 (explaining that Hays and Martin Quigley—a powerful “matchmaker” between the Church and Hollywood—recognized the need for collaboration with the Catholic church, which would bring pressure from powerful Catholic leaders and consumers upon studio executives to adopt and apply the Code).

37 *Id.* at 12.

38 *Id.*; see also Thomas Doherty, *Hollywood’s Censor: Joseph I. Breen and the Production Code Administration*, 45–46 (Colum. Univ. Press 2007) (explaining how the Production Code’s nickname—the “Hays Code”—became popularized).

39 Michael Conant, *Antitrust in the Motion Picture Industry: Economic and Legal Analysis*, ASPECTS OF FILM 1, 40 (Garth S. Jowett ed., report. Arno Press 1978) (1960).

40 David Denby, *Hitler in Hollywood*, THE NEW YORKER, (Sept. 16, 2013, <https://www.newyorker.com/magazine/2013/09/16/hitler-in-hollywood>) [<http://perma.cc/H7DE-UPXV>].

41 Conant, *supra* note 39.

the Code were subject to a \$25,000 penalty.⁴² The Code focused on three general principles:

No picture shall be produced which will lower standards of those who see it. Hence the sympathy of the audience shall never be thrown to the side of crime, wrong doing, evil or sin.

Correct standards of life, subject only to the requirements of drama and entertainment, shall be presented.

Law, natural or human, shall not be ridiculed, nor shall sympathy be created for its violation.⁴³

The code grouped specific areas of prohibition under twelve broader subject headings: crimes against the law, sex, vulgarity, obscenity, profanity, costume, dances, religion, locations (bedrooms), national feelings, titles, and repellent subjects.⁴⁴ All member firms submitted scripts and footage to the PCA for approval, and the MPPDA invited nonmembers to do the same. As a result, 95 percent of all films made in the United States—and a significant number of foreign films—were made with oversight from the PCA by the time the Court held that vertical integration within the film industry violated antitrust law in *United States v. Paramount Pictures*.⁴⁵ The PCA approved most films and scripts submitted for review. For example, the censoring body absolutely rejected only forty out of nearly six thousand submissions in the ten-year span between 1935 and 1945, thirteen of which were later re-reviewed and approved.⁴⁶

Granting the major firms significant control over film *content* by virtue of their membership and consequently their role in the approval process, the PCA worked hand-in-hand with those same firms to control the *distribution* of films by virtue of what was then the reality: the five largest production and distribution companies owned 70 percent of first-run theaters in the nation's major cities—and these theater circuits agreed to show only those films that received PCA approval.⁴⁷ Other theaters in turn based their showing selections on films' first-run earnings, and a film not picked up by the major circuits was almost guaranteed low first-run returns.⁴⁸ This effectively gave the five

42 *Id.* (noting that MPPDA counsel later recommended removal of the penalty fines, fearing that these monetary penalties possibly constituted violations of antitrust law).

43 Motion Picture Producers and Distributors of America, Inc., *Record #2254*, MPPDA DIGITAL ARCHIVE 1, 1 (1931) <https://mppda.flinders.edu.au/records/2254> [perma.cc/WET7-LBLF].

44 *Id.*

45 Conant, *supra* note 39, at 41. See below for greater discussion of the implications of the *Paramount* decision for the film industry.

46 *Id.*

47 *Id.* These five majors included Paramount, Twentieth Century Fox, Warner Brothers, Loew's, and RKO, the top producing studios at the time. Of the eight defendants in *Paramount*, these five were the only studios that also owned theaters. See *id.* at 48.

48 *Id.*

largest production firms complete control over content and, simultaneously, output for the entire film industry.

The rigidity of the Code had two important effects. First, the availability to the public of films dealing with controversial issues or taking innovative approaches to ideas or stories was severely restricted.⁴⁹ Key scenes or critical elements of scripts were deleted because the Hays Code provided no consideration for context or artistic merit.⁵⁰ Second, the PCA effectively became the private government of the film industry.⁵¹ But a governmental system without any promise of equal protection is likely to result in discrimination. Acting as “both Congress and the Supreme Court,” the PCA administered the Code one way for the five major members (Twentieth Century Fox, RKO Pictures, Paramount Pictures, Warner Brothers, and Metro-Goldwyn-Mayer, also known as the “Big Five”) and another way for independent filmmakers and producers, leading to repetitious film content for consumers and providing no recourse to those who could not or would not conform to the Code’s rigid requirements.⁵²

In 1945, independent producer Howard Hughes sued the MPAA for discriminating against his Billy the Kid saga *The Outlaw*, which Hughes alleged contained content and advertising similar to that which the PCA and ACA had previously approved in submissions from the Big Five firms.⁵³ Hughes’ production company was a member of the MPAA and, as contractually required, submitted *The Outlaw* to the PCA for approval. While the film received PCA approval after editing out certain objectionable scenes, some advertising for the film was rejected by the ACA—specifically, pictures and lithographs of Jane Russell’s character “featuring more her breasts, legs and positions than the saga of Billy the Kid.”⁵⁴ Hughes used the advertising material anyway, and the PCA subsequently revoked the film’s approval.⁵⁵ In denying Hughes’ motion for an injunction against the revocation of the seal of approval, the court stated that the MPAA was organized “to establish and maintain the highest possible moral and artistic standards in motion picture production [The court] shall not interfere with the carrying out of that purpose, particularly in favor of one whose sole object is a selfish one.”⁵⁶

49 *Id.* at 41–42.

50 *Id.* at 42. For example, despite numerous edits and manipulations, the PCA categorically rejected *It Can't Happen Here* because of its overall theme. Unlike *It Can't Happen Here, For Whom the Bell Tolls* ultimately made it past the PCA after key scenes were cut, but was roundly criticized as having been emasculated.

51 *Id.*

52 *Mary Pickford Charges Prod. Code Favors Big 5 at Expense of Indies*, VARIETY, Sept. 25, 1946, at 3 (quoting Mary Pickford, a co-owner of United Artists Corporation).

53 *Hughes Tool Co. v. Motion Picture Ass'n of Am., Inc.*, 66 F. Supp. 1006, 1008 (S.D.N.Y. 1946).

54 *Id.* at 1010.

55 Conant, *supra* note 39, at 43.

56 *Hughes*, 66 F. Supp. at 1011.

The *Hughes* case—and numerous other complaints like it—demonstrates the PCA's effectiveness as a tool used by major production firms to restrict both the introduction of, and the market for, independently produced films.⁵⁷ The court's deference to the MPAA's supposedly moralistic and artistic evaluation of film and advertising content, and the characterization of Hughes' claims against the organization as "selfish," indicates that to the extent independent producers had little recourse within the self-censorship regime of the MPAA, the courts provided no relief at all.

C. *The Hays Code Abandoned, 1968*

However, the monopoly Hollywood studios enjoyed over both content and distribution would not last forever. If independent filmmakers were unable to find a sympathetic audience with the judiciary, perhaps Department of Justice might have better luck. In 1948, the United States sued Paramount, Columbia, Universal, and other major studios and distributors under the Sherman Anti-Trust Act.⁵⁸ The Supreme Court found there existed a conspiracy in restraint of trade to fix uniform prices for theater admission and that pooling arrangements between normally competitive theaters resulted in the elimination of competition both in the exhibition and in the distribution of featured motion pictures.⁵⁹ Finally, the Supreme Court affirmed the district court's finding that, in a restraint of trade under the Sherman Act, the major studios acted against small independent exhibitors in favor of large circuits through discriminatory contract provisions.⁶⁰ With this decision, the monopoly control studios exerted over the distribution and showing of films quickly crumbled.

Although the Code was ultimately abandoned, scholars disagree as to what factors gave rise to the rating system under which the industry currently operates. Jack Valenti, named president of the MPAA in 1966, cited weakened Hollywood studios, greater artistic and creative influence of filmmakers, and changing cultural currents as reasons why a new rating system was needed to meet the challenges of evaluating "a 'new kind' of American movie."⁶¹ Following the decision in *Paramount Pictures*, theater ownership was divorced from the studios, and the concentrated power that existed within the Hollywood establishment diminished and the filmmaker took on a greater share of the creative decisions than was previously possible under the industry's old structure.⁶² As they found greater creative and financial independence, filmmakers met an audience demanding more realism than the previous system

57 Conant, *supra* note 39, at 43.

58 *U.S. v. Paramount Pictures, Inc.*, 334 U.S. 131, 140 (1948).

59 *Id.* at 143, 149.

60 *Id.* at 159–160.

61 S. HRG. 108-952, at 6 (2004) (referencing statement of Jack Valenti, Former Chairman and CEO, Motion Picture Association of America).

62 *Id.*

allowed.⁶³ Valenti acknowledged that the threat of possible government intervention in the film industry also prompted the change in the organization's regulatory scheme.⁶⁴

Perhaps it is really this justification—fear of government involvement, rather than social change and creative demands—that served as the primary impetus behind the creation of a new ratings system. As the Code faltered, state and local censors began to buckle under the weight of more and more judicial decisions entered against censorship. In 1957, a New York businessman convicted under a federal obscenity law and sentenced to five years for advertising and publishing obscene materials in a quarterly argued the statute violated his freedom of speech.⁶⁵ The resulting opinion in *Roth v. United States* more strictly defined the test for obscenity, and held that obscene material does not warrant First Amendment protection.⁶⁶ Rejecting common law articulations of obscenity, the Supreme Court now defined it as material wherein the “dominant theme . . . taken as a whole appeals to prurient interest” of an “average person, applying contemporary community standards.”⁶⁷ In the wake of *Roth*, an Ohio film exhibitor took his fight all the way to the Supreme Court after he was convicted under a state statute for showing a French film containing a love scene.⁶⁸ The Court relied on the obscenity test articulated in *Roth* to determine that the film was not obscene and thus not subject to censorship.⁶⁹ Consequently, the decision heightened the standard for finding obscenity in films.

Soon after, in *Freedman v. Maryland*, a Maryland film exhibitor challenged the constitutionality of the state requirement that films be approved by censors before shown where such pre-approval process could extend indefinitely.⁷⁰ The Court in this case shifted the burden of proof in challenges to government censorship from the distributors to the censors, and ruled that undue delays of speech were unconstitutional.⁷¹ Deemed ever so fondly by the Maryland Attorney General as the “Armageddon of motion picture censorship,” the decision invalidated censor statutes in states including Maryland, New York, Virginia, Kansas, Chicago, Texas, and Michigan.⁷² Going forward, these censorship boards would be forced to redraft their statutes to comply

63 Jacob Septimus, *The MPAA Ratings System: A Regime of Private Censorship and Cultural Manipulation*, in 21 COLUM.-VLA J.L. & ARTS 69, 72 (1997).

64 S. HRG. 108-952, *supra* note 61.

65 *Roth v. United States*, 354 U.S. 476, 479 (1957).

66 *Id.* at 484–86.

67 *See id.* at 489.

68 *Jacobellis v. Ohio*, 378 U.S. 184, 186–87 (1964).

69 *Id.* at 196.

70 *Freedman v. Md.*, 380 U.S. 51, 57–59 (1965).

71 *Id.*, at 58.

72 Laura Wittner-Keller, *Governmental Censorship, the Production Code and the Ratings System*, in HOLLYWOOD AND THE LAW 130, 143 (Paul McDonald et al. eds., 2015).

procedurally and could only censor for obscenity according to the heightened *Roth* standard.⁷³

In the vacuum of censorship authority post-*Freedman*, local governments instituted board-governed classification systems based on age in an effort to restrict adult content from consumption by children. In the spring of 1968, the Supreme Court reviewed a Dallas city ordinance that established a board to review films and determine their suitability for “young persons.”⁷⁴ The ordinance instructed the board to classify a film as “not suitable” if the film described or portrayed themes such as brutality, violence, and sexual promiscuity to a degree that impressed upon young persons that the conduct was “desirable, acceptable, [or] respectable.”⁷⁵ Although the Court struck down the ordinance as violative of the First and Fourteenth Amendments for unconstitutional vagueness, the Court did not challenge the city’s formation of a board to classify films according to age appropriateness.⁷⁶ Given the Court’s support of a state’s power to regulate the dissemination of objectionable material to children, the MPAA feared the proliferation of board-governed age-based classification systems in other regions—Valenti himself believed that as many as forty regulatory boards were prepared to institute their own classification systems.⁷⁷ This potential development, coupled with increased talk of similar federal classifications coming from the Senate, pushed Valenti and the MPAA to take action.⁷⁸ By that fall, the Code and Rating Administration (CARA) was born.

D. *The Current MPAA Ratings System*

Recognizing that the one-size-fits-all structure of the Code was failing to meet the expectations of post-war audiences,⁷⁹ and was thus susceptible to

⁷³ *Id.*

⁷⁴ *Interstate Circuit, Inc. v. Dall.*, 390 U.S. 676, 680 (1968) (defining “young persons” as those under the age of sixteen).

⁷⁵ *Id.* at 681.

⁷⁶ *Id.* at 690 (“[A] State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them . . . [W]e conclude only that ‘the absence of narrowly drawn, reasonable and definite standards for the officials to follow,’ is fatal.”) (citing *Ginsberg v. New York*, 390 U.S. 629 (1968)) (citing *Niemotko v. Md.*, 340 U.S. 268 (1951)).

⁷⁷ STEPHEN VAUGHN, *FREEDOM AND ENTERTAINMENT: RATING THE MOVIES IN AN AGE OF NEW MEDIA* 13 (Cambridge Univ. Press 2006).

⁷⁸ *Id.* (Senator Margaret Chase Smith pushed for a national movie classification system and federal agencies investigated connections between violence and mass media).

⁷⁹ After World War II, film studios faced new competition from television and “racy” foreign films, and audiences clamored for films full of the very thematic elements the Hays Code banned. In 1955, Frank Sinatra received an Oscar nod for his role as a heroin addict in *The Man with the Golden Arm*, which did not receive MPAA approval. The 1959 comedy *Some Like It Hot* also did not pass the Hays Code, but was met with critical acclaim and box office success. See Bob Mondello, *Remembering Hollywood’s Hays*

a new government-led censorship regime, Valenti developed the modern iteration of the ratings system, which embraced age classification as a means of evaluating film content.⁸⁰ Valenti stressed that the system was voluntary^{81, 82} and simply stood to serve as a guide for parents, rather than as a form of legal censorship.⁸³ Introduced in 1968, the Code and Rating Administration—later changing its name to the Classification and Rating Administration, but retaining its old acronym—did away with the pre-production system of review and approval used under the Hays Code. Instead, filmmakers who sought classification by the MPAA submitted the film in final form for review and received a CARA rating.

The original ratings categories consisted of G (general audiences), M (mature audiences), R (restricted, no one under the age of sixteen admitted without parent or guardian), and X (not suitable for anyone under sixteen due to sex, violence, or language).⁸⁴ Over time, the M rating split into two: PG (parental guidance suggested) and PG-13 (parents strongly cautioned); and the previous age minimums shifted from sixteen to seventeen.⁸⁵ The X rating—the only one not trademarked by the MPAA and thus available for independent filmmakers to self-designate in hopes of attracting a very specific audience—soon became synonymous with pornographic material, so the MPAA eventually adopted the NC-17 rating (no one seventeen and under admitted) in 1996 to signal material that is “patently adult”⁸⁶ in nature.⁸⁷ Before assigning a rating, the CARA board considers factors such as sex, violence,

Code, 40 Years On, NPR (Aug. 8, 2008, 5:58 PM), <https://www.npr.org/templates/story/story.php?storyId=93301189> [<https://perma.cc/LQV7-USTX>].

80 Laura Wittern-Keller, *Governmental Censorship, the Production Code and the Ratings System*, HOLLYWOOD AND THE LAW 130, 143 (Paul McDonald et al. eds., 2015).

81 The Classification and Rating Administration, *Classification and Rating Rules*, MPAA and NATO 1, 3 (Jan. 1, 2010) https://www.filmratings.com/Content/Downloads/rating_rules.pdf [<https://perma.cc/YPU7-UQ4F>] (Theoretically, the rating system is voluntary in the same way that membership in the MPAA is voluntary. However, all members of the MPAA who produce or distribute a movie intended for exhibition in the United States must submit the film for, and accept, a CARA rating).

82 While there are no legal sanctions for failing to obtain an MPAA rating, many theaters refuse to run a film without one. Members of the National Association of Theater Owners (about 85 percent of theaters) will not show unrated movies. See Moira Hodgson, *Movie Rating—Do They Serve Hollywood or the Public*, N.Y. TIMES (May 24, 1981), <http://www.nytimes.com/1981/05/24/movies/movie-ratings-do-they-serve-hollywood-or-the-public.html?pagewanted=all> [<http://perma.cc/LJ7R-Q8BE>].

83 Wittern-Keller, *supra* note 80, at 143.

84 *Id.* at 144.

85 *Id.*

86 The Classification and Ratings Administration, *The Movie Rating System: Its History, How It Works, and Its Enduring Value*, MPAA 1, 8 (Dec. 21, 2010).

87 Wittern-Keller, *supra* note 80, at 144.

language, and drug use.⁸⁸ However, the explicit criteria for evaluating these factors are largely undefined.⁸⁹

Ratings often directly bear upon box-office success, and studios understand how to manipulate the ratings system to obtain the ratings they believe will be most profitable.⁹⁰ The G rating (suitable for general audiences) is considered “box-office poison” and too kiddie,⁹¹ while more restrictive ratings are thought to draw larger crowds who are titillated by the promise of greater violent or sexual content.^{92,93} Movie makers will deliberately include harsher language or suggestive elements in order to distance themselves from a kid-friendly rating.⁹⁴ On the other end of the spectrum, some filmmakers chose not to obtain ratings for movies that would be likely to garner X ratings—particularly before the advent of the NC-17 rating—given the “tainted” use of non-trademarked X ratings in pornographic material.⁹⁵ Given the close correlation between ratings and financial success, the rationale behind self-regulation becomes even more suspect. Expecting the large and powerful member studios and the trade organization tasked with protecting them to ignore their own “bottom line” and disinterestedly assign a rating to a film is almost laughable.

Now, as at the time of its formation, the CARA Ratings Board hands down ratings. Membership of the Ratings Board includes a chair, selected by

88 *Film Ratings*, MPAA, <http://www.mpa.org/film-ratings> [https://perma.cc/2WXA-4CMZ] (last visited Feb. 4, 2017).

89 For a summary of expansive classification codes for violent, sexual, and language content used by the MPAA (the study notes twenty-seven categories for violence alone), see Kimberly M. Thompson & Fume Yokota, *Violence, Sex and Profanity in Films: Correlation of Movie Ratings With Content*, 6(3) MEDSCAPE GENERAL MEDICINE (2004), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1435631> [https://perma.cc/9Y6Z-5CJY] at Table 7.

90 Moira Hodgson, *Movie Ratings—Do They Serve Hollywood or the Public*, N.Y. TIMES (May 24, 1981), <http://www.nytimes.com/1981/05/24/movies/movie-ratings-do-they-serve-hollywood-or-the-public.html?pagewanted=all> [https://perma.cc/NJ3W-W8P5].

91 Valenti himself acknowledged in 1985 that a G rating was undesirable, with many producers seeing it as the “kiss of death.” In the 1980 film *Popeye*, the filmmaker added the phrase “Oh, shit” into the dialogue in order to avoid the dreaded G. STEPHEN VAUGHN, *FREEDOM AND ENTERTAINMENT: RATING THE MOVIES IN AN AGE OF NEW MEDIA* 13, 52 (Cambridge Univ. Press 2006).

92 Hodgson, *supra* note 90.

93 One study has shown a direct correlation between violence and ticket sales in the United States, finding the highest average gross ratings for PG-, PG-13-, and R-rated movies belonged to films that only received an MPAA rating for violence, compared to films with other combinations of rating reasons. See Thompson & Yokota, *supra* note 89.

94 Hodgson, *supra* note 90 (quoting then-chair of the CARA ratings board, Richard Hefner) (“[M]ovies are a commercial venture. We’re only the messengers telling the parents what we think they’ll consider an R.”).

95 See *id.* (George Romero released *Dawn of the Dead* without a rating but acknowledged the use of the X rating in pornographic films meant that the ratings board was more likely to rate explicit material R to avoid being perceived as censoring films).

the chairman of the MPAA with the approval of the president of the National Association of Theatre Owners (NATO); senior raters⁹⁶ selected by the chair; and between eight and thirteen full-time⁹⁷ paid anonymous parent raters selected by the chair.⁹⁸ The anonymous parent raters can serve up to seven years on the Board at the discretion of the chair. They must have children between the ages of five and fifteen when they join and must leave the board when all of their children reach the age of twenty-one.⁹⁹ Aside from the ages of their children, parent raters are not required to hold any other qualification, experience, or expertise except for a belief that they can determine what the average American parent would think of a film's content.¹⁰⁰ No effort is made to select educators, childhood development experts, or those with special training regarding the impact of media on children.¹⁰¹ In fact, Valenti specifically rejected the idea of choosing members with some sort of professional or educational background in this area, instead giving preference to average people.¹⁰²

As under the state and local censorship regimes that preceded CARA, the details of the rating process are kept secret, and votes cast by the Board members towards the final rating assignment are not disclosed outside of the organization.¹⁰³ Each member of the Board individually views a given submission and designates by written ballot the rating he or she believes a majority of American parents would consider appropriate.¹⁰⁴ After a collective discussion of the individual ballots, the Board votes on the rating, with a majority vote determining the final outcome.¹⁰⁵ Senior raters can work with a filmmaker to adjust a film's content in order to seek a re-rating.¹⁰⁶ There is no limit to how

96 Senior raters administer the process of the Ratings Board. Typically, they have previous experience on the Ratings Board and, as a result, may have older children. Senior raters communicate rating decisions directly with filmmakers and the public; thus, they are not anonymous. See The Classification and Ratings Administration, *The Movie Rating System: Its History, How It Works, and Its Enduring Value*, MPAA 1, 11–12 (Dec. 21, 2010).

97 *Id.* at 11.

98 The Classification and Rating Administration, *Classification and Rating Rules*, MPAA and NATO 1, 2 (Jan. 1, 2010) https://www.filmratings.com/Content/Downloads/rating_rules.pdf.

99 *Id.* at 2.

100 *Id.*

101 Barbara J. Wilson, *What's Wrong with the Ratings?*, 63 MEDIA & VALUES 2 (Fall 1993), <http://www.medialit.org/reading-room/whats-wrong-ratings> (last visited Jan. 28, 2017).

102 Moira Hodgson, *Movie Ratings—Do They Serve Hollywood or the Public*, N.Y. TIMES (May 24, 1981), <http://www.nytimes.com/1981/05/24/movies/movie-ratings-do-they-serve-hollywood-or-the-public.html?pagewanted=all> [<https://perma.cc/L4T5-VRU8>] (quoting Valenti as saying, “I don’t want social scientists. I want people who can put themselves in the shoes of a parent.”).

103 The Classification and Rating Administration, *supra* note 98, at 5.

104 The Classification and Ratings Administration, *The Movie Rating System: Its History, How It Works, and Its Enduring Value*, MPAA 1, 12 (Dec. 21, 2010).

105 *Id.*

106 *Id.*

many times a studio may submit a revision for a new ruling, and studios will frequently cut a film to achieve the rating they want.¹⁰⁷ Alternatively, if it feels that its film as submitted merits a rating different from the one assigned by the Board, the studio can appeal to the CARA Appeals Board.¹⁰⁸

The CARA Appeals Board consists mostly of members inside the film industry, including the CEO of the MPAA, the president of NATO, and industry representatives chosen by the CEO of the MPAA and the president of NATO.¹⁰⁹ Independent producers or distributors may designate up to two representatives, which would appear to bring some impartiality to a body otherwise dominated by major studios and industry players. But, in order for the independents to have representation, the CEO of the MPAA and president of NATO must approve the appointees, and the independents must agree to submit all of their films for rating by CARA and to release those films only with the CARA rating.¹¹⁰ A contested rating can be overturned only if the Appeals Board finds by a two-thirds majority that the initial rating given by the Ratings Board was clearly erroneous.¹¹¹ Of the eight hundred to nine hundred films reviewed by CARA each year, fewer than a dozen are appealed, of which only about one-third on average are overturned.¹¹²

Since the implementation of CARA, the ratings system has faced legal action in the form of either challenges to statutory reliance on the ratings or challenges to the rating system as applied to individual films.¹¹³ Courts have not embraced statutory reliance on MPAA ratings because the ratings have no cognizable standards supporting them.¹¹⁴ Since 1970, the Court has upheld only one statutory use of an MPAA rating, finding a “reasonable pedagogical concern” behind a school district’s regulation that children could only view movies rated less than R at school-sponsored activities.¹¹⁵

In the second category of challenges, only three distributors have sued the MPAA since 1970. As with the acceptance of the PCA before it, the MPAA

107 Hodgson, *supra* note 102.

108 Laura Wittern-Keller, *Governmental Censorship, the Production Code and the Ratings System*, in *HOLLYWOOD AND THE LAW* 130, 144 (Paul McDonald et al. eds., 2015).

109 The Classification and Rating Administration, *Classification and Rating Rules*, MPAA and NATO 1, 14 (Jan. 1, 2010) https://www.filmratings.com/Content/Downloads/rating_rules.pdf [<https://perma.cc/26F6-BB7B>].

110 *Id.* at 14–15.

111 *Id.* at 16, 22.

112 The Classification and Ratings Administration, *The Movie Rating System: Its History, How It Works, and Its Enduring Value*, MPAA 1, 13 (Dec. 21, 2010).

113 Wittern-Keller, *supra* note 108, at 144. The term “statutory reliance” is used here to describe legislation that uses the MPAA ratings system as a measure or standard for evaluating materials.

114 *Id.*

115 *Id.* (citing Colin Miller, *A Wolf in Sheep’s Clothing: Wolf v. Ashcroft and the Constitutionality of Using the MPAA Ratings to Censor Films in Prison*, 6 *VAND. J. ENT. & TECH. L.* 265–90 (2004)).

faced little objection from the Hollywood greats against its exclusive control over ratings—most of the legal challenges came from independents.¹¹⁶

In 1990, Miramax filed suit contesting the X rating assigned to the Weinstein film *Atame!*, the plot of which centered around a newly-released mental patient who kidnaps a soft-porn actress and ties her to a bed in the hopes that she will eventually come to love him (which, of course, she does—it's the movies!). CARA gave the film an X rating because the Ratings Board found two sex scenes and some language unsuitable for anyone under the age of seventeen. Miramax appealed the decision but failed to reach the two-thirds majority necessary to receive a re-rating.¹¹⁷ While successfully bringing suit against a private, voluntary-membership organization like the MPAA is challenging—especially because Miramax was not even a member and thus had difficulty establishing a due process violation—a New York civil statute that required both public and private organizations to apply their standards equally and without prejudice gave the distributor some leverage.¹¹⁸ Miramax argued that other Hollywood member companies received more favorable ratings for similar content, rendering the rating assigned to *Atame!* arbitrary and capricious.¹¹⁹

Although the court ultimately ruled against Miramax, Justice Charles E. Ramos devoted the majority of the court's opinion to questioning the validity and integrity of the MPAA ratings system. The Justice stated that “censorship is an anathema to the Constitution,” and that, notwithstanding the MPAA's denials of censorship and the system's origins within the industry rather than from without, the ratings system nonetheless constituted censorship.¹²⁰ While the ratings system categories were “cloaked in terms” that suggest an intent to protect children, the fact that raters have no qualifications or professional standards aside from actually having children and that violent content is more readily condoned than sexual activity revealed the hypocrisy of the CARA board and its failure to actually consider the welfare of children.¹²¹

The court concluded that the MPAA and motion picture industry developed the ratings system “to create an illusion of concern for children,” imposing censorship in an effort to facilitate the marketing of exploitative and violent films.¹²² Unless it meaningfully dealt with its internal process in order

116 *Id.* In the first case decided in 1970, a federal district court ruled that a film's X rating was not proven to be a cause of the movie's low profitability and refused to entertain a challenge to the ratings system itself.

117 *Id.* at 145.

118 *Id.*

119 *Miramax Films Corp. v. Motion Picture Ass'n of Am., Inc.*, 560 N.Y.S.2d 730, 731 (N.Y. App. Div. 1990).

120 *Id.*

121 *Id.* at 733–34.

122 *Id.* at 736.

to properly perform its stated mission, Justice Ramos warned, the MPPAA may continue to find its ratings system subject to viable legal challenge.¹²³

In 2000, the results of a Federal Trade Commission (FTC) report revealed that studios—including Columbia Tri-Star, MGM/United Artists, and Disney—frequently targeted children as young as ten years of age for violent, adult-oriented films, music, and video games, despite adult-content ratings.¹²⁴ Then President Bill Clinton, joined by his Vice President Al Gore, threatened to throw their support behind harsh regulatory legislation unless the aggressive marketing and advertising practices stopped.¹²⁵ Indeed, the FTC report found that, of the forty-four movies selected for the study that were rated R for violence, 80 percent targeted children under the age of seventeen.¹²⁶ In addition, the marketing plans for 64 percent of those films included express statements that the target audience included children under the age of seventeen.¹²⁷ Of the marketing plans that did not include express statements, the remaining plans shared enough similarities in their language and actions to lead the FTC to conclude that they still targeted children under the age of seventeen.¹²⁸

Following the original report commissioned in 2000, the FTC subsequently commissioned another report, which noted that industry standards against marketing violent entertainment to teenagers and young children fail to sufficiently protect the youth audience, particularly in online media.¹²⁹ Review of internal studio documents and FTC monitoring revealed explicit and pervasive targeting of young children for PG-13 movies, with studios even conducting marketing research for PG-13 films on children as young as seven years old.¹³⁰ Studios continue to intentionally market violent PG-13 movies to children under the age of thirteen.¹³¹

Just as Justice Ramos feared more than a decade before, the FTC's investigation exposed that the ratings system, creating the "illusion of concern" for children, is in actuality used by the entertainment industry to guard its own

123 *Id.*

124 See F.T.C., *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A REVIEW OF SELF-REGULATION AND INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING, AND ELECTRONIC GAME INDUSTRIES: A REPORT OF THE FEDERAL TRADE COMMISSION* 8 (Sept. 11, 2000).

125 Mike Allen and Ellen Nakashima, *Clinton, Gore Hit Hollywood Marketing; Ads Aimed at Kids Could Spur Rules, Industry is Told*, *THE WASHINGTON POST*, Sept. 12, 2000.

126 *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN* (2000), *supra* note 124, at iii.

127 *Id.*

128 *Id.* The FTC's report recommended the entertainment industry strengthen their self-regulatory programs in part by prohibiting target marketing of violent content to children and sanctioning such behavior. *Id.* at iv.

129 FTC, *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A SIXTH FOLLOW-UP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES* i (Dec. 2009).

130 *Id.* at ii.

131 *Id.* at 5.

interests and promote its financial gain. The FTC's report also highlighted the fact that the abuse of the ratings system to promote content to children outside of the intended category extends far beyond the rating of the films themselves; the intentional abuse pervaded the marketing, advertising, display, and promotional retail tie-ins for films, inundating children with inappropriate content and parents with the near-impossible task of shielding them from it.

II. ANALYSIS

A. *Regulation of the Film Industry in the U.S. and Abroad*

One commentator argued that the post–World War II transition from viewing movies as a business to viewing movies as an art form meant that legal regulation of films lost its greatest justification.¹³² Given the current landscape of First Amendment jurisprudence,¹³³ it would seem almost unthinkable for the government to fully control film content nowadays, whereas direct government regulation was readily accepted and even encouraged during the early part of the twentieth century.¹³⁴ While it remains contested whether movies are truly a public art or a commercial product subject to regulation, Hollywood has largely accepted the ratings system as good for business.¹³⁵ The almost totally unchallenged implementation of the ratings system by the entertainment industry might be cause enough for concern. It seems reasonable to expect Hollywood to reject a scheme that actually rated content because an effective, independent content rating system would impact studios' financial success and likely result in increased appeals and litigation. The embrace of self-regulation and lack of related litigation raises questions about the efficacy of such a system at regulating content, as well as concerns about its inherent tendency to favor its own wellbeing over that of consumers. Perhaps unsurprisingly, the U.S. film

132 Laura Wittern-Keller, *Governmental Censorship, the Production Code and the Ratings System*, *HOLLYWOOD AND THE LAW* 130, 131 (Paul McDonald et al. eds., 2015).

133 While a full discussion of the First Amendment concerns related to film censorship is beyond the scope of this Article, a brief summary may provide helpful context. Films did not merit constitutional protection until 1952, when the Supreme Court ruled that films were protected speech, subject only to prohibitions for obscenity. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (holding that cinematic expression falls within the free speech and free press guarantees of the First and Fourteenth Amendments); see also *Roth v. U.S.*, 354 U.S. 476, 489 (1957) (deciding the standard for obscenity is “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest”). For a deeper analysis on the impact of the analytical framework created by the Supreme Court's interpretation of the First Amendment on films, see Jason K. Albosta, *Dr. Strange—Rating or: How I Learned That the Motion Picture Association of America's Film Rating System Constitutes False Advertising*, 12 *VAND. J. ENT. & TECH. L.* 115, 120–25 (2009).

134 WITTERN-KELLER, *supra* note 132, at 130.

135 *Id.* at 147.

industry's ratings system lies in stark contrast to the kinds of regulation found in other industries and even around the globe.

B. *Regulation in Other Industries*

i. *Television*

The 1968 ratings system eventually became a model for the classifications and ratings systems used by other entertainment media, including television and video games.¹³⁶ As the availability and breadth of television content dramatically expanded, social groups, medical and scientific organizations, and politicians pushed for a television ratings system for several years; but Valenti opposed such a system on the grounds that it would be too difficult to implement.¹³⁷ Finally—after the federal government threatened to get involved in the ratings business¹³⁸—Valenti acquiesced, and in 1997, television adopted a ratings system fashioned after the motion picture industry's system.¹³⁹ In December 1996, a coalition consisting of the National Association of Broadcasters, the National Cable Television Association, and the MPAA developed the TV Parental Guidelines in an effort to circumvent the threat of a rating code implemented by a government committee under the Telecommunications Act.¹⁴⁰ This first iteration of the television ratings system set forth categories that differentiated between programs designed for children and programs designed for general audiences: TV-Y, TV-Y7, TV-G, TV-PG, TV-14, and TV-M.¹⁴¹

Television's adoption of this age-based classification system came at a time when Hollywood faced heightened criticism of its rating system, both from critics who felt the system was too harsh and still others who thought

136 STEPHEN VAUGHN, *FREEDOM AND ENTERTAINMENT: RATING THE MOVIES IN AN AGE OF NEW MEDIA* 6 (Cambridge Univ. Press 2006).

137 *Id.* at 222.

138 The Telecommunications Act of 1996, signed into law by President Clinton, allowed for the creation of an FCC Advisory Committee to develop a television ratings system within one year if the broadcasters were unable to create a suitable system. The Act required that the Committee include parents, broadcasters, producers, cable operators, appropriate public interest groups, and interested individuals from the private sector. The Committee was also to be fairly balanced in terms of political affiliation and points of view. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 551(b)(2), 110 Stat. 56 (1996).

139 VAUGHN, *supra* note 136, at 222.

140 By pressuring the industry to design and produce its own ratings system, President Clinton hoped to serve the interests of families without infringing on the First Amendment rights of TV programmers and producers. *Statement by President William J. Clinton Upon Signing S. 652*, 32 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 218, reprinted in 1996 U.S.C.A.N. 228-1, 228-3 (1996).

141 Joel Federman, *Media Ratings Systems: A Comparative Review*, in *THE V-CHIP DEBATE: CONTENT FILTERING FROM TELEVISION TO THE INTERNET* 99, 119 (Monroe E. Price ed., 1998).

it was too weak.¹⁴² By this time, Richard Heffner—chairman of CARA for the preceding two decades—had resigned, having become increasingly disillusioned with both the purpose and the effectiveness of the MPAA’s ratings system.¹⁴³ Abandoning his absolutist position on the First Amendment and fearing the ratings system too outdated, Heffner joined the call for serious reform. Heffner believed that the existing ratings system failed to protect children given technological changes, was too burdensome to be effectively utilized by parents, and lacked the selfless leadership necessary in a self-regulatory structure.¹⁴⁴ Valenti, however, dismissed the call and downplayed criticisms of the ratings system; he warned that abandoning the current system would only leave a vacuum that state and local censors would quickly fill.¹⁴⁵

As with the film industry’s rating system, parent groups, Congressmen, public health associations, and media advocacy organizations met the television ratings system with hostility. These groups cited public opinion surveys that showed parents preferred a rating system that detailed a show’s content over one that simply applied blanket age-based designations.¹⁴⁶ The industry entered negotiations with several of the larger institutional critics,¹⁴⁷ which resulted in the addition to the ratings system of some content description¹⁴⁸ in exchange for organizational support before the FCC. In particular, these organizations agreed to back the proposition that the MPAA ratings system and the TV ratings system be the only systems implemented under the Telecommunications Act.¹⁴⁹

The swift technological changes of the twentieth century challenged the continued use of this system, especially for television. The changes called into question the relevance of a ratings system born of a time that no longer existed—a time when “people had to go to a theater to see a first-run, uncut motion picture.”¹⁵⁰ Reluctantly adopted to avoid government influence over the industry, the television ratings system carried over many of the flaws of the

142 VAUGHN, *supra* note 136, at 223.

143 *Id.*

144 *Id.* at 239.

145 *Id.* at 223.

146 FEDERMAN, *supra* note 141, at 119.

147 The ratings system developed for TV was criticized by the American Medical Association, the American Academy of Pediatrics, the American Psychological Association, the Children’s Defense Fund, the National Education Association, the National PTA, and others. *Id.*

148 The agreement added the marker “FV” for fantasy violence to the TV-Y7 category, and the content markers “V” for violence, “S” for sexual situations, “L” for language, and “D” for dialogue to the TV-PG, TV-14, and TV-MA categories. Revised Proposal from Jack Valenti, President, MPAA, et al., to William F. Caton, Secretary, FCC (Sept. 10, 1997) (accepted by the FCC on Mar. 12, 1998).

149 FEDERMAN, *supra* note 141, at 119.

150 STEPHEN VAUGHN, *FREEDOM AND ENTERTAINMENT: RATING THE MOVIES IN AN AGE OF NEW MEDIA* 6–7 (Cambridge Univ. Press 2006).

Hollywood system but faced even greater obstacles. Foremost was the “sheer volume” of content slated to be rated; while CARA might rate ten or fifteen movies each week, television raters would be tasked with rating ten thousand hours of programming per week.^{151, 152}

ii. *Video Games*

Members of the software industry founded the Interactive Digital Software Association (IDSA) in 1994 to oversee the development of a self-regulated system for the entertainment software industry. In turn, the IDSA created the Entertainment Software Rating Board (ESRB) to govern the ratings of software titles. The ESRB is a nonprofit, independent organization, and its ratings rulings are not subject to review by the IDSA.¹⁵³ Countries that use ESRB ratings—the United States, Canada, and Mexico—do not enforce the ratings under federal law, though some Canadian provincial governments require retailers to enforce the ratings system to the extent that the sale of mature- and adult-rated games to minors is prohibited.¹⁵⁴ Although submission of games for review is voluntary, the ESRB rates virtually all video games in the U.S. and Canada that are sold at retail or downloaded to a gaming system.¹⁵⁵

Submissions to the ESRB include a range of content-related material that represent the most “extreme portions” of the title as well as more general elements of gameplay selected by the product publishers.¹⁵⁶ The ESRB randomly selects three raters from a pool of seven specially trained, full-time individuals from the New York City area¹⁵⁷ to review submissions.¹⁵⁸ The raters collectively discuss what rating would be most appropriate for any given title.¹⁵⁹ While their identities are anonymous, all raters are adults who typically have

151 *Id.* at 223.

152 Dramatic improvements in technology—riddled with its own unique set of challenges—would provide a possible solution: the V-chip. Required by the Telecommunications Act of 1996, the inclusion of the V-chip in all newly manufactured television sets provided new content-filtering capability. *Id.* at 224. However, the V-chip was not the “cure-all” its proponents had hoped for—the technology was underutilized and appeared to have little impact on how consumers watched television. *Id.* at 249.

153 FEDERMAN, *supra* note 141, at 123.

154 *Canadian Advisory Committee to Provide Advice on Video Game Ratings*, ESRB (June 10, 2005), <http://www.esrb.org/about/news/6102005.aspx> [<https://perma.cc/WWP8-AS7K>].

155 *About the ESRB*, ESRB, <http://www.esrb.org/ratings/faq.aspx#2> [<https://perma.cc/4N-JY-KP4K>] (last visited Feb. 13, 2017).

156 FEDERMAN, *supra* note 141, at 124.

157 Brandon Boyer, *ESRB Seeks Full-Time Game Rating Staff*, GAMASUTRA (Feb. 21, 2007), http://www.gamasutra.com/view/news/103791/ESRB_Seeks_FullTime_Game_Rating_Staff.php [<https://perma.cc/UXW2-HAH6>] (due to increased political scrutiny, the ESRB began seeking full-time staff to be “more attuned to pertinent content”).

158 *About the Ratings Process*, ESRB, <http://www.esrb.org/ratings/faq.aspx#14> [<https://perma.cc/P98X-MPHH>] (last visited Feb. 13, 2017).

159 *Id.*

experience with children through work, education, or caregiving or parenthood.¹⁶⁰ The ESRB prohibits raters with connections to individuals or entities within the industry.¹⁶¹

Like its film and television counterparts, the ESRB employs six age-based ratings categories: EC (early childhood), E (everyone, suitable for all ages), E10 (suitable for ages ten and up), T (suitable for ages thirteen and up), M (suitable for ages seventeen and up), and AO (adults only, ages eighteen and up).¹⁶² Content descriptors, such as “strong language,” “use of drugs,” or “sexual violence,” might accompany a rating to apprise consumers of material that may be of particular concern.¹⁶³ On its website, the ESRB lists thirty-two content descriptors with definitions; however, descriptors that accompany a rating are not necessarily exhaustive summaries of content.¹⁶⁴

Though lacking in legal enforcement authority, the ESRB contractually partners with retailers and developers to ensure consumers receive reliable ratings information. Companies submitting video games and other entertainment software to the ESRB for ratings review sign judicially enforceable affidavits affirming the accuracy of the submitted material.¹⁶⁵ For particularly egregious violations of the full-disclosure standard, the ESRB may impose harsh sanctions—including fines of up to \$1 million and product recall. Lesser violations may result in the assignment of points or fines, or other corrective actions.¹⁶⁶

The FTC has repeatedly praised the ESRB and the video game industry for providing the “strongest self-regulatory code” and setting an example for other entertainment media.¹⁶⁷ The FTC found that, unlike its film and television counterparts, the software industry and ESRB had not specifically targeted mature and teen-rated games at younger children.¹⁶⁸ The video game industry outpaced the film industry in restricting target-marketing of mature-rated products to children, clearly and prominently displaying ratings information, and restricting child access to mature-rated products sold at retail.¹⁶⁹ Even though the ESRB’s marketing and advertising practices appear superlative,

160 *Id.*

161 *Id.*

162 *ESRB Ratings Guide*, ESRB, http://www.esrb.org/ratings/ratings_guide.aspx [https://perma.cc/2D5U-ZTRW] (last visited Feb. 13, 2017).

163 *Enforcement*, ESRB, <http://www.esrb.org/ratings/enforcement.aspx> [https://perma.cc/W4A8-ZCY9] (last visited Feb. 13, 2017).

164 *Id.*

165 Joel Federman, *Media Ratings Systems: A Comparative Review*, THE V-CHIP DEBATE: CONTENT FILTERING FROM TELEVISION TO THE INTERNET 124 (Monroe E. Price ed., 1998).

166 *Enforcement*, *supra* note 163.

167 FTC, *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A SIXTH FOLLOW-UP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES* iii (Dec. 2009).

168 *Id.*

169 *Id.* at 30.

some remain critical of the conflict of interest inherent in a self-regulatory ratings system promulgated and funded by the industry itself.¹⁷⁰

C. *Rating Movies Abroad*

In a 1996 survey of thirty-one countries across the globe, the United States was one of only three nations in which the film ratings system was entirely independent of the government.¹⁷¹ Though data on international ratings show that movies with high teenage appeal¹⁷² do receive lenient ratings abroad as well, the United States stands apart with respect to its rating of this particular type of film.¹⁷³ Often criticized for being overly permissive of violence and overly restrictive against sexual content,¹⁷⁴ the United States is more lenient towards violent movies with high teenage appeal, even compared to ratings assigned to films with little or no sexual content.¹⁷⁵ Thus, data suggests that even when films have little to no sexual content—content which the MPAA ratings system strongly disfavors—they still receive harsher age restrictions than films containing violence. Violence has a high appeal to teenagers, which frequently drives a film's profitability. The ratings system therefore favors violence in films and finds ways to lower their restrictions such that they often receive lower ratings, even lower than movies containing almost no sexual content.

While data indicates that self-regulation is stricter for MPAA members than non-members overall, the ratings system demonstrates greater tolerance

170 A 2005 campaign in the Senate sought support for legislation that—among other things—would require an independent analysis of the accuracy of the ESRB's ratings system. For additional background on the failed legislation, see Paul Tassi, *Can We Forgive Hillary Clinton for Her Past War on Video Games?*, FORBES (Feb. 5, 2016), <https://www.forbes.com/sites/insertcoin/2016/02/05/can-we-forgive-hillary-clinton-for-her-past-war-on-video-games/#6f965aa912aa> [<https://perma.cc/352N-4WXT>]. In 2007, Senator Sam Brownback reintroduced the Truth in Video Game Rating Act, which would require that the ESRB review a game's content in its entirety before assigning a rating. The Act would also assign a commission from the Government Accountability Office to study the efficacy of the ESRB ratings system. See Truth in Video Game Rating Act, S. 568, 110th Cong. §§ 3(a), 5(a) (2007).

171 STEPHEN VAUGHN, FREEDOM AND ENTERTAINMENT: RATING THE MOVIES IN AN AGE OF NEW MEDIA 242 (Cambridge Univ. Press 2006) (citing JOEL FEDERMAN ET AL., MEDIA RATINGS: DESIGN, USE AND CONSEQUENCES (1996)).

172 RYAN LAMPE & SHAUN McRAE, THIS PAPER IS NOT YET RATED—SELF-REGULATION IN THE U.S. MOTION PICTURE INDUSTRY 1, 14 (Jan. 2014). Lampe & McRae use a measure of teenage appeal constructed from information from Screen It! (www.screenit.com) about whether or not kids will want to see a particular film. Films categorized as having high teenage appeal include: *Transformers*, *Ratatouille*, and *Freddy vs. Jason*.

173 *Id.* at 24.

174 A criticism—often attributed to Jack Nicholson—of the CARA ratings board's preoccupation with restricting sexual content over violence suggested that if the board saw “a nipple it's R, unless it's cut off, in which case it's only violence, and it's PG.” VAUGHN, *supra* note 171, at 53.

175 LAMPE & McRAE, *supra* note 172, at 24–25.

towards member movies with high teenage appeal—precisely those movies in which the studios’ financial interest is greatest.¹⁷⁶ Perhaps unsurprisingly then, the resulting “ratings creep” — the decreased stringency of ratings over time — is consistent with a theoretical model of a self-regulator with a strong preference for maximizing industry revenue.¹⁷⁷ There exists a reasonable expectation that a self-regulating entity is incapable of disinterest when regulation carries implications for revenue. Studies show that if it were to adopt the relatively stricter system used in Great Britain, the United States might expect film revenues to fall by 1.7 percent while exposure of audiences to violent content would decrease by nearly the same proportion.¹⁷⁸

i. Australia

In Australia, an independent government agency—the Commonwealth Classification Board—directs a national classification code for films, videos, magazines, and computer games.¹⁷⁹ Australian customs legislation empowers the Classification Board to refuse to register a film for public exhibition if it is blasphemous, obscene, injurious to morality, or harmful to children.¹⁸⁰ In rating a film, the Classification Board—composed of twelve appointed members,¹⁸¹ each typically serving a three-year term—considers international reviews by critics and international ratings given by other countries.¹⁸² They also seek out advice from experts, like clergymen and psychologists, and consult the public for input on certain movies.¹⁸³ Occasionally, the Classification Board puts together focus groups to discuss both particular films and censorship issues generally, to ensure the ratings system accurately reflects the public opinion.¹⁸⁴

Employing a five-category, age-based classification system for films (G, PG, M, MA 15+, R 18+), the Australian system seems, at first glance, similar to the one used by CARA. However, the categories of the former supply greater detail than the CARA classifications so that the standard for inclusion in or exclusion from each is relatively well-defined. For example, the category called “PG Parental Guidance” succinctly notes “Parent guidance recommended,” and then goes on to list more specifically what the rating denotes:

176 *Id.* at 27.

177 *Id.* at 1.

178 *Id.* at 31.

179 Joel Federman, *Media Ratings Systems: A Comparative Review*, THE V-CHIP DEBATE: CONTENT FILTERING FROM TELEVISION TO THE INTERNET 99 (Monroe E. Price ed., 1998).

180 *Id.* at 100.

181 Unlike the CARA review board members, the Classification Board members are not anonymous—their photographs and biographies can be readily found online. Like their American counterparts, though, there are no specific qualifications required to serve as a member of the board. Read more at <http://www.classification.gov.au/About/Board-Members/Pages/Classification-Board-Members.aspx>. [<https://perma.cc/J3EJ-TSJZ>]

182 FEDERMAN, *supra* note 179, at 100.

183 *Id.*

184 *Id.*

Material classified PG may contain material which some children find confusing or upsetting, and may require the guidance of parents or guardians. It is not recommended for viewing by persons under 15 without guidance from parents or guardians.

Themes. The treatment of themes should have a very low sense of threat or menace, and be justified by context.

Violence. Violence should be mild and infrequent, and be justified by context. Sexual violence is not permitted.

Sex. Sexual activity should be mild and discreetly implied, and be justified by context . . .¹⁸⁵

The criteria continue on and include provisions detailing the course language, drug use, and nudity content to the degree that it may or may not be present in the film. Each of the five categories addresses six classifiable elements: themes, violence, sex, language, drug use, and nudity, as well as their frequency, intensity, purpose and tone, and overall effect. Each category also includes an “impact test,” which summarizes the cumulative impact of the classifiable elements on the intended audience.¹⁸⁶ Categories G, PG, and M are advisory and impose no legal viewing or showing restrictions, while categories MA 15+ and R 18+ legally restrict films’ viewing or exhibition.¹⁸⁷

ii. *United Kingdom*

The British Board of Film Classification (BBFC), the primary body that classifies films in the United Kingdom (UK), was initially developed by the nation’s film industry in 1912 as a response to censorship imposed by local authorities.¹⁸⁸ In 1984, Parliament passed the Video Recordings Act, giving the BBFC statutory authority to classify video and DVD recordings for sale or hire commercially in the United Kingdom.¹⁸⁹ Under the statute, local licensing authorities retain power over films shown in their theaters, but usually

185 AUSTRALIAN DEPARTMENT OF COMMUNICATIONS AND THE ARTS, *Guidelines for the Classification of Films 2012*, 10 (Dec. 2012), <https://www.legislation.gov.au/Details/F2012L02541> [https://perma.cc/6NEK-G9AQ].

186 *Id.* The “impact test” requires consideration of “the treatment of classifiable elements” as well as their cumulative effect, purpose, and tone. The Australian legislation provides examples of when impact may be higher, such as scenes that contain greater detail, accentuation techniques, special effects, realism, and that are prolonged or frequently repeated. For lessened impact, the reference to a classifiable element may be verbal rather than visual or include an incidental depiction rather than a direct one. *See id.*

187 DEP’T OF COMM’NS & THE ARTS, *Classification Categories Explained*, AUSTRALIAN CLASSIFICATION, <http://www.classification.gov.au/Guidelines/Pages/Guidelines.aspx> [https://perma.cc/4MSY-2RNB] (last visited Feb. 3, 2017).

188 Joel Federman, *Media Ratings Systems: A Comparative Review*, THE V-CHIP DEBATE: CONTENT FILTERING FROM TELEVISION TO THE INTERNET 113 (Monroe E. Price ed., 1998).

189 *About the BBFC*, BBFC, <http://www.bbfc.co.uk/about-bbfc> [https://perma.cc/EDX4-67XJ] (last visited Feb. 15, 2017).

follow the unofficial decisions issued by the BBFC.¹⁹⁰ Nevertheless, these local councils can overrule a BBFC decision, ban films the BBFC passed, waive cuts, institute new ones, or alter categories for films exhibited in their licensing jurisdiction.¹⁹¹

Since 2003,¹⁹² the age-based classification system used to rate films in the United Kingdom comprises six categories: U, PG, 12A/12, 15, 18, and R18.¹⁹³ In considering a film's proper rating, the BBFC evaluates the film's general context, theme, tone, and impact, as well as specific instances of drugs, imitable behavior, discrimination, sex, language, nudity, threat, and violence.¹⁹⁴ Similar to the structure of the Australian ratings, the BBFC ratings provide for each of the six categories a breakdown of the content that it may or may not contain as relates to the specific factors considered, such as drug use, language, and nudity.

Two examiners review a film for theatrical release and their recommendation is typically confirmed by a Compliance Manager.¹⁹⁵ If the examiners fail to agree, or if important policy issues are involved, the film is reviewed by other members of the Board or outside specialist advice is solicited to determine the propriety of film content or its potential to cause harm.¹⁹⁶ The Board does not require that examiners have specific qualifications, such as a college degree; however, experience in media regulation, law, or child development is important, as well as a broad knowledge of film.¹⁹⁷ The current ratings team includes academics, journalists, researchers, marketing professionals, and individuals who have backgrounds in film and television.¹⁹⁸

In the UK, release format is taken into consideration and can result in alterations to ratings across the same or similar work. For example, classifications may be stricter for DVD or Blu-ray formats than their film counterparts intended for cinematic distribution. This is due to the heightened possibility of under-age viewing in the home as well as the increased potential for scenes or sections viewed out of context.¹⁹⁹ Additionally, the screen format or

190 *Id.*

191 *Id.*

192 Following the end of World War II but preceding the introduction of a new ratings system in 2003, the BBFC did not maintain a formal set of rules for determining classification decisions and instead judged each film independently, taking into account the "evolution of public taste." FEDERMAN, *supra* note 188, at 114.

193 BRITISH BOARD OF FILM CLASSIFICATION, AGE RATINGS YOU TRUST 12–13, http://www.bbfc.co.uk/sites/default/files/attachments/BBFC%20Classification%20Guidelines%202014_0.pdf [<https://perma.cc/6RJG-RUUY>] (last visited Feb. 7, 2017).

194 *Id.* at 4–7.

195 *How Does Classification Work?*, BBFC, <http://www.bbfc.co.uk/what-classification/how-does-classification-work> [<https://perma.cc/4KMZ-3L6N>] (last visited Feb. 15, 2017).

196 *Id.*

197 *About the BBFC*, *supra* note 189.

198 *Id.*

199 BRITISH BOARD OF FILM CLASSIFICATION, AGE RATINGS YOU TRUST 9, 12–13, http://www.bbfc.co.uk/sites/default/files/attachments/BBFC%20Classification%20Guidelines%202014_0.pdf [<https://perma.cc/6RJG-RUUY>] (last visited Feb. 7, 2017).

visual presentation of a submission, in 3D or IMAX for example, impacts the classification of the film.²⁰⁰ Titles that are particularly inflammatory or that encourage an interest in criminal, abusive, or illegal sexual activity are also subject to heightened classification scrutiny; changes to or obscuring of these kinds of titles by the distributor may be required as a condition to classification.²⁰¹ Conversely, films deemed to have an educational benefit outweighing the nature of the objectionable content might receive a lower age rating than would otherwise apply.²⁰²

If the central concept of a work is unacceptable, or if the distributor seeking a particular rating is not amenable to appropriate cuts, the Board may reject the work and refuse it classification all together.²⁰³ Studios in search of a more favorable outcome are free to submit their product to any local authority.²⁰⁴ Either the BBFC or the local licensing authority that licenses cinemas in a particular area handles appeals. The BBFC offers to any dissatisfied distributor a formal reconsideration process that usually results in a final decision within ten days.²⁰⁵ A distributor can engage the local licensing authorities after, or instead of, requesting a reconsideration by the BBFC.²⁰⁶ Members of the public may also petition the local licensing board to reconsider a film's rating.²⁰⁷

iii. Sweden

The Swedish Media Council (SMC), a descendant of the National Swedish Board of Film Classification (1911–2010), is a government agency responsible for classifying films slated for public screening. The stated purpose of the SMC is the promotion of the empowerment of minors as media users and the protection of minors from harmful media influences.²⁰⁸ Run by twenty people—half men and half women—the SMC is comprised of project managers, research and communication officers, film classifiers, and

bbfc.co.uk/sites/default/files/attachments/BBFC%20Classification%20Guidelines%202014_0.pdf [https://perma.cc/6RJG-RUUY] (last visited Feb. 7, 2017).

200 *Id.*

201 *Id.*

202 *Controversial Decisions*, BBFC, <http://www.bbfc.co.uk/education-resources/student-guide/age-ratings/controversial-decisions> [https://perma.cc/45RF-WWFQ] (last visited Feb. 15, 2017) (*Saving Private Ryan* received one such adjusted rating from the BBFC in 1998 because of its perceived educational value).

203 *Cuts, Rejects and Appeals*, BBFC, <http://www.bbfc.co.uk/education-resources/student-guide/age-ratings/cuts-rejects-and-appeals> [https://perma.cc/YX5B-HUVP] (last visited Feb. 15, 2017).

204 *Id.*

205 *Id.*

206 *Id.*

207 *Id.*

208 *In English—About The Swedish Media Council*, STATENS MEDIERÅD (Dec. 13, 2016), <https://www.statensmedierad.se/ovrigt/inenglish.579.html> [https://perma.cc/H8HL-SBEU].

administrative staff.²⁰⁹ Swedish law requires that the SMC assign one of the following ratings to any film intended for exhibition to children under the age of fifteen: A (all ages allowed), 7, 11, and 15 (allowed for adults, that is, persons fifteen years of age or older).²¹⁰ Two film reviewers view each submission and assess it in accordance with certain legal criteria;²¹¹ in the event of disagreement, a third film reviewer helps make the final decision.²¹² The government finances the SMC entirely. Film distributors are charged a fee, greatly reduced for documentaries, based on the length of the film submitted for review.²¹³

A film may not be shown to children under the applicable age rating group if doing so is liable to harm the wellbeing of children in that age group.²¹⁴ If a film distributor does not intend to show the film to an audience under fifteen years old, they do not have to submit it to the SMC.²¹⁵ By law, either the Administrative Court in Stockholm decides appeals, or the SMC decision remains final.²¹⁶ At trial, the Court composition includes one legal member and two special members, one with special knowledge of film and the other of behavioral science.²¹⁷

In addition to issuing film classifications, the SMC produces pedagogical material for use by parents, educators, and professionals who work with children; publishes reports on media developments and the effects of media on children and young people; and monitors research in the field.²¹⁸ Media literacy is central to the agency's work, and the SMC represents government efforts to increase public knowledge and understanding of content in various

209 *Id.*

210 Joel Federman, *Media Ratings Systems: A Comparative Review*, in *THE V-CHIP DEBATE: CONTENT FILTERING FROM TELEVISION TO THE INTERNET* 99, 99 (Monroe E. Price ed., Routledge 2011) (1998).

211 *Hur Går Det Till När Ni Sätter en Åldersgräns? [How Do You Set an Age Limit?]*, STATENS MEDIERÅD (Oct. 19, 2015), <https://statensmedierad.se/aldersgranserforfilm/fordigsomserfilm/vanligafragorochsvar/faqaldersgranser/hurgardettillnarnisatterenaldersgrans.765.html> [<https://perma.cc/RF2P-4PTV>]. The primary assessment focuses on whether a submission can cause fear, terror, panic, anxiety or confusion. Qualitative aspects such as the degree of realism, the possibility of identification, and the manner and context in which the different elements are depicted are included as well. *Id.*

212 *Id.*

213 Federman, *supra* note 210, at 116.

214 *About the Swedish Media Council*, STATENS MEDIERÅD, 1, 2 (July 1, 2016), <https://statensmedierad.se/download/18.1957a5a615000172419264e7/1443444536847/About-the-Swedish-Media-Council.pdf> [<https://perma.cc/T7SN-HMG4>].

215 *Hur Får en Film en Åldersgräns? [How to Get a Film an Age Limit?]* STATENS MEDIERÅD (Dec. 22, 2015), <https://statensmedierad.se/aldersgranserforfilm/fordigsomserfilm/hurfarefilmenaldersgrans.721.html> [<https://perma.cc/C8JC-FF2R>].

216 12 § OM ÅLDERSGRÄNSER FÖR FILM SOM SKA VISAS OFFENTLIGT (Svensk författningssamling [SFS] 2010:1882) (Swed.).

217 12 (a) § OM ÅLDERSGRÄNSER FÖR FILM SOM SKA VISAS OFFENTLIGT (SFS 2010:1882) (Swed.).

218 *In English—About the Swedish Media Council*, *supra* note 208.

media, particularly as it relates to children.²¹⁹ Recent government mandates have directed the SMC to complete studies on antidemocratic messages conveyed on the internet and on children's use of online social communities from a gender perspective.²²⁰

D. *The Weaknesses of Self-Regulation*

Self-regulation offers certain benefits not provided by a government regulatory scheme, such as greater speed, flexibility, and lower costs.²²¹ A self-regulatory system that encourages cooperation between the regulators and the regulated allows actors within the system easier access to knowledge, experience, creativity, goodwill, and organizational efficacy.²²² On the other hand, critics point out that self-regulatory organizations like the MPAA exist to serve the interests of their members and therefore are not adequately incentivized to protect the public.²²³ Although there has been little empirical analysis on the performance of self-regulatory organizations in the film industry, the financial and chemical industries provide some evidence of the failure of self-regulation. In financial markets, for example, the self-regulation of commodity exchanges between 1865 and 1922 did not efficiently reduce monopolization within the industry.²²⁴ In the chemical industry, members of the self-governing Responsible Care program showed slower improvements to environmental, health, and safety performances than did non-members.²²⁵ However, threats of government regulation encouraged United States firms to voluntarily reduce emissions between 1988 and 1992.²²⁶

In addition, self-regulatory organizations are not immune to changes in the political climate. In the United States, a swing to the conservatism of the political right “has, and will, affect ratings.”²²⁷ Before Richard Heffner left CARA, he stated that the obligation of the ratings board was to “reflect the contemporary opinion of parents,” indicating that the goals of the ratings board are intended to shift with perceived popular opinion.²²⁸ This flux, exacerbated by the task of selecting a small group of parents who effectively reflect

219 *About the Swedish Media Council*, *supra* note 214, at 2.

220 *Id.*

221 RYAN LAMPE & SHAUN McRAE, THIS PAPER IS NOT YET RATED—SELF-REGULATION IN THE U.S. MOTION PICTURE INDUSTRY 1, 2 (Jan. 2014).

222 See Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 357 (2005).

223 *Id.*

224 LAMPE & McRAE, *supra* note 221, at 2.

225 *Id.* (citing John W. Maxell et al., *Self-Regulation and Social Welfare: The Political Economy of Corporate Environmentalism*, 43 J.L. & ECON. 583 (2000)).

226 LAMPE & McRAE, *supra* note 221, at 2.

227 Moira Hodgson, *Movie Ratings—Do They Serve Hollywood or the Public*, N.Y. TIMES (May 24, 1981), <http://www.nytimes.com/1981/05/24/movies/movie-ratings-do-they-serve-hollywood-or-the-public.html?pagewanted=all> [<https://perma.cc/KH22-PVVQ>].

228 *Id.*

the national political climate, proves problematic for understanding and evaluating ratings over time.

As a self-regulatory system, the MPAA is susceptible to pressure from well-connected and powerful industry insiders. For example, studio heads with political clout and close connections to Valenti often exercised leverage over ratings of their own projects and usually got what they wanted.²²⁹ When United Artists' Arthur Krim objected to an R rating for his studio's 1975 movie *Rollerball*, Heffner—who himself would have given the film an X rating—deduced that impassioned objections and personal attacks from the studio's head were prompted by the estimated \$5 million the studio stood to lose on the project if a PG rating were not obtained.²³⁰ This interaction with the “high-minded” Krim convinced Heffner that self-interest trumped self-restraint in the MPAA.²³¹ Valenti himself, a “political genius” and lobbyist for the industry, rarely advocated for the public good when doing so meant opposing the interests of rich and powerful Hollywood executives.²³²

III. SOLUTION: ADOPTING A NEW MODEL OF FILM INDUSTRY REGULATION IN THE U.S.

Driving questions about censorship and ratings are assumptions about the ability of film and other forms of entertainment to influence people's thoughts and behaviors. As demonstrated by the early proliferation of censorship regimes throughout the United States at the beginning of the century, many critics, both domestic and foreign, feared Hollywood might be used to undermine morality and, in the extreme, even civilization itself.²³³ In an attempt to understand the effects of mass media—especially exposure to images of explicit sexuality and violence—on behavior, social scientists continue to conduct research on the issue. But the power of public relations and advertising greatly influenced interpretations of that research and its implications.²³⁴ From reviled to revered, individuals working in the entertainment industry are now

229 STEPHEN VAUGHN, *FREEDOM AND ENTERTAINMENT: RATING THE MOVIES IN AN AGE OF NEW MEDIA* 54 (Cambridge Univ. Press 2006).

230 *Id.* at 55. At a second appeal, which Valenti had personally arranged outside of CARA standard practices, Krim accused Heffner of being a “fanatic about violence.” *Id.*

231 *Id.* at 239 (quoting Heffner) (“[L]eadership and restraint were ‘absent when you’re functioning with an extreme kind of competitive economy . . .’”).

232 *Id.* at 239–40.

233 *Id.* at 7 (quoting Soviet leader Joseph Stalin, who saw the propagandist potential in films: “If I could control the medium of the American motion picture, I would need nothing else in order to convert the entire world to Communism.”).

234 *Id.* at 8 (pointing out that it is no accident that the three men at the helm of the MPAA during most of the twentieth century—Will Hays, Eric Johnston, and Jack Valenti—all came from backgrounds in business, public relations, advertising, and politics).

some of the most powerful and influential figures—socially, economically, and politically.²³⁵

Since the creation of the MPAA, the looming threat of government intervention has been, if not *the* most, then one of the most effective ways of encouraging self-regulation within the motion picture industry. The history and current state of the MPAA and the CARA ratings board suggest that, rather than to inform parents and protect children, the ratings system's central purpose is to diffuse public criticism about the efficacy and reliability of the ratings for assessing content and to protect the film industry against government intervention.²³⁶ The entertainment revolution—catalyzed by cable, satellites, computers, and the internet—presents an opportunity to revisit Hollywood's system of self-regulation, just as advances in social science research present new insights as to the effects of violent and sexual content on children.²³⁷

The CARA ratings board often assigns more restrictive ratings to films containing sex than to those containing violence.²³⁸ However, a 2003 study showed that over a ten-year period the amount of sexual content in films rated PG, PG-13, and R significantly increased, contributing to the notable overall rise in “ratings creep.”²³⁹ The incidence of significant ratings creep, driven by leniency or showing preference towards certain types of objectionable content, suggests the need to standardize the rating criteria. In addition, parents are increasingly finding that the MPAA's ratings system is insufficient, though it is the exclusive system used to rate DVDs, film advertisements in theaters, and marketing materials.²⁴⁰ Other studies show that 78 percent of parents believe a uniform ratings system for all media would be a better solution.²⁴¹

235 Although her run was ultimately unsuccessful, there is a reason why Hilary Clinton's campaign trail was glittered with stars from the silver screen. See *Hillary Clinton's Celebrity Supporters: Amy Schumer, George Clooney, More*, NEWSDAY, <http://www.newsday.com/entertainment/celebrities/hillary-clinton-s-celebrity-supporters-amy-schumer-george-clooney-more-1.12006219> [<https://perma.cc/9386-ZZLU>] (last updated Nov. 8, 2016, 9:01 PM) for a long list of Hollywood celebrities who publicly endorsed the presidential candidate in 2016.

236 Barbara J. Wilson, *What's Wrong with the Ratings?*, 63 MEDIA & VALUES 2 (Fall 1993), <http://www.medialit.org/reading-room/whats-wrong-ratings> (last visited Jan. 28, 2017).

237 See *id.* (suggesting that the narrow age categories of the current MPAA rating system ignore the subtleties of developmental differences among children of different ages and their ability to perceive, distinguish, and understand violence in different contexts).

238 Kimberly M. Thompson & Fume Yokota, *Violence, Sex and Profanity in Films: Correlation of Movie Ratings With Content*, 6(3) MEDSCAPE GENERAL MEDICINE (2004), <http://www.medscape.com/viewarticle/480900> [<https://perma.cc/9Y6Z-5CJY>] at Table 7–9.

239 *Id.* The study compiled data from the ratings and content of all films—excluding those rated NC-17—released between January 1992 and December 2003.

240 Jennifer J. Tickle et al., *Tobacco, Alcohol, and Other Risk Behaviors in Film: How Well Do MPAA Ratings Distinguish Content?*, 14(8) J. HEALTH COMM. 756, 757 (2009).

241 Thompson & Yokota, *supra* note 238.

One way to establish a more objective, standardized ratings system is to link the standards to the developmental stages of children and adolescents.²⁴² The industry has made no effort to develop a rigorous, science-based, child-development-conscious, parent-friendly, universal ratings system.²⁴³ A more responsible ratings system—one that truly serves the best interests of children and their parents—would have a board that solicited expert opinions from professionals qualified to evaluate a film’s content and its potential impact on viewers, with analysis grounded in social science. Basing ratings on what parents *might* find offensive rather than on scientific knowledge about harm to children leads to classifications that ignore psychological facts and are therefore unhelpful to consumers.²⁴⁴ Rather than engaging lay persons to guess what the average American parent might think of a film’s content, a ratings board should engage in data-driven analysis on how different types of content impact children. Indeed, precisely this type of social science experience and the application of expert advice in fields such as psychology, sociology, and education are commonplace in other regulatory bodies around the world.²⁴⁵

A new model for a ratings board should establish a regular review process to compare content and associated ratings decisions over time in order to prevent ratings creep. Compiling this data could inform a deeper understanding of trends in media content and development and how the ratings board and the general public respond to these changes over time. Made available to the public, the results of such an internal control would also encourage greater external accountability to audiences, rather than to industry producers and studio heads.

Both internal and external accountability are critical components of effective self-regulation. To increase accountability, the MPAA should consider introducing an outside monitor—a third party accountable to the public interest, independent of the industry—functionally similar to the BBFC and local councils utilized in the United Kingdom. Outside monitors have a unique ability to detect a firm’s efforts to conceal non-compliance and separate those

242 *See id.* (suggesting a similar connection between ratings and developmental stages and emphasizing the need for physicians to engage parents about media content).

243 *Id.*

244 Daniel Linz et al., *Sexual Violence in the Mass Media: Legal Solutions, Warnings, and Mitigation Through Education*, 48 J. Soc. ISSUES 145, 152 (1992), <https://spssi.onlinelibrary.wiley.com/doi/epdf/10.1111/j.1540-4560.1992.tb01162.x> [<https://perma.cc/Y2BF-2ZNH>].

245 For example, Sweden requires a member of their ratings appeals court to possess a specialization in behavioral science, and the United Kingdom intentionally seeks out raters with a background in child development. *See* 12 (a) § LAG OM ÅLDERSGRÄNSER FÖR FILM SOM SKA VISAS OFFENTLIGT (Svensk författningssamling [SFS] 2010:1882) (Swed.); *About the BBFC*, BBFC, <http://www.bbfc.co.uk/about-bbfc> [<https://perma.cc/8VE5-KRXX>] (last visited Feb. 15, 2017).

efforts from good faith mistakes.²⁴⁶ In this way, monitors serve firms seeking to demonstrate compliance and advancement of public benefit (and to preempt government scrutiny), while conserving resources for exposing and remedying conduct of chronic violators.²⁴⁷ While the presence of an outside monitor would invite a greater “degree of a public scrutiny” than government oversight alone, permitting an outside monitor into the ratings process would demonstrate the MPAA’s willingness to sacrifice some of their near-absolute power over the process in exchange for greater public benefit.²⁴⁸ For these reasons, an outside monitor would incentivize compliance with the film industry’s professed self-regulation without subjecting the process entirely to government control.

In order to increase the effectiveness and clarity of ratings, a new model should place greater emphasis on communicating clearly with the public. Better efforts at education and transparency would elucidate for parents and consumers the meaning of each rating, the assigning procedure, and the content considered.²⁴⁹ This would allow the public to utilize the ratings system with ease, resulting in healthier, more appropriate choices for families and children. Content-based ratings may be a way to achieve such clarity. Studies show that parents prefer content-based ratings over age-based ratings and that the level of parental concern about types of content varies by age and gender of their children.²⁵⁰ Content-based, rather than age-based, indicators would allow parents greater flexibility and control to filter viewing according to the level of concern they attach to specific content.²⁵¹ The inclusion of more descriptive information on the type of content in a film would more closely serve the needs of parents, rather than the broad, age-based ratings CARA currently employs. Although CARA includes summaries of possible content concerns alongside age ratings, parental preferences indicate a need for separate content ratings—such as ratings for violence, sex, or language—rather than a more generalized indication of whether the program is inappropriate or appropriate for a particular age group.²⁵²

246 Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 381 (2005).

247 *Id.*

248 *Id.* at 373.

249 Contrast this idea with the recent approach employed by the MPAA and Jack Valenti, which demanded that Heffner, chair of the CARA ratings board, not speak publicly about the ratings system at all. The justification offered was one of unification behind a fragile system, but Heffner felt the reality was that Valenti was too egotistical to tolerate counter-opinions. STEPHEN VAUGHN, *FREEDOM AND ENTERTAINMENT: RATING THE MOVIES IN AN AGE OF NEW MEDIA* 34 (Cambridge Univ. Press 2006).

250 James T. Hamilton, *Who Will Rate the Ratings?*, *THE V-CHIP DEBATE: CONTENT FILTERING FROM TELEVISION TO THE INTERNET* 133, 138–39 (Monroe E. Price ed., 1998).

251 *Id.* at 138.

252 *Id.*

Another opportunity for simplification might be the consolidation of separate regulatory schemes into a single, universal board that evaluates content across all media. Given the similarities between the film and television ratings systems, an easy first step toward simplification would be to merge the two, so consumers could benefit from more streamlined ratings information.

CONCLUSION

In reality—and rather predictably—the self-regulatory nature of the entertainment industry has taken on the character of a “‘Machiavellian conspiracy’ against the rating board and the public interest” in favor of the major studios.²⁵³ While there are benefits to maintaining a self-regulatory ratings board, the undeniable existence of conflicts of interest and powerful influence exerted by the entertainment industry require additional safeguards to protect the integrity and usefulness of ratings. Strong incentives towards profit maximization will continue to influence the kind of content—particularly with regard to sex and violence, which tend to drive a film’s appeal and profitability—that the industry submits for review. Without significant changes to the existing system, pressure to respond with increased leniency will continue to plague the ratings system.

253 VAUGHN, *supra* note 249, at 26.

