

THE PROTECTION OF CHILDREN FROM HARMFUL EFFECTS OF FILMS IN THE UNITED STATES

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In the U.S., children are protected from the harmful effects of films through a combination of government regulation and industry-regulation. The contour of the various protections is the result of a continuing struggle to reconcile tension between two legitimate and often-contradictory goals: upholding the First Amendment of the United States Constitution (“First Amendment” or “Constitution”), which limits the Federal government’s ability to take more aggressive action¹ and the universal agreement by the public, film industry, and policy-makers that children must be protected.²

I. PROTECTION OF CHILDREN FROM FILMS IN THEATRES

a. The System of Self-Regulation³

In the U.S., the film industry self-regulates the distribution of its films in theatres. The system of self-regulation is implemented with the cooperation of the relevant industry players through three basic steps: (1) the film is submitted to the Classification and Rating Administration (“CARA”) of The Motion Picture Association of America (“MPAA”) for a rating that is a cautionary warning for parents;⁴ (2) CARA issues one of its five ratings – *G*, *PG*, *PG-13*, *R*, or *NC-17* - to the film; and (3) a theater will only show a film if it has been issued a rating by CARA and will only sell tickets to the film under the conditions recommended for its rating.

b. What do the ratings mean?⁵

- **G — General Audiences. All Ages Admitted.** A G-rated film has no themes, language, nudity, sex, violence or other matters that would offend parents whose younger children view the film. Some snippets of language may go beyond polite conversation if they are common everyday expressions but no stronger words are present, depictions of violence are minimal, and there is no nudity, sex, or drug use. It is not a "certificate of approval" or a signal that it is a "children's" motion picture.
- **PG — Parental Guidance Suggested. Some Material May Not Be Suitable For Children.** A PG-rated film should be investigated by parents before they let their younger children attend because some material may be unsuitable for children. There is no drug use but there may be some profanity, depictions of violence, or brief nudity but not if they are so intense as to require that parents be strongly cautioned.
- **PG-13 — Parents Strongly Cautioned. Some Material May Be Inappropriate For Children Under 13.** A PG-13 film may go beyond the PG rating in theme, violence, nudity, sensuality, language, adult activities or other elements. The theme by itself will not result in a rating greater than PG-13, although depictions of activities related to a mature theme may result in a restricted rating. Any drug use or more than brief nudity requires at least a PG-13 rating, but such nudity generally can not be sexually oriented. There may be depictions of violence in a PG-13 movie, but generally not if it is realistic, extreme, or persistent. A film’s single use of one of the harsher sexually-derived words requires at least a PG-13 rating but more than one such expletive requires an R rating. The Rating Board may rate such a film PG-13 if, based on a special vote by a two-thirds majority, it feels that most American parents would believe that a PG-13 rating is appropriate because of the context or manner in which the words are used or because their use is inconspicuous.

¹ U.S. Const. Am. I (It provides that “Congress shall make no law...prohibiting the free exercise thereof; or abridging the freedom of speech or of the press”).

² While the protection varies depending on the child’s age, a person generally reaches adulthood in the eyes of the law on their 18th birthday.

³ *Ratings History*, MOTION PICTURE ASSOCIATION OF AMERICA. <http://www.mpa.org/ratings/ratings-history> (last visited June 19, 2012).

⁴ Most major studios submit all titles for rating prior even though no industry member is required to do so or is legally bound by the rating.

⁵ *What Each Rating Means*, MOTION PICTURE ASSOCIATION OF AMERICA <http://www.mpa.org/ratings/what-each-rating-means> (last visited June 19, 2012).

- **R — Restricted. Children Under 17 Require Accompanying Parent or Adult Guardian.** An R-rated film contains some adult material and may include adult themes, adult activity, hard language, intense or persistent violence, sexually-oriented nudity, drug abuse or other elements. Children under 17 are not allowed to attend R-rated films unaccompanied by a parent or adult guardian.
- **NC-17 — No One 17 and Under Admitted.** An NC-17 film is only appropriate for adults because most parents would consider the content patently too adult for their children 17 and under; it does not mean it is obscene or pornographic in their common or legal meanings. It has violence, sex, aberrational behavior, drug abuse or any other element most parents would consider too strong and off-limits for their children.

c. Why do the ratings matter?

There are often significant financial implications associated with the rating a film receives. It impacts the potential revenue of the film – often significantly - because each rating effectively limits the number of people who will be allowed to see it. This problem is particularly acute for films that can be rated *R* or *NC-17* because many theaters will not play *NC-17* films, those that do are usually smaller theaters, and many newspapers and magazines will not run ads for *NC-17* films. As a result, most *NC-17* films have limited theatrical release or are released directly to video or DVD. Some films even have ratings for different versions of its film, such as a *PG-13* rating for the screen and an *R* rating for a director's cut.

d. The system of self-regulation is a product of trial and error

The first regulations of the film industry were established by states and municipalities after the U.S. Supreme Court (“Court” or “Supreme Court”) held that states may censor motion pictures without violating the Constitution.⁶ It became so pervasive by the early 1930s that “one-third of the American film audience resided in areas controlled by state or municipal movie censors.”⁷ However this resulted in inconsistent regulations and disjointed enforcement. The major Hollywood studios and distributors therefore established The Motion Picture Producers and Distributors of America (“MPPDA”), which in turn created the Studio Relations Committee (SRC) to “oversee and control the moral values of the stories they filmed.”⁸ The SRC synthesized many of the state regulations into guidelines for “content, arbitration, intra-industry relations, and negotiations with government entities.”⁹ The guidelines took the shape of a list of “Don’ts and Be Carefuls” for how to address 11 objectionable topics and 26 others (“The Code”).¹⁰ Even though its members agreed to adhere to the Code, there was minimal compliance because there were no enforcement mechanisms. The MPPDA therefore amended the Code by establishing that a jury composed of three heads of production of MPPDA member studios would be the final arbiters of whether a film conformed “to the spirit and letter of the Code” (“Jury”) and established moral obligations, working principles, and production guidelines for the treatment of various plots and plot elements.¹¹ The SRC, which was renamed The Production Code Administration (“PCA”), instituted a number of further changes to the Code after it found it difficult to determine whether something is in the spirit and letter of the Code.¹² It therefore granted the SRC the authority to review and change morally objectionable material at any point in the production process and established that a ruling by the PCA could be overturned by a direct appeal to the MPPDA’s Board of Directors.¹³ It also established that a film would receive a certificate number that had to be displayed with the MPPDA seal on every print released and would not be shown in any theater owned by a major studio or distributed by any MPPDA member without it and added an enforcement mechanism for the first time – authority to levy a \$25,000 fine on any studio that made changes to a film after it receives a PCA certificate.¹⁴ The 1950s marked the beginning of fundamental changes to the regulatory landscape. The influence of interest groups declined as films were increasingly shown in theatres without a PCA seal and achieved critical and financial success.¹⁵ It was also fundamentally altered by three landmark Court decisions: in 1948, the Court deprived the industry of its main tool of enforcement when it ordered the

⁶ See *Mutual Film Corp. v. Ohio Industrial Comm.*, 236 U.S. 230 (1915).

⁷ Ken Robichaux, *Movie Censorship in the United States (A Brief History)*, THE PICTURE SHOW MAN, http://www.pictureshowman.com/articles_genhist_censorship.cfm (last visited June 19, 2012).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

major Hollywood studios to divest themselves of their theater chains;¹⁶ in 1952, the Court effectively “sounded the death knell for local government oversight of the movie industry” when it held that expression in films is protected by the First Amendment;¹⁷ and in 1965, the Court limited the power of state government censorship boards when it held they could only approve a film, had no power to ban a film, and must approve a film within a reasonable time or go to court to stop it from being shown in theatres.¹⁸ By 1968, the Code was officially replaced by the first version of the MPAA's voluntary movie classification system.

II. PROTECTIONS OF CHILDREN FROM DIRECT-TO-VIDEO FILMS

Direct-to-video films are films that are released straight to video without carriage in theatres and are also self-regulated by the industry. A direct-to-video film can receive a rating by the MPAA. However it can also receive a rating by the Film Advisory Board (“FAB”). FAB is the only official rating system other than the MPAA and awards and promotes “quality family-oriented and children's entertainment in all areas, including film.”¹⁹ While MPAA and FAB are both advisory, they use different benchmarks. MPAA's ratings are based on the film's content, while FAB's ratings are based on the intended audience's maturity. The FAB rating system has six ratings:²⁰

- **Children** signifies that it is suitable for children ages 10 and younger.
- **Family** signifies it is suitable for all ages and may have a corresponding content description. The equivalent MPAA rating is *G*.
- **Parental Discretion** signifies that parental discretion is advised and may have a corresponding content description. The equivalent MPAA rating is *PG*.
- **Parental Discretion – Mature** signifies that it is suitable for ages 13 and older and may have a corresponding content description. The equivalent MPAA rating is *PG-13*.
- **Extremely Mature** signifies it is suitable for ages 17 and older and may have a corresponding content description. The equivalent MPAA rating is *R* or *NC-17*, depending on the content.
- **Adults Only** signifies it is suitable for ages 18 and older and may have a corresponding content description. There is no equivalent MPAA rating, but it is equivalent to the *X* rating for pornography.

III. PROTECTION OF CHILDREN FROM FILMS ON TELEVISION

In the U.S., films are carried on two types of television networks: free over the air programming on Broadcast networks (“Broadcast”) and subscription programming services like cable networks (“Cable”). While the U.S. generally has a decentralized, market-oriented television system, films carried on television are regulated by a combination of Federal regulation and industry self-regulation. The Federal government regulates obscenity, indecency, and profanity through *legislative acts* passed by Congress and *regulations* promulgated by the FCC, while the industry self-regulates other harmful content, such as violence, criminality, drug use and alcohol use.

1. Federal Government

a. Obscene Content

Regardless of whether a film is carried on broadcast or cable television, obscene content may not be carried at any time because it is not protected by the First Amendment. The Court has established a three-prong test for determining whether content is obscene: (1) an average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient interest; (2) the material must depict or

¹⁶ United States v. Paramount Pictures, 334 U.S. 131 (1948).

¹⁷ Joseph Burstyn v. Wilson, 343 U.S. 495 (1952) (overturning *Mutual Film Corp. v. Ohio Industrial Comm.*, 236 U.S. 230 (1915)).

¹⁸ Freedman v. Maryland, 380 U.S. 51 (1965).

¹⁹ *About FAB*, FILM ADVISORY BOARD, <http://www.filmadvisoryboard.org/about/> (last visited June 25, 2012).

²⁰ *FAB Rating System*, FILM ADVISORY BOARD, <http://www.filmadvisoryboard.org/ratings/> (last visited June 19, 2012).

describe, in a patently offensive way, sexual conduct specifically defined by applicable law; and (3) the material, taken as a whole, must lack serious literary, artistic, political, or scientific value.²¹

b. Indecent and Profane Content

In contrast to obscene content, indecent and profane content are protected by the First Amendment and thus may be restricted but not banned.²² Congress therefore established that “[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined . . . or imprisoned not more than two years, or both”²³ and charged the FCC with enforcing it.²⁴ The FCC applies this restriction only to broadcast television and has never extended it to cable operators, explaining that programming on cable services is easier for parents to control and harder for children to access because they require a subscription to view.²⁵ Congress also granted the FCC authority to levy fines, but it only levied its first fine for carriage of indecent content on broadcast television in 2001 and refrains from fining stations that broadcast content that would otherwise be indecent or patently offensive if it has educational or historical value.²⁶

Specifically, indecent and profane content is prohibited on broadcast television between 6 a.m. and 10 p.m. because there is a reasonable risk that a child may be in the audience but is permitted during a safe harbor period between 10 p.m. and 6 a.m. (“Safe Harbor”).²⁷ Content is profane if it is so highly offensive that their mere utterance in the context presented may, in legal terms, amount to a nuisance.²⁸ Content is indecent if “in context it depicts or describes sexual or excretory organs or activities in terms patently offensive as measured by contemporary community standards for the broadcast medium.”²⁹ The FCC applies three factors to determine whether content is patently offensive: “(1) [T]he explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.”³⁰ Indecent language includes a broad range of material³¹ and fleeting expletives.³² However, the FCC explained that it will make such a determination by assessing the full context of allegedly indecent broadcasts.³³

c. Limitations on regulation

The Federal government’s authority to protect children by regulating indecent and profane content is constrained by the First Amendment.³⁴ The Court has held that the appropriate level of scrutiny for determining whether a regulation violates the First Amendment depends on the unique characteristics and policy goals associated with the medium being regulated. It therefore held in a series of cases that broadcast and subscription based networks warrant different standards of review because they have sufficiently distinct characteristics. Regardless of the applicable standard of scrutiny, however, the court must assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence. In doing so, it must accord Congressional findings and predictive judgment substantial deference and refrain from substituting its judgment for that of Congress.

²¹ *Regulation of Obscenity, Indecency and Profanity*, FEDERAL COMMUNICATIONS COMMISSION, <http://transition.fcc.gov/eb/oip/Welcome.html> (last updated March 1, 2011).

²² *Id.*

²³ 18 U. S. C. § 1464.

²⁴ 47 CFR § 73.3999.

²⁵ *Supra* note 21.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Supra* note 21.

²⁹ *Id.*

³⁰ *Id.*

³¹ *In re Pacifica Foundation Inc.*, 2 FCC Rcd. 2698, 2699 (1987).

³² *Supra* note 21.

³³ *Pacifica* order, *Infinity* Order, 3 FCC Rcd., at 932 (1975).

³⁴ The FCC has additional constraints. It may only promulgate regulations if Congress grants it authority over that area. (What is the agency’s authority to issue legislative rules?, Rulemaking Process at the FCC, FEDERAL COMMUNICATIONS COMMISSION <http://www.fcc.gov/encyclopedia/rulemaking-process-fcc> (last visited June 4, 2012), it must follow various rule-making procedures in the Administrative Procedure Act (See ADMIN. PROCEDURE ACT, 5 U.S.C. §706; see also Rulemaking Process at the FCC, FEDERAL COMMUNICATIONS COMMISSION <http://www.fcc.gov/encyclopedia/rulemaking-process-fcc> (last visited June 4, 2012)), and its actions can be overturned by Congress or the courts. (What is the role of the courts in the rulemaking process?, Rulemaking Process at the FCC, FEDERAL COMMUNICATIONS COMMISSION <http://www.fcc.gov/encyclopedia/rulemaking-process-fcc> (last visited June 4, 2012) (It will be overturned if it is arbitrary, capricious, or an abuse of discretion or contrary to the Constitution or a statute).

- *Broadcast Regulation*

Congress established the first broadcast regulations and the FCC's authority to implement those rules in the Communications Act of 1934 ("1934 Act").³⁵ The Court explained that the goal of the First Amendment as it relates to broadcast television is to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market" and that "the right of the viewers and listeners, not the right of the broadcasters...is paramount."³⁶ It found that broadcast television "is uniquely accessible to children,"³⁷ broadcast bandwidth belongs to the public and is granted to broadcasters in exchange for serving the interest of the community, and bandwidth is scarce.³⁸ Consequently, it held that broadcast television should receive "the most limited First Amendment protection" such that restrictions on broadcast television must only be "reasonably" related to a "legitimate" government interest ("The Rational Basis Test").

- *Cable Regulation*

It was not clear whether the FCC had authority to regulate cable television because it was developed after the 1934 Act was passed.³⁹ Nonetheless, the FCC first promulgated regulations for all cable systems in 1965.⁴⁰ The Court upheld the regulation and held the FCC has jurisdiction over cable television because "regulatory authority over [Cable] is imperative if [the FCC] is to perform with appropriate effectiveness certain of its responsibilities," namely assuring "the preservation of local broadcast service" and "an equitable distribution of broadcast services."⁴¹

The Court held in a series of cases that regulation of cable television must satisfy a greater justification than for broadcast regulation because they differ in two critical respects: (1) it is more difficult for children to access content on cable television because it requires a subscription, and (2) there is no practical limitation on the number of speakers on cable television.⁴² However, it also held that the standard of review hinges on whether the regulation is content-based or content-neutral. A content-based cable regulation warrants "stricter scrutiny" because the regulation reflects the government's "preference for the substance of what the favored speakers have to say."⁴³ It must therefore be narrowly tailored to a compelling state interest. A regulation is content-based if the government adopted the regulation "because of disagreement with the message it conveys," if it regulates speech based on "favoritism" for the content being conveyed, or if it "impose[s] differential burdens upon speech because of its content." In contrast, a content-neutral regulation is constitutional only if it "further[s] an important or substantial governmental interest; the governmental interest is unrelated to the suppression of free expression; and the incidental restriction on the First Amendment is no greater than is essential to the furtherance of that interest" ("The Intermediate Level of Scrutiny").⁴⁴ In order to be narrowly tailored, the means must not "burden substantially more speech than is necessary to further the government's legitimate interests."

2. **Industry Regulation**

In 1992, Broadcasters adopted a "Statement of Principles of Radio and Television Broadcasting" in an effort to stave off government regulation that encouraged broadcasters to align themselves with the audiences' expectations and the public interest, write their own guidelines, and carefully select programming.⁴⁵ However, it also affirmed the centrality of the First Amendment and made clear that the Statement is advisory. After the passage of the Telecommunications Act of 1996 and upon the urging of policy-makers, Broadcasters and Cable operators agreed to provide parents with information to help them make more informed choices about the television programs their children watch ("The TV Parental Guidelines"). The ratings are modeled after the MPAA rating system and are placed at the beginning of all rated programming for 15 seconds in the form of

³⁵ Communications Act of 1934, 47 U.S.C. § 151.

³⁶ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

³⁷ *Id.*

³⁸ *Id.*

³⁹ Evolution of Cable Television, FEDERAL COMMUNICATIONS COMMISSION, <http://www.fcc.gov/encyclopedia/evolution-cable-television> (last visited June 1, 2012).

⁴⁰ *Id.*

⁴¹ *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

⁴² *Id.*

⁴³ *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000).

⁴⁴ *Turner Broadcasting System v. FCC*, 512 U.S. 622, 638-639 (1994).

⁴⁵ *Charting the Digital Broadcasting Future*, BENTON, http://benton.org/initiatives/obligations/charting_the_digital_broadcasting_future/appc (last visited June 19, 2012). Each network also has its own staff for Network Standards and Practices (S and P), to enforce their particular policies for advertising and programming, often thought of as 'network censors'.

icons and symbols. A Monitoring Board composed of TV industry experts monitors the ratings to ensure accuracy, uniformity and consistency of the guidelines.⁴⁶

- **TV-Y All Children.** It signifies that the themes and elements are specifically designed for a very young audience, including children from ages 2-6, is designed to be appropriate for all children and is not expected to frighten younger children.
- **TV-Y7 Directed to Older Children.** It signifies that the program is designed for children age 7 and above and may be more appropriate for children who have acquired the developmental skills needed to distinguish between make-believe and reality. Themes and elements in this program may include mild fantasy violence or comedic violence that may frighten children under the age of 7. Parents are therefore advised to consider the suitability of this program for their very young children.
- **TV-Y7-FV Directed to Older Children – Fantasy Violence.** It is assigned to programs where fantasy violence may be more intense or more combative than other programs designated TV-Y7-FV.
- **TV-G General Audience.** It signifies that most parents would find this program suitable for all ages because it contains little or no violence, no strong language and little or no sexual dialogue or situations.
- **TV-PG Parental Guidance Suggested.** It signifies that the program contains material that parents may find unsuitable for younger children and that many parents may want to watch it with their younger children. The theme itself may call for parental guidance and/or the program may contain one or more of the following sub-ratings: suggestive dialogue (D), infrequent coarse language (L), some sexual situations (S), or moderate violence (V).
- **TV-14 Parents Strongly Cautioned.** It signifies that the program contains some material that many parents would find unsuitable for children under 14 years of age. Parents are therefore strongly urged to exercise greater care in monitoring this program and are cautioned against letting children under the age of 14 watch the program unattended. It may contain one or more of the following sub-ratings: intensely suggestive dialogue (D), strong coarse language (L), intense sexual situations (S), or intense violence (V).
- **TV-MA Mature Audience Only.** It signifies that the program is specifically designed to be viewed by adults and therefore may be unsuitable for children under 17. It may contain one or more of the following sub-ratings: crude indecent language (L), explicit sexual activity (S), or graphic violence (V).

IV. CONCLUSION

While the protection of children from the harmful effects of films has always been an important goal, it took shape in the context of protecting the general public from immorality. However, as the mores of the public have evolved over time, the appropriate regulators and regulations have adapted accordingly. Thus, the story of the protection of children from the harmful effect of films - above all else - is the struggle to balance constitutionally-protected free speech rights of adults with the need to protect children from immorality.

⁴⁶ *Understanding the Guidelines*, THE TV PARENTAL GUIDELINES, <http://www.tvguidelines.org/ratings.htm> (last visited June 25, 2012).