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# VIOLENCE IN THE MEDIA: ANTITRUST IMPLICATIONS OF SELF-REGULATION AND CONSTITUTIONALITY OF GOVERNMENT ACTION

## HEARING

BEFORE THE

## COMMITTEE ON THE JUDICIARY
## UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

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# VIOLENCE IN THE MEDIA: ANTITRUST IMPLICATIONS OF SELF-REGULATION AND CONSTITUTIONALITY OF GOVERNMENT ACTION

**WEDNESDAY, SEPTEMBER 20, 2000**

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The committee met, pursuant to notice, at 10:10 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Grassley, Specter, DeWine, Leahy, Biden, Kohl, and Feinstein.

## OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

The CHAIRMAN. If we could begin, good morning and welcome to this Judiciary Committee hearing about violence in the media. Today, we will examine the antitrust implications of industry self-regulation and the constitutionality of governmental action.

Our goal is to examine what appropriate action Congress can take, given the confines of the First Amendment, to assist the entertainment industry in limiting the exposure of our youth to explicit sex, violence, and other harmful material in music, movies, and video games, and I might add the Internet itself.

Last week, the Federal Trade Commission released a study that demonstrated how American media companies may be intentionally marketing harmful material to our children. The study's findings can be summarized in one sentence: some in the entertainment industry have deliberately forced violent and unsuitable material on the most vulnerable members of our society, our children, for the purpose of making money.

The harmful effects of violent entertainment are no surprise to those of us who have studied this issue over the years. A year ago, the Senate Judiciary Committee issued a report entitled "Children, Violence, and the Media: A Report for Parents and Policymakers," which had similar findings.

But the point of today's hearing is not to belabor a conclusion we have already reached, and I want to be careful to avoid disparaging the entire entertainment industry because of the actions of some. It is important to recognize that America's entertainment industry can be a very positive force.

For example, I have seen a number of powerful films that convey ideas that I believe are greatly beneficial to our society. As a song-

writer myself, I have experienced firsthand the ability of music to uplift and inspire. And many in the industry strive to do what is right. In short, it is not my intention at this hearing to heap further attacks on the entertainment industry. Rather, we are here to find solutions, ways of empowering the industry to do what is best for our country and our culture.

As we will hear more about today, the industry has made some significant efforts to police itself. Each of the industries at issue here—motion picture, recording, and video games—has developed voluntary ratings systems that either provide notice to parents about unsuitable content of certain products or that attempt to restrict the sale of unsuitable products to adults or mature audiences.

Unfortunately, as the FTC report confirms, these efforts have failed to produce adequate or sufficient results. Some producers demonstrate inadequate adherence to industry standards, and retail stores do not enforce the guidelines. The FTC report found that 85 percent of children who attempt to purchase music or video games that contain unsuitable material, as defined by the industry itself, have no trouble at all purchasing these items. The report confirms the widely held view that voluntary standards are meaningless unless followed and enforced, and currently there is no enforcement of these voluntary standards.

The failure of voluntary action necessarily raises the question of whether Government regulation is appropriate. Some proposals of Government regulation, however, run afoul of the first Amendment. We all might remember in mid-1974 when the House Appropriations Committee ordered then FCC Chairman Richard Wiley to report on actions to be taken by the Commission to protect children from violence and obscenity.

Chairman Wiley began a series of meetings with industry heads, and in 1975 the broadcasters adopted a family viewing policy as part of the broadcasters' code of conduct. This family viewing policy was challenged by the Writers Guild of America under the theory that the threat of Government regulation amounted to State action and thus was not voluntary self-regulation.

In 1976, a district court agreed with the Guild and concluded that the FCC had engaged in, "a successful attempt * * * to pressure the networks and the NAB into adopting a programming policy they did not wish to adopt," and barred the NAB from enforcing the policy. Although this decision was later overturned on jurisdictional grounds and the case was not further developed due to the antitrust challenge to the overall NAB code, the court's holdings should give us pause about the constitutionality of proposals that might coerce, "voluntary," action in regulating protected speech.

In looking toward solutions, we not only must be mindful of the limitations of the First Amendment, but we also need to look at the impediments that exist to the entertainment industry's successful development and enforcement of meaningful codes of conduct. Concerns have been raised that industry fears about liability under antitrust laws are hindering successful self-regulation.

For example, it has been suggested that the industry would not boycott a video rental chain that routinely refuses to enforce industry-imposed age restrictions out of fear of antitrust liability. These

fears stem largely from the 1982 case, *United States* v. *National Association of Broadcasters,* in which the court ruled that the broadcasters' joint code of conduct relating to television advertising violated the antitrust laws.

Last fall, I offered a provision as a part of a larger floor amendment to the juvenile justice bill to empower the entertainment industry to collaborate in order to develop and enforce their own voluntary guidelines without the risk of liability under the antitrust laws.

While my hope is that such a law would result in the industry limiting the sale to minors of material that the industry itself deems unsuitable for them, I want to emphasize that my proposal does not impose any particular code or requirement. I was pleased that the Senate overwhelmingly adopted this provision by a vote of 98 to 0, and I am hopeful that we can enact that provision into law this year.

Today, we have the opportunity to examine how Government can act both in a constitutional and in a constructive manner to enable entertainment companies effectively to limit the exposure of our children to materials the companies themselves deem inappropriate.

Let me just now turn to our distinguished ranking member, Senator Leahy, for his statement, and then we will turn to Senator Grassley after that.

You have no statement. Then we will turn to Senator Kohl.

**STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT**

Senator LEAHY. Thank you, Mr. Chairman. In the past few years, we have seen tragic shooting incidents at schools across the country. They have prompted a public firestorm of concern about the causes of violent acts by our children. Even though the rate of serious violence by juveniles in this country has dropped dramatically by 33 percent between 1993 and 1997, each tragic incident of school violence shocks us and makes every parent or grandparent or responsible citizen struggle to figure out what is happening.

In this regard, the FTC report that was released last week states that, "Exposure to violence in entertainment media alone does not cause a child to commit a violent act and it is not the sole, or even necessarily the most important factor contributing to youth aggression, anti-social attitudes and violence."

We should know instinctively, and studies prove, that the root causes of violence are multi-faceted. We can all point to inadequate parental involvement or supervision, drugs, crimes, poverty, overcrowded classrooms and oversized schools that add to students' alienation, as well as a number of other factors that are more influential that depictions of violence in assorted entertainment media.

Senator Hatch pointed toward a major factor in his testimony last week when he alluded to domestic violence against children's mothers, siblings, and themselves. There is no single cause, and also there is no single legislative solution that is going to cure the ill of youth violence in our schools or on our streets. And we delude ourselves if we think otherwise.

But the President and the Congress tried to respond to the concern that all of us have youth violence. Both the House and the Senate took up and passed juvenile justice legislation which included studies proposed by Senator Lieberman and others on the marketing practices and guideline systems used by the entertainment industry and on the causes and the ways to prevent youth violence. In addition, the Senate-passed bill included an amendment proposed by Senators Brownback, Hatch, Lieberman, Kohl and others that would provide an antitrust exemption to the entertainment industry for the purpose of developing and enforcing content guidelines.

Now, of course, despite the strong bipartisan support for these proposals, in particular, and for the juvenile justice bill in general, they never became law. The Republican majority has refused to proceed with the juvenile justice conference, and so we do not have that bill and probably will not.

Fortunately, the Clinton-Gore administration did not wait for the Congress to act. On June 1, 1999, the President ordered the Department of Justice and the Federal Trade Commission to conduct a joint study of the marketing strategies and practices of the motion picture, music recording, and video game industries to find out whether they are marketing to children violent and explicit-content material.

That report was released Monday, and I am delighted to see Chairman Pitofsky here to follow up on his testimony concerning this report. Chairman Pitofsky and his department have done a very great service, I think, to all of us because the FTC report serves as an important wake-up call to those in the industry and to us as parents.

There is good news in the report about the effectiveness of the self-regulatory product rating and the labeling systems adopted by the movie, recording, and electronic game industries. The majority of parents not only understand, but they find these systems and these ratings to be invaluable.

But there is also bad news. It is not acceptable for the entertainment to target and market directly to children products which the industry itself identifies as inappropriate for children. It is not acceptable for the entertainment industry to include children in market research tests for products which the industry identifies as inappropriate for them without parents' approval. And it is not acceptable for over 80 percent of the children participating in an FTC survey to be able to buy explicit-content labeled recordings and electronic games without their parents' consent, and for 46 percent of unaccompanied children to buy tickets for entry to R-rated movies without parental approval.

These findings do not occur in a vacuum. Parents share a responsibility, too. Congress and Government cannot stand in loco parentis on these types of things. The majority of parents surveyed by the FTC felt they restricted a child's exposure to inappropriate entertainment.

As a parent, and now a grandparent, I well appreciate the challenge of limiting a child's exposure to media violence and other inappropriate material. But no legislation we could pass—and let's not kid ourselves; it is great to make campaign statements about

all the legislation we might pass, but no legislation is going to be an effective substitute for parental involvement. No filter, no software, no rules are an effective substitute for parents.

We ought to remember that films like "The Patriot," "Saving Private Ryan," "Schindler's List" and "The Hurricane" are among those receiving R ratings that invite parental permission before a teenager sees them. But many parents very appropriately chose to have their teenagers see those films, even though they contain very graphic scenes, and to consider the important values and lessons and human history those films depict.

At the same time, perhaps what we need to do is to have ratings that more clearly tell parents what is in there. One of the biggest blockbusters of the summer was a PG movie that had 100, 200 people murdered in the first few minutes in an airplane. Now, that gets PG. If it had been a story of family or something like that with no violence or anything else, but may have had some nudity, it would have gotten an R rating. Parents need to know better what the ratings stand for.

We have to be very vigilant about feel-good efforts to involve Government either directly or indirectly in regulating the content of movies, records, and games produced by the entertainment industry. In every Congress, we expend a good deal of effort on First Amendment issues. We also devote our time to ensuring protection under our copyright laws. I hope that no one intends to undermine the protection of our freedom of thought and religion and political activity that flow from the First Amendment.

Some have come to me to complain, for example, about a television commercial being run currently on behalf of gun manufacturers. It shows an American flag being destroyed, as the stars and stripes are ripped aside to leave a white flag of surrender. It is a powerful and emotional image. It is jarring and upsetting. I disagree with the gun manufacturers on this even though I am a gun owner, and I certainly disagree with the depiction of the American flag being torn apart in this way. But it is an expression subject to the provisions of our First Amendment.

This past weekend when speaking to the questions raised by the FTC report, Lynne Cheney, the wife of the Republican vice presidential nominee and former Chair of the National Endowment for the Humanities, said there was no way to legislate or regulate this issue without running afoul of the First Amendment, and suggested these hearings were politically motivated.

This hearing is focused on a proposal to grant the entertainment industries an antitrust exemption. I have worked to clarify antitrust laws with respect to joint research and manufacturing efforts, and was a principal sponsor of the National Cooperative Production Amendments Act, the first high-tech legislation signed by President Clinton in 1993. But I generally disfavor antitrust exemptions.

Senator Hatch and I have worked building on the efforts of Senator Metzenbaum and Senator Bradley to end Major League Baseball's antitrust exemption, something artificially declared in 1922, I believe it was—I will check with Mr. Fithian out here; I believe it was 1922—by the Supreme Court.

In general, I agree with Teddy Roosevelt and Al Gore—did you get that, Mr. Chairman, Teddy Roosevelt and Al Gore?

The CHAIRMAN. Surprise, surprise. [Laughter.]

Senator LEAHY. I agree with both of them that American consumers benefit from competition and the protection of our antitrust laws. Surely, the burden of persuasion is on those who propose an exception to it.

I don't think the entertainment industries need a statutory antitrust exemption in order to curtail inappropriate marketing efforts by individual companies. I am wary of granting antitrust immunity to the huge multi-national corporate conglomerates that dominate so much of our entertainment industries. Our antitrust enforcement agencies have said that no antitrust exemption is necessary for the industry to engage in voluntary efforts to develop and enforce guidelines for children, and I think that can be done.

The Commerce Committee heard that the entertainment industry is taking seriously the gaps in their self-regulatory system, and I think that is very positive. So let's use the FTC report as a tool for dialogue and not a quick legislative fix, and then do the things that can help with violence.

For example, violence against women and children that affect them for a lifetime. Let the Senate pass the Violence Against Women Act 2000 without further delay. Every Senator on my side of the aisle has agreed to let it be passed immediately. These are things we can do, and then let us go back one more time to what is most appropriate. Remember, parents have an obligation.

We have a remarkable entertainment industry in this country. There are things in it I don't like, movies I will not see because I don't want to. That is my choice. And when my children were young, it was also my choice what movies they would see. They survived that, we survived that, and we have got good kids as a result. And I would suggest that that might be a lot better than those of us who might go on television to say how we will take over for the parents.

Thank you.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF SENATOR PATRICK LEAHY

Over the past few years, tragic incidents at schools across the country have prompted a firestorm of public concern about the causes of violent acts by our children. Even though the rate of serious violence by juveniles in this country has dropped dramatically—by 33 percent between 1993 and 1997—each tragic incident of school violence shocks our conscience and makes every parent, grandparent and responsible citizen struggle to find out why some children resort to violence.

In this regard, the FTC report released last week states that "exposure to violence in entertainment media alone does not cause a child to commit a violent act and [ ] it is not the sole, or even necessarily the most important, factor contributing to youth aggression, anti-social attitudes and violence." The root causes of youth violence are multi-faceted. We can all point to inadequate parental involvement or supervision, drugs, crime, poverty, over-crowded classrooms and over-sized schools that add to students' alienation as well as a number of other factors that are more influential that depictions of violence in assorted entertainment media. Senator Hatch pointed toward a major factor in his testimony last week when he alluded to domestic violence against children's mothers, siblings and themselves. There is no single cause and no single legislative solution that will cure the ill of youth violence in our schools or on our streets.

Nevertheless, the President and the Congress tried to respond to the concern that all of us have about youth violence. Both the House and the Senate took up and passed juvenile justice legislation, which included studies proposed by Senator Lieberman, and others, on the marketing practices and guidelines systems used by the entertainment industry and on the causes of and ways to prevent youth vio-

lence. In addition, the Senate-passed bill included an amendment proposed by Senators Brownback, Hatch, Leiberman, Kohl and others that would provide antitrust exemptions to the entertainment industry for the purpose of developing and enforcing content guidelines.

Despite the strong bipartisan support for these proposals in particular and for the juvenile justice bill in general, they never became law because the Republican majority in Congress has refused to proceed with the juvenile justice conference for over a year. Senate and House Democrats have urged repeatedly that the majority reconvene the juvenile justice conference and work to craft an effective juvenile justice conference report and law. Despite numerous repeated requests by Democratic members and the President to reconvene, the Republican majority has rejected our pleas for action, as they have those of the American people.

Fortunately, the Clinton-Gore Administration did not wait for the Congress to act. On June 1, 1999, the President ordered the Department of Justice and the Federal Trade Commission (FTC) to conduct a joint study of the marketing strategies and practices of the motion picture, music recording, and video game industries to determine whether these industries are marketing to children violent and explicit-content material. The result is the report that was released last Monday. I welcome Chairman Pitofsky here to follow-up on his testimony concerning this report to the Commerce Committee.

The FTC Report serves as an important wake-up call to those in the industry and to us as parents. There is good news in the report about the effectiveness of the self-regulatory product rating and labeling systems adopted by the movie, recording and electronic game industries. The majority of parents not only understand but also find these ratings systems to be valuable tools in choosing what their children may see, listen to and play.

But there is also bad news. It is not acceptable for the entertainment industry to target and market directly to children products which the industry itself identifies as inappropriate for children. It is not acceptable for the entertainment industry to include children in market research tests for products which the industry identifies as inappropriate for them and without their parents' approval. It is not acceptable for over eighty percent of the children participating in an FTC survey to be able to buy explicit-content labeled recordings and electronic games without their parents' consent and for forty-six percent of unaccompanied children to buy tickets for entry to R-rated movies without showing proof of age and without parental approval.

These findings do not occur in a vacuum. As parents we have to accept our share of responsibility. While the majority of parents surveyed by the FTC felt they restricted a child's exposure to inappropriate entertainment, almost eighty percent of children felt their parents effectively restricted their movies and less than fifty percent felt parents restricted their use of music and games.

As a father and a grandfather, I well appreciate the challenge of limiting a child's exposure to media violence and other inappropriate material. Yet, no legislation we could pass would be an effective substitute for parental involvement. No filter, no software, no rules are an effective substitute for parents. We must remember that films like The Patriot, Saving Private Ryan, Schindler's List and The Hurricane are among those receiving R ratings that invite parental permission before a teenager sees them. Many parents chose to have their teenager see those films, although they contain graphic scenes, and to consider the important values, lessons and human history those films depict.

We must be very vigilant about feel-good efforts to involve government, either directly or indirectly, in regulating the content of the movies, records or games a produced by the entertainment industry. This Committee each Congress expends a good deal of effort on First Amendment issues. We also devote our time and energy to ensuring protection under our copyright laws. I hope that no one intends to undermine the protection of our freedom of thought, and religion and political activity that flow from the First Amendment.

Some have come to me to complain, for example, about a television commercial being run currently on behalf of firearms manufacturers. It shows an American flag begin destroyed as its stars and stripes are ripped aside to leave a white flag of surrender. It is a powerful and emotional image. It is jarring and upsetting, but it is also expression subject to the protection of our First Amendment.

This past weekend when speaking to the questions raised by the FTC report, Lynne Cheney, wife of the Republican vice presidential nominee and a former chair of the National Endowment for the Humanities, said there was "no way to legislate or regulate this issue without running afoul of the First Amendment." She characterized all the reports and hearings and statements as posturing and politically motivated.

Ironically, this hearing is focused on a proposal to grant the entertainment industries an antitrust exemption, a form of immunity from laws that have been passed to foster competition and protect the American consumer from companies getting together to make their business lives easier and to collude, conspire and combine about marketing practices that would otherwise be illegal.

While I have worked to clarify our antitrust laws with respect to joint research and manufacturing efforts and was the principal sponsor of the National Cooperative Production Amendments Act, which was the first high tech legislation signed by President Clinton in 1993, I generally disfavor antitrust exemptions. Building on the work of Senator Metzenbaum, Senator Bradley and others, Senator Hatch and I worked hard for several years to end major league baseball's antitrust exemption. That was an exemption that had been declared by the Supreme Court in 1922 when it found baseball to be a local matter not in interstate commerce. That legal fiction served to insulate professional baseball team owners for more than 75 years. Over the last several years, I have helped the Senate think twice before enacting antitrust exemptions for doctors to collude and possibly engage in price-fixing.

In general, I agree with Teddy Roosevelt—and Al Gore—that American consumers benefit from competition and the protections of our antitrust laws. Surely the burden of persuasion is on those who propose an exception to our antitrust laws.

As we begin this hearing, I do not think the entertainment industries need a statutory antitrust exemption in order to curtail inappropriate marketing efforts by individual companies. I am wary of granting antitrust immunity to the huge multinational corporate conglomerates that now dominate so much of our entertainment industries. I am skeptical of requests for immunity from law for marketing practices in particular, because grants of such immunity can too easily be used to coordinate marketing in too many ways, and have the effect of providing cover to restrict access or affect price in ways that disadvantage consumers generally. Much of the current consideration of proposed mega-mergers has to do with ensuring access and availability to competing entertainment and information sources. To seek to impose moral values and restrict depictions of violence through grants of antitrust exemptions is not without risks in my view. Accordingly, it is with a dose of skepticism that I approach legislative proposals for antitrust exemptions.

Our antitrust enforcement agencies have opined that no antitrust exemption is necessary for the industry to engage in voluntary efforts to develop and enforce guidelines to protect children from inappropriate material, nor have the industries requested such legal immunities as far as I know. Each segment of the entertainment industry already has a rating and labeling system and a cooperative relationship with retailers on how best to implement those systems. That has been accomplished within the bounds of our antitrust laws and without the need for antitrust immunity.

The Commerce Committee heard last week that the entertainment industry is taking seriously the gaps in their self-regulatory systems pointed out in the recent FTC report and taking steps to address them. Just last week, for example, the recording industry committed to making music lyrics available for parents; Disney announced it would review and revise its marketing policy; and retailers Kmart and Wal-Mart announced they would not sell violent video games to children under 17. The initiative and effort of these industries deserve to be acknowledged. Let us use the FTC Report as a tool for dialogue, not some quick legislative fix that may pose risks for important First Amendment values and for the protection to American consumers provided by business competition.

There are laws we can pass that can make a difference. I return to the issue of domestic violence—violence against women and children that affects them for a lifetime. Let the Senate pass the Violence Against Women Act 2000 without further delay. It was cleared for passage by all Democratic Senators in July. It is past time to reauthorize and build upon the historic programs of the Violence Against Women Act and do all that we can to protect children from the ravages and lasting impact of domestic violence.

The CHAIRMAN. Thank you, Senator.

The chairman of the Antitrust Subcommittee, Senator DeWine, is in another committee markup, so we will certainly allow him the option of giving opening remarks when he gets here, if he desires. But we will call on the ranking member and then we will turn to our witnesses.

Senator Kohl.

**STATEMENT OF HON. HERBERT KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN**

Senator KOHL. Thank you, Mr. Chairman.

Last week, the Federal Trade Commission reached the conclusion that the entertainment industry often willfully, consciously, and intentionally markets their most violent content to our young. Examples of these practices are all too easy to find. At last week's Commerce Committee hearing, a senior Sega executive defended his company's practice of placing ads for M-rated games, which are games with content suitable only for persons aged 17 and older, in magazines with, "close to a majority of readers over 18."

Like too many others in his industry, he apparently thinks it is fine to put an ad for his company's "Resident Evil" game into a magazine with over 60 percent of readers under age 17. Mr. Chairman, I strongly disagree. Those who purvey such sleaze to our young are motivated by a selfish desire for profit and do not care about the damage they do to our society.

But beyond denouncing the irresponsibility of these companies for these practices, what can we actually do to make a difference consistent with the First Amendment? We cannot regulate content, as some might like, and while exposing the industry's practices to public scrutiny has its place, I am not satisfied with mere talk, no matter how eloquent or well-intentioned. But I believe there are two steps we can take and should take now.

First, we can enact legislation which will make clear that antitrust law does not prevent entertainment companies from voluntary joining together to create and enforce codes of conduct which prevent companies from marketing violent or explicit sexual content to minors. That is why many of us joined you, Mr. Chairman, last year in cosponsoring an amendment to the juvenile justice bill which does exactly this.

But we should not stop with this one measure. Surely, marketing violent or sexually explicit entertainment to children in violation of industry codes is a deceptive trade practice, in violation of the FTC Act. The video game makers, for example, have adopted a code prohibiting marketing to under-age consumers, but some of these very same manufacturers repeatedly ignore their own code. In fact, the FTC found that 91 percent of the video game companies surveyed targeted males under 17 in advertising campaigns for violent M-rated games. We should not tolerate such dishonest conduct by these companies.

Therefore, Senator DeWine and I today have written to Chairman Pitofsky calling on the FTC to investigate and prosecute companies for deceptive trade practices whenever they violate their own codes of conduct by deliberately marketing this material to children.

From our music to our popular music, from TV to video games, American society is awash in a glut of violent and lurid images. Sadly, many in the entertainment industry often have little or no hesitance to market this inappropriate material to our young people. The time has come now to do more than merely denounce this behavior, though denounce it we should. We can and should take sensible action by granting the industry an antitrust exemption to enforce voluntary codes of conduct and by prosecuting those who

violate these codes for deceptive trade practices, to do all we can to keep our children safe from violence both on our streets and in the media.

Thank you, Mr. Chairman.

[The prepared statement of Senator Kohl follows:]

PREPARED STATEMENT OF SENATOR HERB KOHL

Just last week the Federal Trade Commission reached the chilling conclusion that the entertainment industry—movie studios, record companies, and video game manufacturers—often willfully, consciously and intentionally market their most violent content to our youth. Examples of these practices are all too easy to find. At last week's Commerce Committee hearing on this issue, for instance, a senior Sega executive, Pete Moore, defended his company's practice of placing ads for M-rated games—with content suitable only for persons aged 17 and older—in magazines with "close to a majority of readers over 18." Like too many others in his industry, he apparently thinks it's just fine to put an ad for his company's "Resident Evil" game into a magazine with over 60 percent of readers under 17.

Mr. Chairman, I strongly disagree. Those who purvey such sleaze to our youth are motivated only by a base and selfish desire for profits and care not in the least for the damage they do to our society. Their irresponsibility is unconscionable. Let me state it as plainly as I can: These rotten apples of the entertainment industry should be ashamed of themselves, and I condemn them.

But beyond denouncing the irresponsibility of these companies for these practices, what can we actually do to make a difference, consistent with the First Amendment? We cannot regulate content, as some might like. And while exposing the industry's practices to public scrutiny has its place, I, for one, am not, satisfied with mere talk, no matter how eloquent or well intentioned. But there are two steps we can take, and take right now.

First, we can enact legislation which will make clear that antitrust law does not prevent entertainment companies from voluntarily joining together to create and enforce codes of conduct which proscribe companies from marketing violent or sexually explicit content to minors. That's why many of us last year joined you, Mr. Chairman, in co-sponsoring an amendment to the Juvenile Justice bill that does exactly this.

Establishment of codes of conduct, and industry self-regulation to enforce these codes, are in no way contrary to the goals or principles of antitrust law. The purpose of antitrust law is to protect consumers by ensuring that members of industry engage in vigorous competition in the price and quality of goods and services. This exemption will not affect competition in the slightest. Indeed, these codes of conduct will benefit consumers by ensuring that industry will clean up its act and keep objectionable material out of the hands of youngsters.

But we should not stop with this one measure. Surely marketing violent or sexually explicit entertainment to children in violation of industry codes is a deceptive trade practice in violation of the FTC Act. The video game makers, for example, have adopted a code prohibiting marketing to underage consumers. But some of these very same manufacturers repeatedly ignore their own code. In fact, the FTC found that 91 percent of the video game companies surveyed targeted males under 17 in advertising campaigns for violent M-rated games. We should not tolerate such dishonest conduct by these companies. Therefore, Senator DeWine and I today have written to Chairman Pitofsky calling on the FTC to investigate and prosecute companies for deceptive trade practices whenever they violate their codes of conduct by deliberately marketing this material to children.

From our movies to our popular music, from TV to video games, American society is awash in a glut of violent and lurid images. Sadly, many in the entertainment industry often have little or no hesitance to market this inappropriate material to our youth. The time has come now to do more than merely denounce this behavior—though denounce it we should. We can and should take sensible action—by granting the industry an antitrust exemption to enforce voluntary codes of conduct and by prosecuting those who violate these codes for deceptive trade practices—to do all we can to keep our children safe from violence, both on our streets and in the media.

The CHAIRMAN. Thank you, Senator.

Senator Brownback has been held up in a markup, as well. He was our first witness. So we will turn to our second witness, the

Honorable Robert Pitofsky, Chairman of the Federal Trade Commission.

Prior to his 1995 nomination to Chair the FTC, Chairman Pitofsky was a Professor of Law at Georgetown University Law Center. He is a person I greatly respect, and we really look forward to hearing your testimony today, Mr. Pitofsky.

**STATEMENT OF HON. ROBERT PITOFSKY, CHAIRMAN, FEDERAL TRADE COMMISSION, WASHINGTON, DC**

Mr. PITOFSKY. Thank you very much, Mr. Chairman and members of the committee. I am pleased to be here once again discussing an antitrust question, this time the relationship between antitrust and self-regulation. And I am particularly pleased because it was this committee and so many members like Senator Hatch, Senator Leahy, Senator Kohl, among others, who have been so supportive of the FTC's project in this area from the very beginning.

The issue the Commission has been asked to address today is whether discussion or implementation of a rating system for violent entertainment materials and associated directions to its members not to market these products in ways that are inconsistent with rating systems could raise serious antitrust problems.

Let me start where the Commission report on violent materials ended. The right approach here, if at all possible, is industry self-regulation because of the important First Amendment considerations that are involved here.

In Appendix K of our report, the Commission took the position that if self-regulation is sensibly designed and implemented, there should be no antitrust problem. Problems could only arise if the self-regulatory program, the system, were a cloak or camouflage to achieve an anti-competitive effect, for example, to keep new players out of the marketplace. We reviewed thousands of documents in the course of our study and we never found any evidence whatsoever that that had been the goal or the effect of this regulatory program.

The question then is what could the antitrust problems be. With respect to the rating system itself, it simply provides information to parents and others about the nature and level of violence in entertainment materials, and they are free to use the information as they see fit. Scores of industries in this country rate their products, usually as a matter of safety, but no serious antitrust questions are raised if it is a legitimate rating system and not designed to be anti-competitive.

With respect to a possible restriction on marketing that is inconsistent with the rating, that too is highly unlikely to have a serious anti-competitive effect. At its core, antitrust is concerned with effects on price, on output, on innovation. That doesn't appear to be the purpose in any respect of these rating systems.

Also, this is a rating system that is grounded in a policy frequently adopted by Congress, by State legislatures, by the courts that treat young people as special and give them protection against over-reaching marketing behavior.

The Commission violence study noted that self-regulation, to be effective, requires some sort of sanction. And, arguably, sanctions

begin to move closer to the line where antitrust is an issue, but the first question I would ask is what sanctions are we talking about.

In other industries, sanctions have included publishing the names of companies that do not abide by industry regulations, denial of a seal of approval, or even expulsion from the association. But I don't think those sanctions would be an antitrust problem. It would only be an antitrust problem if the company needed the membership or the seal of approval to stay active in the marketplace. And if that is not the case, then I don't think that history would indicate that antitrust would be involved because it is hard to see how the sanction would have an anti-competitive effect.

It doesn't appear that seals of approval are necessary to compete here. I would add, however, that the program would be even more invulnerable to challenge if there were some procedural regulations, like notice and hearing, so the target of the regulation would have some opportunity to argue that the rating system was inappropriate.

It is only if the sanction moved in the direction of industry-wide boycotts of those who did not go along with self-regulation rules, including possible boycotts of retailers, than antitrust concerns do begin to arise. But I have no reason to believe that boycotts are the direction that these industries are inclined to take.

I should add, as the chairman mentioned, that there are some older cases that cast a shadow from antitrust on self-regulation—the NAB case, *Professional Engineers*. I think they are either distinguishable from what these industries are doing or are inclined to do. And several of these cases I just don't think would be decided the same way today. The courts are much more generous toward self-regulation from the point of view of antitrust than they were, say, 40 or 50 years ago.

Let me conclude. There are many self-regulatory programs in effect in this country. The advertisers have an excellent program; funeral directors, the direct marketers, among many others. Antitrust enforcement officials have never challenged any of those for an anti-competitive effect.

If self-regulators in the music, movie, and video game industries are nervous about the issue, they could ask for an advisory opinion from my agency, as the direct marketers did just 2 or 3 years ago, and we gave them an advisory opinion saying their self-regulatory program was not anti-competitive. One of the advantages of that is the industry submits a specific program and a Government agency approves or disapproves it. Therefore, you don't run the risk of an exemption that covers too much.

The three entertainment industry sectors that we have discussed have already introduced self-regulatory programs and they weren't worried at that time about antitrust. We have seen that in many respects those programs are not effective. I don't see how making those programs effective raises serious antitrust questions.

Now, I do want to address this question. Maybe the industry doesn't need an antitrust exemption, but what is wrong with granting one? I mean, after all, maybe they will rest easier knowing they don't have an antitrust threat.

There are several problems. One is—and it has already been suggested this morning—we ought to be careful about giving out antitrust exemptions.

Senator FEINSTEIN. Could you speak directly into the microphone, please, so we can hear you?

Mr. PITOFSKY. Oh, I am sorry.

Senator LEAHY. In fact, repeat that last one. [Laughter.]

Mr. PITOFSKY. Yes. I want to underscore the point that antitrust exemptions are frowned upon, and I think we should be careful about giving them out if it is not necessary.

Second, my sense is that the industry is ready to move on improving their own self-regulatory programs. And I would hope that any suggestion that they need an antitrust exemption doesn't lead to delay in their implementing reforms that I think are necessary.

Finally, it is very hard to construct an antitrust exemption that covers exactly what you want and goes no further. However, if the exemption could be introduced promptly, if it could be carefully tailored—and I am sure this committee would do exactly that—then I still don't think it is necessary, but I can't really oppose an exemption. I don't think it would do any harm, and it is possible that there are people in the industry who would move more promptly toward self-regulation if they weren't worried about antitrust. They don't have anything to worry about, but I can see where they might be concerned.

Thank you, and I would be glad to answer questions.

The CHAIRMAN. Thank you, Mr. Pitofsky. If I could have you delay for questions to take Senator Brownback's statement, you can stay right there.

Senator Brownback, why don't we take your statement at this time and then we will turn to Mr. Pitofsky for questions that all of us have. We are happy to welcome you, Senator Brownback, a good colleague and friend, and certainly a leader in trying to do what is right in keeping our society in somewhat of a protected mode for children and people who are vulnerable.

Senator Brownback.

## STATEMENT OF HON. SAM BROWNBACK, A U.S. SENATOR FROM THE STATE OF KANSAS

Senator BROWNBACK. Thank you very much, Mr. Chairman and members of the committee. It is a pleasure to be here with you. I appreciate your leadership and work on this topic.

Mr. Chairman, I just want to note for you that the conclusions of the report that came out last week were considered by many to be common sense. Indeed, when I went home this past weekend, people were asking well, what was the real news here? They all knew from hard personal experience that the entertainment industry was targeting their kids to push entertainment that they, the parents, thought inappropriate.

We see that Hollywood has been making a killing off of marketing violence to children. The FTC study—and I want to commend Chairman Pitofsky for this—was excellent. The report noted that in popular music, a hundred percent of the albums that carried a parental-advisory sticker were marketed directly to children. We have problems, as well, in the movie and video games industry.

This is not just irresponsible marketing, it is a public health concern.

We now have six major public health organizations that have said that exposing kids to violent entertainment causes increased aggressive behavior among some children. The American Academy of Pediatrics, child psychologists, the AMA, and three others have all signed that document. This is a public health concern.

One step we need to take is to ensure that the industries can enter into a code of conduct. I have previously introduced legislation, S. 2127, the Children's Protection Act, that would provide a very limited antitrust exemption that would enable, not require, companies to do just that.

This is an important step and one that we can take immediately. There is broad support for such a code of conduct. Indeed, the provisions of S. 2127 were passed as an amendment to the juvenile justice bill, which passed by a vote of 98 to 0 last year.

Paving the way for the entertainment industry to adopt a code of conduct is a good idea, but it is not a new one. I have modeled my legislation after the old National Association of Broadcasters' code of conduct which was in effect for 3 decades, until questions were raised about whether it violated antitrust laws. That is when that code was done away with when those questions were then raised. The Children's Protection Act would provide a limited antitrust exemption to enable companies to either revive the old NAB code or to formulate and implement a code of their own.

There are several reasons why we need a code of conduct, and why we should provide a limited antitrust exemption to make such codes possible. First, given the enormous power that entertainment companies wield, it is only right that parents and consumers should know what their corporate standards are. S. 2127 would encourage entertainment companies to define their standards, what they will and will not do, what scenes they will or will not show, and how low they will go. The public has a right to know this, and entertainment companies have a responsibility to tell them.

Second, providing an antitrust exemption to enable a code of conduct will not only help inform parents and consumers, but by doing so it will hold the entertainment industry accountable. Parents will have a written code by which to judge movies, music, television, and video games, and be empowered to demand that companies live up to their professional standards.

Last, enabling a code of conduct acknowledges the reality that the entertainment industry wields great power, and therefore bears some corporate responsibility for the products they produce, promote, and peddle.

There are other steps we should consider, including many of the FTC's recommendations, but a rush to legislation is not one of those.

Mr. Chairman, I have worked with the entertainment industry and talked with them and pushed them on this issue for several years since I have been in the Senate. I have tried to encourage them to put forward better products that don't directly target market violence and vulgar material to children. I have met with resistance all along the way. There have been a number of people within the industry that say: we want to produce better products,

but we have got to get more edge to the product because we are aiming at that 18-to-24 male audience. We are using, they were saying in some cases, the sex and violence to get them hooked into the television and hooked into watching or playing the video game or listening to the music.

I think this legislation will empower the industry to do what it wants to do, produce a higher-quality, better product that people that are working in that business—the writers, the directors, the producers, the actors, the technicians—can go home at night feeling good about.

We need to provide this limited antitrust exemption so that people within the industry will set standards and self-regulate. By removing the barriers to self-regulation, entertainment executives will be free to clean up their act—and be accountable to consumers and parents if they fail to do so.

So I would urge the committee to pass this limited antitrust exemption. I would hope we could move it to the floor and through this Congress, as well. Mr. Chairman, thank you very much for allowing me this privilege to testify.

The CHAIRMAN. Thank you, Senator Brownback. We know your time is valuable and we won't keep you any longer, but we appreciate you coming.

Senator BROWNBACK. Thank you.

[The prepared statement of Senator Brownback follows:]

PREPARED STATEMENT OF SENATOR SAM BROWNBACK

Mr. Chairman, I want to thank you for holding this hearing, and giving a public airing to a most important public issue. When I introduced legislation last year, along with several of my colleagues here today, to authorize this FTC report, I did so because the anecdotal evidence was overwhelming that violent, adult-rated entertainment was being marketed to children. It's been said that much of modern research is the corroboration of the obvious by obscure methods. This study does corroborate what many of us have long suspected—and it does so unambiguously and conclusively. It shows, as FTC Chairman Robert Pitofsky noted, that the marketing is "pervasive and aggressive." It shows that Hollywood is making a killing off of marketing violence to kids.

The problem is not one industry, but can be found in virtually every form of entertainment: movies, music, and video and PC games. Together, they take up the majority of child's leisure hours. And the messages kids get, and images they see, often glamorize brutality, and trivialize cruelty.

Take, for example, popular music. The FTC report found that 100 percent! of the stickered albums they surveyed were target-marketed to kids. This is both troubling and fairly predictable: troubling in that hyper-violent, misogynistic, and racist lyrics are target-marketed to young kids—mostly young boys—whose characters, attitudes, assumptions, and values are still being formed, and vulnerable to being warped. And predictable in that there are few fans of such music that are over 20.

Movies are equally blatant in their marketing to kids, and appalling in their content. Movies have great power—because stories have great power. When that power is used responsibly, it can edify, uplift, and inspire. But all too often, that power is used to exploit. I've seen some movies that are basically two-hour long commercials for the misuse of guns.

The movie industry has had the gall to target-market teen slasher movies to child audiences—indeed, the report notes that some movie-makers used kids as young as ten in focus groups for R-rated movies. They then claim that parents bear total responsibility, even as they deliberately do an end-run around parents, and make it harder for them to make decisions. Of course parents bear primary responsibility in policing what their children watch—but that doesn't mean that entertainment companies bear no responsibility at all. Moreover, entertainment companies cannot simultaneously claim that it is a parent's duty to make informed choices, and then make it as difficult as possible for them to do so.

Or take video games. When kids play violent video games, they do not merely witness slaughter, they engage in virtual murder. Indeed, the point of what are called "first person shooter" games—that is, virtually all M-rated games—is to kill as many characters as possible. The higher the body count, the higher your score.

Common sense should tell us that positively reinforcing sadistic behavior, as these games do, cannot be good for our children. We cannot expect that the hours spent in school will mold and instruct a child's mind but that hours spent immersed in violent entertainment will not. We cannot hope that children who are entertained by violence will love peace.

This is not only common sense, but a public health consensus. In late July, I convened a public health summit on entertainment violence. At the summit, we released a joint statement signed by the most prominent and prestigious members of the public health community—including the American Medical Association, the American Academy of Pediatrics, the American Psychological Association, the Academy of Family Physicians, the American Psychiatric Association, and the Academy of Child and Adolescent Psychiatrists. This statement concluded:

"Well over 1,000 studies * * * point overwhelmingly to a casual connection between media violence and aggressive behavior in some children. The conclusion of the public health community, based on over thirty years of research, is that viewing entertainment violence can lead to increases in aggressive attitudes, values and behaviors, particularly in children."

There is no longer a question as to whether exposing children to violent entertainment is a public health risk. It is—just as surely as tobacco or alcohol. The question is: what are we going to do about it? What does it take for the entertainment industry, and its licensees and retailers, to stop exposing children to poison? And why do see so little concern, and so much defiance, from an industry deliberately harming kids to make a buck? What can be done to encourage them to clean up their act—without resorting to any measure that restricts free expression?

The first step we need to take is to ensure that these industries can enter into a code of conduct. Consumers and parents need to know what their standards are—how high they aim, or how low they will go. I've introduced legislation, S. 2127, that would provide a very limited anti-trust exemption that would enable (not require) companies to do just that.

This is an important step, and one we can take immediately. There is widespread support for such a code of conduct; indeed, the provisions of S. 2127 were passed as an amendment to the Juvenile Justice bill by a vote of 98–0. And the President's Advisory Commission on Public Interest Obligations unanimously called for a re-adoption of the code of conduct.

Paving the way for the entertainment industry to adopt a code of conduct is a good idea, but is not a new one. I have modeled my legislation after the old the National Association of Broadcaster's Code of Conduct, which was in effect for three decades, until the early 1980s, when questions were raised about whether it violated anti-trust rules. The Children's Protection Act would provide a limited anti-trust exemption to enable companies to either revive the old NAB code, or to formulate and implement a code of their own.

There are several reasons why we need a code of conduct, and should provide a limited anti-trust exemption to make such codes possible:

• First, given the enormous power that entertainment companies wield, and their insistence that parents and consumers bear responsibility for their choices, it is only right that parents and consumers should know what their standards are. S. 2127 will encourage—without requiring—entertainment companies to define their standards—what they will and will not do, what scenes they will or will not show, and how low they will go. The public has a right to know. And entertainment companies have a responsibility to tell them.

• Second, providing an anti-trust exemption to enable a code of conduct will not only help inform parents and consumers, but by doing so, it will hold the entertainment industry accountable. Parents will have a written code by which to judge movies, music, TV and video games, and be empower to demand that companies lives up to their professed standards.

• Third, enacting a limited-trust exemption will enable far more broad-reaching voluntary agreements than are now possible. Although the video game industry has a code of conduct, for which I commend them, the FTC report concludes that is not well-known, certainly not well-followed, and definitely not enforced. Enacting an anti-trust exemption takes away any reason for industries to avoid enacting codes of conduct that include the cooperation of retailers, and promoters, as well as producers, and to enforce them.

• Last, enabling a code of conduct acknowledges the very simple reality that the entertainment industry wields great power, and therefore bears some corporate responsibility for the products they produce, promote, and peddle.

There are other steps we should consider—including many of the recommendations made by Chairman Pitofsky and the FTC in their report—but a rush to legislation is not one. Hollow threats may score political points, but won't do much good. Frankly, imposing six-month deadlines on an industry one is actively fleecing for money is unlikely to bring about lasting reform. We need to encourage responsibility and self-regulation. We need a greater corporate regard for the moral, physical and emotional health and well-being of children.

Ultimately, what we need is what Edmund Burke called "obedience to the unenforceable." Whatever we do in the Senate, there will be ways for this multi-billion dollar industry, with all of its brigades of lobbyists and lawyers, to find a loophole. We do need to take steps to encourage greater self-regulation and self-restraint on the part of the entertainment industry. But we need to change minds even more than laws.

Appealing to conscience and reason, finding ways to better inform and empower parents, and enabling long-standing and hard-hitting public pressure for greater corporate responsibility is difficult work—it takes time, effort, and offers little short-term political rewards. But it is the best way to keep children protected, parents empowered, and speech free.

The CHAIRMAN. Let me turn to you, Mr. Pitofsky. Now, Senator DeWine has an opening statement, but he has kindly deferred until after we question you so that you don't have to stay here longer than necessary. I have just a couple of questions to ask you.

You noted that you do not believe that the antitrust exemption is needed to allow the entertainment industry to develop responsible codes of conduct which include means of enforcement. Yet, in the report you released last week, the Commission acknowledged that, "some industry members have raised concerns that collective action to restrict youth access to rated or labeled products would violate the antitrust laws." Now, this is not new. These concerns have been expressed by members of the industry in the past, and sometimes with glee. The report also concludes that an effective solution requires, "mechanisms to ensure compliance."

Could you first elaborate for us why you don't believe a collaborative effort by the industry to develop a voluntary system and have an effective mechanism to ensure compliance would not violate the antitrust laws? And then I would like to know what objection the Commission, or anyone for that matter, could have to a limited exemption which makes clear that such actions would not subject the industry to antitrust liability from the Government or from an opportunistic private plaintiff.

Mr. PITOFSKY. Senator, I want to be clear about this. I don't think antitrust problems are raised generally, but that depends a little bit on what sanction the industry chooses to impose. And if the sanction were something along the lines of a boycott, for example, that the producers of movies or of music were to say with respect to a retailer, you are not doing the job that we require you to do, we are not going to sell our product to you, then we do have an antitrust concern.

The CHAIRMAN. That is a good reason to have this.

Mr. PITOFSKY. I know that the bill that you have proposed has an exception to the exemption, that there will be an antitrust exception, but not for boycotts. So if there is to be a bill, I think it is very important that it be designed along the lines that you have already suggested.

If there is no boycott issue involved and it is not a camouflage for some anti-competitive scheme—and really there is no reason to think that that is what these companies are up to here—then I certainly think they don't have a problem, in my view. I would advise them that they don't have a problem.

If they think they have a problem, they could ask for an advisory opinion. That is what the direct marketers did. We gave them an advisory opinion fairly promptly, I think, which relieved their minds of any concern. However, if the exemption is narrowly tailored and if it can be introduced promptly so there is no delay, then I agree with the implication of your question, what harm is being done here, other than my concern that giving out antitrust exemptions generally is not a good idea.

The CHAIRMAN. Well, I share that concern.

Now, we will hear from a number of our witnesses who have expressed concern over possible anti-competitive conduct which may occur as a result of the industry's voluntary code of conduct. The concerns relate to the possibility that content producers such as movie studios and record companies could possibly engage in an illegal boycott of a retailer whom they conclude has not complied with the labeling or rating system which they have instituted. As I understand it, such action, unless affecting output or price to the consumer, would not appear to violate the antitrust laws. I hope I am right on that. If I am not, I will stand corrected.

Could you put these anti-competitive concerns in context for us? You stated in your testimony that you submitted today that appropriately structured collective action appears unlikely to violate Federal antitrust laws. Can you provide more details on such, "appropriately structured collective actions," and specifically address the anti-competitive concerns raised?

Mr. PITOFSKY. Let me try to make this more concrete. Suppose you had a retail chain selling CD's, selling music at less than the suggested retail price, and the producers of music were very unhappy about that. What they might do is cut off the price-cutter and then claim that the reason they are doing it is the price-cutter isn't paying any attention to the self-regulatory scheme. That is where the antitrust laws would kick in.

If the exemption is so broad as to allow that kind of behavior, then the exemption is a bad idea. But you have anticipated that by having an exception to your exemption which would not cover boycotts, and I think that is well designed and appropriate. So like every exemption, one worries that it will be used to cover conduct that is not really designed for some worthy purpose but is used as a cloak for some kind of anti-competitive behavior.

I hope I have answered your question.

The CHAIRMAN. Well, thank you. You have been very helpful.

Let me turn to our ranking member.

Senator LEAHY. Thank you, Mr. Chairman.

You know, we have debated the need and usefulness of antitrust immunity for parts of the entertainment industry for years. I recall—and Senator Biden and Senator Hatch were on the committee at the time—the efforts of Senator Paul Simon in the 1980's to pass an antitrust exemption for TV broadcasters, and it became law, I think, from 1990 to 1993.

When that sunsetted, the Justice Department issued opinions in 1993 and 1994 that really echo the position that you have taken, Mr. Chairman, namely that no antitrust exemption is necessary for the creation and operation of a rating system for products that are inappropriate for children or for the enforcement of such a rating system, enforcement against other manufacturers and retailers of such products.

Are you aware of any incidents where concern over antitrust liability has stopped any particular entertainment company from participating in or enforcing a rating system?

Mr. PITOFSKY. I have heard remarks indicating apprehension, but I am not aware that anyone has declined to adopt a self-regulatory system because of antitrust concerns.

Senator LEAHY. Well, since self-regulatory systems that are designed to protect children would be acceptable and legal under the antitrust laws, as I understand it, as a reasonable restraint on trade, do you have any concern that a grant of antitrust immunity would only be necessary to shield unreasonable steps from antitrust scrutiny?

Mr. PITOFSKY. Well, that is exactly the point. I don't think they need it, and it might end up being used in such a way as to at least arguably protect behavior that we don't want to see protected. We want the rating code, but we don't want the other behavior.

Senator LEAHY. After we passed the juvenile justice bill—and there are two antitrust exemptions in there that are part of the Brownback-Hatch amendment—I said at the time when that was going through that I was concerned about the breadth of the exemption, but that we would look at it in conference. It turned out we haven't had a conference.

The Justice Department raised a concern that the exemptions, "would raise difficult constitutional questions and would be vulnerable to constitutional challenge."

Mr. Pitofsky, I won't take up your time now, but I am wondering if you could have your staff review this Justice Department analysis—I will get it to you to see if you have the same sense.

The Brownback-Hatch amendment to S. 254, the juvenile justice bill, would give broad antitrust immunity to a consortium of industry members. They may refuse to sell their products to certain retailers, including those retailers who market the products of other manufacturers that are not part of the consortium. The Justice Department pointed out that this would restrict the ability of manufacturers outside the consortium to distribute their own movies and videos and records, and could stifle their speech in the marketplace.

Have you looked at that at all?

Mr. PITOFSKY. Yes, I have.

Senator LEAHY. And what did you think on it?

Mr. PITOFSKY. Well, I read the Department of Justice's view on the constitutionality of an antitrust exemption. I then read Professor Cass Sunstein's analysis that comes to an opposite conclusion, and what I decided was that is a very close call and that you probably wouldn't know the answer to that until the Supreme Court passed on it.

Senator LEAHY. There was a suggestion here a bit earlier perhaps—this is really not a question from me, this is more an observation of mine that Vice President Gore and Senator Lieberman, in criticizing an industry which they have also supported, as many of us have, may not be being totally forthright.

Governor Bush was paid over $100,000 as a member of the board of directors of a company that produced dozens of R-rated movies, slasher movies, but I don't think that makes him a bad man or a bad parent. From everything I have seen, he seems to be a very good parent. Or the tens of thousands of investors who invested in that—I don't think they are bad people either.

I think we ought to be very clear that neither Vice President Gore nor Governor Bush are bad people or bad parents. I will certify right here that from everything I know about them, they are good people and they are good parents, and apparently good investors, too.

But I would still go back to my other point. I think we could do more in making some basic changes in the rating systems. It is not enough to say that PG–13 where a whole lot of people get murdered is OK, or an R that may be is a love story is not. I think what we should have at least some kind of a synopsis that gives parents some idea of what they are going to see and then let parents make some choices, because again ultimately I am not going to vote for something that is going to have us tell parents how they must decide what their children can see or read. I mean, some parents have some books they don't want them to read and other parents might think it is very good. And I don't think we could if we wanted to.

I also would emphasize again that the best way of parents enforcing the ratings they want or what they want is with their wallet. If I don't like a movie, I don't go to see it. If I don't like a TV program, I don't turn it on. I vote that way, and maybe more of us should do that.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

We will turn to Senator Grassley.

Senator GRASSLEY. I have three questions. I would like to quote from your written statement. "The Commission found evidence of marketing and media plans that expressly target children under 17." Do you mean by this comment that the entertainment companies that you reviewed had the specific intention of marketing violent material directly to minors, or is it just that these companies adopted marketing plans which had the effect of attracting minors to the product containing violence?

I ask the question because I think there is a difference between marketing to young adults which also happens to affect minors, and marketing aimed at minors, since adults are more likely to be more discriminating.

Mr. PITOFSKY. I think both were the case in the documents that we saw. I can't quote it exactly, but there was one document that said our goal is to see to it that every young person from 12 to 18 sees this movie. That is intent, as far as I am concerned. Many of the other documents are really the other kind that you described. They talk about a marketing plan in magazines that have a very

high percentage of young people, or on MTV which we all know has a high percentage.

So, many of them had the effect of inducing young people to see their movies or buy their products. But also a considerable number clearly indicated intentional target marketing of an inappropriate audience, inappropriate according to their own rating.

Senator GRASSLEY. In your written statement, again referring to that, you discuss how the industry can impose discipline on industry participants who don't comply with the rules, such as not selling or marketing content labeled for adults to minors.

Are there currently industry codes which prohibit the sale or marketing of violent material to minors? And if so, have these disciplinary powers ever been used to punish bad actors?

Mr. PITOFSKY. Let me check on that one, Senator. There certainly are codes which prevent marketing to minors. For example, the alcohol industry has a code that covers that. Whether there is any code around that talks about violent materials marketed to minors, I simply don't know, but I can get back to you on that.

Senator GRASSLEY. In a written response. Thank you.

Then I would ask my last question on something that Senator Hatch has already brought up, but I would like to be more specific. One of the witnesses that will follow you has expressed concerns in his written testimony about creating an antitrust exemption for the entertainment industry. Specifically, he has concerns that an exemption would effectively give the manufacturers of entertainment products a monopoly over movie and video game rating systems, an exemption would hamper the first sale doctrine, and an exemption could seriously weaken competition at the retail level.

Do you have concerns about that, or whether or not that testimony would raise a valid concern?

Mr. PITOFSKY. Well, I mentioned the possibility that an exemption could be used to weaken competition at the retail level. I think, however, that a carefully tailored exemption could address that, as this exemption now does, by taking boycotts—if you are going to go this route, maybe we ought to take all per se antitrust violations, like price-fixing, market division, boycotts, and say with respect to those we don't mean that is an exemption from the antitrust laws, only the rating code and a provision that says the product should be marketed in a way that is consistent with the rating code. I think you would want to be careful to take into account what that witness will testify to, and that is that an exemption could be misused at the retail level.

Senator GRASSLEY. Thank you very much.

The CHAIRMAN. Let me just clarify one point with respect to the antitrust exemption proposal. The group boycott exception does not apply to section 405. I believe to have effective enforcement, you must allow for a limited group boycott. But as you have pointed out, we would not intend to allow producers to use a sham excuse to limit sales to a retailer who is pro-competitive.

What would be the problem with the boycott of a retailer who routinely violates the industry's own code and sells an unstable product to the minor?

Mr. PITOFSKY. The problem would be—and we have seen this sort of thing—that they claim they are enforcing their self-regula-

tion against someone that is not abiding by the code, and really what they are doing is cracking down on a retailer who is unduly aggressive in marketing, and it is hard to tell the difference. That is where the problem is.

The CHAIRMAN. Thank you.

Senator Kohl, you are next.

Senator KOHL. Chairman Pitofsky, today Senator DeWine and myself are sending a letter requesting that you examine whether entertainment companies engage in a deceptive trade practice when they violate their own codes of conduct by marketing violent or otherwise inappropriate entertainment to minors.

Can we expect you to answer this inquiry within 30 to 60 days?

Mr. PITOFSKY. Yes, I believe we can do that.

Senator KOHL. Furthermore, if you find a deceptive trade practice, will you commit to bringing an action in court against companies that violate their own code of conduct?

Mr. PITOFSKY. Yes, I think we should, yes. If we have the authority to challenge that kind of behavior, if it is a violation of law, certainly we would bring an action.

Senator KOHL. Well, then doesn't it follow that we have a very fruitful avenue here of trying to alleviate this problem by first doing whatever it is we need to do to encourage the industries to develop a code of conduct, however we encourage them to do that, and once that code of conduct is in place, then the Federal Trade Commission has an ability to implement the code of conduct if necessary by going to court?

Mr. PITOFSKY. Senator, I am not sure we do under present law. We have never brought a case like that. We have never brought a case challenging as deceptive or unfair the marketing of a product in a way that is inconsistent with their own code. We are looking at that. It does have a feel of deception or unfairness about it, but I would like some time to think through whether or not we are over-reaching in that area.

And I have said from the very beginning that my hope is that self-regulation is really going to be the first line of defense in this area. But if it doesn't work out, then we will have to think about litigation, and perhaps we can do that under existing law.

Senator KOHL. Obviously, we are hopeful that the Federal Trade Commission can be very useful in trying to alleviate the problem, or we wouldn't be talking to you today. I don't know whether I am reading you as being encouraging in your ability to help us or discouraging or trying to straddle the fence.

I thought I heard you say a minute ago that you would believe that you could bring a deceptive trade practice against a company that violated their own codes of conduct signed with other companies.

Mr. PITOFSKY. Let me be clear.

Senator KOHL. Did you say that?

Mr. PITOFSKY. Let me be clear. Step one: do we have the authority to crack down on companies that market in a way inconsistent with their regulations? Maybe I am straddling. I would like some time to think that one through, and I have asked the staff to give the Commission, my colleagues and myself, a formal report on that.

If we have the authority, then I don't have any reservation about enforcing the law in a situation like that.

Senator KOHL. The law would be a violation of their own codes of conduct?

Mr. PITOFSKY. Yes, which in turn would be a violation of section 5 of our statute.

Senator KOHL. So I take it from that that you would lead us to be encouraged this morning.

Mr. PITOFSKY. Well, I am trying to duck; I am trying to duck very hard here. [Laughter.]

We will have a report in 30 to 60 days, and I assure you that we will answer these questions.

Senator KOHL. Do us a favor and don't make this, "just another hearing." Thank you.

Senator BIDEN. Could I ask a clarifying point?

Mr. PITOFSKY. Sure.

Senator BIDEN. In terms of the code of conduct, would the violation lie in violating their code or would the violation lie in violating what they said the record said? If the record has a label that says "no violence" and there is violence in it, or "no sexually explicit language" and there is sexually explicit language, I can understand that being a deceptive trade practice. They have said one thing and sold something else.

Is that what you guys are talking about, or are you talking about the code? They violated the code, not what they said on their product? Just a point of clarification.

Mr. PITOFSKY. Well, that is exactly where the issue is. Typically, advertisements for music or movies or video games don't say anything about the level of violence in the material. There may be a rating, a tiny little notice at the bottom of the ad. I am not sure if that is a material fraud right there.

But in any event, yes, if they said this is for all audiences or there is no problem here, there is no violence, and then there was a lot of violence, that would be deceptive. But that is not your typical ad for these materials. That kicks you over to the question of whether or not it is somehow unfair, and unfairness has been interpreted more liberally when children or young people are the targets of the marketing behavior, whether that is the violation here.

All I can say is we haven't brought that case in the past, and I want to be careful about suggesting that we could bring it in the future. If we can't bring it, as I said to Senator McCain last week, then I think perhaps legislation which makes that behavior an unfair trade practice if what ought to be considered; that is, if self-regulation doesn't work.

The CHAIRMAN. Thank you.

Senator DeWine.

Senator DEWINE. Thank you, Mr. Chairman. I did have an opening statement. Do you want me to give that now or do you want me to defer on that?

The CHAIRMAN. Why don't you wait until he finishes and then we will turn to your opening statement?

Senator DEWINE. That will be fine.

Let me ask you, if I could, to answer Senator Biden's question, I believe that what we are potentially talking about is both of what

you were referencing. Either you violate the code, you say you are going to do one thing and then you just don't do it, and the question we have raised is, is that deceptive. The other is obviously more micro and it is probably an easier case to make, and that is that you label it one way and it is clearly something else. So I think the answer is both.

Chairman Pitofsky, when Hilary Rosen, the President of the Recording Industry, testified before the Commerce Committee last week, she took exception with certain aspect of your Commission's report. She appeared to indicate that there were only three or maybe four instances where younger teen audiences were targeted to market products with explicit material. She also was of the opinion that the report demonstrated that the labeling and rating system was, in fact, adequate.

I wonder if you could respond to that testimony.

Mr. PITOFSKY. Before I do, Senator, in my opening statement I acknowledged the support of many on this committee for our project, and I certainly want to mention your very strong and constant support for what we have done here.

We did not set out to rate the rating systems. We weren't asked to do it and I thought it was beyond our mandate. As far as the music ratings system is concerned, speaking now only for myself, I do have some reservations about it. My principal reservation is that the rating is not done by an independent third party, but by the artists and their distributors. I think that is a matter of concern.

On the other hand, I can hear the response of the music people that maybe it is the best way, maybe it is not, but people aren't complaining. And indeed we looked at the documents and people are not complaining about the rating that is applied to most music lyrics.

As to how many instances where the music people overreached in marketing to young people, I don't know the answer to that. I can find out. I am pretty sure it is more than three or four.

Senator DEWINE. Mr. Chairman, Mr. Lowenstein, the President of the Interactive Digital Software Association, testified before the Commerce Committee that he strongly disagreed with the FTC's conclusions that game magazines, which the FTC concluded have a majority of under-17 readership, are not appropriate outlets for advertising M-rated games. His position was that because these magazines have a substantial share of older viewers, they are appropriate venues for advertising the kind of products at issue.

Could you respond to that, please?

Mr. PITOFSKY. Well, I think there is a point at which the readership, the viewership is mainly adults, and we have no business depriving the company of an opportunity to market their products to the adults. Therefore, if it is 10, 15, 20 percent kids, that is the price you pay in a free-market system. On the other hand, when the percentage of the market is 51 percent kids, 60, 70 percent kids, then it seems to me troublesome.

I would not like to see violent entertainment material broadcast on Saturday morning cartoon programs. That is the extreme example of that. Where you draw that line—is it 35 percent, 50 percent, some other—that is a point that reasonable people can argue over.

But there ought to come a point where there are so many young people in the audience that advertising to that audience is inappropriate.

Senator DEWINE. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Senator Feinstein.

Senator FEINSTEIN. Thanks, Mr. Chairman.

Mr. Pitofsky, I read your report with great interest. I think beyond any doubt it establishes that the rating system is badly broken. The question now is what can be done to fix it.

Giving the industry a limited antitrust exemption, carefully tailored, it seems to me is the kind of nudge that was spoken about in terms of saying, OK, industry, we are prepared to do this, now it is up to you to sit down together—and this is difficult because it is a very fragmented industry—and try to overcome what is out there and see that the system is enforced and corrected.

I was heartened to see that one large company did step forward, and that, of course, is the Disney company. Disney essentially said three things, as I understand. One, ABC, a subsidiary, will no longer accept advertising for R-rated movies in prime time before 9 p.m. in the evening. Second, Disney and its subsidiaries will not target audiences under 17 for R-rated movies. And, third, the company will provide additional information for parents about why a film has been rated R. I think these are very good first steps. I applaud Disney.

I would like to know, in your professional evaluation, how far these steps go, and if they were replicated by all other filmmakers, whether that would be a substantial improvement.

Mr. PITOFSKY. They go a long way, and that would be a substantial improvement, absolutely. I am very admiring of what the Disney company did in this area.

Let me just take one extra minute. There is an interesting aspect that you raise with your question. Most people are not only satisfied, but they approve the rating systems that are out there. If there is a criticism, it is the question of why something got that rating. They want more information.

Therefore, if there is any criticism, it is, well, you gave it an R rating, but tell us if it is bad language, nudity, drugs, violence, sex. So the Disney people in moving in that direction, I think, have taken a very constructive step.

Senator FEINSTEIN. Thank you very much.

Second, it is my understanding that the theater owners will not enforce the rating system. What can the industry do to require that level of enforcement? That would be somebody comes who is a juvenile, who is unescorted, and simply to make the decision not to sell a ticket to them, I would assume it means that the industry would have to hire someone in every theater to do just that.

Mr. PITOFSKY. Well, two questions there. What could be done? First of all, the movie owners, NATO, the National Association of Theater Owners, have taken the position that they will respect the rating system and they will improve their monitoring of young people buying tickets.

Senator FEINSTEIN. May I ask you just for clarification on that point, are they saying they will enforce it?

Mr. PITOFSKY. I am not sure they have said. No, I don't think they have. I don't think they have.

Senator FEINSTEIN. I intend to ask them when they are here.

Mr. PITOFSKY. It is hortatory. As a matter of policy, we want to move in that direction, but I don't believe there has been any suggestion that theater owners that essentially ignore their obligations under the NATO self-regulation program will be disciplined in any way.

Self-regulation means self-regulation, and therefore I would like the industry to take the lead here. One of the mildest forms of sanction would be to simply publish the names of the theater owners who don't pay any attention to this rule. I think that could do a lot of good.

Actually, I have the impression that more theater owners are checking age at the ticket booth before they will sell a ticket to a young person, but it is still around 50 percent, 46 percent, 50 percent. They could do more, they could do better, and my hope is they would be willing to do so.

Senator FEINSTEIN. Let me ask a third question. It is my understanding that the youngsters at Columbine, the two youngsters that carried out the murders, were obsessed with two particular video games, which I am not going to name, spent hours watching them.

What could be done essentially to encourage that industry to take some steps to clean up its act?

Mr. PITOFSKY. I suppose our main concern here is that those video games—and we have documents to indicate that—those very video games may very well have been marketed with a very young target audience in mind. I seem to recall documents talking about people who are 8, 10 and 12 years old. They ought to cut that out.

But now I want to go back to what Senator Hatch said, Senator Leahy said. The Government can't control that kind of issue. In the end, parents are going to have to pay attention to what kind of video games their children are playing.

Video games are not the sort of thing I ordinarily do, but I tried out the video games that we are talking about here and they are incredibly violent. But I think the obligation is on the parents to watch to see what their young people are doing, and for the industry not to be targeting young people with those particular video games after they said they ought to be available only for a mature audience.

Senator FEINSTEIN. Thanks very much, Mr. Pitofsky. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

If we could go to Senator Specter now.

Senator SPECTER. Thank you, Mr. Chairman.

Chairman Pitofsky, this hearing which focuses on the FTC is part of a broader effort by the Congress and others to find some answer to juvenile violence, and I commend Senator Hatch, the chairman, for the application of the antitrust laws, the FTC, and the Clayton Act dealing with unfair or deceptive practices.

Looking at the issue before coming to the antitrust question more sharply focused, your comments are diplomatic where you say although scholars and observers generally agree that exposure to vio-

lence in entertainment media alone does not cause a child to commit a violent act, there is widespread agreement that it is nonetheless a cause for concern. I think you understate the issue when you later testify about the video games being very violent in and of themselves.

One of the concerns that I have in seeking to get to the entertainment industry—movies, TV, records, video games—is to have a congressional view that there are many other components of the issue which need to be addressed. I have had a couple of meetings with Mr. Valenti. He was a very forceful spokesman for the movie industry. He has had a fair amount of experience at it.

Our Appropriations Subcommittee on Health, Human Services, and Education funding put about $800 million last year into a program, and are now in the final stages of upping the ante to almost $1.2 billion, looking at a variety of problems such as character education, counseling in school, safe schools and drug-free schools, and the impact of the National Institute of Mental Health.

We are going to be having a report from the Surgeon General in a few months which is going to look at the issues of violence in a broader context as to what we do about them. And my instinct is that if there is a broader congressional view which identifies the violence problems as only one part of the issue that we may have reason to expect a little less reaction that the entertainment industry is being picked on and being singled out when we identify so many other causes. That remains in the broader picture of the Congress with other committees.

But in focusing on the antitrust issues which are before us now—and there is talk about a limited antitrust exemption—I am always very leery about limited antitrust exemptions because it is very hard to anticipate the impact as to where they are going to go.

We have a limited antitrust exemption for pro football, and pooling of receipts, and we have created a situation where cities are being subjected to blackmail to keep teams or bring teams. So when you talk about amending the antitrust laws with respect to exemptions, I am very leery of that.

But you say, "An antitrust problem would arise if the self-regulatory program was a cloak for an anti-competitive scheme and not truly designed to protect young people from inappropriate exposure to violent material." My question is do you think that is realistic, that if there were self-regulation it would be susceptible to being anti-competitive to keep the little guys out, so to speak?

Mr. PITOFSKY. Well, I certainly have seen absolutely nothing to indicate the rating system as of now has ever been used in an anti-competitive way. Could it be used in the future? Well, we have seen self-regulatory schemes that were used as a cloak to get at new entrants with innovative products, so it is possible.

Senator SPECTER. Can you give us an illustration as to where you have seen that kind of an anti-competitive effect so that there might be some analogy to this situation?

Mr. PITOFSKY. Not a direct analogy, but the Supreme Court in *Allied Tube*. That is the leading case in this area. What happened was the raters, the regulators stacked the deck and got the group to agree that a particular product was unsafe. Their purpose was

really not to protect consumers. Their purpose was to drive an innovator out of the market. It does happen.

Senator SPECTER. Well, I understand that kind of a context, but I would have to see something which was much closer to this field to justify any antitrust exemption.

Thank you for an excellent report, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

We have 3 minutes left. There has been an objection to any committee meeting raised on the part of the minority, any committee meeting beyond 11:30 a.m. So I am going to apologize to all of you in advance, but I want to give the remaining time to Senator Biden.

**STATEMENT OF HON. JOSEPH R. BIDEN, A U.S. SENATOR FROM THE STATE OF DELAWARE**

Senator BIDEN. Thank you. You turn to me because I am the most concise member of the committee, Mr. Chairman. My reputation is that. I have a lot of questions for Cass Sunstein and some Jack Valenti. I guess I am not going to get to ask them today.

I will get right to it. Did your report in any way indicate whether or not the exposure of a manufacturer or a producer, a television show, a movie, a recording that was engaged in what some people would call predatory practices—that is, seeking to expose 12- to 16-year-olds to untoward material—that if you exposed who they were, if they were shamed, that it would increase their record sales or diminish their record sales?

Was there any notion of what merely outing, if you will, the bad guys would have on their performance?

Mr. PITOFSKY. No, no finding on that.

Senator BIDEN. One of the things, it seems to me—and I realize I am not going to get a chance to ask my questions, so I will just make a statement. My mom, a pretty smart woman, wondered here in this why the industry just doesn't do what doctors don't do enough and lawyers don't do enough and just point to the bad guy, just say, hey, look, there is xyz company, they are deliberately trying to peddle this stuff to 12-year-olds.

There is freedom of speech. I am worried about us crossing the line. I wanted to talk to Cass Sunstein about commercial speech and non-commercial speech, and why non-commercial speech is not protected as much. It is not an absolute standard that the court applies; it is a more lenient standard in terms of regulation of it, and so on.

But I just want the industry to know—and I respect a lot of people in the industry, particularly Jack Valenti, whom I have known for years.

Jack, freedom of speech works two ways. It seems to me one of the ways we could deal with this in Congress is not passing a law, but just start talking about how rotten certain people in the industry are, name them, hold hearings and talk about how bad they are. The only reason I wouldn't do that is it might—I don't know if there are any studies, but that may increase their sales. I am not being facetious.

The CHAIRMAN. They might start talking about how rotten we are, you know. You never know.

Senator BIDEN. Well, that is part of the deal already. That is already done, as it can be and should be.

But I guess what I am trying to say is it seems to me that we are going to be going through this for a long, long time. The idea that the industry is going to come up with a self-regulating system is, I think, somewhat unlikely. I think the idea that we are going to come to a consensus here on what laws we pass to regulate the industry that don't trample on free speech gets very tricky. I don't see why we need an exemption to the antitrust laws for the industry to get together now.

Is there anything in your base of knowledge as a professor at Georgetown, a dean down there, an incredibly well-informed scholar, anything you have seen, that you have read, any cases you are aware of that would prevent the industry getting together now and setting out a code of conduct, not an enforcement mechanism but a code of conduct? Is there anything?

Mr. PITOFSKY. Just a code of conduct?

Senator BIDEN. Just a code.

Mr. PITOFSKY. No. Even the old cases wouldn't——

Senator BIDEN. There is no requirement, so it really comes down to the enforcement mechanism.

Mr. PITOFSKY. Yes.

Senator BIDEN. That is the place where the rubber meets the road. Well, that is a bad metaphor these days. That is the place where we really get into the question of what constitutes a violation of the antitrust laws or not, correct?

Mr. PITOFSKY. Yes, absolutely.

Senator BIDEN. Well, obviously, the time is up, the hearing is over. But I look forward to having a chance to talk to the other witnesses at another time. And I am sure the chairman feels this way, too. We apologize to all of you for there being an objection to us meeting under the Senate rules. Someone on the floor of the Senate is not letting any committees meet under a rule we have relating to you can't meet beyond 2 hours after the Senate session goes in without unanimous consent.

Senator LEAHY. Mr. Chairman, if I might put a statement in the record saying that one of the reasons I understand an objection was made was the lack of judges being voted out of this committee. I will put the whole statement in the record.

The CHAIRMAN. Well, I thought we might be able to get by without another comment about that, especially since we have appointed almost as many as the all-time high that we have gotten through this committee.

But be that as it may, I apologize to you witnesses who have taken so much time to get here and have put forth such an effort. We were looking forward to hearing the rest of the witnesses, but any Senator has a right to object to committees meeting beyond 2 hours after the Senate comes into session. So, that objection has been made for whatever reasons, and we have to abide by it and I just want to apologize to all of you folks who have made such an effort to get here. We will try to continue this hearing at a future date, and please accept my apologies for today. There is not much I can do about it, other than abide by the rules.

So with that, we will adjourn until further notice.

[The prepared statement of Mr. Pitofsky follows:]

PREPARED STATEMENT OF ROBERT PITOFSKY

I. INTRODUCTION

Mr. Chairman and Members of the Committee, I am pleased to appear before you to present testimony of the Federal Trade Commission ("FTC") on the issue of the antitrust implications of entertainment industry self-regulation to curb the marketing of violent entertainment products to children. The Commission recently released its study concerning the marketing to children under 17 of violent entertainment products labeled or rated with parental advisories, and I discussed the conclusions of that study last week before the Senate Committee on Commerce, Science, and Transportation.[1]

The FTC is a law enforcement agency whose statutory authority covers a broad spectrum of the American economy, including the entertainment industry. The Commission enforces, among other statutes, the FTC Act[2] and the Clayton Act,[3] sharing with the Department of Justice authority under section 7 of the Clayton Act to prohibit mergers or acquisitions that may "substantially lessen competition or tend to create a monopoly."[4] In addition, section 5 of the FTC Act prohibits "unfair methods of competition" and "unfair or deceptive acts or practices," thus giving the Commission responsibilities in both the antitrust and consumer protection areas. The Commission also provides advice and guidance to states and other federal regulatory agencies on competition issues. Moreover, the Commission has experience applying antitrust principles across many different industries.

The FTC frequently considers issues involving self-regulatory initiatives, from both competition and consumer protection perspectives. In our competition role, we seek to prevent self-regulatory restraints that harm the competitive process by denying consumers the full range of choices or by preventing new forms of competition from emerging. We also play a role in counseling self-regulatory organizations on how they can perform certain collective functions without raising significant antitrust concerns. But we also seek to prevent self-regulation that unnecessarily restricts competition in the market. In our consumer protection role we have emphasized the importance of self-regulation and we work with industry groups to develop sound self-regulatory initiatives, often to complement existing laws.

We frequently hear concerns expressed that the antitrust laws pose obstacles to self-regulation efforts. We think a careful analysis of current case law and enforcement agency guidance will alleviate much of this concern. In particular, we believe it is unlikely that the antitrust laws prevent the entertainment industry from adopting and enforcing effective restraints against the target marketing to children of violent entertainment products that industry itself labels or rates with parental advisories. Self-regulation by the entertainment industry is especially important considering the First Amendment protections that prohibit government regulation of content in most instances. However, antitrust problems would arise if the self-regulatory program was a cloak for an anticompetitive scheme, and not truly designed to protect young people from inappropriate exposure to violent material.

II. BACKGROUND

On June 1, 1999, following the horrifying school shooting in Littleton, Colorado, the President requested that the Federal Trade Commission and the Department of Justice conduct a study of whether violent entertainment material was being advertised and promoted to children and teenagers.[5] President Clinton's request paralleled congressional proposals for such a study.[6] Revelations that the teen-aged

[1] See Prepared Statement of the Federal Trade Commission presented by Robert Pitofsky, Chairman, before the Committee on Commerce, Science, and Transportation, United States Senate, on "Marketing Violent Entertainment of Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording, and Electronic Game Industries," September 13, 2000.

[2] 15 U.S.C. 41–58.

[3] 15 U.S.C. 12–27.

[4] 15 U.S.C. 18.

[5] See Letter from William J. Clinton, President of the United States, to Janet Reno, Attorney General of the United States, and Robert Pitofsky, chairman, Federal Trade Commission (June 1, 1999) (on file with the Commission).

[6] Legislation calling for the FTC and the Justice Department to conduct such a study was introduced in both Houses of Congress following the Columbine incident. See Amendment No. 329 by Senator Brownback et al. to the Violent and Repeat Juvenile Offender Accountability and Rehabilitation Act of 1999, S. 254, 106th Cong. § 511 (1999); H.R. 2157, 106th Cong. (1999); 145

shooters at Columbine High School in Littleton had been infatuated with extremely violent movies, music, and video games reinvigorated public debate about the effects of violent entertainment media on youth. While opinions vary, many studies have led experts and public health organizations to believe that viewing entertainment media violence can lead to increases in aggressive attitudes and behavior in children. Although scholars and observers generally have agreed that exposure to violence in entertainment media alone does not cause a child to commit a violent act, there is widespread agreement that it is, nonetheless, a cause for concern.

In response to the President's request, the Commission, with financial assistance from the Justice Department, collected information from the motion picture, music recording, and electronic game industries regarding their self-regulatory systems and marketing practices.[7] The Commission requested information from the principal industry trade associations, as well as the major motion picture studios, the music recording companies, and electronic game companies. In addition, the Commission contacted interested government agencies, public health associations, academics, and parent and consumer advocacy groups. We reviewed a substantial amount of information collected from consumers through various surveys and polls, and also designed and conducted our own surveys for this study. Specifically, we conducted a survey of parents and children regarding their understanding and use of the rating and labeling systems, and how they made purchase decisions for these entertainment products. We also conducted an undercover survey of retail stores and movie theaters to see if unaccompanied children under 17 could purchase or gain access to products rated or labeled as inappropriate or warranting parental guidance. Finally, we reviewed Internet sites to study how they are used to market and directly access these products.

The report answers two questions raised by President Clinton when he requested this study: Do the motion picture, music recording and electronic game industries promote products they themselves acknowledge warrant parental caution in venues where children make up a substantial percentage of the audience? And, are these advertisements intended to attract children and teenagers? After a comprehensive 15-month study, the Commission has found that the answers to both questions are plainly "yes."

Although all three industries studied have self-regulatory systems that rate or label their products to help parents make choices about their children's entertainment, the Commission found that members of all three industries routinely target children in their efforts to advertise and market entertainment products that have been rated or labeled with parental advisories due to their violent content. The Commission believes that these advertising and marketing efforts undermine each industry's parental advisories and frustrate parents' attempts to protect their children from inappropriate material.

## III. THE COMMISSION'S FINDINGS

The Commission carefully examined the structure of these rating and labeling systems, and studied how these self-regulatory systems work in practice. We focused on the marketing of products designated as violent under these systems. We did not examine the content itself, but accepted each industry's determination of whether a particular product contains sufficient violent content to warrant parental caution.

The Commission found that despite the variations in the three industries' systems, the outcome is consistent: individual companies in each industry routinely market to children the very products that have industries' self-imposed parental warnings or ratings with age restrictions due to violent content. Indeed, for many of these products, the Commission found evidence of marketing and media plans that expressly target children under 17. In addition, the companies' marketing and media plans showed strategies to promote and advertise their products in the media outlets most likely to reach children under 17, including those television programs ranked as the "most popular" with the under-17 age group, magazines and Internet

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Cong. Rec. S5171 (1999). In May 1999, the U.S. Senate Committee on Commerce, Science, and Transportation conducted hearings on the marketing of violent entertainment media to children. See Marketing Violence to Children: Hearing Before the Senate Comm. on Commerce, Science, and Transp., 106th Cong. (1999). Based on these hearings, in September 1999, the Majority Staff of the Senate Committee on the Judiciary issued a committee report on this issue. See Majority Staff of the Senate Comm. on the Judiciary, 106th Cong., Report on Children, Violence, and the Media: A Report for Parents and Policy Makers (Comm. Print. 1999).

[7] The Justice Department provided the FTC with substantial funding and technical assistance to enable the FTC to collect and analyze public and non-public information about the industries' advertising and marketing policies and procedures, and to prepare the Commission's written report and appendices. The analysis and conclusions contained in the Report are those of the FTC.

sites with a majority or substantial (i.e., over 35 percent) under-17 audience, and teen hangouts, such as game rooms, pizza parlors and sporting apparel stores.

Further, most retailers make little effort to restrict children's access to violent products. Surveys conducted for the Commission in May through July 2000 found that just over half the movie theaters admitted children ages 13 to 16 to R-rated films even when not accompanied by an adult. Even when theaters refuse to sell tickets to unaccompanied children, they have various strategies to see R-rated movies. The Commission's surveys also showed that unaccompanied children ages 13 to 16 were able to buy both explicit content recordings and Mature-rated electronic games 85 percent of the time.

Although consumer surveys show that parents value the existing rating and labeling systems, they also show that parents' use and understanding of the systems vary. The surveys also consistently reveal high levels of parental concern about violence in the movies, music and video games their children see, listen to and play. These concerns can only be heightened by the extraordinary degree to which young people today are immersed in entertainment media, as well as by recent technological advances such as realistic and interactive video games. The survey responses indicate that parents want and welcome help in identifying which entertainment products might not be suitable for their children.

Since the President requested this study over a year ago, each of the industries reviewed has taken positive steps to address these concerns. Nevertheless, the Commission believes that all three industries should take additional action to enhance their self-regulatory efforts. The industries should:

1. ESTABLISH OR EXPAND CODES THAT PROHIBIT TARGET MARKETING TO CHILDREN AND IMPOSE SANCTIONS FOR NONCOMPLIANCE. All three industries should improve the usefulness of their ratings and labels by establishing codes that prohibit marketing R-rated/M-rated/explicit-labeled products in media or venues with a substantial under-17 audience. In addition, the Commission suggests that each industry's trade associations monitor and encourage their members' compliance with these policies and impose meaningful sanctions for non-compliance.

2. INCREASE COMPLIANCE AT THE RETAIL LEVEL. Restricting children's retail access to entertainment containing violent content is an essential complement to restricting the placement of advertising. This can be done by having retailers voluntarily agree to respect the codes and check identification or require parental permission before selling tickets to R movies, and not sell or rent products labeled "Explicit" or rated R or M, to children.

3. INCREASE PARENTAL UNDERSTANDING OF THE RATINGS AND LABELS. For parents to make informed choices about their children's entertainment, they must understand the ratings and the labels, as well as the reasons for them. That means the industries should all include the reasons for the rating or the label in advertising and product packaging and continue their efforts to educate parents—and children—about the meanings of the ratings and descriptors.

## IV. SELF-REGULATION AND ANTITRUST

The concern that the antitrust laws pose obstacles to self-regulatory efforts has some basis in historical fact. Antitrust enforcement has not always acknowledged the benefits of industry self-regulation. Early enforcement was deeply suspicious of any kind of cooperative undertaking among competitors, and not without reason. Trusts and cartels were common. In contrast, industrial product standardization was uncommon, the International Standards Organization ("ISO") did not exist, and the service sector of the economy was quite small.

However, technological innovations and the growing integration of the economy across regions spurred recognition among competitors and enforcement officials alike that some kinds of cooperation were important to efficiency and economic success, and beneficial to both sellers and consumers. Today, in our interconnected, increasingly networked world, many products such as computers, telecommunications, and ATM banking systems need compatibility so that consumers can make use of the widest and most convenient array of services.

The benefits of industry self-regulation are numerous. First, many product standards developed through self-regulation enhance safety. Industry self-regulatory bodies such as the American National Standards Institute ("ANSI") and the American Society of Mechanical Engineers ("ASME") have established thousands of voluntary standards regarding matters such as product design, fire prevention, and ethical standards of practice. By establishing a floor of common quality, such standards increase product acceptability and familiarity, which helps facilitate the emergence of new markets and the entry of previously unknown products and suppliers. This enhances competition and innovation.

Second, industry regulatory standards can improve the efficiency of industry members, leading to lower costs of production and distribution. For example, industry standards can reconcile diverse systems or products, permitting greater interchangeability of parts or more compatible designs. This is critical in computer, high-tech and network industries. As compatibility increases, so do opportunities to achieve increased economies of scale and scope, lower costs, and higher profits. Compatibility can also facilitate entry by new suppliers and growth for smaller firms, thus enhancing competition. And if offers consumers more choices by allowing them to interconnect or easily substitute rivals' products.

Third, industry regulatory schemes can provide useful information for consumers regarding product qualities, benefitting both consumers and competition. As the Circuit Judge Breyer explained, the promulgation of standards "provid[es] information to makers and to buyers less expensively and more effectively than without the standard."[8] Many industry associations have testing or consumer education programs, which are particularly important with resect to new or highly complex products or services. When consumers know what products to trust and how best to use them, they can make better choices, and competition on the merits is enhanced. Such information also facilitates the entry of new products and suppliers and promotes innovation.

In addition, an industry group may engage in self-regulation to enhance its reputation for fair and honest service by establishing ethical standards and disciplining in a reasonable manner those who do not abide by the standards. Through their power to repudiate and reward, industry self-regulatory bodies can rapidly achieve a high degree of compliance with this standards of competence, safety, design, or responsibility to consumers. In most fields, a good reputation with competitors, vertically-related industries, and consumers is vital to success. Few companies want to jeopardize that reputation by failing to abide by measures adopted by their peers. This risk of condemnation by other firms, and thus possible rejection by consumers, can be a potent sanction.

Of course, self-regulation can be anticompetitive. Competitors may use the self-regulatory process to disadvantage new rivals or new forms of competition, or to reduce the rigor of traditional forms of competition. When that happens, the antitrust agencies will bring enforcement actions. As the Supreme Court observed in connection with standard setting:

> There is no doubt that the members of [private standard-setting] associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm. Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products. Accordingly, private standard-setting associations have traditionally been objects of antitrust scrutiny.[9]

In sum, prevailing antitrust doctrine is not inherently antagonistic toward self-regulatory efforts. The Supreme Court has expressly confirmed the substantial value of such activities.[10] At the same time, the court has recognized the possibility that self-regulatory efforts can be abused. The role of government enforcers, therefore, is not to interdict legitimate industry self-regulation but to ensure that such efforts are consistent with the operation of competitive markets.

The antitrust laws are concerned about conduct that unreasonably restricts competition (e.g., increases prices, reduces output, lowers quality or variety, or lessens innovation) and harms consumers. Under the antitrust laws, the legal test applicable to most kinds of self-regulation is called the "rule of reason." This test has two components: (1) whether the conduct significantly restricts competition; and (2) whether there are legitimate justifications for the conduct that further, rather than restrict, the competitive process.[11] The rule of reason test requires a balancing of these two elements. Violations of this rule of reason test involve agreements that are not truly efforts at self-regulation, but rather are attempts to fix prices or reduce output.

The Commission has followed the Court's guidance and has supported those collective efforts that, on balance, have procompetitive benefits for consumers. A recent

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[8] See *Clamp-All Corp.* v. *Cast Iron Soil Pipe Institute,* 851 F.2d 478, 487 (1st Cir. 1988), cert. denied, 488 U.S. 1007 (1989).

[9] *Allied Tube & Conduct Corp.* v. *Indian Head, Inc.,* 486 U.S. 492, 500–01 (1988).

[10] *California Dental Ass'n* v. *FTC,* 526 U.S. 756, 781 (1999) (procompetitive potential of self-regulation in restricting certain discount advertising mandates "a less quick look" rule of reason test).

[11] See, e.g., *Chicago Board of Trade* v. *United States,* 246 U.S. 231 (1918).

example involves the efforts of the Direct Marketing Association ("DMA") to enable consumers to restrict their receipt of unsolicited direct mail or telephone direct marketing by providing a system that allows consumers to place their names on nonsolicitation lists. DMA submitted a proposal to the FTC that in essence would require member firms not to engage in mail or telephone solicitation of consumers on the nonsolicitation lists. In addition, DMA proposed to require each member to notify consumers of its information practices (for example, that the member sometimes sells its customer list to other firms) and to allow consumers to prevent the sale or other disclosure of their name, address, or other information.

In an advisory opinion, the FTC staff noted that the requirement that DMA members not engage in direct mail or telemarketing solicitation of consumers who request such treatment could be considered a direct restriction on solicitation. Nonetheless, the staff suggested that his requirement was not vulnerable on antitrust grounds, because it would restrict solicitation only of consumers who affirmatively communicated that they do not want the information that direct marketers would otherwise seek to provide. The restraint did not limit any information consumers desired. From another point of view, the restriction improved the information available to consumers and gave consumers new choices. Members firms now had to disclose their marketing practices to consumers and permit them to opt out. This option was previously unavailable to consumers, and was unlikely to become available absent government action or self-regulation.

Similar efforts to provide truthful information to consumers and to expand consumers' choices are likely to be found legal, as they would advance the purposes of the antitrust and the consumer protection laws.

## V. APPLYING ANTITRUST PRINCIPLES TO ENTERTAINMENT INDUSTRY SELF-REGULATION

The analysis of current case law and enforcement agency actions concerning industry self-regulation makes it clear under the special circumstances here, including the unique role of children in the marketplace and the nature of the material, that the antitrust laws are not a serious impediment to a rational, legitimate effort to control the target marketing to children of violent entertainment products labeled or rated with parental advisories. A look at some of the potential methods of restricting such marketing reveals considerable procompetitive benefits.

Industry self-regulatory efforts to discourage the target marketing and sale of entertainment media products with violent content to children can take various forms, such as: (i) creation and operation of rating or labeling systems to identify and classify those products that warrant parental caution; (ii) industry self-regulatory codes that prohibit members from selling, renting, or marketing such rated or labeled products in a way that undercuts the effectiveness of parental cautions; (iii) trade association rules that provide sanctions for failing to adhere to such a self-regulatory code; (iv) actions by manufacturers to discourage retailers from selling or renting to children violent products containing parental cautions; and (v) advertising restraints, such as codes that prohibit advertising violent products in media with a substantial underage audience. Although each of these measures has a somewhat different competitive implication, in this instance none is likely to violate the antitrust laws so long as the rules are sensibly designed and implemented to achieve the stated objective and do not restrict competition in ways unrelated to the basic objective.

Rating or Labeling Systems.—The creation and operation of a rating or labeling system to identify and classify entertainment products that warrant parental caution is unlikely to have a restrictive effect on competition, because a rating or labeling system generally would not restrict the products that may be produced or sold.[12] Producers and retailers are still free to make, market, display, and sell the products. Rather, the function of such systems is informational. Like a safety standard for products, rating or labeling systems convey information about the suitability of a product for a particular use. Rather than restrict competition in the market, a well-designed rating or labeling system can enhance the functioning of the market by

[12] However, manipulation of a rating system to put a product in a restricted category without substantial justification can be problematic. See *Allied Tube & Conduit Corp.* v. *Indian Head,* 486 U.S. 492 (1988) (manufacturers of metal pipe unlawfully manipulated the certification process to deny market access for manufacturers of plastic pipe). Participation in the process by persons without an economic interest in stifling competition can help ensure that the result is not anticompetitive. See id. at 501 ("When * * * private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition, those private standards can have significant procompetitive advantages." (citation omitted)).

enabling consumers to make useful comparisons and purchase decisions with minimal search costs.[13] A rating or labeling system may increase overall demand for products by reducing consumer confusion or uncertainty, and by increasing consumer confidence that the relevant attributes of the product will be as advertised.[14]

Restriction on Sales and Marketing to Children.—Industry codes that prohibit members from selling, renting, or marketing certain entertainment products to children constitute a higher level of self-regulation and could be challenged as agreements to restrain competition. So long as the industry limits the restraint to children and pursues fair procedural rules, competition in sales to the adult audience is not likely to be affected.[15] Here, the restraints would appear to reflect a determination by the industry, reflecting public concerns, that sale to children of entertainment products that warrant parental caution is inappropriate.[16] In this situation, the sale of such products to children could undermine the efficient functioning of the market by creating mistrust of the industry rating system and apprehension among consumers, possibly leading to a longer-term dampening effect on overall sales.[17] Consequently, restrictions on sales and targeted marketing to children appear likely to have a legitimate business justification if appropriately tailored.[18]

Disciplining Members for Non-Compliance.—Industry codes that impose disciplinary measures on members that fail to adhere to rules regarding the sale, rental, labeling, or marketing of restricted entertainment products to children are yet another step in the self-regulatory process. Possible forms of discipline might include expulsion from membership in the association or withdrawal of other membership privileges. Such rules could be challenged as an agreement to restrain the competition offered by the disciplined member. Although such disciplinary actions potentially could affect the disciplined member's sales to only to children but also to other

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[13] See *Clamp-All Corp.* v. *Cast Iron Soil Pipe Inst.,* 851 F.2d 478, 487 (1st Cir. 1989) (Breyer, J.). See also *Tropic Film Corp.* v. *Paramount Pictures Corp.,* 319 F. Supp. 1247, 1254 (S.D.N.Y. 1970) (independent movie producer sought preliminary injunction against movie studio's refusal to distribute an unrated film, alleging violations of Sections 1 and 2 of the Sherman Act and asking the court to enjoin Paramount and the MPAA from engaging in an asserted industry-wide refusal to deal in and distribute, advertise, and exhibit the film Tropic of Cancer without an X rating; court denied the motion, stating that the rating system was "not designed to eliminate competition, but to advise motion picture exhibitors and, through them, the public, of the content of films which the Supreme Court has held that states have the constitutional right to prevent minors under seventeen from viewing").

[14] See generally Self Regulation and Antitrust, Prepared Remarks of Robert Pitofsky, Chairman, Federal Trade Commission, Before the D.C. Bar Association Symposium (Feb. 18, 1998).

[15] Restrictions on sales of entertainment products to adults inevitably raise First Amendment issues. The Commission's support for enhanced industry self-regulation in the advertising context is motivated in part by our strong belief in the benefits of self-regulation, and in part by our concern that government regulation of advertising and marketing—especially if it involves content-based restrictions—may raise First Amendment issues. The First Amendment issues that have been raised in the context of restricting or limiting advertisements for media products are identified in Appendix C of the Commission's Report (First Amendment Issues in Public Debate Over Governmental Regulation of Entertainment Media Products with Violent Content).

[16] That the restraints have broader public origins, and are not imposed solely by agreement of competitors, is a relevant consideration under a rule of reason analysis. The Supreme Court has been skeptical of arguments that competitors alone should be permitted to restrict consumer choice on grounds that consumers may make "unwise" or "dangerous" decisions under competitive market conditions. See *National Soc'y of Prof'l Engineers* v. *United States,* 435 U.S. 679 (1978). In Professional Engineers, an association attempted to justify a ban on competitive bidding by claiming that such competition would lead to "deceptively low bids, and would thereby tempt individual engineers to do inferior work with consequent risk to public safety and health." Id. at 693. The Supreme Court rejected the asserted justification, explaining that "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." Id. at 696. In contrast, an agreement to refrain from marketing restricted entertainment products to children would reflect a broader societal view that children occupy a unique place in the marketplace.

[17] Further, it is not entirely clear that the prohibited conduct—selling to children products that warrant parental caution—is one that the competitive process is intended to foster. Professional associations often adopt ethical standards to govern members' conduct. Such agreements are permissible so long as they do not unreasonably restrict competition.

[18] Reasonable self-regulation to prevent targeted marketing of restricted products to children, therefore, could be defended within the parameters established by the ruling of the Supreme Court in Professional Engineers, 435 U.S. 679, where the Court held that the rule of reason analysis is limited to competitive considerations. Reasonable self-regulation to prevent marketing of such products to children can lend credibility to the rating system and thereby assist the function of the market. The situation in professional Engineers was different. In that case, an association attempted to justify a ban on competitive bidding—i.e., on price competition—by claiming that such competition would lead to "deceptively low bids, and would thereby tempt individual engineers to do inferior work with consequent risk to public safety and health." Id. at 693. The Supreme Court rejected the asserted justification.

segments of the market, they generally are unlikely to impose a significant restraint on competition in this situation unless the withdrawal of membership or of membership privileges would substantially impair the disciplined member's ability to compete.[19] This is unlikely in the entertainment media industry. Association membership generally is not so important that loss of membership would effectively exclude a firm from the market.

The use of clear and fair procedures in the design, implementation, and enforcement of such restrictions should further lessen any antitrust concerns.[20] Such procedural safeguards help ensure that the self-regulatory group's actions are impartial and not calculated to gain an economic or competitive advantage for particular members. Further, such rules may be justified because the prohibited conduct, if left unchecked, may subvert or distort the competitive process if other firms succumb to a temptation to compete at the same level, and consumers lose confidence in the industry's ability to market its products properly. Thus, appropriately designed self-regulating code mechanisms to enforce compliance with reasonably designed labeling restrictions also are likely to avoid antitrust problems.

Actions Against Retailers.—Entertainment media producers might also act collectively to discipline retailers that voluntary agree to and yet fail to observe restrictions on selling or renting certain violent-content products to children. Of course, there may be some antitrust risk if manufacturers seek to preclude a retailer from dealing with a non-member manufacturer, as in Fashion Originators' Guild where the Supreme Court held that a group boycott of retailers who dealt with price-cutting pirates violated section 5.[21] However, while issues relating to actions against retailers may raise some of the most difficult concerns, appropriately structured collective action of this type appears unlikely to violate federal antitrust laws.[22] Other avenues that may be pursued include seal programs and "Hall of Shame" type publication of offending retailers. And of course, entertainment media producers could individually opt not to deal with offending retailers.

Advertising Restraints.—Efforts by producers to place appropriate limitations on the targeted advertising of products that are rated or labeled as warranting parental caution need not restrict competition unreasonably. If, as suggested above, it is reasonable to impose certain restrictions on actual sales or rental of certain rated or labeled products to children, it should be reasonable under the antitrust laws to restrict advertising of these products to children. So long as the content of, and means available for, marketing these products to adult audiences are not unduly restricted, consumers will continue to have access to product information, and sellers can continue to compete for their patronage.[23] Consequently, self-regulation reasonably tailored to prevent the advertising of certain entertainment products with violent content to children should not impose a significant restraint on legitimate competitive activity. In fact, reasonable self-regulation should further the competitive process by focusing competitive efforts on legitimate marketing activities and by lessening the need for government regulation.

## VI. CONCLUSION

The Commission's exhaustive study of certain segments of the entertainment industry reveals a continuous pattern of target marketing to underage users. Industry self-regulation designed to eliminate this marketing is unlikely to violate the antitrust laws. The kinds of self-regulation that would be necessary are likely to be analyzed under the rule of reason. Thus, the Commission concludes that an exemption

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[19] *See Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.,* 472 U.S. 284, 296 (1985) (expulsion from a purchasing cooperative did not create a probability of anticompetitive effect "unless the cooperative possess[ed] market power or exclusive access to an element essential to effective competition").

[20] *See, e.g.,* Allied Tube & Conduit, 486 U.S. at 501.

[21] *See Fashion Originators' Guild* v. *FTC*, 312 U.S. 457 (1941) (group of designers of higher-priced dresses unlawfully boycotted outlets that dealt with manufacturers that "pirated" the higher-priced designs).

[22] If retailers voluntarily agree to such a restriction, the First Amendment should not be implicated. However, any legislation giving producers power over marketing by retailers may raise First Amendment issues. In *Denver Area Educ. Telecomm. Consortium, Inc.* v. *FCC,* 518 U.S. 727, 737–39 (1996), all members of an otherwise divided Court accepted the notion that First Amendment analysis should be applied to enactment of a federal statute itself where that legislative enactment alters the legal relations between private entities in a way that empowers one category of private entities to control or suppress the speech of other private entities.

[23] Even if a restricted advertising venue has a substantial audience suitable for the advertised product, as well as a significant underage audience, competition will not be significantly affected if firms have adequate access to other, permissible advertising venues that reach adults. Only if the various advertising or marketing restrictions, taken together, significantly restrict the flow of information to adult consumers might there be an antitrust or First Amendment concern.

from the antitrust laws is unnecessary for the industry to establish or expand codes that prohibit target marketing to children and impose sanctions for noncompliance, increase compliance at the retail level, or increase parental understanding of the ratings and labels.

[The prepared statement of Senator DeWine follows:]

PREPARED STATEMENT OF HON. MIKE DEWINE, A U.S. SENATOR FROM THE STATE OF OHIO

Chairman Hatch, thank you for holding this hearing today. I had the opportunity to testify just last week before the Senate Commerce Committee regarding the Federal Trade Commission's (FTC) recent findings on the marketing of violent entertainment to children. At that hearing, we heard convincing evidence indicating that the entertainment industry often employs marketing strategies designed to entice children to watch violent movies, listen to violent music, and play violent video games. These marketing ploys are encouraging kids to seek out the very entertainment that the industry's current voluntary ratings systems indicate is unsuitable for children.

At that hearing, we talked about the FTC's recommendations for implementing tougher marketing standards and ratings systems to deal with this pervasive problem. So, I asked the representatives from the entertainment industry who were there if they believed that additional antitrust protection would help them implement the FTC's recommendations. And, I told them that if that's what they need—if that's what it is going to take to get some action on this—then, by all means, the Antitrust Subcommittee is ready to help. They didn't answer my question, Mr. Chairman, so I will pose it again today to the industry representatives on the panel: Do you believe that additional antitrust protection would help you implement the FTC's recommendations?

But, before we talk more about those antitrust concerns, specifically, let me just say that I am very distressed by the FTC's findings. I am convinced that the entertainment industry is at war with parents. They are trying to get between parents and their children. And, it is our children who are the casualties.

The FTC's findings are alarming and reveal a double standard that prevails in the entertainment industry. For example, of the 44 movies rated "R" for violence that the Commission selected for its study, 80 percent of them were targeted toward children under 17 years of age. Marketing plans for 64 percent—that's two-thirds of those movies—contained express statements that the films' target audiences included children under 17, even though the "R" rating says children under 17 shouldn't watch those films without adult supervision. Unfortunately, we all know, and the FTC report confirm this, that many children do watch "R" rated movies without adult supervision. What that means is that even if the motion picture industry admits that a film is inappropriate for unsupervised children, they still encourage them to go see it anyway—knowing full well that many will do so without adult supervision. That defies the very logic of their own ratings system!

The industry says that it is up to parents to monitor what their children do. And, of course, it is up to parents to use these ratings as a guideline. But, the value of these voluntary ratings systems is destroyed when individual entertainment producers go out of their way to undermine parental decisions by enticing children to seek out inappropriate entertainment. That's just plain wrong.

So, where do we go from here? Last week during the Commerce Committee hearing, I encouraged the FTC to provide Congress with an annual report on the industry's marketing practices. With an annual report, we can continue to monitor the industry and their implementation of the FTC's recommendations.

In addition, today Senator Kohl and I sent a letter to the FTC, asking them to investigate the video game industry for possible deceptive trade practices. Specifically, most companies in the video game industry have pledged to not market inappropriate video game products to children, but, according to the FTC's report, many companies appear to be doing just that. That said, I would like the FTC to examine whether such conduct may constitute a deceptive trade practice.

Regarding specific antitrust concerns, some in the entertainment industry have raised antitrust concerns as an excuse—as an excuse for why they cannot get together, agree to some sensible rules or guidelines, and then police themselves. The FTC report indicates that such guidelines—if carefully drafted and reasonably enforced—will not pose any antitrust problems. As Chairman of the Antitrust Subcommittee, I tend to agree with that assessment. However, I also believe, as I think you do, Mr. Chairman, that as legislators and as parents, we have an obligation to

remove any possible barrier that the entertainment industry feels currently impedes their ability to devise tougher standards.

Also, several years ago, I worked with you, Mr. Chairman, as well as Senators Brownback, Kohl and Lieberman on legislation designed to give the television industry, specifically, antitrust protection because some in the industry believed it might be necessary. Mr. Chairman, I also co-sponsored your amendment to the Juvenile Justice bill to do the same thing for the entertainment industry as a whole. I will continue to support such legislation.

I will note for the record that I believe it is important that any legislation continue to be drafted narrowly. We need to make it clear that antitrust protection applies only to cooperative action that will prevent the pervasive practice of marketing violent and other inappropriate entertainment media products to children. We must also make it clear that we expect the entertainment industry to live up to its own ratings recommendations. Such legislation should take away any excuses for this industry to ignore its moral responsibility to parents—and especially to children.

It's time for the entertainment industry to live up to its responsibility, and I will support any legislation that will help them do just that.

Thank you, again, Mr. Chairman, for convening this hearing today.

[Whereupon, at 11:33 a.m., the committee was adjourned

# VIOLENCE IN THE MEDIA: ANTITRUST IMPLICATIONS OF SELF-REGULATION AND CONSTITUTIONALITY OF GOVERNMENT ACTION

**THURSDAY, SEPTEMBER 21, 2000**

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The committee met, pursuant to notice, at 8:03 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

## OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

The CHAIRMAN. If we can begin, good morning. We are back to continue our hearing from yesterday on violence in the media and what Government can do. I extend my apologies to all of you for what happened yesterday, with the minority objecting to any Senate committee business beyond the 2 hours. We will just chalk that up to election year politics.

I want to thank those of you who were able to come back for taking time to continue the hearing this morning. This is an important issue which should not get mired in politics, so I appreciate you all being here. So let me introduce our distinguished panel.

First, we will hear from Mr. Jack Valenti. Mr. Valenti is President and CEO of the Motion Picture Association of America and one of the great leaders of film in the world. He is a former top staffer with President Lyndon Johnson, somebody that I had a long relationship with. I appreciate you being here, Jack.

Our next witness is Ms. Hilary Rosen, if she is here; if not, when she gets here. Hilary is President and CEO of the Recording Industry Association of America, and she has been a leader in the field of digital copyright protection, as well as a strong defender of the arts. So we will be happy if Hilary can be here.

Next, we will welcome Mr. John Fithian, President of the National Association of Theatre Owners, whose legal experience, coupled with his time in the entertainment industry, provides a unique perspective at our hearing today.

Next, we will hear from Ms. Pamela Horovitz, President of the National Association of Recording Merchandisers.

Well, she will not be with us. I am sorry.

Mr. Douglas Lowenstein, President of Interactive Digital Software, is also unable to be with us today.

But we will welcome Mr. Crossan "Bo" Andersen, President of the Video Software Dealers Association. Mr. Andersen, a former assistant U.S. attorney, has used his legal expertise to defend and protect the First Amendment rights of video retailers, as well as consumers.

Now, we are very happy to have you begin, Jack, and we are going to make this record regardless of the time in the morning. I am sorry. I know this is really early for some of you folks, but I have been here since 6 a.m., so it is nothing for me.

**PANEL CONSISTING OF JACK VALENTI, PRESIDENT AND CHIEF EXECUTIVE OFFICER, MOTION PICTURE ASSOCIATION OF AMERICA, WASHINGTON, DC; HILARY B. ROSEN, PRESIDENT AND CHIEF EXECUTIVE OFFICER, RECORDING INDUSTRY ASSOCIATION OF AMERICA, WASHINGTON, DC; JOHN FITHIAN, PRESIDENT, NATIONAL ASSOCIATION OF THEATRE OWNERS, ALEXANDRIA, VA; AND CROSSAN "BO" ANDERSEN, PRESIDENT, VIDEO SOFTWARE DEALERS ASSOCIATION, ENCINO, CA**

**STATEMENT OF JACK VALENTI**

Mr. VALENTI. Mr. Chairman, you are going to get a terrible reputation in this town for punctuality. At any rate, thank you.

I want to congratulate you and Senator Leahy and your colleagues for addressing this issue in such a sensitive and sensible way, understanding the need for protecting constitutional freedoms, and I am grateful to you for that.

When you testified before the Senate Commerce Committee, I listened with interest in and approval of what you had to say. I agree with you that the entertainment industry has much to be proud of. I agree with you that parents should exercise more responsibility with their children. I agree with you that faith is indispensable in sustaining this free Republic and keeping its moral compass on course. And, finally, I agree with you that the motion picture industry has to stand up to its responsibilities, and I might add has been.

One of the things that I want to point out is that I am not an antitrust expert, which will come as a surprise, I know, to you and all of your committee. But I am not sure that we need this amendment yet. I agree with you that I think voluntary action is much better. We are looking at this, and in all candor I have to say we are not quite sure if we need it, but whether we can do all the things that you think ought to be done within the circumference of voluntary action.

By the way, I must say that the motion picture industry probably is more attentive to the needs of parents and what they have to have in helping shape the conduct of their children than any other industry in the United States. For almost 32 years, we have been giving advance cautionary warnings to parents so they can better judge what movies they want their children to see or not to see, and that is a power that only parents are authorized to wield.

For almost 32 years, we have been turning away revenues in order to redeem the obligation that we have made to parents. No other non-entertainment industry in this country can make that

statement. For almost 32 years, we have been monitoring parents' reactions to this rating system that we have proffered to them.

Each year since 1969, the Opinion Research Corporation, of Princeton, NJ, has been taking national surveys of between 2,300 and 2,600 respondents. The last one was just completed 2 weeks ago, and found that 81 percent of all parents with children under 13 found this rating system very useful to fairly useful in helping them guide their children's movie-going.

And I might add that in an independent survey which is contained in the FTC report, the FTC found a marvelous coincidence. They found 81 percent of parents that they checked were, "satisfied," with the rating system. Nothing in the last 32 years in this unfaithful, abrasive marketplace, Mr. Chairman, unless they are providing some kind of benefit that they aim to serve, in this case parents of America.

So I am saying to you that I believe that in a very stalwart and enduring way, we are standing up to our responsibilities.

Now, it is has been 9 days since the FTC report came out, and I must tell you that in those 9 days I have been going around the clock almost in conference calls and in face-to-face meetings in California with the major studios, where we are trying to put together our response, a responsible response, I might add, to the recommendations made by the Federal Trade Commission.

I am not prepared at this time to tell you exactly what we will say because we haven't finished our deliberations, but I can assure you that we will act on these. And I hope when we do that you and Senator Leahy and others on your committee will feel that we have had a serious response, and that our concern is evidenced in the way that we do respond.

Now, about the exemption, as I said, I don't know if it is required. I can certainly sympathize with the concerns of our allies and partners and customers about what some antitrust exemption might do to them. I can understand that. I will tell you this: we are looking at this and sitting down to talk about this with our allies and customers. And then if we feel that an antitrust exemption is needed to do the things that you and your committee feel we ought to do, then we will sit down with you and work out with you some carefully tailored, carefully shaped amendment that would allow us to do what it is that we think ought to be done.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Valenti follows:]

PREPARED STATEMENT OF JACK VALENTI

Chairman Hatch, I congratulate you for addressing the issue of media violence in a constructive manner that is respectful of First Amendment freedoms. I listened with attention to and approval of your testimony last week before the Senate Commerce Committee. I agree with you that there is much to be proud of in the entertainment product of this nation; parents must exercise responsibility in supervising their children; faith is important to provide a moral compass in our society; and yes, the entertainment industry must stand up to its responsibilities to America's parents and their children.

I am not an antitrust expert. Having said that, MPAA agrees that voluntary industry action, as distinguished from government intrusion, is the best way to address the exposure of children to inappropriate material.

MPAA has a long and distinguished record of voluntary initiatives aimed at recognizing and meeting its responsibilities to parents and their children. As you know, for almost 32 years, through our voluntary movie rating system, we have been offer-

ing advance cautionary warnings to parents about individual films so that parents can more watchfully and carefully make their own decisions about the films they want their children to see or not to see. Only parents, not government, should have that power.

For almost 32 years, we have been monitoring parents' reaction to movie ratings. In the latest of annual surveys conducted by the Opinion Research Corporation of Princeton New Jersey, with 2,300 respondents, the rating system got an all-time high in parental endorsement. This year some 81 percent of all parents with children under 13 found the movie rating system "Very Useful" to "Fairly Useful" in helping them to choose the films they want their children to see or not to see. Nothing lasts 32 years in this volatile marketplace unless it is providing a benefit to the people it aims to serve.

Moreover, we have stepped up our efforts to make information about ratings available to parents in many different locales. All advertising carries the rating and a legend that defines that rating category. We have web sites: (1) "filmratings.com" which allows a parent to get specific reasons for ratings, (2) "parentalguide.org" which offers to parents a guide to ratings systems for movies, TV programs, video games and music, (3) "MPAA.org" gives specific reasons for ratings, (4) Moviefone.com gives specific reasons for ratings, (5) Weekly bulletins which catalogue movies rated that week along with reasons for the ratings are sent to magazine, newspaper and TV movie critics. Reviews of just about movie released appear in publications and on television. There is no scarcity of ratings advice for parents.

For almost 32 years the movie industry has been the only segment of our national marketplace, including all business enterprises, that voluntarily turns away revenues in order to redeem the pledge we have made to parents. No other non-entertainment American enterprise can make that statement.

MPAA member companies have adopted and put in place an industry "code of conduct" which governs the marketing of films. All advertising/publicity (newspaper and magazine ads, outdoor advertising, previews of coming attractions, television spots, radio spots, Internet sites) for rated movies must be submitted and approved for general audiences prior to being shown to the public, and must contain nothing that most parents would find objectionable for their young children to see or hear.

Although I am very proud of MPAA's record, we are committed to do more. It has been nine days since the FTC Report was released. While I cannot tell you at this moment precisely how we will act on the FTC's recommendations, I can tell you that we will act. As I reported I would do, I am now in the process of sitting down with each studio represented by the MPAA and talking with them about what it is that we can and should do to do better in meeting our solemn obligations to parents.

Because we have not had time to flesh out an action plan, I cannot say that the antitrust amendment you propose is necessary to its success. Quite frankly, I would prefer to take actions that would not run afoul of current law. Even though the antitrust exemptions you have proposed are for our benefit, I understand and sympathize with the concerns such exemptions would create among those with whom we do business.

We are committed to addressing the recommendations made by the FTC. We will work within our industry and with our business partners in the theater, home video and television industry to fashion a plan of action that is effective and also consistent with existing antitrust law. If we find that there are things we should be doing, then we would like to work with you and other interested parties to fashion a narrow, carefully crafted amendment that specifically addresses the actions that need to be taken.

To conclude, Mr. Chairman, I commend you, Senator Leahy and other members of this Committee for addressing this very complicated, emotionally charged issue in a way that does no violence to our most cherished Constitutional protections. I appreciate your giving me this opportunity to appear before you and I look forward to working with you and the Committee as we move forward.

The CHAIRMAN. Thank you, Mr. Valenti.

We will turn to you, Ms. Rosen. We are very interested in what you have to say.

**STATEMENT OF HILARY B. ROSEN**

Ms. ROSEN. Thank you, Mr. Chairman. My full statement will be in the record, right, Mr. Chairman?

The CHAIRMAN. Without objection, we will put it in the record.

Ms. ROSEN. And I also want to associate myself with and ask that Pam Horovitz' full statement be placed in the record.

The CHAIRMAN. We will place that in the record as well.

Ms. ROSEN. She was sorry that she could not be here back again this morning. She obviously doesn't live here.

The CHAIRMAN. We understand. I apologize for not being able to pull that off yesterday, but that is just one of those things we have to put up with.

Ms. ROSEN. I understand.

I just want to share a few things with you today, and I have to most especially say good morning to the loyal staff of the Senate Judiciary Committee.

A few things this morning. I want to just remind you, Mr. Chairman, that we have made significant changes to the parental guidelines already that the FTC commented upon. I want to talk a little bit about my concerns about a potential antitrust exemption, and I want to compliment you and other members of the committee in the way that you, in a bipartisan way, have steadfastly avoided some of the constitutional pitfalls of other kinds of proposals in this area.

As a practical matter—and Chairman Pitofsky touched upon it yesterday—the FTC didn't really find problems with our rating system, although they have a personal problem with it. But they basically said that consumers and parents actually find it useful. I don't see much changing in that because the voluntary nature of the system is such that, with 26,000 albums released a year, it is simply not practical for this system to be administered any other way. Indeed, we don't simply have the complaint that things that should have been stickered weren't stickered. So in my view, the FTC's conclusions of parents is well warranted.

There were a few marketing concerns that the FTC raised, although in the music industry we are again somewhat unique because we often offer edited versions of music. And what was not clear in the FTC report was in those few instances where there were marketing questions that seemed to have been directed to younger teens whether those were edited versions of albums or not.

The one thing that the FTC did find, I know, is something that this committee is focusing on, which is that record retailers will sell stickered product in certain areas of the country to young people. This is a choice that they make for their own local community, and frankly I don't think it is something that we are very much in a position to do something about, nor do I think it appropriate for us to attempt to collectively try and stop.

And I guess that gets to the heart of the antitrust proposals because while, in concept, I agree with Jack, there is nothing wrong with an antitrust proposal, my concern would be what this committee's expectations would be 6 months or a year down the road, once such a proposal were passed, for actually what changes would take place in the marketplace.

And to the extent that the results were expected to be some sort of collective decision not to sell to certain retailers because they chose to have individual policies that fit their local community area, I think that is going to be a problem. Chairman Pitofsky put

it another way yesterday which I might not have chosen, but I think he sort of bluntly said we can't be trusted.

The other expectation that I think is problematic from the retail level is that simply because this committee exempts industries from engaging in individual activity, it doesn't exempt individual retailers from liability for withholding product or not having product available for individual adult consumers. So there are some significant problems with expectations on restricted sales, and Bo Andersen probably has some more views on that.

The second area where I have some concerns is the idea that we would fundamentally get together among industries and develop different rating systems. Music is different than movies, is different than video games, is different than television. And despite the potential uncertainty as to whether parents can accommodate these various systems in the marketplace, the marketplace does seem to be accommodating them. And we don't think, at least in the music community, we are going to be able to come up with a uniform rating system. So to the extent that that were an expectation of this committee, I want to lower those expectations because the last thing we want to do is disappoint the committee about their expectations.

So I would be happy to answer any questions that you have, and my statement has some more detail on those thoughts.

[The prepared statements of Ms. Rosen and Ms. Horovitz follow:]

PREPARED STATEMENT OF HILARY B. ROSEN

I am President and CEO of the Recording Industry Association of America. RIAA is the trade association of America's record companies. Our membership is as diverse as our music:

I speak for thousands upon thousands of people in the recording industry. Our views on youth violence and culture—just like those of members of this committee and others who testify before it—are not informed by their professional capacity alone.

They are informed by our dreams for our own kids—our concerns about our community—and our commitment to our country.

We are proud to be members of an industry who work with artists to create the most diverse music in the world filled with a multitude of musical styles, lyrical imagination and cultural experiences. And we are also proud of our 15-year track record of helping parents make informed choices about their children's entertainment.

Throughout that period, the issue of how entertainment affects children has wandered back and forth between the headlines from the back pages. But we have been consistent.

Today, as the issue finds itself back on the front pages again, we are proud to speak with you just as authoritatively and every bit as passionately as we have for each of the last 15 years.

Mr. Chairman, I want to explain how the recording industry's Parental Advisory system works, describe how it has been improved, respond to some of the FTC's criticisms, and address some of the antitrust issues this Committee is considering.

THE RECORDING INDUSTRY'S VOLUNTARY PROGRAM

The premise of our system is to balance an artist's right of self-expression with a parents' need for information to make choices based on their children's individual situation and their own values.

In 1985, we reached agreement on that approach with the National Parent Teacher Association and the Parents Music Resource Center. Within months, music releases with explicit lyrics, whether about violence or sex, were identified.

I should add that despite the emphasis at these hearings on recordings with explicit content, they comprise a relatively small proportion of our industry's output and the themes and language contained in all of our music is a part of today's society.

In an average retail store with 110,000 titles, about 500 will carry the Parental Advisory logo. That's less than one-half of one percent of that store's total inventory. And the major labels produce clean versions of nearly all recordings that carry the logo.

And let me assure you, Mr. Chairman, that this industry is a very tough customer. Recently a story in the New York Times carried this headline: "Recording Industry's Strictest Censor Is Itself."

Is this system perfect? Of course not. Even if it had been, entertainment is a constantly evolving industry.

So where our system was imperfect, We have tried to improve it. Where entertainment media evolved, we have tried to adapt to them.

Some thought we hadn't gone far enough—that parents couldn't spot the advisory easily.

So in 1990, we established a uniform, universally recognizable Parental Advisory logo. It is one inch by a half-inch on cassettes and CD jewel boxes.

We have launched extensive marketing campaigns to educate both parents and retailers about the system.

With the advent of the Internet, we recently created standards for applying the Parental Advisory logo to online sales.

We worked with retailers to use the logo in the way they feel best squares with their own values and needs. Some retailers, for example, chose not to sell recordings carrying the Parental Advisory logo to minors. As I indicated before, we cooperate with this decision.

Indeed, we welcome it as an indication that this system is working precisely as we intended—by giving people the information they need to make their own decisions based on their own values.

Our most recent attempt to fine-tune this system will take effect just over one week from now, on October 1, with the implementation of RIAA's new guidelines for the Parental Advisory label.

The revised guidelines cover the following areas.

First, they provide uniform standards to guide a label and artist in deciding whether to apply the Parental Advisory logo. They advise that this decision be made by weighing contemporary cultural morals. They clarify that the logo should be applied to single-track recordings when they are commercially released as well as full albums.

Second, these guidelines indicate that the Parental Advisory logo should be applied in all advertising of a recording that carriers the logo.

Finally, we created Internet guidelines for the first time. These guidelines call for a specific display of a parental advisory logo for on-line sales. The Parental advisory should be visible from the catalog pages all the way through to the shopping basket.

We have done all this in a manner that you have supported, Mr. Chairman—voluntarily.

Today, the recording industry's system has taken root in the public mind and the popular culture. They are instantly recognized. And 74 percent of parents say they are effective.

WHAT DID THE FTC FIND?

From what I can tell, the FTC's findings can be summed up in few sentences. Parents are satisfied with the industry's rating systems to the extent that 74 percent said so, but the FTC is not. The majority of CD's that carried the sticker were also available in edited form. So far as I can tell, there was one—I repeat one—specific incident of a television program where this music was advertised with a majority under 17 years of age audience and three more that were questionable. Hardly a sweeping industry condemnation. Indeed, since our guidelines are only voluntary and have never contained any age specific restrictions, there is nothing wrong with these companies leaving the decision to parents to determine what their kids should own.

There were a few instances where an album was seemingly marketed to younger teens (the actual specifics are not in the report) although since the FTC report does not delineate whether or not those albums had edited versions available, it is impossible to draw the conclusion that younger teens were subjected to anything that might have been inappropriate.

The report also says that all of its conclusions were reached prior to having the revised guidelines issued by the RIAA, which addresses these concerns.

The FTC recommends three things that all of the industry should do:

1. Establish guidelines for adversiting—we have
2. Increase compliance at retail—retailers make their own decisions

3. Increase parental understanding of the label—77 percent of the people have said that they are aware but we can always do more education

THE ANTITRUST ISSUES

Mr. Chairman, I want to compliment your longstanding effort to avoid the constitutional pitfalls of other proposals by encouraging the entertainment industry to voluntarily develop systems to better inform parents and consumers about explicit content contained in entertainment products.

I have no objection to the concept of simply permitting industry competitors to come together without fear of being sued under the antitrust laws to discuss ways to improve ratings and labeling systems—in fact, we do this already in the music industry even in the absence of an antitrust exemption. With regard to proposals to create a legislated antitrust exemption for certain purposes, I do have some concerns. Principally, I fear there may be an unstated expectation in the granting of this exemption that we develop a universal ratings system or create an "industry code" to prohibit the sale or marketing of certain products. In such an expectation lies the greatest danger of all—that of restraining sales to and by retailers of certain products based on subjective analyses of the content of protected speech. And to that, I respectfully but strenuously object.

As I have said many times before, we take our responsibility to warn parents seriously, and remain committed to advising consumers when an album contains explicit material that some may consider offensive.

We have a successful system in place, have recently adopted modifications to our guidelines, and like the Federal Trade Commission, believe we can implement these modifications with or without a specific exemption in the antitrust laws.

Our members cooperate with merchandisers who have quite different policies when it comes to selling labeled content: some, like KMart and Walmart, refuse to sell labeled product, and our members often create edited versions which are sold in these and other stores. The FTC found that 82 percent of labeled recordings have edited versions available.

Other stores sell both edited and unedited versions of music which is labeled with the Parental Advisory, and we are endeavoring to ensure that customers are adequately informed about what the Parental Advisory label means. We support a retailer's decision whether it is to carry only edited versions of recordings or to sell recordings based on the community in which they do business.

The point is that this is a matter of local choice and local concern. I believe the Committee will hear more about this from the National Association of Recording Merchandisers. Community standards differ, and we don't believe it would be appropriate for an organization like ours to dictate to local retailers what they can sell to their customers, so long as their customers are adequately informed about music lyrics that may be offensive because of explicit content.

Because we don't try to directly police sales to consumers or control retail merchandising, and because we have an effective voluntary system, we don't believe that antitrust concerns are raised by our actions, and would certainly oppose any exemption that would carry with it—explicitly or implicitly—a mandate to create a mandatory system or to police sales.

Indeed, efforts to restrict distribution of certain music in an official way is complicated immensely by changing technology. As Members of this Committee know better than most, music distribution today is vastly different than it was just five years ago. Thousands and thousands of songs and albums are posted by individual creators (or in some cases "infringers"!) who are distributing them to as wide an audience as possible without any formatted security or certainly without regard to potential explicit lyrics.

We have created guidelines for the Internet which we hope legitimate distributors will follow for music sales but the sheer volume of music available and surging onto the Internet, by individual artists and musicians of their own work, makes traditional sanctions and enforcement efforts in this area extremely difficult if not virtually impossible to monitor effectively.

THIS IS ABOUT MUSIC

This debate over music keeps coming back to the same thing. Despite all of the trappings and new ways to look at the issue, the fact is that some people just don't like the music. And that is not an antitrust issue or a labeling system issue—it is a freedom of expression issue.

The committee is concerned about violent and sexual lyrics. As a parent, so am I. But I want to apply my own values—the needs of my individual children—to decide what sources of entertainment are appropriate for them.

If we attempt to apply any other standard, no bonfire will be tall enough to burn the centuries of art that will have to go up in flames.

If violence is inherently demeaning to culture, then Verdi's Rigolletto—in which he opens a sack to find it contains his dying daughter—belongs on the pyre. So does Strauss's Salome—in which Herod presents Salome with the head of John the Baptist on a platter. For that matter the recent Dixie Chicks song "Earl" where a wife exacts revenge for an abusive spouse by poisoning his food is, in theory, equally violent. A new Steve Earle song talks about a death row killer, his crimes and the value of life and death.

Incidentally, nobody has asked for an advisory label or restricted sales for those CD's.

I fully understand those who, with utter sincerity, feel there is a difference between rap lyrics and grand opera or country music. But there really isn't.

Remember that these artists have been criticized. So were others like them, from Picasso to Stravinsky, Flaubert to James Joyce, Charlie Chaplin to Lenny Bruce to George Carlin to Imus—dismissed in their time. Classics are rarely recognized in the momentary heat of controversy.

And remember that the distinction between high art and the low road is deeply rooted in individual values and perspectives.

For each person who believes rap lyrics portray a foreign world, there is another who finds them deep and powerful because that world is all too real.

And above all, we must remember this: In our country, expression is not required to pass any test of validity, or even propriety, to be both permitted and protected.

After all, the test of whether America allows free speech is not whether it grants freedom to those with whom we mildly disagree. It is whether we protect the freedom of those whose views—and language—make us apoplectic.

Still, I testify today in a spirit of confidence and cooperation—because I speak here as both an executive and a parent.

I care as deeply and passionately about my own children as I know you do about your own. So do my colleagues in the recording industry, from artists to executives.

The real test of commitment to our youth is not how strongly each participant in this discussion can defend its positions or papers, but whether every party can work together to address the complex blend of challenges facing our children.

The last 15 years have proven that we can. And I am confident that we can do so for decades to come. Thank you.

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PREPARED STATEMENT OF PAMELA HOROVITZ, ON BEHALF OF THE NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS

Good morning. My name is Pamela Horovitz, and I am President of the National Association of Recording Merchandisers, the trade association for retailers and wholesalers of recorded music. I am also the mother of a ten year old.

NARM has supported the RIAA Parental Advisory Program since its inception in 1985. Over the years we have worked closely with RIAA on improving the program, providing feedback from retailers who hear directly from their store personnel and from parents about what is or isn't working. Because of that feedback, the language, look and placement of the logo have been refined, and more uniform guidelines for applying the label have been developed. We have collaborated with RIAA in publicizing the program to parents via posters and counter cards in the stores. This past year we have been working with our members and with RIAA to take the Parental Advisory online.

Our members use the Parental Advisory in a variety of ways. Some companies choose not to purchase recordings that carry the sticker. Some restrict the sale of these titles to 18 year olds, others to 17 year olds, others to 13 year olds. Some companies let the advisory sticker speak for itself, and some companies place the responsibility for how to handle the product in the hands of a local store manager who is frequently most in touch with the needs of a specific community.

Last week, the findings of the FTC report on industry practices with respect to violent entertainment were presented to the NARM Board of Directors. We welcomed this study as a useful snapshot of how the various segments of the music industry are addressing this important issue, and also as a benchmark of comparison between music, film, and videogames. We are in the process of publicizing the findings of the FTC to our member companies along with the newest guidelines for the Parental Advisory program.

We also discussed the recommendations of the FTC and concur with the conclusion that marketing plans fro entertainment products should be consistent with the content. We concur that the findings indicate that we need to redouble our efforts

to increase parental awareness not just of the music industry advisory, but of all the entertainment industry ratings programs.

The one recommendation with which we do not agree is the one which advocates restricting access to this music by anyone under the age of 17 and which characterizes this as "compliance" with a system that was never intended to be more than an informational aid to parents. Let me tell you why we disagree.

The FTC report has a lot of good information in it, but sometimes facts just don't tell the whole story. For example, here's one fact that every parent knows: kids mature at different speeds and in different ways. Some kids can play violent video games but have nightmares after a scary movie. Some kids' neighborhoods are scarier than any song will ever be. And Bobby Knight still isn't old enough to go see Gladiator or play Doom or listen to Eminem. So what is appropriate for one child isn't always appropriate for another child, even if they're are the same age, or go to the same school, or are even in the same family.

Several years ago, NARM and RIAA sponsored focus groups on the Parental Advisory program. We learned about the wide variety of responses that parents had to situations in which their kids had purchased records that carried the PA sticker. Some parents returned the CD to the store. Some parents threw the tapes in the trash and told the kids they had just blown their allowances by purchasing something they knew wasn't allowed. Other parents restricted play of such records to personal listening devices because older siblings had permission to hear the record, but younger ones didn't. Still other parents used the appearance of stickered product in the house to listen to the record themselves and later ask their kids why they were attracted to these songs. The parents' interactions with the PA program were as varied and unique as the kids themselves were.

If you try to restrict kids under the age of 17 from access to all of this music, either through direct legislation prohibiting the sale of such music to minors or through legislation that would enable content providers to boycott retailers who sell stickered or rated product, you are taking away every parent's opportunity to have these kinds of interactions. You are saying, in essence, that Americans don't have the right to practice their parenting in this area because Congress has decided that they aren't up to the challenge. "Parents, you don't have to monitor entertainment products anymore, because we've taken care of the problem by removing it from the marketplace." You would have us believe that all kids, once they hit age 17, will somehow magically be ready to hear, play, or watch adult material even though they haven't had the benefit of any dialog with their parents beforehand.

And you are also saying, at least in the case of the music industry, that five giant companies, (all of whom are now beginning to sell music over the Internet themselves) should get together and jointly decide to boycott any retailer they claim has not complied with the labeling system applicable to music products. Not only am I told that such an exemption from antitrust law would be unprecedented, but the opportunity for abuse—i.e., to eliminate from the marketplace retailers with whom the five major music companies are themselves now directly competing—is obvious and, quite frankly, frightening.

I believe America's parents and America's kids are much better served by a retail environment in which the practices of retailers are as varied as the families that they serve. This approach inevitably means that more kids, including my daughter, will come in contact with entertainment products that they're not yet ready to handle.

Each day that I send my daughter out the door, I know that potentially she will encounter language that I don't approve of or see behavior that I don't condone, not just in entertainment, but at the softball game, at the playground, at the grocery store. I will have nights when I'm too tired to do a good job of explaining a news story on TV, and times when I will lose my patience at the constant barrage of advertising masquerading as entertainment. But when I signed on for this job of parent, I knew I wasn't going to get to pick which nights would be sleepless and which battles would be easy. And even if I do a less than perfect job, I still think it will be better than letting some record company or retailer who doesn't know anything about me or my daughter decide what's appropriate for my family.

The music industry is filled with people like me, who aren't just in the business, but who are parents. We have worked hard at balancing artist's rights with parents' rights. We recognize that businesses need to thrive, but that kids do too. We will use all the tools available to us to keep on improving our understanding of this issue, including the feedback from parents as articulated in the FTC report. We know from talking to parents year in and year out that they prefer a voluntary information system to censorship and government regulation. Accordingly, we object to censorship by a private trade association of content providers that is given congressional authority to do what Congress itself is prohibited from doing directly.

The CHAIRMAN. Well, thank you.
Mr. Fithian, we will turn to you.

**STATEMENT OF JOHN FITHIAN**

Mr. FITHIAN. Thank you, Chairman Hatch. I want to echo the compliments on your leadership on this issue. I think it is particularly appropriate that this committee is bringing a reasonable deliberative approach to something that has been subject to a great deal of heated political rhetoric lately. I think the fact that you are willing to reconvene back at eight o'clock in the morning and take these issues seriously shows that this is a real legislative and deliberative process, and that is a welcome change from what we have seen recently in some of the campaign rhetoric.

My Association, the National Association of Theatre Owners, represents over 730 companies in this country that show movies on screens. They range from a few large national circuits with thousands of screens to hundreds of little mom-and-pop operators who have two or four or six screens. We operate in every State in the country. Last week, I was in Park City meeting with the theater owners in Utah and Colorado, talking to them about the rating system.

I think the theme I want to emphasize the most today is that enhanced voluntary entertainment rating systems can do much more to protect America's kids than can any government mandates. Concepts or proposals to take our rating system, to write it into law, and then enforce it with other civil or criminal penalties are a bad plan—violate the First Amendment, unenforceable in many ways. And we are delighted that this committee is seeking a different approach.

We have been partners with Jack and the MPAA for 32 years in our rating system, and frankly we are quite proud of it. We have turned away millions of dollars of business over those years, denying kids the right to come into our theaters.

And I wish Senator Feinstein were here this morning. We will go and talk to her personally. When she asked yesterday if theaters enforce the rating system, I think the emphatic answer is yes, and we know we have to do better. Last summer, we announced a national policy to I.D.-check kids for R-rated movies, the first time we put this policy into place just last June.

The FTC report commenced just a few months after we started that policy. Even so, the theater industry had the best enforcement record of any of the industries surveyed by the Federal Trade Commission. But we know that we need to do more. We are working to develop a Web site on ratings information that we can coordination with Jack's Web site at the MPAA.

We are distributing posters that explain what the rating system means, and encouraging all of our members to post them so that parents can learn even more about the system. And parents already know a great deal about our system. The highest numbers in the investigation were for awareness and support of the movie rating system. Ninety-one percent of the parents surveyed said that they knew about the system. And more importantly, 90 percent said they actually use it. They check the ratings and then they help to control and work with their children on their movie-going

choices. Those are numbers that I think any politician would die for, and that comes from 32 years of history of constantly working to improve the enforcement and the education about our rating system.

I will be meeting with all my members in the first week in November to discuss additional ways that we can respond to the report of the Federal Trade Commission because we do take it very, very seriously. We have to be careful of course, in what we decide to do and what Congress decides to mandate that we do.

If you have read the business page lately, you know that the exhibition industry is in some very troubled times. Four of my largest members have declared bankruptcy in the last few months, and I have several more who are very close to doing the same. So we need to find ways to balance the importance of improving our enforcement of our rating system without driving up labor costs and driving our members out of the market at the same time. But I am confident that we can do both.

You have asked about the antitrust exemption and how that might help us in our collaborative discussions of what to do with the rating system. Let me say that we are very willing to work with you and Senator Leahy on crafting appropriate language.

As you know, Chairman Hatch, over a year or two we did the very same thing on the baseball antitrust exemption, and I appreciate your leadership on that. I think if it were needed, we could come up with appropriate language. We cannot support the current draft of the amendment that was proposed on the Senate floor last year. It is flawed in several ways.

First, the exemption doesn't apply to us. It only applies to the producer of the product, so we could not be allowed to be involved in the discussions. And as Jack knows even better than I, we have been involved together with the Motion Picture Association and the studios for 32 years. It is very much a partnership. So if there were to be any legislation, we would like to be able to be at the table. With or without legislation, that is what we are going to do. Jack and I have committed, and we have already begun talking about ways that we can work together to improve the system.

Second, as Chairman Pitofsky illuminated yesterday, a blanket antitrust exemption is dangerous if it doesn't take care of certain types of violations. We would not support an amendment, for example, that allowed group boycotts of our theaters—a classic per se violation. There are other types of per se violations that we would like exempted from the bill—allocations of product or price-fixing, refusals to deal. Those types of classic per se violations that traditionally Congress has written out of antitrust exemptions need to be included in whatever legislation this committee wants to consider.

And the reason for that, as Chairman Pitofsky alluded to, is quite simple. If a small theater for some reason is not liked by the studios—and I am not saying this would happen, but theoretically it could—the studios, under the guise of enforcing the rating system, could deny all their product to that theater. That would put the theater out of business, obviously. The way the amendment is drafted currently, we couldn't even be involved in that discussion under the antitrust exemption about whether or not the studios

would deny the product. That being said, there are other ways that an antitrust exemption could be used to increase enforcement and education, and I would be very willing to work with your staff and Senator Leahy's staff if that were deemed necessary.

Again, I agree with Jack that we are taking the steps we need to take. The FTC report and these congressional hearings have been very helpful in pointing out areas for improvement and we are working on them. And we think our own voluntary efforts are the best way to go. But if Congress must legislate, we would be delighted to work with you on what the language should look like.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Fithian follows:]

PREPARED STATEMENT OF JOHN FITHIAN

Chairman Hatch, Senator Leahy, and other members of the Committee. I am pleased that the Senate Committee on the Judiciary is holding this hearing. I especially appreciate your leadership in bringing a deliberative approach to a set of difficult issues that have been subject to much heated rhetoric.

I serve as the President of the National Association of Theatre Owners, or "NATO." NATO is the largest trade association of theatre owners and operators in the world. We represent over 700 movie theatre companies, ranging from a few large national circuits with thousands of screens, to hundreds of small operators with only a few screens. Our members operate more than 27,000 movie screens in the United States, or approximately 70 percent of all domestic screens. NATO members operate in every state in the union.

THE VOLUNTARY RATING SYSTEM AND THE FTC REPORT

The theme of my remarks is simple—enhanced voluntary entertainment rating systems will do more to protect America's kids than will any attempt by the government to censor speech and regulate commerce. For over thirty years the movie rating system has served to provide America's parents with the information necessary to make informed and responsible decisions about their kids' movie going choices. NATO co-founded the system with the Motion Picture Association, and we continue to work on improvements.

There are two components to our efforts—enforcement and education. For three decades our members have turned away millions of dollars in business to enforce the ratings. And we work continually to tighten enforcement.

Last year, NATO announced a new national ID-check policy for "R" rated movies. We have distributed materials and training video tapes to our members to assist them in their enforcement efforts. I travel around the country often to speak to our theatre managers about the importance of the system.

We note that our enforcement record is the best of the three industries surveyed by the Federal Trade Commission. The Commission found that theatre circuits included in their investigation "have taken responsible measures to increase enforcement of the minimum age requirement for the purchase of tickets to R-rated features since the Columbine shootings."

That said, we certainly are not satisfied with the enforcement numbers reflected in the report and will be redoubling our efforts. The FTC's investigation began just a few months after we adopted and announced our new ID-check policy. We are confident that as our members continue to train their employees, and as we develop new ways to tighten up enforcement, our numbers will improve even more.

Education is equally important. The rating system is a shared responsibility between the entertainment industry and America's parents. We work to make ratings information available while parents must strive to become informed. As the FTC noted, over 80 percent of America's parents are satisfied with the movie rating system.

What's more important than parental satisfaction is the fact that parents use the ratings. Ninety-one percent of the parents surveyed by the Commission indicated their awareness of the moving rating system, and 90 percent said they consulted the system and restricted their child's movie going as a result. Those numbers were considerably higher for movies than for the other industries surveyed for the report.

Through increased education, NATO hopes to involve more parents in their children's movie-going decisions. For example, we are distributing free ratings posters for our members to display so that even more parents can learn what the ratings

mean. We are developing a new NATO web site which will contain ratings information, and will be linked to the MPAA's rating sites as well. At our annual membership meeting in November, we will be discussing additional ways to provide information about the ratings, and to improve enforcement.

ECONOMIC VIABILITY OF THE THEATRE INDUSTRY

As we and Congress examine our system, we must work to improve education and enforcement without driving up costs. If you have read the business page lately, you are aware that the motion picture exhibition industry faces very tough economic times currently. Four major theatre circuits have declared bankruptcy in the past few months, and others may follow soon. Better policies won't mean a thing to a theatre that closes it doors to the public. We must redouble our efforts to improve the workings of the voluntary system while keeping a careful eye on costs. I am confident we can do both.

The Commission recognized these pressures in its report, by noting that "theaters must strike a delicate balance between the need for enforcement (including the costs associated with measures beyond identification checks) and the need to maintain a friendly and welcoming environment" (parenthetical included in the original).

The release of the Federal Trade Commission's report last week, combined with these congressional hearings, provide important government oversight to the entertainment culture in our country. We got the message. Now we industry leaders must take what we've learned from the oversight and apply it, by working within the voluntary system.

FIRST AMENDMENT ISSUES

As I did at the beginning of this testimony, I emphasize the voluntary nature of the system. Proposals to codify the industry's voluntary code, or to impose a new government system, would be tied up in the courts for years and eventually declared unconstitutional under the First Amendment.

The FTC report, which advocates continued self-regulation, notes that "most commentators agree that any law requiring the rating or labeling of entertainment media products would raise the [constitutional] issue of 'compelled speech'." Moreover, courts have uniformly invalidated the enforcement of the industry's ratings by government officials. See *Drive-In Theatre* v. *Huskey,* 305 F.Supp. 1232 (W.D.N.C. 1969), aff'd 435 F.2d 228 (4th Air. 1970) (enjoining sheriff from prosecuting exhibitors for obscenity based on "R" or "X" rating); *Engdahl* v. *Kenosha*, 317 F.Supp. 1133 (E.D.Wisc. 1970); and *MPAA* v. *Specter,* 315 F.Supp. 824 (E.D.Pa. 1970).

Although oversight is healthy and productive, Congress must also be cautious not to threaten the industry to improve its voluntary system or face government regulation. Courts have found that industry self-regulation can be unconstitutional if it is undertaken merely because of the threat of government regulation. As the FTC report noted, the First Amendment applies to private activity if "the government has exercised coercive power or provided such significant encouragement that the challenged action can fairly be attributed to the government." See FTC Report, Appendix C at 2 (citing *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982); *Lugar* v. *Edmonson Oil Co.,* 457 U.S. 922 (1982); and *Blum* v. *Yaretsky,* 457 U.S. 991 (1982)). Furthermore, government pressure compelling industry self-regulation has been found to violate the First Amendment. Cf. *Writers Guild of America, West, Inc.* v. *FCC,* 423 F.Supp. 1064 (C.D. Cal. 1976) (holding that the television industry's adoption of the "family viewing hours" was unconstitutional state action because if was adopted in direct response to the threat of government regulation).

Some in Congress and on the campaign trail have repeatedly threatened the industry with regulation if additional self-regulatory steps are not taken. Such continued threats would increase the likelihood that additional self-regulation will be successfully challenged in court. The proper role of Congress is oversight—to highlight the need for further education and enforcement without threatening unconstitutional government regulation. Working together, Congress and industry can improve on a rating system that has grown over thirty years.

ANTITRUST LEGISLATION

Chairman Hatch's staff has also asked us to consider legislation which would grant a limited antitrust exemption to permit the industry to work together better on matters involving the voluntary rating system. NATO is willing to work with the committee to fashion appropriate legislation in this regard.

In an earlier career, I worked with the leaders of this very committee on legislation to clarify the application of the antitrust laws to Major League Baseball. We knew then that antitrust exemptions are dangerous, and that antitrust legislation

must be carefully crafted. As Senator Leahy said during the baseball debate, "Our antitrust laws are intended to protect competition and benefit consumers. No one is or should be above the law." And as Chairman Hatch cautioned, we must ensure that antitrust exemptions do not allow businesses to "conspire and collude without restraint—the precise practices the antitrust laws were designed to prohibit."

If the committee were to consider antitrust legislation, it should do so very carefully. For example, legislation should not exempt any so-called "per se" violations, such as price fixing, boycotts, refusals to deal or allocation of territories. When Congress has considered antitrust exemptions in the past, it has tended to protect the application of antitrust scrutiny to per se activities.

Sometimes Congress used general language to cover per se violations. See the limitations section of The Television program Improvement Act of 1990, P.L. 101–650, Section 501(d). Other times Congress specified which type of actions would be exempted and which would not. See the limitations section of The National Cooperative Research Act of 1984, and The National Cooperative Production Amendment of 1993, codified at 15 U.S.C. Sec. 4301(b).

As for the "rule of reason" violations that might be exempted by the bill to help facilitate useful dialogue within the industry, we are willing to work with the committee to craft appropriately limited language.

We would also recommend that the committee consider limiting the duration of any antitrust exemption legislation. The Television Program Improvement Act, for example, expired after three years.

The movie rating system began in 1968. Since that time it has been tooled and re-tooled to reflect societal changes as they relate to parents, their kids and the movies they see. This is both the beauty and the strength of our voluntary system. We look forward to working with the committee and others in our industry to improve upon this valued parental tool.

Thank you for the opportunity to testify, and for your leadership on these important issues.

The CHAIRMAN. Well, thank you, Mr. Fithian. I am serious about getting an antitrust exemption and I would like all of your input on how that might best be written. I am not caught up in any language, although we did pass the amendment 98 to 0. So I am serious about it because I can't see where—well, we will get into that in a minute.

Mr. Andersen, we will take your testimony.

**STATEMENT OF CROSSAN "BO" ANDERSEN**

Mr. ANDERSEN. Good morning, Mr. Chairman. Retailers welcome the opportunity to appear this morning, and appreciate the attention that this committee has brought to the need for bringing more information to parents about the content of movies and video games. I should say in opening that retailers, video retailers in particular, believe that motion pictures and video games should be marketed consistent with the age groups to which they are intended.

I do represent video retailers and video distribution companies, but I am also the father of a soon to be 4-year-old daughter and two post-teen children, all of whom I am immensely proud of, but that is another story. I also should mention on the personal side that I started my legal career in the Antitrust Division, and for me that was a high calling for more than 10 years.

I mention that because I do want to address at least briefly some of the problems presented by the chairman's suggestion and the chairman's amendment to the Child Protection Act involving an antitrust exemption for these purposes.

First, concerning the notion of a need for more intensive enforcement of ratings in video stores, particularly rental video stores, there is simply a misconception. There is no evidence of a failure

of denying access to children of M-rated video games and R-rated movies in the rental context. The Federal Trade Commission report recognized this in several ways, and the core of their recognition of that was a statement that in the home video context the involvement of parents is required. By the very nature of the rental arrangement in video stores, parents are involved.

I admit that perhaps too few parents know that they can make individual choices about products to be rented to their children individually for their children in home video stores. We have a program which is called Pledge to Parents, branded that way, and that brand is available to any video retailer. The Blockbusters and Hollywoods among the video retailers have this program under different names. But what it means is that parents can register their individual choices, more restrictive or less restrictive, for their individual children. And I doubt that we should intervene between parent and video retailers, or that Congress would want to.

Where parents have not registered a specific choice or control, video retailers default to the ratings and do not rent R-rated videos or M-rated video games to children under 17, unless there has been that level of parental intervention and parental consent.

This program is not an 11th-hour conversion. This has been a program available in video stores for at least 10 years, and there is no evidence that it is not working well and that it is not serving the needs of parents. These programs have been called ratings enforcement programs. I think of them as parental empowerment programs, and as I said, parents have used this system for more than a decade.

But I think equally important to this debate that the committee will have is that parents often just start with the video and video game rating. They use other rating systems, the Internet. The Hollywood Reporter yesterday listed 14 family-focused Internet sites rating and reviewing movies. They use religious publications, and they use probably most widely the advice of neighbors and family members.

So, often, the MPAA rating or the ESRB rating is only the start of a process. And, often, parents use the MPAA rating as only a starting point and then make individual adjustments, setting either a higher or a lower age for their individual children for access to M-rated and R-rated products. In other words, we think that there is some danger in elevating a single, monolithic rating system and denying parents the attention that they would give to other systems, other ratings, other reviews that they might prefer to trust.

We ask the committee to examine on the antitrust question how studio executives might use the antitrust exemption that is contained in section 405. And here I am not speaking of the sham use of the exemption that Chairman Pitofsky referred to yesterday. Instead, I am referring to the potential use of the antitrust exemption and the boycott power specifically with reference to the enforcement of supplier-run ratings programs.

Let me ask the chairman to consider a hypothetical. Suppose an independent rating system, perhaps entitled Movie Ratings 2001—this independent rating system, one of several, assume that it had been too hard, if you will, on the products of the major motion pic-

ture studios and that it was hurting their sales to video rental and hurting box office.

An exemption would allow the studios to boycott a retailer who promoted these ratings in his advertising or enforced these ratings in a more restrictive way as a default in his stores. I agree that perhaps it is more likely that the exemption would be used to manage the inventories of independent video stores or small chains of video stores.

By that I mean how would studio executives react to the dominance of unrated products in a video store which was cutting their access or cutting the shelf space of the major releases? Would they be authorized to agree to quotas of unrated and rated products, and apply it to retailers? Could they prohibit the use of competing rating systems because it might confuse consumers?

And then there is the issue of unrated films. Presumably, if the rating systems will remain voluntary, there will always be unrated product. But any significant economic imperative that the studios could place by way of a threatened boycott on video retailers that would limit or cut shelf space for unrated product would create an economic imperative to rate the product and cut off a choice, and would make the rating systems less than voluntary.

What concerns us most as retailers, however, is probably the loss of freedom that retailers have enjoyed. Traditionally, home video retailers have not purchased directly from the studios, and this fact, plus the first sale doctrine, has given them a high degree of freedom over the stocking of and the rental and sale of products once the studios have sold them into the stream of commerce.

Video retailers chose to share this level of control with parents with respect to the content for youth and children, and I think that opportunity for sharing that control in varied ways should be continued. Particularly, our view that the antitrust exemption would be dangerous and problematic is supported by the absence of any evidence that these controls are not working well in the home video rental context. In our view, this would be problematic and perhaps a little bit dangerous.

Beyond that, Mr. Chairman, we are willing to consider and work with the committee to consider a voluntary approach in which retailers would participate in establishing and enhancing ratings and finding ways to voluntarily enforce them at the retail level. But the exemption that is proposed in section 405, we feel, is currently unnecessary.

Thank you.

[The prepared statement of Mr. Andersen follows:]

PREPARED STATEMENT OF BO ANDERSEN

Mr. Chairman: Thank you for inviting the Video Software Dealers Association (VSDA) to testify at this hearing on antitrust law and the entertainment industry's efforts to restrict marketing and sales of violent entertainment to children.

My name is Bo Andersen and I am president of VSDA. VSDA is a not-for-profit international trade association for the $17 billion home entertainment industry VSDA represents over 3,000 companies throughout the United States, Canada, and 22 other countries. Our core membership comprises the full spectrum of video retailers (both independents and large chains), as well as video distribution companies.

VSDA is pleased that the recently released Federal Trade Commission (FTC) study, "Marketing Violent Entertainment to Children," supports what we have long

said: There is no better place than a home video store for parents to control the content of the movies and video games to which their children have access.

I want to assure the committee that VSDA and its members are concerned about the level of youth violence in our society. While we have no expertise in the relationship between depictions of violence in entertainment and real-world youth violence, the home video industry believes it has a role to play in helping parents ensure that their children do not gain access to movies and video games that the parents deem inappropriate for them. We want to share with you the actions video retailers take to assist parents in this regard through ratings education and effective, voluntary parental control programs.

While the home video industry supports and indeed actively utilizes voluntary ratings programs, we strongly oppose proposals to grant antitrust immunity to the producers of entertainment so that they may enter into restraint of trade agreements to enforce their ratings systems at the retail level. These proposals would allow entertainment media executives to gain unprecedented control over the sale and rental of movies and video games by video stores, to the detriment of both video stores and their customers.

FTC REPORT AND VIDEO RETAILERS

Individuals who have not read the FTC report will assume, given the report's recommendation for retail enforcement of motion picture and video game ratings, that the FTC found deficiencies in ratings enforcement by video stores.

In actuality, the FTC report portrayed the rental of movies and video games positively. Specifically citing the policies of Blockbuster and Hollywood Video, the FTC acknowledged that "[p]arents have significant controls over the videos their children rent because of limitations established by the major rental outlets" and the rental of videos "requires a degree of parental involvement." VSDA believes these findings are true also for the vast majority of other chains and independent video retailers, as video stores of all sizes have effective parental control policies.

The FTC report also found that the only major brick and mortar sellers of videos that it examined that had policies restricting the sale of R-rated videos to children were stores that also rent videos. It correctly noted that retailers that both sell and rent videos are "more attuned to the issue of parental consent in this area."

In light of the findings regarding video stores, the FTC's statement that "[c]hildren's access to violent movies on home video differs according to whether the video is rented or purchased," would have been more accurate had it said that access differs according to whether the rental or purchase occurs at a video store or a non-specialty retailer.

In sum, the FTC study does not support the inference that there is a ratings enforcement problem in video stores. Quite the opposite is true.

Regarding sales of movies and video games outside of video stores, most of which are conducted by mass merchants, enforcement of industry ratings is more difficult to manage. We are pleased to note that major retailers such as Wal-Mart, Kmart, and Toys R Us have resolved to work through the logistical barriers to ratings enforcement in their stores. VSDA is prepared to serve as a facilitator and manager of more widespread adoption of ratings-based "stops" and "ID checks" in checkout lines of mass merchants. We feel that the "checkout time" devoted to this effort will be understood by consumers and will reflect positively on mass merchants that choose to adopt such approaches.

VOLUNTARY USE OF INDUSTRY RATINGS.

The FTC report encouraged retailers to check IDs or require parental permission before selling or renting R-rated movies and M-rated video games. It also suggested that steps be taken to better educate parents about movie and video game ratings by providing ratings information in retail outlets. I am pleased to report that these steps are already being taken in video stores, and have been for many years.

The video retailers of VSDA agree with this Committee that the best control is parental control. As stated in "Children, Violence, and the Media: A Report for Parents and Policy Makers," issued by the Committee in September 1999: "[P]arents should realize that there is simply no substitute for close adult supervision of, and involvement in, the lives of their children. Parents must take the time to learn what their children are viewing and playing." We are also pleased to note that the FTC acknowledged that "parents must become familiar with the ratings and labels, and with the movies, music, and games their children enjoy." Accordingly, we insist on approaching this as an issue of enforcing "parental control" rather than enforcing ratings.

VSDA-member retailers have taken action to aid parents in making more-informed entertainment choices for their families. They do this through voluntary ratings enforcement programs, such as the company-specific programs used by VSDA members Blockbuster, Hollywood Video, and Movie Gallery and VSDA's own "Pledge to Parents" program.

The centerpiece of Pledge to Parents, established by VSDA in 1991, is a commitment by participating retailers:

1. Not to rent or sell videos or video games designated as "restricted" to persons under 17 without parental consent, including all movies rated "R" by the Motion Picture Association of America and all video games rated "M" by the Entertainment Software Rating Board.

2. Not to rent or sell videos rated "NC–17" by the Motion Picture Association of America or video games rated "Adults Only" by the Entertainment Software Rating Board to persons aged 17 or under.

In addition, as part of the Pledge to Parents program, many retailers solicit from customers written instructions regarding what types of movies and video games can be rented or purchased by family members. For instance, a customer can limit all of his or her children, regardless of age, to videos rated "G" by the Motion Picture Association of America, or indicate that one child is permitted to rent "G" games while another can rent "PG–13." Thus, our voluntary system allows parents, if they so choose, to be even more restrictive than any industry- or government-enforced system would be.

The program also includes educational materials to make parents more aware of and better utilize movie and video game ratings.

In 1999, we updated our Pledge to Parents materials and provided the revised kit, at no cost, to each retail member of VSDA.

Each Pledge to Parents kit contains the following:

• *Customer Flyer and Parental Consent Form*—These materials provide information about the Pledge to Parents program and allow customers to indicate their restrictions or authorizations on video and video game rentals and sales by their family members.

• *Terminal-Topper Sign*—This sign, to be displayed near the cash register, draws customers' attention to Pledge to Parents and the retailer's ratings enforcement policy.

• *ID Check Sign*—We encourage retailers to post this sign, which indicates that IDs will be checked when appropriate, throughout their store.

• *MPAA Theatrical-Size Ratings Poster*—This poster provides customers with movie ratings information to further assist them with their selection of movies.

• *Video Game Ratings Poster and Brochures*—The poster and brochures are designed to help customers make informed decisions concerning their children's video game rentals.

We encourage VSDA members to make maximum use of the Pledge to Parents materials and proving ratings and content information to customers of all ages. We also strongly urge our members to check IDs whenever appropriate. We are pleased to report that the response to this program from our members has been extremely positive.

VSDA educates consumers about the entertainment ratings systems and video stores' voluntary parental control programs. As part of the relaunch of Pledge to Parents, we conducted a substantial public outreach campaign that reached millions of consumers through television, radio, newspapers, and the Internet. The purpose of this campaign was to make parents aware of the resource available to them in video stores.

The voluntary Pledge to Parents demonstrates our industry's commitment to the communities in which we live. Video stores and their employees are part of the neighborhoods where they are located. They often know their customers by name. They know what is acceptable and what is not acceptable in their communities. They take pride in the entertainment they bring into people's homes. And they realize that their reputations and livelihoods are on the line every time they sell or rent a movie or video game. Video retailers do not put their businesses at risk by providing to children movies and video games that their parents don't want them to have.

ANTITRUST EXEMPTION TO ENFORCE INDUSTRY RATINGS SYSTEM

VSDA is opposed to providing the producers of entertainment with antitrust immunity to enter into restraint of trade agreements to enforce their ratings systems at the retail level.

Sections 404 and 405 of the Juvenile Justice Act (H.R. 1501), as passed by the Senate, would grant antitrust exemptions to the entertainment industry for agreements to reduce the impact on children of violence in entertainment products. Section 405 would exempt from the coverage of the antitrust laws agreement among entertainment industry organizations to ensure enforcement of ratings and labeling systems by video retailers, theater owners, and others. Section 404 would provide a separate exemption for agreements to develop and disseminate voluntary guidelines "to alleviate the negative impact" of movies, video games, and other entertainment that contain depiction of violence, sexual activity, or criminal behavior, so long as the guidelines do not result in a boycott of any entity.

We oppose Section 405 and similar proposals for three principal reasons. First, they would effectively give the manufacturers of entertainment products a monopoly over movie and video game ratings systems.

VSDA supports the ratings systems of the Motion Picture Association of America and the Entertainment Software Rating Board. In fact, we have formally endorsed each, in 1987 and 1994 respectively. We do not object to an antitrust exemption for entertainment industry organizations to develop and disseminate guidelines regarding the content of their products, should Congress determine that such authority is necessary. However, we strongly oppose granting the motion picture studios and game manufacturers the power to strip from parents the right to make decisions regarding what movies and video games are right for their individual children.

The customers of video retailers are sophisticated consumers who rely on a variety of reviews and rating systems to determine their viewing choices. They seek guidance from family, friends, reviewers, critics, religious leaders, and informed retailers. There are numerous opinions in the marketplace concerning movies and video games, but none of the sources of opinions currently have the power to impose their views on others. Most importantly, parents are currently the final arbiters of whether, for example, their 15-year-old may rent Schindler's List or Saving Private Ryan, two highly acclaimed R-rated movies that many parents may definitely want their teenagers to see. An antitrust exemption for entertainment industry executives would place competing independent ratings systems at a competitive disadvantage, place at risk the current parental control over whose guidance to follow, and grant ultimate authority to entertainment industry executives, the very individuals who create the product that is being evaluated.

Second, we must not lose sight of the implications such an exemption would have for copyright law. The power of copyright owners, recently expanded by Congress to unprecedented levels, would be expanded once more to create a dangerous exception to the first sale doctrine.

The first sale doctrine, as codified in Section 109 of the Copyright Act, provides that the owner of a lawfully made copy of a movie, video game, or other copyrighted work is entitled, without the consent of the copyright owner, to sell or transfer possession of that copy. The first sale doctrine is the legal underpinning of the home video retailing industry. It gives retailers the right to rent and sell prerecorded videos and video games without the authorization of the copyright holder. The United States' longstanding policy against restraints on alienation of property has served us well for more than 200 years, and we believe it would be a very dangerous precedent indeed to given copyright owners the right to continue to control the distribution of copies of their works after they have transferred title to them.

VSDA has fought hard through the years to maintain the independence of video retailers and their ability to sell and rent movies and video games to the public without interference from the motion picture studios and game manufacturers.

VSDA was formed, in part, as a response to the motion picture studios' efforts to abolish the first sale doctrine and prohibit the rental of movies. It is difficult to believe today, when home video represents approximately one-half of the total domestic film revenues of the studios, but the studios tried to destroy the video rental industry in its infancy. Legislative initiatives such as the "Consumer Video Sales/Rental Amendment of 1983" (H.R. 1029.S. 33, 98th Congress) sought to require anyone wishing to rent videotapes to obtain prior permission from the copyright owner, which would have effectively precluded video rentals. VSDA was instrumental in defeating efforts to undermine the first sale doctrine. In doing so, we ensured the phenomenal growth of the home video industry and contributed to the financial health of the studios.

An antitrust exemption would jeopardize our hard-won right to rent movies and video games and allow entertainment industry executives to dictate to video stores what they can sell and to whom.

Third, we oppose granting the manufacturers of entertainment products an antitrust exemption to control retail distribution because such an exemption could seriously weaken competition at the retail level.

There is a very real possibility that the studios would use this authority to force video stores to adopt a certain product mix or buy specific genres or titles. They could even use it to preclude stores from offering unrated product or "NC–17" or other adult videos and video games. This would deny adult consumers the full range of entertainment choices to which they are entitled under the Constitution.

Given the studios' historic antagonism towards home video, the studios might use the antitrust exemption to restrict competition within the industry and engage in otherwise impermissible group boycotts.

We also fear that the enforcement power would be used selectively. It is natural to assume that the studios would be loathe to use the enforcement power against major retailers from whom they gain significant revenue, and would be more willing to use it against retailers who have little economic power.

Restrictions on product, group boycotts, and selective enforcement are most likely to be directed at independent video retailers, a market segment that has shrunk tremendously in recent years due to changing business models and heightened competition. Because of the nature of video retailing, retail consolidation financially benefits the studios.

We must also add that it is inconceivable to us, given the excellent job that video retailers have done in empowering to keep R-rated movies and M-rated video games out of the hands of their children, that Congress is seriously considering granting ratings enforcement authority to the very companies the FTC has determined routinely target those products to children.

In addition to being unwise, we believe the antitrust exemption proposals for enforcement by entertainment media producers are unnecessary given the voluntary programs of video stores I mentioned earlier to enforce parental control, and the recent actions of major mass-merchant retailers to institute similar programs.

We believe a more appropriate course of action would be for the home video industry to police itself. Consistent with the FTC report's call for entertainment industry trade associations to "actively monitor compliance [with self-regulatory programs] and ensure that violations have consequences," VSDA will examine whether we should require our members who engage in video retailing to certify that they have effective policies for ratings education and of parental control, and impose sanctions on members that violate those policies.

Allowing the home video industry to regulate itself would reassure parents that they can rely on their neighborhood video stores to help them control their children's access to entertainment. It also would allow VSDA to police conduct that the public believes is inappropriate, but for which there is no other effective or legal control mechanism. Due to its expertise and experience in video retailing, VSDA is best suited to evaluate alleged violations and has a strong interest in ensuring the integrity of its programs.

It is our opinion that existing antitrust laws allow us to take such actions and we require no further legal authority. However, if the Congress disagrees with our interpretation, we would not oppose legislation clarifying our authority in this regard.

CONCLUSION

Finally, we must keep in mind that, in addressing the issue of violence in American society, the government cannot infringe the constitutional rights of video retailers and consumers—or of parents to raise their families as they see fit. Ultimately the responsibility for raising children lies with their parents, not the government and certainly not video store clerks. As you said last week, Mr. Chairman, we must "recognize that the responsibility for what our children are watching is not the burden of someone else but our own."

The nation's video stores are doing their part to make sure that America's children are not exposed to R-rated movies and M-rated video games without their parents' consent. The FTC report supports the premise that home video provides parents with the greatest control of their children's movie watching and electronic game playing. Voluntary programs, such as VSDA's Pledge to Parents, are the best way to help parents exercise that control, and appropriate self-regulation by the retail community can ensure that such programs exist and are utilized.

The CHAIRMAN. I want to thank all of you. I am going to submit the questions because I have gotten you up early enough here. Some of the questions are very specific and very legally-oriented, and I would like to submit questions to you and have you answer them by next Monday. We will get them to you today and if you

can get the answers back by next Monday, it will help us in making a final determination on what to do.

Now, look, there are a lot of problems here. There is a lot of demagoguery about the movie industry, the music industry, the videotape industry, the Internet, and so many other aspects of entertainment in our society today. Everybody knows my feelings about protecting children from salacious and detrimental materials.

On the other hand, I am really offended, to be honest with you, with politicians who are trying to make hay at the expense of these industries, when there are great aspects to every one of your industries. And you know it and I know it. Our country would not be nearly as good today or as viable or as enjoyable or as successful today in creating materials that literally uplift if it wasn't for your respective industries.

On the other hand, we do know that there are people in your industries who don't give a darn about anything. They don't care about our children, they don't care about any moral high road in our society. In fact, there is a moral bankruptcy that is developing in this country that is starting to bother a lot of people.

But to demagogue about it and to scream and shout about it and to act like you can pass laws that are literally going to enforce or impose voluntary rules and regulations on your respective industries is just total BS, and you know it and I know it. And it is done for political purposes, and that is offensive to me.

That doesn't mean we can't be political in a political institution like the U.S. Senate or the Congress of the United States, but I think we ought to be really careful about working on these First Amendment rights and freedoms in ways that really make sense.

This hearing is very important because my own personal feeling is it would be helpful to you to have a limited antitrust exemption, if it is written properly, that would provide a means whereby we might be able to get rating systems that can be enforced voluntarily by you, without Congress trying to put you through years of litigation contesting the constitutionality of what really are political statements by Congress rather than true constitutional approaches.

In the process, a lot of people are critical because people within the industry themselves do the rating, and therefore it can't be valid and it is a phony system. I don't agree with that, but I do think that we need to resolve a lot of problems. I would like to have your input on just how rating systems should be done, who should do them, how should they be enforced, what is voluntary. These are all questions that are very important to me.

I respect each of your industries and I see a lot of good that comes from your industries, and I do see a lot of bad that occasionally crops up that really can hurt our children.

In the music industry, Hilary, you know as well as I that there are things being put out today that are extremely detrimental, although for the life of me it is hard to understand the lyrics sometimes. The music overrides the lyrics anyway. But on the other hand, there are some bad things.

Jack, you know that in the movie industry there are some very detrimental things that hurt everybody in the industry. And there are some people who don't give a darn about anything except the

almighty buck. I think it is important to be profitable so that you can continue, but it is also important to have some measure of consideration for the community as a whole.

Well, I don't mean to lecture you folks. I just have been grateful to have your testimony here today. I am sorry to put you through this eight o'clock thing, but I am not going to put up with that stuff. If they want to play that game, we will start our hearings at eight o'clock, and we will at least have until 11:30 a.m. everyday, it seems to me.

But it is important that you showed up here today. It is important that you gave the testimony that you gave, and it is important that you answer any questions that we send to you so that we can approach this in an intelligent, non-political, or at least as apolitical as we can way that might help to resolve some of these problems so that parents and communities and churches and other institutions will have some degree of confidence that what we are doing in these various entertainment industries is not totally detrimental to our children and our society.

So with that, rather than ask a lot of questions and keep you here any longer, I would rather put them in writing so that you can take some time to answer them. These are significant and important questions that we will put into the full record.

[The questions of Senator Hatch can be found in the appendix.]

The CHAIRMAN. We will keep the record open until next Monday for anybody who would like to submit statements. I know there are some of you who would like to have testified here today. We will take your statements and make them part of the official record.

So with that, I appreciate all of you coming and we will adjourn until further notice.

[Whereupon, at 8:41 a.m., the committee was adjourned.]

# APPENDIX

## QUESTIONS AND ANSWERS

SEPTEMBER 21, 2000

RESPONSES OF JACK VALENTI TO QUESTIONS FROM SENATOR HATCH

*Question 1.* The entertainment industry has repeatedly cited potential antitrust violations as a reason for not developing voluntary codes of conduct with a meaningful enforcement mechanism. In response, the Senate has already voted 98 to 0 for an antitrust exemption that removes the legal barriers to acting responsibly. In light of the concerns expressed by your industry, please elaborate on why you would not fully support a limited exemption that gives you legal certainty to collaborate, develop and enforce a set of responsible codes of conduct that could limit the exposure of minors to material your industry finds unsuitable.

Answer. The Motion Picture Association and its member companies are fully committed to acting responsibly in fulfillment of our solemn, long-enduring obligations to parents. That commitment is at the heart of voluntary initiatives, like the movie rating system and the MPAA advertising code, that are designed to help parents make their own decisions about what films they want their children to see or not to see, and to limit exposure to material that parents may find objectionable. Moreover, as a result of these obligations taken very seriously by us, the movie industry has been the only segment of our national marketplace, including all business enterprises, that for almost 32 years has voluntarily turned away revenues in order to redeem the pledge we have made to parents. Thus far the antitrust laws have not stood as barriers or prevented us from undertaking such voluntary, responsible efforts.

As I indicated in my testimony, while I am proud of MPAA's record, we are committed to doing more in light of the findings and recommendations of the FTC Report. I am confident that the antitrust laws similarly will not get in the way of our determined efforts to respond to the FTC's findings. I am confident we can work within our own industry and with our partners in the exhibition, home video, and television industries to respond in a way that does not impose unreasonable restraints on trade in contravention of existing antitrust principles.

As you know, the member companies of the MPAA and Dreamworks SKG recently announced a 12-point set of voluntary initiatives that responds to each of the FTC's recommendations. I attach a copy of these initiatives—which were delivered to you prior to their being made public on September 26—for your reference. Each of these initiatives is fully consistent with current antitrust principles and, I believe, when implemented, will address in a serious and significant way the concerns raised by the FTC Report. Included in these initiatives is a commitment to work with theater owners—who are our partners in the voluntary rating system—to improve on-the-ground enforcement. These initiatives mark significant new commitments on the part of our studios and should be given a chance to work. If in implementing these initiatives we find that there are things we can and should be doing to better fulfill our commitment to parents, and that antitrust law prohibits us from doing those things, then we will work with you and other interested parties to fashion a narrow, carefully crafted exemption that specifically addresses the actions that need to be taken.

*Question 2.* In a legal memorandum prepared for the Recording Industry by David Kendall, it was concluded that a government imposed labeling system—like that proposed by Senator and Vice Presidential candidate Lieberman—would likely be

unconstitutional. Such a labeling system would be unconstitutionally vague or overbroad, and would like not be the least restrictive means of dealing with the government interest in limiting violence to minors. Kendall's memorandum suggested, "Perhaps the most obvious alternative involves augmenting collaborative efforts among the media industries to expand currently existing voluntary labeling endeavors." Isn't that what the antitrust exemption I have proposed would allow you to do, without the fear of antitrust liability?

Answer. I agree that a government imposed labeling system would be constitutionally deficient for a host of reasons, including those you describe. I commend you for your longstanding commitment to addressing these issues in a manner that does not compromise First Amendment freedoms. I also agree that renewed attention to voluntary rating and labeling systems is the logical and most effective alternative in addressing concerns regarding exposure by children to material that parents may deem objectionable. It is not clear to me, however, that an expansion of these existing endeavors, as referred to in Mr. Kendall's memorandum, would run afoul of antitrust principles thereby necessitating an antitrust exemption.

*Question 3.* Professor Sunstein, a member of the President's Advisory Committee on Digital Television and Violence, noted in an article that members of the industry have raised antitrust as the reason to oppose developing "any code." He also noted, "[T]his is very odd, because in private discussions, members of the NAB treated the possibility of an antitrust violation as extremely good news. It is not often that high-level corporate officials are smiling when they discuss the possibility that certain action would be found unlawful." How would you respond to Professor Sunstein's comments?

Answer. I do not speak for the NAB. I wish only to note that any consideration of an antitrust exemption by the NAB and its members must be viewed in the historical context of the NAB's experience with antitrust scrutiny of the earlier-adopted NAB code of conduct. the voluntary initiatives of the motion picture industry have rightly not been the subject of similar scrutiny, and those initiatives continue to be effective and well-received by parents. I think if it far better to seek solutions that would not be found unlawful under current antitrust principles as unreasonable restraints on trade. One resorts to antitrust exemptions only when otherwise lawful means prove insufficient or ineffective in meeting our obligations to parents.

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RESPONSES OF JACK VALENTI TO QUESTIONS FROM SENATOR LEAHY

*Question 1.* The Congress has been debating the need and usefulness of antitrust immunity for parts of the entertainment industry for years. As a result of the efforts of Senator Paul Simon in the 1980s, an antitrust exemption for television broadcasters became law for three years from 1990 and 1993. After that antitrust exemption sunset, the Justice Department issued opinions in 1993 and 1994 that echo the position of the FTC in 2000: namely, that no antitrust exemption is necessary for the creation and operation of a rating system for products inappropriate for children or for the enforcement of such a rating system against other manufacturers or retailers of such products. Are you aware of any incidents since 1994 where concern over antitrust liability has stopped any particular entertainment company from participating in or enforcing a rating system?

Answer. I do not recall any incidents since 1994 where concern over antitrust liability has stopped an MPAA member company from participating in or enforcing a rating system.

*Question 2.* Since self-regulatory systems that are designed to protect children would be acceptable and legal under the antitrust laws as reasonable restraints on trade, do you have any concern that a grant of antitrust immunity would only be necessary to shield unreasonable steps from antitrust scrutiny?

Answer. You are right to point out that an antitrust exemption is necessary, by definition, only to shield conduct that would otherwise be prohibited as an unreasonable restraint on trade. I most respectfully petition the Congress and industry not to rush to hasty judgment, and in the doing to abandon reasonable, voluntary, and lawful mechanisms for addressing the needs of parents and children. Such a swift and unnecessary action would also significantly undercut the public confidence in the existing rating system and the partnerships that have made it successful.

For nearly 32 years the motion picture rating system has been a working partnership between the movie studios and theatre owners, as well as through our relationships with video retailers. All this rapport works to the benefit of parents. Studios, theatre owners, and retailers are committed to working together to improve the usefulness and enforcement of the existing rating system. We are committed to con-

tinue our service to parents, without running afoul of the antitrust laws. To suggest that otherwise unreasonable and unlawful measures—and thus an exemption from the antitrust laws—are now somehow necessary to the success of the voluntary rating system absolutely contradicts the high parental endorsement that parents accord the movie rating system (81 percent of all parents with children under 17 find the rating system 'very useful' to 'fairly useful' and comports with the FTC own independent poll which found that 81 percent of parents are 'satisfied' with the voluntary movie rating system). Perhaps, even more importantly, to expressly sanction unreasonable and otherwise unlawful restraints on trade in the name of ratings enforcement could substantially impair the cooperative relationships between theatre owners, retailers, and motion picture studios that are absolutely necessary for the success of any voluntary system.

*Question 3.* The FTC report says that restrictions by manufacturers on inappropriate retail sales, pursuant to a self-regulatory system to protect children, would pass muster under the antitrust laws. In light of this opinion by an antitrust enforcement agency, do you believe that an antitrust exemption is necessary to enforce a rating system against retailers?

Answer. As I said in my testimony before the Committee, I am not an antitrust expert. I give substantial deference to Chairman Pitofsky's judgment on such matters. I am concerned, however, by the implications of a regime whereby the ratings system is to be "enforced against" retailers. Retailers, like theatre owners, are our business partners, not our adversaries, and the government ought not force on us a most unsuitable relationship which would enfeeble our partnership. That partnership is the prime reason for the success of our voluntary system. It is for that reason the MPAA member companies are committee to working cooperatively with our retail and exhibition partners to ensure that the needs of parents are met through voluntary, industry-led initiatives.

*Question 4.* The Brownback–Hatch amendment to S. 254, the juvenile justice bill, appears to grant broad antitrust immunity to a consortium of industry members who may refuse to sell their products to certain retailers, including those retailers who market the products of other manufacturers that are not part of the consortium and do not abide by the consortium's rating and labeling systems. a. Do you believe this goes too far?

Answer. Yes, it goes too far. The example posited in this question is a good example of why the enactment of a broad antitrust exemption would threaten to undermine the public confidence in the existing rating system and undercut the cooperative relationships between studios, exhibitors, and retailers. I find it hard to believe that the Senate intended to sanction this sort of group boycott when it adopted the Brownback-Hatch amendment to the juvenile justice bill. Again, I do not believe that any antitrust exemption is necessary to implement successfully the rating system and our responsibilities to parents. Even so, such an example demonstrates the need to give far greater scrutiny to any proposed exemption to the antitrust laws than has been afforded any antitrust exemption currently before Congress.

*Question 4b.* The Justice Department has expressed concern that this amendment would restrict the ability of manufacturers outside the consortium to distribute their own movies, videos and records and pose the risk of stifling their speech in the marketplace. Do you share this concern?

Answer. I am concerned that even the perception that such a result could flow from the implementation of the voluntary rating system through an antitrust exemption would undercut the public confidence in the rating system and with it its usefulness to parents.

*Question 5.* Professor Sunstein testified before the Antitrust Subcommittee in 1997 regarding a proposed antitrust exemption for TV broadcasters, staging, "In my view, a general grant of permission, by the Congress, for broadcasters to engage in collusive behavior would probably be unconstitutional . . . and in any case would depend on a judgment that, in practice, legislative authorization for concerted action had serious consequences in limiting diversity for the viewing public." Would it be fair to say that Congress should only grant antitrust immunity with great caution since opening the door to unreasonable collusive behavior would do far more harm than good?

Answer. I believe Congress should treat grants of antitrust immunity with both skepticism and caution.

*Question 6.* Do you agree that the entertainment industry should stop marketing directly to children products which the industry itself identifies as inappropriate for children? What steps is the entertainment industry taking to this end?

Answer. Much of the current debate turns on a misperception of what the ratings mean and a view that the industry has rated certain movies as "inappropriate for

children." The ratings (other than NC–17) merely alert parents when a movie contains material that may not be suitable for children and allow them to choose whether to allow their children to view those movies. The ratings system does not offer 'recommendations' to parents. All the ratings do or should do is to provide parents with advance cautionary warnings, so that parents can make their own judgments. That is a decision they and only they are empowered to make.

It is particularly important to recognize that the "R" rating does not mean "adults only." That is the province of the "NC–17" rating. The "R" rating clearly and openly informs parents that children are admitted to R-rated movies if accompanied by a parent or adult guardian. Many parents take their children approvingly to R-rated movies, and many parents allow their children to attend R-rated movies with other adults. The selection of such movies for attendance by children is a choice that parents, and parents alone, are qualified to make. The rating system, most assuredly, does not intervene in such choices. All the ratings system is designed to do is offer an advance cautionary warning to parents so they can decide whether or not a specific R-rated movie is appropriate for their own children. It would be both improper and impertinent for industry or government to attempt to stand in the shoes of parents in this regard.

Having said that, I testified that I believe it is unsuitable to "target" very young children in advertising R-rated movies. That is wrong. I believe the FTC report and its recommendations merit very serious consideration and substantive response. As you know, the MPAA member companies and Dreamworks SKG have embarked on a 12-point set of initiatives that respond seriously and responsibly to each of the FTC's three basic recommendations. I attach a copy of these initiatives—which were delivered to you prior to their being made public on September 26—for your reference. some companies may—as some have already done—go beyond these initiatives, but these basic 12 points form the platform on which all the eight companies stand. The companies have just now begun the process of implementing these changes, which will be reviewed regularly by each company and annually by the MPAA. I will be personally in contact with the compliance mechanisms that all the companies are constructing, so that what we said we will do, we will do.

*Question 7.* Do you agree that the entertainment industry should stop including children in market research tests for products which the industry identifies as inappropriate for them without their parents approval? What steps is the entertainment industry taking to this end?

Answer. As I indicated in my answer to the previous question, the motion picture ratings system does not pretend to make judgments as to what is or is the appropriate for children. Again, having said that, included in our 12 point set of initiatives is a commitment by each of the MPAA member companies and Dreamworks SKG to not knowingly include persons under the age of 17 in research screenings for films rated R for violence, or in research screenings for films which the company reasonably believes will be rated R for violence, unless such person is accompanied by a parent.

*Question 8.* Chairman Pitofsky made clear in his testimony that giving out antitrust exemptions was not good policy but that a narrowly drafted antitrust exemption may do no harm, particularly if group boycotts, which constitute a per se antitrust violation, were excluded from the exemption. a. Are there other types of per se violations that should be expressly excepted from any antitrust exemption the Congress may consider?

Answer. I defer to others more expert in the intricacies of antitrust law to answer this question. I do believe, however, that this is the type of question that would need to be considered and addressed very carefully before the Congress chooses to enact an antitrust exemption.

*Question 8b.* If so, please provide examples of anti-competitive conduct that should also be excepted from such an antitrust exemption.

Answer. Same as (a).

*Question 8c.* Given the difficulty in specifying every example of anti-competitive conduct that should be excluded from an antitrust exemption, is it fair to say that a congressional grant of an antitrust exemption to the entertainment industry poses the risk of unintentionally shielding some forms of anti-competitive conduct?

Answer. I believe this is a real risk. I believe that risk would be enlarged and infected by the failure to explore fully these questions in the legislative process, which has not occurred to date.

*Question 9.* Some witnesses have expressed concern about the expectation that the Congress would have actions by the entertainment industry if an antitrust exemption were granted, particularly in the face of current cooperative efforts "to discuss ways to improve ratings and labeling systems * * * even in the absence of an anti-

trust exemption." Do you have any concern that congressional pressure to fulfill those expectations could implicate any First Amendment rights?

Answer. Absolutely. As you indicated, a number of the witnesses addressed this concern in their testimony, including a discussion of the relevant judicial precedents which insist that Congress cannot, consistent with the First Amendment, compel industry to do by private agreement what it cannot achieve directly through governmental action. I will not repeat the legal analysis here. I will merely note the FTC's own findings that the First Amendment can be brought to bear when "the government has exercised coercive power or provided such significant encouragement that the challenged action can fairly be attributed to the government." See FTC Report, Appendix C at 2.

There is no question that recent legislative proposals granting antitrust immunity express a desire on the part of Congress, if not an expectation, that the entertainment industry act to restrict voluntarily expressive conduct protected by the First Amendment. These proposals are often described as an "alternative" to more onerous proposals that are, at best, of questionable constitutionality. This backdrop lends credibility and coherence to the argument that voluntary industry action taken under a grant of antitrust immunity would be subject to constitutional challenge.

*Question 10.* The hearing elicited a number of important observations regarding the possible anti-competitive consequences and effectiveness of any antitrust exemption and, specifically, the antitrust exemption adopted as part of S. 254, the juvenile justice bill, including that the antitrust exemption would: (i) not protect a company from civil lawsuits under state antitrust laws; (ii) not address the practical concerns of developing a sanctions policy; (iii) effectively give the manufacturers of entertainment products a monopoly over movie and video game rating systems; (iv) place competing independent rating systems at a competitive disadvantage; (vi) place at risk the current parental control over whose guidance to follow: (vi) expand the power of copyright owners over the distribution of their products, even after transfer of title of such products, to an extent that may undermine the first sale doctrine, as codified in section 109 of the Copyright Act; (vii) empower manufacturers of entertainment products to preclude retailers from offering unrated products or adult videos and video games; and (vii) empower manufacturers of entertainment products to adopt a certain product mix or buy specific genres or titles. Do you believe these observations and concerns are valid?

Answer. These observations raise serious questions that merit careful and thorough review. Moreover, each of these expressed concerns demonstrates the often-ignored complexity of this issue and the fact that a grant of antitrust immunity would affect different sectors of the entertainment industry in very disparate ways. Many of these observations go to the heart of the concerns of our partners in retail and exhibition and make very clear some of the reasons why a grant of antitrust immunity would threaten to thwart the cooperative efforts between these parties that are so essential to the successful implementation of a voluntary rating system.

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### Response of Jack Valenti to a Question From Senator Thurmond

*Question 1.* Mr. Valenti, should the entertainment industry allow its members to market violent movies, music, and other products to children without consequences?

Answer. I do not believe one can say that depictions of violence per se are inappropriate for under 17 audiences. This is reflected in the rating system itself, which allows for different ratings depending on the type, intensity, context, and frequency of violence, among other considerations.

As I have said in my answers to the questions posed by Senator Leahy and in my testimony before the Committee, there are movies depicting violence that are entirely appropriate for youth audiences, and which parents may—and do—what their children to see. The move Amistad, for example, was a wonderful movie of great educational and social value. That movie received an R-rating based on, among other things, "strong brutal violence" in the depiction of the 19th Century slave trade. I myself recommended to high school students that they see Saving Private Ryan—rated R for "intense" and "prolonged" war violence—so that they might understand how brave American warriors bled and died so that this loving land could remain free. You were among those, Senator, who were there on June 6, 1944 and who fought so valiantly for a great battle triumph. That film needed to be seen by youngsters, so they would maybe for the first time understand that the liberties and freedom they so casually take for granted were purchased for them at a terrible price. I do not believe there is anything inappropriate about producers letting teenagers know about such movies.

The point is, whether a movie is appropriate for any child is a decision that only a parent can make. We are committed to do our part to give parents advance cautionary warnings so they are better informed to make the right choices about their children's viewing habits. This commitment is reflected in the 12-point set of initiatives adopted by the MPAA member companies and Dreamworks SKG in response to the FTC Report, which is attached. I have pledged to personally monitor the compliance mechanisms which each company has committed to construct. Our aim is to redeem the pledge we have made to Congress, and to keep our promises to the parents of America.

INITIATIVES OF MPAA MEMBER COMPANIES

1. Each company will request theater owners not to show trailers advertising films rated R for violence in connection with the exhibition of its G-rated films. In addition, each company will not attach trailers for films rated R for violence on G-rated movies on videocassettes or DVDs containing G-rated movies.
2. No company will knowingly include persons under the age of 17 in research screenings for films rated R for violence, or in research screenings for films which the company reasonably believes will be rated R for violence, unless such person is accompanied by a parent or an adult guardian.
3. Each company will review its marketing and advertising practices in order to further the goal of not inappropriately specifically targeting children in its advertising of films rated R for violence.
4. Each member company will appoint a senior executive compliance officer or committee to review on a regular basis the company's marketing practices in order to facilitate the implementation of the initiatives listed above.
5. The MPAA will review annually how each member company is complying with the initiative listed above.
6. The MPAA will strongly encourage theater owners and video retailers to improve compliance with the rating system.
7. The companies will seek ways to include the reasons for the ratings of films in its print advertising and official movie web sites for such films.
8. The MPAA has established or participated in the establishment of the following web sites: "mpaa.org"—"filemratings.com"—"parentalguide.org." "Mpaa.org", among other things, describes the rating system and includes database listing almost every movie rated since the commencement of the rating system in 1968. "Filmratings.com" is a separate site devoted exclusively to providing ratings information on all rated movies, including the reasons for the ratings on recent releases. "Parentalguide.org" was established by MPAA in conjunction with the electronic game, music, cable and television broadcast industries. The site is intended to provide parents with one central site where they can obtain information about each of the ratings systems that have been developed in those industries. To insure that this information reaches a wider audience, each company will link its official move web site to mpaa.org, filmratings.com and parentalguide.org.
9. Henceforth, each company will include on all packages of new rated releases for its videocassettes and DVDs the rating of such film and the reasons for the rating.
10. Henceforth, each company will include in the preface to its new rated releases for videocassettes and DVDs the reasons for the rating of the film, plus information about filmratings.com web site.
11. The MPAA and each company will strongly encourage theater owners to provide reasons for the ratings of films being exhibited in their theaters in their customers call centers.
12. Each company will furnish newspapers with the reasons for the ratings of each of their films in exhibition and will request that newspapers include those reasons in their movie reviews. The MPAA and each company will seek newspapers' cooperation in printing a daily column listing films in exhibition, their ratings and the reasons for the rating.

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RESPONSE OF CROSSAN "BO" ANDERSEN TO QUESTIONS FROM SENATOR HATCH

*Question 1.* Concerning whether we still have concerns about the anticompetitive effects of a limited antitrust exemption to facilitate the development and enforcement of entertainment industry ratings systems after having heard the testimony of FTC Chairman Pitofsky and Professor Sunstein.

Answer. The answer is emphatically "yes." Chairman Pitofsky's testimony underscored that validity of our concerns, as he described how easily ratings enforcement

strategies could be used as a pretext for fundamentally anticompetitive purposes, such as terminating a retailer who sells below the manufacturer's suggested retail price under the pretext that the discounter had violated one of the terms of the industry's rating system. As Chairman Pitofsky noted, "issues relating to actions against retailers may raise some of the most difficult concerns." Although he noted that "appropriately structured collective action" might be permissible, the only examples of an appropriate structure were where the retailer voluntarily agreed to adhere to the norm, or where "seal [of approval]" or "Hall of Shame" lists were used.

Professor Sunstein, in contrast, appears to have misconstrued the proposed sections 404 and 405 as authorizing only voluntary action. No retailer in America would believe that enforcement against retailers of a standard set through legalized voluntary collusion on the part of its suppliers would be voluntary in any meaningful sense of the word. It also appears that Professor Sunstein's analysis was developed from his background in the First Amendment rules applicable to broadcasting, which are substantially different because of the public "ownership" of the airwaves, limited frequencies available, and other unique characteristics. Perhaps Professor Sunstein's views would be a step forward in relation to other countries where he renders advice (according to his biography at http://www.law.uchicago.edu/faculty/sunstein/, he "has been involved in constitution-making and law reform activities in a number of nations, including Ukraine, Poland, China, South Africa, and Russia"), but his advocacy of a revisionist approach to the First Amendment offers what is most certainly a step backward in American First Amendment jurisprudence. Nevertheless, Professor Sunstein himself concluded that even if not compelled by existing law, in his own view "a general grant of permission, by the Congress, for broadcasters to engage in collusive behavior would probably be unconstitutional—at least if the consequence of the grant was sharply to reduce diversity over the airwaves." Statement of Cass R. Sunstein Before the Senate Judiciary Committee September 20, 2000. Given that Congress has less authority to control dissemination of speech where the airwaves are not involved, we believe Professor Sunstein's concern that Section 405 could be unconstitutional is well-founded.

Your question not only raises legal issues, but also raises concern that Congress approach this issue from a sound factual basis. Your first question states that retailers of entertainment products are an integral part of any voluntary codes that "delineate what is appropriate for minors." We respectfully suggest that one of the difficulties with the various proposals to enforce a voluntary code is precisely this premise, which VSDA believes to be a false premise. None of the current industry codes for any entertainment media delineate what is appropriate for minors, much less for all minors. Rather, as noted in your reference to FTC Chairman Pitofsky's testimony in the next paragraph of your first question, these ratings and labeling systems seek to identify "those entertainment products that warrant parental caution." These systems are not intended to objectively declare what is or is not appropriate for all minors nor could they possibly do so.

Given the wide diversity of minors, even minors of identical ages in identical communities, and given the wide diversity in parental values, child-rearing approaches, and both moral and faith-based norms, these parental advisories reflect nothing more than a rough estimate of where most parents might either draw the line, or at least want to be cautioned about the content before allowing their respective children to enjoy the product. To put it simply, the entertainment industry has never declared any of its products unsuitable for all minors of all ages under all conditions. No parents should be deemed unfit because their judgment of what is or is not appropriate for their own child differs from the judgment of industry-appointed panels or lawmakers, nor should any retailer be penalized for adopting a different rating system or for following the parents' instructions. It is the prerogative of the parent, not the entertainment industry, to decide whether to allow a teenager to watch an R-rated movie before his or her seventeenth birthday, and that is certainly every parent's prerogative. it is the prerogative of the parent to use these ratings systems as merely a starting point—an "advisory" that cautions them to pay close attention to whether a particular product is appropriate for a particular child.

It is for this reason that VSDA members have taken a lead in empowering parents to control these sensitive decisions. For nearly a decade, VSDA has been advocating and improving upon its Pledge to Parents program described in my testimony. This week, the VSDA Board of Directors carefully considered the FTC's recommendation that trade associations enhance their programs regarding children's access to certain entertainment products. The Board voted unanimously to accept this recommendation by launching a three-point "Parental Empowerment Program" (1) endorsing and encouraging every retailer (including those outside of VSDA) to use parental control programs relating to movie and video game ratings, (2) directing that VSDA's popular "Pledge to Parents" materials continue to be made avail-

able to all video retailers, including non-members, and (3) authorizing VSDA staff to develop a certification program for video retailers who provide parental education and empowerment tools regarding their control over access by their children to movies and video games at the retail level. The objective is to make certain that consumers cannot miss this important starting point in their evaluation of the suitability of entertainment products for themselves and their families, and that parents be empowered to exercise as much control as they desire over their children's choices.

*Question 2.* Concerning how industry guidelines for keeping violent material out of the hands of children should be enforced at the retail level.

Answer. The home video industry already enforces the ratings systems of the motion picture and video game industries, and has for many years. Retail enforcement is achieved through company-specific programs used by VSDA members Blockbuster, Hollywood Video and Movie Gallery and VSDA's own "Pledge to Parents" program, which has been in existence since 1991.

It is important to reiterate that the FTC report found the programs in video stores that it examined to be effective. The FTC acknowledged that "[p]arents have significant controls over the videos their children rent because of limitations established by the major rental outlets" and the rental of videos "requires a degree of parental involvement." VSDA believes these findings are true also for the vast majority of other chains and independent video retailers, as video stores of all sizes have effective parental control policies.

The FTC report also found that the only major brick and mortar sellers of videos that it examined that had policies restricting the sale of R-rated videos to children were stores that also rent videos. It correctly noted that retailers that both sell and rent videos "are more attuned to the issue of parental consent in this area."

The FTC report did not identify a single specific instance of a video store renting an R-rated video or an M-rated game to a person under 17 years of age. It is important to note that the FTC's "Mystery Shopper" program did not include attempts by persons under age 17 to rent movies or video games or to purchase R-rated videos.

Regarding sales of movies and video games outside of video stores, most of which are conducted by mass merchants who are not video specialists, the FTC found less ratings enforcement. However, major retailers such as Wal-Mart, Kmart, and Toys R Us have resolved to work through the logistical barriers to ratings enforcement in their stores.

The FTC report made a valid suggestion that trade associations enhance their self-regulatory programs. As noted in the answer to Question 1, the VSDA Board has done precisely that, and VSDA staff have already begun to carry out the Board's unanimous directive.

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RESPONSES OF CROSSAN "BO" ANDERSEN TO QUESTIONS FROM SENATOR LEAHY

*Question 1.* Concerning whether we are aware of any incidents since 1994 where concern over antitrust liability has stopped any particular entertainment company from participating in or enforcing a rating system.

Answer. VSDA is unaware of any such incidents.

*Question 2.* Concerning whether a grant of antitrust immunity would only be necessary to shield unreasonable restraints on trade from antitrust scrutiny.

Answer. This is precisely the problem with the proposed antitrust exemption. Many restraints of trade have long been permitted. It is only the unreasonable restraints on trade that are prohibited by the antitrust laws. The antitrust laws prohibit only those agreements "which were unreasonably restrictive of competitive conditions." *Standard Oil Co.* v. *United States*, 221 U.S. 1, 58 (1991). Accordingly, an exemption to engage in such restraints means, a fortiori, that the only new restraints authorized by the proposed exemption are the restraints that are currently considered so unreasonable as to carry serious civil and potentially criminal penalties. We see no reason to condone such conduct.

*Question 3.* Concerning whether, in light of the FTC report, we believe that an antitrust exemption is necessary to enforce a rating system against retailers.

Answer. For the extensive reasons outlined in our written statement and our oral testimony, VSDA believes it is inappropriate and wholly unnecessary to grant entertainment manufacturers an antitrust exemption to enforce their ratings systems at the retail level.

Moreover, when we speak of allowing manufacturers to enforce a rating system "against retailers," an important fact that has been missed in this debate is that

some major retailers are also manufacturers (acquiring exclusive rights in films), and some manufacturers have already begun to develop a retail presence, particularly over the Internet and through emerging digital delivery. Retailers that are also manufacturers would thus be given power to negotiate and enforce a manufacturer-imposed rating system against their direct competitors at the retail level. Certainly this can be of no benefit to consumers.

*Question 4.* Concerning the Brownback-Hatch amendment to S. 254, granting broad antitrust immunity for manufacturers to engage in concerted refusals to deal with retailers who market products of other manufacturers outside of the consortium, and who do not abide by the consortium's rating and labeling system.

Answer. Part a (whether it goes too far). VSDA believes that the Brownback-Hatch amendment to S. 254 would allow a consortium to affect the products of competing manufacturers outside of the consortium, such as by restricting retail channels that market (and perhaps even favor) the products of the competing manufacturers who choose not to participate in the consortium's rating system or to adopt a competing rating system. Therefore, it would naturally tend to victimize retailers caught in the crossfire between competitors. Because some retailers are also market participants at the manufacturing level, and some major manufacturers are also engaged in retail sales, it would allow these vertically integrated companies to gain a significant competitive advantage over non-integrated companies, such as smaller independent retailers.

Part b (whether we share the Justice Department's concern). VSDA certainly shares the concern of the Department of Justice stated in this question. Because each motion picture is unique, none are fungible. That is, the consumer demand for each motion picture is for that motion picture itself, and the retailers who purchase them are motivated to purchase each individual title at the volumes necessary to service the consumer demand which they anticipate for that title. Although each retailer's monthly purchasing budget is limited, cheaper copies of other titles are simply not an effective substitute, so suppliers have a limited ability to increase their market shares purely by price cutting. However, if manufacturers are permitted to form consortiums that use a joint ratings system to compete with manufacturers outside of the consortium, the consortium members will be able to restrict retail channels for their competitors and thereby be assured that the retailer's limited purchasing dollars will flow to films of the consortium members.

*Question 5.* Concerning whether a grant of antitrust immunity encouraging unreasonably collusive conduct impinging on freedom of speech would do more harm than good.

Answer. Allowing unreasonable conduct in restraint of competition is inherently harmful. As FTC Chairman Pitofsky indicated, any manufacturers who wish to institute reasonable restraints may do so now, and if they have any doubt concerning the legality of the measures they may be considering, they are free to seek guidance from the FTC or the Department of Justice. Moreover, because the purpose in allowing the use of unreasonable restraints of trade to enforce an industry-sponsored ratings system has both the purpose and effect of limiting public access to constitutionally protected material, the harm is not just to competition, to individual retailers and to manufacturers outside of the consortium. The harm is also to the creators and consumers of artistic works, and thus to civil rights protected by the Bill of Rights.

*Question 6.* Concerning whether we agree that the industry should stop marketing certain products to children.

Answer. It is important to note that the FTC study was critical of the marketing activities of manufacturers, not retailers. We are unaware of any allegation that the home video industry at the retail level has targeted children in its marketing of R-rated movies of M-rated video games. We will defer to the manufacturers of entertainment products to describe the actions they have taken as a result of the FTC study.

Nevertheless, VSDA members realize that it is impossible for any product advertisement to be entirely shielded from children. For example, children are regularly exposed to television commercials for products that are exclusively for adults, ranging from shaving cream to retirement programs, even though the advertiser has no interest in attracting children to the product. The same can be said for many entertainment products. It is simply impossible to shield everyone under seventeen from all R-rated movies. Ironically, the very young may have no interest in an advertisement for an R-rated movie, while those who are closer to the age of seventeen would probably have a greater interest.

Precisely because it is impossible to shield everyone under seventeen from the knowledge that R-rated movies and M-rated video games exist, VSDA supports pro-

viding more product information to inform consumers, including children and their parents, concerning the content of the home video entertainment products they wish to consider. It is for this reason that VSDA welcomes the announcement by the major motion picture studios and the MPAA that videos with clearer content descriptors will soon be arriving in our members' stores. VSDA will continue to encourage reliance upon the MPAA rating system as a starting point, while encouraging customers to continue to look beyond the rating to determine the suitability for their family of every contemplated movie purchase or rental, regardless of the rating.

We note, also, that this question rests on a false premise. The "industry itself" does not identify certain motion pictures or video games as being "inappropriate for children." Rather, in the case of motion pictures and video games, the industry has ratings which simply reflect the informed opinion of a panel of individuals concerning which video games or motion pictures the panel believes warrant a consumer advisory as a guide. This guidance is a far cry from condemnation of the material as being harmful for minors, much less a determination that all minors under a specific age must be shielded from the material until a requisite birthday is reached.

In the final analysis, VSDA agrees with the proposition that if a supplier has reached a determination that a given product may not be appropriate for children below a certain age—regardless of the rating—the supplier should not specifically target that age group in its marketing and should be selective in its general marketing to avoid creating demand among unintended audiences. While VSDA cannot speak to the marketing practices of our suppliers, it is precisely because of these difficult questions that the home video retail industry has chosen to use the predominant industry rating systems as only a default, while giving preference to empowering parents to control the decision concerning whether entire categories of products or specific products within a ratings category are appropriate for their children.

*Question 7.* Concerning the use of children in certain market research tests.

Answer. VSDA strongly condemns the use of children in market research tests for products that the motion picture studios and game manufacturers identify as inappropriate for them without their parents' approval. We are unaware of any such tests having occurred in the home video industry, and therefore would defer to others to detail what steps they are taking.

*Question 8.* Concerning the possible exclusion of per se violations of antitrust law from the exemption.

Answer. VSDA shares the concern of the National Association of Recording Merchandisers (NARM) about the anticompetitive consequences to retailers, and joins in the response to this question by Pamela Horovitz, NARM's President. We add the following observations.

Answer. Part a. VASDA opposes any exemption from antitrust law that would give any power over suppliers to control their products beyond their current power under the Copyright Act. You have asked whether, in the event Congress were to grant an exemption from antitrust laws, there are per se violations in addition to group boycotts that should be expressly excepted from any such exemption. It should be noted, however, that the line between conduct that warrants per se treatment or is subjected to a rule of reason analysis is not a clear one. Under current law, courts will often employ a rule of reason type of analysis to determine whether certain conduct will be given per se treatment. Generally speaking, however, other types of violations which are condemned outright under per se treatment, or are ordinarily condemned unless certain saving facts can be shown, are price fixing, bid-rigging, market or customer allocations, and product tying. In this context, an agreement which does not boycott a retailer directly but encourages retailers to refuse to deal with certain consumers, encourages consumers to refuse to deal with certain retailers, or encourages suppliers (including retailers who are also suppliers) to penalize a retailer for what amounts to a difference of opinion, should also be excluded from any exemption under the same principles that give rise to per se treatment—there simply is no conceivable pro-competitive basis to support such conduct, particularly in light of the constitutionally protected rights of retailers and their customers to the entertainment products of their choice.

Part b. As for examples of other types of anti-competitive conduct which should be excluded from any exemption, the short answer is that all anti-competitive conduct should be excluded. This would include all per se violations of the antitrust laws and also all conduct which, when judged under the rule of reason, constitutes an "unreasonable" restraint on trade. The fact is that we believe it is fundamentally unreasonable to allow suppliers to agree with each other on how they will do busi-

ness with retailers, even if under the guise of preventing some Americans from having access to what the suppliers may deem to be unsuitable for them, unless it can be shown that the purpose and effect of the agreement is not anticompetitive and has either procompetitive benefits or other social value. One principal reason for this position is that suppliers often compete with retailers at the retail level (and this is happening with greater frequency through the use of Internet-based retailing models), and an increasing number of retailers are able to enter into direct competition with other suppliers at the production and distribution level. For example, it is estimated that more than one hundred films were produced or entered production over the past year by companies whose primary business is video retailing.

The threat of possible pretextual and anticompetitive use of a ratings enforcement program as described by Chairman Pitofsky is not just a speculative proposition. VSDA has already been rocked by controversy within the home video industry. In particular, small independent retailers have been troubled by the ability of larger retailers to acquire exclusive rights in films, which can then be marketed on an exclusive basis. A group of independent retailers are currently engaged in an antitrust lawsuit against another retailer and the major motion picture studios alleging what is, in plain English, favorable treatment to one retailer. These plaintiffs are understandably alarmed at the prospects of the defendants in their lawsuit being given the power to agree upon, and enforce against the plaintiffs, restrictions on their freedom to continue to market freely and competitively. Though I do not wish to imply that the defendants would take advantage of the proposed tool to control the plaintiffs, what is being proposed is a permanent change in our antitrust laws at a time when emerging new technologies are giving rise to new business models and strategic relationships in a market with increasing vertical integration and rapid consolidation. This is simply not the time to interfere with the free market, even if out of a genuine concern for encouraging parents to alter their parenting choices.

Part c. A grant of an antitrust exemption to the entertainment industry poses not only a risk, but a certainty that the exemption will serve to shield forms of anticompetitive conduct that Congress would never condone directly. This is primarily because so many suppliers are also retailers, and so many retailers are also suppliers. For example, under current law, a supplier could unilaterally refuse to sell its product through any retail channels but its own, or grant exclusive access to only one or a small number of select retailers. Similarly, a major retailer which owns the copyright to a new release may keep it as an exclusive product for its own stores. It would be a very simple process for such a supplier/retailer to explain its refusal to deal as being necessary to prevent children form having access to the product, and not trusting the competing retailers to do a good enough job of enforcing the supplier-imposed restriction.

*Question 9.* Concerning whether we have any concern that congressional pressure to fill expectations could implicate First Amendment rights.

Answer. You have raised a very important issue because, in our judgment, which we share with NARM, the increasing pressure upon members of the entertainment industry to do by agreement with each other what Congress cannot lawfully do outright raises a very real risk that what would otherwise be lawful private action will be challenged and condemned under the long line of cases exemplified by *Shelley* v. *Kramer*, 334 U.S. 1 (1948). To put it simply, the greater the congressional pressure upon the entertainment industry to take "voluntary" action (under frequent threats that failure to act will be addressed by more restrictive legislation), the greater the likelihood that what might otherwise be lawful private action will be converted into "state action" and subject to challenge under 42 U.S.C. 1983. It would be both ironic and disappointing if the zeal and urgency with which some members of Congress are pressing private actors to do what Congress cannot do directly would so infect otherwise voluntary private action that it will be found to be coerced state action in violation of the First Amendment.

We do not raise this concern in a vacuum. For many Americans, the memory of government "encouragement" of private action to deny equal rights to persons on the basis of race remains fresh. For example, although private landowners are free to seek enforcement of the trespass laws against trespassers even if they file charges on a racially discriminatory basis, the Supreme Court reversed the trespass conviction of sit-in demonstrators where local government actors had encouraged such private voluntary action by condemning the sit-ins and publicly stating that the government was prepared to prosecute anyone charged with trespass. *Lombard* v. *Louisiana*, 373 U.S. 267 (1963).

"The line sought to be drawn is that beyond which the state assists a private person in seeing to it that others behave in a fashion which the state could not itself have ordained." Pollak, Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler, 108 U. Pa. L. Rev. 1 (1959). In *Lugar* v. *Edmondson Oil Co.*, 457

U.S. 922 (1982), the Supreme Court reviewed several of the factors which the Supreme Court has used over the years, in different contexts, to determine whether what may appear to be private conduct is in fact the conduct of a "state actor" for purposes of liability for infringing constitutionally protected rights, id. at 939 (noting the "public function" test, the "state compulsion" test, the "nexus" test, and the "joint action" test). It concluded that, regardless of the test used, "the first question is whether the claimed deprivation has resulted form the exercise of a right or privilege having its source in state authority. The second question is whether, under the facts of this case, respondents, who are private parties, may be appropriately characterized as 'state actors.'" Id. Concerning the latter question, the Court quoted approvingly from *United States* v. *Price*, 383 U.S. 787, 794 (1944), the Court reiterated: "It is enough that [the private person] is a willful participant in a joint activity with the State or its agents." (*Edmondson Oil Co.*, 457 U.S. at 941.)

Thus, the proposed antitrust exemption, which has the fundamental purpose of empowering private parties to engage in conduct, currently prohibited, to deprive persons of their constitutional right to freedom of speech, places retailers in an untenable position. If they resist this action, they can be penalized to the point of bankruptcy. If they cooperate with the government scheme, they become exposed to liability for violation of civil rights under 42 U.S.C. § 1983.

*Question 10.* Concerning several important observations regarding the possible anticompetitive consequences and effectiveness of any antitrust exemption.

Answer. VSDA continues to believe that the concerns we expressed at the hearing are valid and should lead to the conclusion that an antitrust exemption for entertainment manufacturers to enforce their ratings systems at the retail level should not be granted. In fact, if anything, the hearing heightened our concern because of the statement of the Chairman that he seeks to remove any question that the entertainment industry could engage in a group boycott of "a video rental chain" that does not adhere to industry age advisories for their products. Retailers and their customers must remain free to disagree with their suppliers concerning such a sensitive matter. Congress did not put Joe Camel in charge of dictating to tobacco retailers and consumers what the appropriate smoking age should be. Where the Constitution reserves such a right to the people and prohibits congressional abridgement of that right, Congress should not delegate power that it does not have to entertainment product suppliers.

Although VSDA's position in relation to the issues raised in this question is addressed in my written testimony, we wish to give special attention to the issue in (vi) concerning the effect that this proposed antitrust exemption would have on a well established body of copyright law—the first sale doctrine.

The Constitutional authority vested in Congress to enact copyright laws is for the purpose of promoting the progress of science and the useful arts "by securing for Limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." (U.S. Const., art. I, cl. 8.) Early on, the courts determined, however, that one of "the ordinary incidents of ownership in personal property" is "the right of alienation" of that property, which is "attached to" the ownership. *Harrison* v. *Maynard*, 61 F. 689, 691 (2d Cir. 1894). Accordingly, the right to vend (or the distribution right) is exhausted once exercised. This is commonly referred to as the "first sale doctrine," which has now been codified in Section 109 of the Copyright Act.

Section 109(a) provides that, notwithstanding the copyright owner's distribution right, the owner of a particular copy or phonorecord lawfully made under U.S. copyright law *"is entitled, without the authority of the copyright owner,* to sell or otherwise dispose of that copy or phonorecord." Accordingly, America's retailers of copyrighted artistic and entertainment works are entitled to sell them without interference from the copyright owner as to what price they may sell them, or to whom they may sell them, or how they will merchandise them.

Thus, the proposed exemption from antitrust law, ostensibly intended to allow copyright owners to enforce their own ratings system as against all others, would in fact upset over 100 years of copyright jurisprudence and hand to copyright owners an unprecedented right to continue to control the distribution of copies of their works long after they sold them. They could control distribution by, in the name of "enforcing" a ratings system, restrict how their products are merchandised in every retail store, designate specific classes of consumers to whom the copies could or could not be sold, place additional burdens on retailers to perhaps keep records of the names and addresses of all persons to whom they sold or rented titles of a given rating, and effectively control all retail and other reselling channels for their works, long after they had conveyed all right, title and interest in a given copy.

Recently, copyright owners have been seeking greater control over copies of their works by trying to avoid the effect of Section 109 of the Copyright Act and pur-

porting to "license" copies of their works. Under the Uniform Computer Information Transactions Act, copyright owners are seeking to gain a foothold in controlling distribution by making a end run around Section 109 where copies are made and distributed in digital format. The copyright power grab would continue if copyright owners are given a direct exemption from antitrust laws for the specific purpose of controlling and limiting public access to copies of their works which they no longer own. In other words, this is not just the power to limit output and keep our competition that is anathema to antitrust law, but also a power to continue to control distribution of copies long after copyright law would extinguish that right and give it to the retailer and the consumer.

"One of the most important limitations on copyright owners' exclusive rights is embodied in Section 109 of title 17, United States Code," H.R. Rep. No. 735, 101st Cong., 2d Sess. (1990) (Statement of Legislative History, Title I, pagination unavailable). This right has even been recognized as implicating First Amendment rights. *United States* v. *Bily*, 406 F. Supp. 726, 735, n.15 (E.D. Pa. 1975). We therefore urge Congress to not allow the rush to encourage private censorship through antitrust exemptions and collusion among copyright owners to restrict distribution and trample such a mainstay of copyright law.

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RESPONSE OF CROSSAN "BO" ANDERSEN, TO A QUESTION FROM SENATOR DEWINE

*Question 1.* Mr. Andersen, you have raised concerns about entertainment producers having an antitrust exemption for the purpose of enforcing their ratings at the retail level. Will you agree to work to establish enforcement provisions at an association level that will ensure that inappropriate products are not sold to children by your members without parental involvement?

Answer. VSDA is committed to continuing and enhancing the home video industry's voluntary programs to empower parents to control the movies and video games to which their children have access. We appreciate your emphasis on parental involvement, an emphasis we embrace.

At the outset, it bears repeating that video stores already have in place parental empowerment programs that provide parents with information about the motion picture and video game ratings systems and ensure that children do not have access to movies and video games that their parents determine are inappropriate for them. The study of the Federal Trade Commission, "Marketing Violent Entertainment to Children," showed these programs to be the most effective of any that the FTC examined and did not identify a single specific instance of a video store renting an R-rated video or an M-rated game to a person under 17 years of age. The study supports the contention that a video store is the best place for parents to control the content of the movies and video games to which their children have access.

Yet, VSDA recognizes that, to keep our pledge to parents, we must constantly look for ways to improve the parental empowerment programs of video retailers. We appreciate the recommendation of the FTC that entertainment industry trade associations "actively monitor compliance [with voluntary self-regulatory programs] and ensure that violations have consequences." Just two weeks after the issuance of the FTC study, the Board of Directors of VSDA discussed this recommendation and took action on it.

At a September 25, 2000, meeting, the VSDA Board of Directors voted unanimously to: endorse members' parental empowerment programs related to movie and video game ratings; direct that Pledge to Parents kits continue to be made available to all retailers, members and nonmembers alike (Pledge to Parents is VSDA's model ratings education and enforcement program); and authorize the establishment of a retailer certification program for parental education on movie and game ratings.

The retailer certification program is intended to provide parents with a recognizable "seal of approval" for video retailers who prominently provide ratings information and train their employees in the ratings systems of the Motion Picture Association of America and/or the Entertainment Software Rating Board, as appropriate.

In light of the existing effective parental empowerment programs of video stores, the lack of any suggestion of systemic failures of ratings enforcement by video stores, and the difficulty in devising and implementing a punitive enforcement system (see the testimony of Douglas Lowenstein, President, Interactive Digital Software Association, for a discussion of these difficulties), VSDA believes that an aspirational program that provides positive incentives for retailer action will serve parents best.

Finally, we are compelled to add a clarification. Although we understand and appreciate the spirit and intent of the question, we are reluctant to "agree" with Congress not to provide constitutionally protected materials to an individual otherwise

entitled to receive them. Video retailers have voluntarily adopted programs to ensure that certain products are not rented or sold to children without parental involvement. This voluntary private conduct is not the result of an agreement with members of Congress. If it were, it would place these programs and participating retailers at risk. To put it simply, the Supreme Court has determined that private actors can become state actors, and be subject to liability for civil rights violations, if their conduct is the result of too much encouragement, cooperation, or agreement with the state. The analysis would be fact intensive, and we hope that you understand our reluctance to create any factual basis for a disgruntled consumer to challenge under 42 U.S.C. § 1983 a retailer's voluntary decision not to sell or rent a particular product to him or her. It could result in a serious set-back to positive programs of video retailers.

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RESPONSE OF PAMELA HOROVITZ, TO QUESTIONS FROM SENATOR HATCH

*Question 1.* With respect to a limited exemption for record companies for developing voluntary and enforceable guidelines, what actions from record companies concern us and why?

Answer. NARM has no objection to entering into discussions with record companies for the purpose of reviewing the findings of the FTC report and developing ways of improving the voluntary Parental Advisory program. We think this is an appropriate use of the FTC report and there is no need for an antitrust exemption to have this conversation. However, if an antitrust exemption is granted for the purpose of recommending improvements to the Parental Advisory program, the exemption should extend to include the retail community.

We take a different position with respect to an anti-trust exemption for the purpose of "enforcing" the Parental Advisory. Because "enforcement" translates to mandating restrictive retail sales policies on a program which is not age based, we believe that if record companies are granted even a limited exemption in which they have the opportunity to impose sanctions on companies with which they compete, there is potential for abuse.

The music industry is rapidly moving to the internet for the marketing and delivery of music. While digital delivery holds much promise for retailers, it also heralds the entrance of suppliers into the marketplace as direct competitors. All five major recording corporations already own or control web sites which sell directly to consumers in direct competition with NARM member retailers. While NARM member retailers do not fear competition (even from suppliers) and are confident of their ability to compete for consumers, our members are concerned about the ability to compete on a level playing field in a digital world. NARM is now in the middle of litigation against Sony Music in which we seek to limit their unfair marketing to consumers via hyperlinks on the Internet. It is not hard to imagine a scenario in which an online retailer could be punished for selling a title to a minor responding to the marketing of the record company doing the punishing.

Any anti-trust exemption which is given to a few companies who control the vast majority of copyrights for music must be scrutinized against their behavior in the existing marketplace. Their strategies clearly indicate a desire to control content, delivery mechanisms, pricing models, and marketing strategies on a worldwide basis. Adding to this list their ability to control ratings programs is both inappropriate and unwise and would facilitate collusion in a highly concentrated market.

Because antitrust analysis is a complex area of the law, we have developed NARM's legal concerns in greater detail with the assistance of counsel in our response to Question 8 by Senator Leahy.

*Question 2.* How would we suggest enforcing guidelines for keeping violent material out of the hands of children at retail?

Answer. NARM opposes the concept of "enforcing" guidelines at retail and believe that America's parents and children are better served by the variety of programs now at work in the marketplace. The FTC findings did not include any indication that parents are demanding that all retailers restrict sales of Parental Advisory recordings. Because retailers must be responsive to the individual communities in which they operate in order to be successful, we believe that the variety of policies and programs now in place is the best reflection of the degree to which parents needs are already being met.

RESPONSES OF PAMELA HOROVITZ, TO QUESTIONS FROM SENATOR LEAHY

*Question 1.* Are you aware of any incidents since 1994 where concern over antitrust liability has stopped any particular entertainment company from participating in or enforcing a rating system?

Answer. No.

*Question 2.* Since self-regulatory systems that are designed to protect children would be acceptable and legal under the antitrust laws as reasonable restraints on trade, do you have any concern that a grant of antitrust immunity would only be necessary to shield unreasonable steps from antitrust scrutiny?

Answer. Suppliers, retailers, and government representatives may have differing definitions of what constitutes reasonable or unreasonable restraints on trade. However, for music retailers, who increasingly face competition from their own suppliers, any steps which give a marketplace advantage to suppliers and have the potential to drive them from the marketplace as cause for concern.

*Question 3.* Do you believe that an antitrust exemption is necessary to enforce a rating system against retailers.

Answer. NARM disagrees with the premise that an effective rating system requires enforcement actions against retailers, regardless whether an antitrust exemption were necessary to achieve that objective. NARM opposes the notion of "enforcing" at retail a program which is not age based by design (the FTC arbitrarily assigned 17 as the appropriate age for all music carrying the RIAA Parental Advisory sticker), and which was created with the intent of being advisory only. We believe that the range of options available to parents under the diversity of programs now available in the marketplace better serves the needs of parents who may have differing views of how intrusive they wish retailers to be in parenting decisions.

*Question 4a.* Does NARM believe the Brownback-Hatch amendment goes too far?

Answer. Yes. We believe the voluntary self-regulation program can be improved without the measures outlined in the Brownback-Hatch amendment. The benefits of the amendment are far outweighed by the potential for abuse and offer parents the false hope that they need not be concerned with the media their children may be exposed to because Congress is ensuring that no exposure can occur.

*Question 4b.* Do we share the Justice Department concern that the amendment would restrict the ability of manufacturers outside the consortium to distribute their own movies, videos, and records?

Answer. Yes. The antitrust exemption places no limit on the creative uses to which such power could be placed. Critics have already noted that the cost of submission of a movie for the MPAA rating is a barrier to emerging independent film companies. The grant of what would amount to a monopoly on a single rating system could easily be used through licensing or service fees to raise competitors' costs and increase barriers to entry.

*Question 5.* Do we think granting anti-trust immunity would open the door to collusive behavior and do more harm than good?

Answer. Yes. See response to Question 8.

*Question 6.* Does NARM agree that the entertainment industry should stop marketing directly to children products which the industry itself identifies as inappropriate for children?

Answer. NARM believes that the findings of the FTC report were a useful snapshot of the practices of certain segments of the entertainment industry with respect to marketing to children. However, NARM disagrees with the notion that industries as diverse as music, motion picture and video games can be treated as one industry, nor should retailers be painted with the same brush as the suppliers who do the marketing. For example, we wish to point out that music retailers were not accused of marketing to children inappropriately in the FTC report. NARM believes that the vast majority of advertising and marketing plans executed by our retail members target mass market audiences and are designed primarily to alert the buying public to the new titles which are available in any given week. Artist-specific marketing is generally executed by the labels, although certain merchants may be "tagged" in a given ad. We support the revised guidelines of the RIAA which specifically preclude advertising recordings which contain the Parental Advisory in media with 50 percent of the demographics below the age of 16.

*Question 7.* Does NARM agree that the entertainment industry should stop including children in market research tests for products which the industry identifies as inappropriate for them without their parents approval?

Answer. We certainly agree that market research activities should not target young children if an age based rating does not indicate the content is suitable for

them. However, NARM is not aware of any music retailers conducting any market research projects for any artist specific projects, so no steps are necessary to end a practice which does not exist for our segment of the entertainment industry.

*Question 8.* In light of Chairman Pitofsky's testimony, a. Whether other types of per se violations of antitrust law, in addition to boycotts, should be excepted from the antitrust exemption? b. If so, give examples. c. Whether the grant of an antitrust exemption for the purpose of ratings enforcement poses the risk of unintentionally shielding some forms of anti-competitive conduct.

Answer. NARM's concerns about the anticompetitive consequences to retailers are rooted in the basic premise that there is no need for an antitrust exemption to facilitate the development of a truly voluntary code governing the appropriate content for entertainment products for minors. This type of activity is governed under the Sherman Antitrust Act pursuant to a "rule of reason" analysis that permits such activity, provided, however, it does not result in an unreasonable restraint of trade or commerce. Voluntary standards or codes, which are unbiased and the product of objective and legitimate expert judgment, do not require an antitrust exemption. *American Society of Mechanical Engineers, Inc.* v. *Hydro-Level Corp.,* 456 U.S. 556 (1982). However, when such standards or codes negatively impact competition or create circumstances that facilitate anticompetitive collusion, such as boycotts or other per se type violations, there is no sound public policy reason to exempt them from antitrust proscriptions even if the goal is to satisfy some societal purpose.

The Supreme Court's decision in *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 692–93 (1978) provides an excellent rationale for not exempting concerted or collusive conduct from antitrust scrutiny. In that case, an association's canon of ethics ostensibly designed to protect public health and safety, and to protect consumers from inferior engineering work, was viewed as nothing more than a pretext to stifle competitive bidding for engineering services. We share FTC Chairman Pitofsky's concern that exempting group boycotts from antitrust scrutiny would permit the exemption to be used pretextually to the competitive disadvantage of retailers. This is particularly true where, as here, the markets for the supply of recorded music and motion pictures are both highly concentrated—five suppliers control over 90 percent of the sound record market, and seven suppliers enjoy similar control in the motion picture market. Those very suppliers are in direct competition with retailers for Internet sales or the digital delivery of entertainment products to consumers. Conversely, there is increasing competition between those suppliers and certain retailers who function at the supplier level in attracting recording artists and producing recorded music, or in acquiring copyrights in motion pictures.

Granting an antitrust exemption, which permits boycotting or refusals to deal aimed at retailers who are also direct competitors at the retail level and, in several cases, also at the supply level, is fraught with serious anticompetitive concerns. The proposed legislation discriminates against retailers by permitting boycotts an similar restrictions against them while at the same time excluding boycotts and advertising restrictions aimed at suppliers. Compare Section 404(b) with the absence of any similar language in Section 405. It is our position that boycotts or refusals to deal raise such serious anticompetitive concerns as to preclude their exemption from antitrust scrutiny. Where there is high market concentration with few suppliers, such as exists in the market for prerecorded music and motion pictures, an antitrust exemption facilitates collusion due to the centralization of power in determining what types of entertainment products are acceptable.

Per se violations are those that almost always restrict competition and have little or no redeeming value in enhancing competition. Thus, price fixing, bid rigging, territorial and customers allocations by competitors fall within the per se category. *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 406 U.S. 2, 9, 15–16 (1984); *Northern Pac. Ry. Inc.* v. *CBS*, 356 U.S. 1, 5 (1958). Where suppliers have market power other practices such as tie-in sales, group boycotts or refusals to deal are treated as per se violations. Even boycotts by groups without market power are per se unlawful if they are designed to obtain higher prices. *FTC* v. *Superior Court Trial Lawyers' Ass'n*, 493 U.S. 411, 432–35 (1990).

Even the exclusion of boycotts from the proposed exemption would be inadequate because it would not cover a number of other per se violations or predatory conduct. The complexities of definition alone argue against granting any exemption particularly where it is unnecessary. At a minimum these complexities certainly would require extensive hearings and investigation to evaluate the impact that an antitrust exemption would have in industries as diverse as those encompassed by the "entertainment industry."

It should also be noted that the courts frown upon and do not lightly infer antitrust exemptions. *United States* v. *National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694,

719–20 (1975). A group boycott or refusal to deal by competitors targeting other competitors generally falls within the per se category of antitrust violations. The courts view such conduct as so antithetical to the public policy favoring competition as to be beyond justification. A statutory exemption for such conduct would be unprecedented and unwise public policy, especially where the objective—a voluntary code aimed at protecting minors—can be achieved without an antitrust exemption. The McCarran-Ferguson Act, 15 U.S.C. §§ 1012(b)–1013(b), which excludes boycotts from its limited insurance antitrust exemption, is instructive with respect to the parameters of the term "boycott." Under this provision, "boycott" includes more than an absolute refusal to deal; it also includes conditional refusals to deal and partial boycotts—refusals to engage in some but not all transactions with the target. *Hartford Fire Insurance Co.* v. *California*, 509 U.S. 764, 801 (1993). In Hartford Fire Insurance, Justice Souter, based on Supreme Court antitrust precedent, included an even broader array of activity where a group uses coercion and intimidation as part of its enforcement activities. Id. at 786–88.

In *Fashion Originators' Guild of America, Inc.* v. *FTC*, 312 U.S. 457, 467–68 (1941) the Supreme Court held that a program to detect "style piracy," under which industry members agreed not to deal or purchase products from other manufacturers who engaged in style piracy, violated the Federal Trade Commission Act and was a per se violation. The Court viewed the program as setting up an "extra-governmental agency" which prescribed a restraint on interstate commerce. Indeed, the Court analogized the practice of imposing sanctions as the assumption of judicial and legislative powers by a private group. To the extent that the proposed legislation would exempt boycotts or variants of boycott activity as enforcement mechanisms, it certainly would smack of delegating governmental powers to private groups. Sanctioning boycotts and concerted refusals to deal that negatively impact competition cannot be justified under some generalized public policy goal.

It cannot be overemphasized that the danger of the proposed exemption is that it provides governmental approval of a standard setting program or voluntary guidelines which encourage or facilitate collusion or monopolistic activity in a highly concentrated industry setting. XIII H. Hovenkamp, Antitrust Law ¶ 223lb at 349 (1999). It makes it relatively easy for those in control to establish a standard or rule—ostensibly neutral on its face—to remove mavericks or aggressive marketers at all levels from the market or raise their costs of doing business. Id.

Providing the umbrella of governmental approval to such a program or standard-setting process raises serious issues concerning whether such a program's ratings and enforcement activities could be viewed as governmental action impinging upon important First Amendment rights. Were Congress to confer such power to private entities, albeit for social welfare benefits, it is difficult to perceive how such a statutory scheme could not implicate first amendment concerns. Even Professor Sunstein conceded as much in his statement:

> . . . a general grant of permission by the Congress for broadcasters to engage in collusive behavior would probably be unconstitutional—at least if the consequence of the grant was sharply to reduce diversity over the airwaves. But this conclusion is not compelled by existing law, and in any case it would depend on a judgment that, I practice, legislative authorization for concerted action had serious consequences in limiting diversity for the viewing public. A statute that allowed collusive and monopolistic activity would of course count as state action.

Statement of Cass R. Sunstein, Before Senate Judiciary Committee (Sept. 20, 2000). Despite Professor Sunstein's efforts to distinguish the proposed legislation from this characterization, the proposed legislation suffers from the same infirmities: it has the earmarks of governmental or state action, in all likelihood has the potential of serious consequences limiting diversity, and facilities collusion and anti-competitive activity.

The proposed legislation would certainly be vulnerable to challenge as governmental action impinging upon fundamental First Amendment rights. Despite the government's legitimate interest of protecting children, there are less restrictive or more tailored means of achieving that goal without granting an antitrust exemption to insulate boycotting or refusals to deal that could limit diversity and which appear to be the product of Congressional intimidation or coercion. See, *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC,* 518 U.S. 727, 755 (1996). A proposal that discriminates against retailers by permitting them to be targets of boycotting activity or group intimidation and coercion by the very suppliers with whom they compete and who have substantial market power, raises serious constitutional problems when the same legislation protects those same competing suppliers from such conduct.

*Question 9.* Does NARM have any concern that congressional pressure to fulfill expectations concerning voluntary industry action if an antitrust exemption is granted could implicate any First Amendment rights?

Answer. Not only is NARM concerned that First Amendment rights might be implicated if the antitrust exemption is granted, but we believe that congressional pressures, accompanied by individual threats that direct legislative action might be taken if voluntary measures are not implemented, may have already placed existing voluntary measures at risk of being challenged as "state action" under 42 U.S.C. § 1983. We join with VSDA in the following observation: The increasing pressure upon members of the entertainment industry to do by agreement with each other what Congress cannot lawfully do outright raises a very real risk that what would otherwise be lawful private action will be challenged and condemned under the long line of cases exemplified by *Shelley* v. *Kramer,* 334 U.S. 1 (1948). Thus, the more pressure the government puts on the entertainment industry to take "voluntary" action to fend off enactment of restrictive legislation, the greater the likelihood that what might otherwise constitute lawful private action will be converted into "state action" and subject to challenge under 42 U.S.C. § 1983. It would be both ironic and disappointing if the zeal and urgency with which some members of Congress are pressing private actors to do what Congress cannot do directly would so infect otherwise voluntary private action that it will be found to be coerced state action in violation of the First Amendment.

We do not raise this concern in a vacuum. For many Americans, the memory of government "encouragement" of private action to deny equal rights to persons on the basis of race remains fresh. For example, although private landowners are free to seek enforcement of the trespass laws against trespassers even if they file charges on a racially discriminatory basis, the Supreme Court reversed the trespass conviction of sit-in demonstrators where local government actors had encouraged such private voluntary action by condemning the sit-ins and publicly stating that the government was prepared to prosecute anyone charged with trespass. *Lombard* v. *Louisiana,* 373 U.S. 267 (1963).

"The line sought to be drawn is that beyond which the state assists a private person in seeing to it that others behave in a fashion which the state could not itself have ordained." Pollak, Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler, 108 U. Pa. L. Rev. 1 (1959). In *Lugar* v. *Edmondson Oil Co.,* 457 U.S. 922 (1982), the Supreme Court reviewed several of the factors which the Supreme Court has used over the years, in different contexts, to determine whether what may appear to be private conduct is in fact the conduct of a "state actor" for purposes of liability for infringing constitutionally protected rights, id. at 939 (noting the "public function" test, the "state compulsion" test, the "nexus" test, and the "joint action" test). It concluded that, regardless of the test used, "the first question is whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority. The second question is whether, under the facts of this case, respondents, who are private parties, may be appropriately characterized as 'state actors.'" Id. Concerning the latter question, the Court quoted approvingly from *United States* v. *Price,* 383 U.S. 787, 794 (1944), the Court reiterated: "It is enough that [the private person] is a willful participant in a joint activity with the State or its agents." (*Edmondson Oil Co.,* 457 U.S. at 941.)

Thus, the proposed antitrust exemption, which has the fundamental purpose of empowering private parties to engage in conduct, currently prohibited, to deprive persons of their constitutional right to freedom of speech, places retailers in an untenable position. If they resist this action, they can be penalized to the point of bankruptcy. If they cooperate with the government scheme, they become exposed to liability for violation of civil rights under 42 U.S.C. § 1983.

*Question 10.* Does NARM believe the following concerns and observations are valid: a. the antitrust exemption would not protect a company from civil lawsuits under state antitrust laws.

Answer. As a general rule, the federal antitrust laws do not preempt state antitrust laws. In this case, given the effort to affect purely local concerns at the retail level, it is unlikely that preemption would be availing, particularly not where the legislation does not expressly preempt state law, there is no Congressional intent to occupy the whole field, and no actual conflict exists between federal and state provisions. *California* v. *ARC America Corp.,* 490 U.S. 93, 101 (1989). Moreover, given that the purpose of the antitrust exemption has nothing to do with Congress' power under the Commerce Clause, but has the clear intent of causing private parties to abridge the First Amendment rights of others, the proposal is not likely to have any possible shielding effect from state antitrust laws.

NARM's concern does not end with state antitrust laws, however. Many music retailers have experimented with restrictive sales policies over the years in an at-

tempt to find the right program for a specific community. What is surprising to many legislators is the fact that restrictive sales programs are not uniformly met with enthusiastic support from parents. Retailers have been criticized by parents for a variety of reasons ("You mean my kid is old enough to drive to your store by himself but not old enough to buy a record once he gets there?", the most important of which is anger over intrusion into their parenting decisions ("How dare you tell me how to raise my children!"). In other cases, retailers have been picketed for being racists ("How dare you put all the rap music behind the counter?") and accused of fraudulent selling practices for stocking edited or "clean" versions of recordings which carry the Parental Advisory. Given that the industry has been subject to numerous class action suits in the past (Milli Vanilli, pricing), it is not unreasonable to expect that civil litigation against retailers would be a tool used by consumers whose views differ from those of Congress on restrictive sales policies regarding stickered music. Their standing to bring a claim under 42 U.S.C. § 1983 is discussed in response to Question 9.

*Question 10b.* The antitrust exemption would not address the practical concerns of developing a sanctions policy.

Answer. There is an existing voluntary program for street date violations in the music industry where the practical concerns of imposing sanctions may be useful to consider in terms of the likely issues to be faced for a content based program. It has been extremely difficult for individual companies to determine at what point sanctions should be triggered. If a retailer has a thousand stores and millions of transactions each month, is it reasonable to impose sanctions for a single violation? What about multiple violations occurring on the same day in the same store? What if the store manager is a new employee? What if different employers were responsible for different violations? Is it fair to impose a different standard on the owner-operator of a single store? Deciding what is appropriate an appropriate sanction can also be extremely difficult. If product is withheld, should it be just the title in question? Should just the violating locations lose product? If the product was purchased through a sub-distributor, should the sanctions apply to the sub-distributor as well? How long does the sanction last? If a fine is imposed, what level is appropriate (and should it vary with the size of the retailer) and to whom should the money go? Who polices the marketplace, and who bears the cost of such policing? Should there be an arbitration procedure? If a company is damaged by a sanction, can they sue? These issues have been extremely challenging for individual companies who have explored sanctions as a means of enforcing a voluntary policy in the marketplace and would become exponentially more complicated if they needed to be coordinated at an industry level.

*Question 10c.* The antitrust exemption would effectively give the manufacturers of entertainment products a monopoly over movie, music, and video game rating systems.

Answer. In the existing music marketplace, market dominant retailers have the ability to command the release of edited versions of titles simply by having a policy of refusing to stock recordings which carry the Parental Advisory. Other retailers have internal programs in place which supplement the RIAA program. If only one supplier-run program is used as the benchmark for retail and parental use, the incentive for other companies to offer alternatives would disappear. Retailers who disagree with decisions made by record labels over applying the Parental Advisory would be reluctant to challenge them for fear of reprisals. In fact, it would be in the retailer's self interest never to impose more restrictive policies, even if more suitable to a given community or more in keeping with the retailer's own standards, so as to avoid being subject to sanctions.

*Question 10d.* The antitrust exemption would place competing independent rating systems at a competitive disadvantage.

Answer. The formal advisory programs already in place by the different segments of the entertainment industry can now be supplemented by the additional information which can be obtained through alternative sources now available in newspapers, magazines, online, and through various private organizations. However, if only the formal programs run by the respective industry trade associations can be used by retailers, the economic underpinnings of these competing programs will be at risk. If parents desire or require additional information about a specific recording, they will be limited to what is made available by the formal industry sources.

*Question 10e.* The antitrust exemption would place at risk the current parental control over whose guidance to follow.

Answer. The antitrust exemption will essentially mandate that the views of a small group of industry insiders regarding a product's level of appropriateness for children be applied to every child in the country. In a free enterprise society, these

views inevitably come in conflict with the dictate to maximize profits and audience. Therefore, one must question the wisdom of placing such decisions in the hands of a few executives, who, no matter how well intentioned they may be, cannot be expected to meet the needs of all children. Because each child's needs and rate of maturity differ, parents are best positioned to make decisions relating to the type of entertainment they will permit for each child.

*Question 10f.* The antitrust exemption would expand the power of copyright owners over the distribution of their products, even after the transfer of title of such products, to an extent that may undermine the First Sale doctrine.

Answer. NARM shares the concern of the Video Software Dealers Association (VSDA) about the impact this exemption would have on the first sale doctrine, and joins in the response to this question by Crossan "Bo" Andersen, VSDA's NARM's President. The two associations have filed Joint Comments in response to a Request for Public Comment by the Copyright Office and the National Telecommunications and Information Administration of the Department of Commerce concerning the effect of the Digital Millennium Copyright Act and electronic commerce on Section 109 of the Copyright Act (the codification of the first sale doctrine).

*Question 10g.* The Antitrust exemption would empower manufacturers of entertainment products to preclude retailers from offering unrated products or adult videos or videogames.

Answer. In the music industry, the vast majority of sound recordings are "unrated," in the sense that only a relatively few sound recordings have been determined to warrant the Parental Advisory label. Thus, NARM does not believe that an antitrust exemption would place unrated sound recordings at risk. Nevertheless, NARM is concerned that such an exemption would empower manufacturers to preclude retailers from facilitating the dissemination of competing product reviews or the implementation of a given retailer's own policies based on different criteria.

*Question 10h.* The antitrust exemption would empower manufacturers of entertainment products to adopt a certain product mix or buy specific genres or titles.

Answer. Yes. The proposed antitrust exemption places no limit on the creativity of manufacturers to use the ratings enforcement power to achieve all manner of market controls.

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RESPONSES OF PAMELA HOROVITZ TO QUESTIONS FROM SENATOR THURMOND

*Question 1.* Do I think that advisory labels on music generally prevent young people from getting access to restricted music?

Answer. The FTC report indicates that 71 percent of American parents either purchase music for their children or are with their children when music purchases are being made. Since the advisory labels were created for the purpose of informing parents and retailers about the nature of the content in a recording, and since 74 percent of American parents indicate that they are satisfied with RIAA's Parental Advisory program, we believe that it's appropriate to assume that parents who wish to restrict access by their children to certain titles are doing so. The FTC findings did not include any indication that parents are demanding that all retailers restrict sales of Parental Advisory recordings to all people below the age of 17.

Additionally, the FTC report included the findings of the *1999 Roper Youth Report* and the *Media In the Home 2000 Study,* both of which indicated that while parents have different "styles", one aspect of parenting which is consistent is the fact that parents are more restrictive with their children's use of media below the age of 12, and are more permissive with their older children. (The exception was the Internet). In this context, it is interesting to note that the results of the FTC "Mystery Shopper" tests show that it was harder for 13 and 14 year olds to purchase music at retail than it was for 15 and 16 year olds. This finding is consistent with NARM's understanding of the various restrictive sales programs of our members, many of which are designed to be consistent with the prevailing parental norms of their communities. The FTC report states that "Parents give older children greater freedom in selecting and purchasing entertainment products than they do to younger children, and are less likely to restrict older children." (p. 7, Appendix F).

*Question 2.* If industry guidelines for retailers on the sale of products to young people are entirely voluntary, what incentive do music or game retailers have to restrict children's purchases.?

Answer. Retailers must be responsive to the individual communities in which they operate in order to be successful. Therefore, the fact that a variety of restrictive sales programs already exist in the marketplace confirms that sufficient incentives exist without government involvement. The fact that not every retailer has the same

program is a reflection of the fact that parents differ in terms of how intrusive they wish retailers to be in their parenting decisions regarding entertainment products. We believe that the variety of policies and programs now in place is the best reflection of the degree to which parent's needs are already being met. This belief is confirmed by a lack of a finding in the FTC report that parents are asking for more restrictive sales policies from retailers for music.

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RESPONSES OF PAMELA HOROVITZ TO A QUESTION FROM SENATOR DEWINE

*Question 1.* Ms. Horovitz, in your written testimony you state that access to products with explicit content should not be withheld from children under the age of 17, partly because allowing sales to kids encourages parents and their children to address what type of content is appropriate. It seems to me that your argument supports a policy of limiting the sale of explicit labeled products to children under the age of 17. Wouldn't such a policy, which in effect, requires a child to go to a parent before a purchase can be made, both encourage parental involvement and allow the parent to assess whether the child is mature enough for the product.

Answer. The excellent question posed by Senator DeWine is one which has been debated within the retail community since the inception of the RIAA Parental Advisory program. Let me preface my answer by noting that the question misstates my characterization of the interface between parents and children on this topic. My written testimony noted that there were a variety of responses from parents in those situations where they found music with the Parental Advisory designation in the hands of their children. Not all parents simply concluded that the content was inappropriate for their children. For some parents a discussion with their kids resulted in a restriction of playing the content through a device with headphones so that an older child could still be permitted to listen, but a younger sibling would not have access. For other parents, the interface presented an opportunity to learn why a son or daughter was interested in certain lyrics, and to discuss the family's values against the values reflected in the lyrics. Some of the most poignant responses from parents involved situations in which violent lyrics related to the topic of suicide and provided and opportunity to explore death and dying with a teenager.

The FTC reports that "When asked how they should respond if their child came to them to ask about buying an explicit-content album, one third (33 percent) of parents indicated they would not allow their child to purchase that music." (p. 16, Appendix F). This means two-thirds of parents would still allow the purchase. If these figures had been broken down further, we believe they would likely have reflected the higher levels of permissiveness parents have for older children as opposed to younger children.

We think it's also important to note the finding in the FTC report regarding the fact that parents regard music differently than they do television, movies or videogames.

- "Parents report placing greater restrictions on the viewing of movies than on the playing of games or the listening of music." (p. 6, Appendix F)
- "By comparison, children have greater autonomy to both select and purchase music than to select and purchase movies or electronic games." (p. 14, Appendix F)
- "Parents mentioned profanity (28 percent of the overall sample) and sexual content (9 percent of the sample) as the principal content concerns for the restriction. Violence was also mentioned as a concern by some respondents (6 percent of the sample) but was not as salient in parents' minds as profanity." (p. 14, Appendix F)

All of the FTC findings are consistent with what retailers experience in the day-to-day selling of music. Retailing companies have different programs for handling Parental Advisory products because they occupy different niches in the marketplace which meet different needs for different families. If there were a great hue and cry from parents for different programs, certainly retailers would already be hearing it from their customers. We think the FTC report indicates that parents are calling on the industry to provide more information about why a title carries the Parental Advisory. This is a request which NARM has previously passed on to the RIAA. We did not find any data supporting a conclusion that parents are looking for all music retailers to restrict the access of all children to Parental Advisory titles.

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## RESPONSES OF DOUGLAS LOWENSTEIN TO QUESTIONS FROM SENATOR HATCH

### RESPONSE TO QUESTION 1 FROM SENATOR HATCH

Our members cannot rely on an exemption unless it offers unmistakable protection. This means protection from federal actions for alleged boycotts and from actions under state laws. Any actions to enforce codes of conduct present a legal risk under state antitrust laws, which parallel federal laws and thus raise precisely the same need for an antitrust exemption that exists under federal antitrust laws. An exemption from the federal antitrust laws, even if well crafted to give industry the protection it needs, will be meaningless if a company against which the rules are enforced can bring the same lawsuit under state antitrust law instead of the federal one.

Similarly, the most effective action that an industry group could take against a retailer who routinely sells inappropriate material to children is to refuse to deal with such a retailer. Such an action against retailers could be characterized as a boycott that would subject a supplier to the risk of antitrust litigation. We understand that there may be some confusion as to whether the bill would protect actions against retailers from federal antitrust lawsuits. The FTC's Chairman, for example, believed that the legislation offers no such protection. Our members cannot rely on an exemption unless it offers unmistakable protection. Further, any actions to enforce codes of conduct would also present a legal risk under state antitrust laws, which parallel federal laws and thus raise precisely the same need for an antitrust exemption that exists under federal antitrust laws. An exemption from the federal antitrust laws, even if well crafted to give industry the protection it needs, will be meaningless if a company against which the rules are enforced can bring the same lawsuit under state antitrust law instead of the federal one.

### RESPONSE TO QUESTION 2 FROM SENATOR HATCH

The alternative suggested by Mr. Kendall to "augment collaborative efforts among the media industries" is not entirely clear to us. Nevertheless, as I stated in my written testimony, the video and PC game industry has been committed to effective self-regulation since the formation of the IDSA in 1994. We have consistently and continuously sought to respond to concerns about the small number of our products that contain significant violence, balancing our absolute commitment to creative freedom with our commitment to empowering consumers to make informed choices.

In the last year alone the IDSA has launched several initiatives on rating enforcement, rating awareness, and game marketing. The IDSA is proud of the efforts it has taken voluntarily with respect to advertising initiatives as well as efforts to encourage voluntary retailer enforcement of the rating system. We believe that voluntary industry efforts have been effective, especially as evidenced by the recent announcements from Toys R Us, K Mart, WalMart, and Target that they will enforce the M rating. We will continue to work to ensure that the self-regulatory regime meet the needs of industry and consumers alike.

In our view, the antitrust exemption you have proposed is unnecessary in order for us to continue the steps described above and outlined in more detail in my written statement. Where the exemption potentially could be helpful is if we need to work collectively on strengthening retailer enforcement, but in this regard the exemption does not provide the legal protection we need, as explained elsewhere.

### RESPONSE TO QUESTION 3 FROM SENATOR HATCH

The imposition of antitrust liability arising when industry standards are established is a serious concern for all industries. While the IDSA has not objected to an antitrust exemption, in theory, any such exemption that fails to provide adequate protection to participating industries will not have the desired impact of encouraging the development and enforcement of industry codes. Moreover, as we note in our testimony, with or without an exemption, we do not think it is feasible for our industry to develop any codes governing game content. That is, and will remain, a matter for individual software developers and publishers and consumers.

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## RESPONSES OF DOUGLAS LOWENSTEIN TO QUESTIONS FROM SENATOR LEAHY

### RESPONSE TO QUESTION 1 FROM SENATOR LEAHY

IDSA has not found antitrust liability to be an impediment to establishing and enforcing our ratings system and compliance with most of our ratings and advertising guidelines and standards has been very high. On the other hand, taking col-

lective industry action against retailers, in the absence of broad antitrust immunity against state and federal antitrust, raises significant concerns.

As FTC Chairman Pitofsky stated at your hearing and in his written testimony, enforcement of industry codes that discipline retailers that fail to observe restrictions on selling or renting certain products to minors could be potentially unlawful. For example, the most effective action that an industry group can take against a retailer who routinely sells inappropriate material to children is to refuse to deal with the retailer.

In his testimony Chairman Pitofsky explicitly stated that the legislation would provide no protection for claims that the industry had engaged in such a boycott. He also stated that industry actions to discipline members for failure to comply with the advertising or marketing restrictions could violate antitrust laws where "the withdrawal of membership or of membership privileges would substantially impair the disciplined member's ability to compete." Since the denial of a rating may substantially impair a company's ability to compete, the FTC's analysis would suggest that such an action would entail serious risks.

RESPONSE TO QUESTION 2 FROM SENATOR LEAHY

To the extent that Congress is pressing the industry to take action that affects the marketing of products, it is important that a broad antitrust exemption is granted. Without a broad antitrust exemption that applies to actions under federal and state antitrust laws, publishers will hesitate before taking joint actions that affect market access and could subject them to liability.

RESPONSE TO QUESTION 3 FROM SENATOR LEAHY

IDSA believes that there is too much legal uncertainty for manufacturers to restrict inappropriate retail sales without risking being sued under the antitrust laws.

IDSA is concerned that enforcement actions taken by manufacturers against retailers will expose the IDSA to claims that it engaged in a group boycott. Absent a clear provision that protects IDSA members against both federal and state lawsuits, IDSA members who attempt to enforce the ESRB ratings by refusing to supply retailers who do not adhere to its guidelines could face antitrust lawsuits from retailers at the state and federal level alleging that they were impermissibly denied access to product. Moreover, even with such a broad exemption, our testimony makes it clear that from a business standpoint, withholding of product from market would be extremely difficult and potentially disastrous for individual software companies and thus is not a viable course of action.

RESPONSE TO QUESTION 4 FROM SENATOR LEAHY

(a). We are concerned that developing an enforcement mechanism to discipline retailers who violate rating enforcement policies would be quite challenging and would bring with it some practical and legal risks, notwithstanding the antitrust exemption that is being proposed.

For example, suppose retailers and publishers agree on a policy barring all retailers from selling M rated games to persons under 17. In effect, this policy means that a company with an M rated game cannot sell it to persons under 17, even though the product is legal and the actual rating itself does not actually bar that person's use of the product (remember, ESRB ratings are advisory—an "M" rating says "content may be suitable for persons ages 17 and older"; it does not say content is unsuitable for persons 17 and under). By denying a retailer access to software if they violate codes of conduct, the industry could be exposed to legal liability. Even if the legislation cleared up all ambiguities by providing ironclad protection against federal antitrust lawsuits for such actions, the industry would likely face lawsuits under state antitrust laws or the numerous state laws that regulate commercial conduct.

(b). Yes, we share this concern. Please see our response to Question 4a above.

RESPONSE TO QUESTION 5 FROM SENATOR LEAHY

IDSA agrees with those members of the Committee, the Chairman of the FTC, the Department of Justice, and others who urge that any granting of an antitrust exemption be done only after the exercise of great caution and consideration. We share the concern that even the most well-meaning antitrust exemption could be used inappropriately. We are pleased at the tremendous progress made to date by our industry and we believe industry self-regulation is the best and most effective means of strengthening retailer enforcement. We also note that one unintended con-

sequence of such exemptions may be a weakening of self-regulation, not a strengthening of it.

RESPONSE TO QUESTION 6 FROM SENATOR LEAHY

Yes, IDSA agrees that our products should only be marketed to those people for whom they are appropriate, as determined by the industry's independent ratings body, the Entertainment Software Ratings Board (ESRB). IDSA and its member companies have taken a number of voluntary, proactive steps to address concerns over advertising and marketing which are detailed in my written statement. However, it's important to note that an "M" rating on a game is an advisory to the purchaser, 85 percent of whom, according to the FTC, are parents. An "M" rating indicates that the "content may be suitable for persons ages 17 and older", which does not necessarily mean that the content is unsuitable for all persons 17 and under. Our ratings system is aimed at providing parents the information they need to help make purchasing decisions.

RESPONSE TO QUESTION 7 FROM SENATOR LEAHY

While currently our industry's advertising guidelines do not specifically address the issue of including children in market research testing, we will include this topic among the agenda items when our Board meets to discuss issues stemming from the FTC report, and we will recommend that the guidelines explicitly address this issue.

RESPONSE TO QUESTION 8 FROM SENATOR LEAHY

In thinking about enforcement mechanisms, the only effective one we know to control retailers would be some concentrated group effort to withhold product (if such action is even practical from a business standpoint.) As we have noted elsewhere in our responses, as well as in my written testimony, taking collective industry action against retailers, in the absence of broad antitrust immunity against state and federal liability, raises serious concerns.

With respect to enforcing codes of conduct, if they could even be devised (which we note elsewhere is problematic) we also doubt there are any industry sanctions that could force compliance. For example, it has been suggested that non-compliant companies be expelled from association membership and the names of non-compliant companies be published so consumers would have access to that information. This is certainly possible but we doubt its efficacy. Moreover, we submit such "enforcement" systems would be no more effective than leaving it to the press, Members of Congress, and consumers to condemn or not buy offensive content.

Also, please see our response to Question 1 by Senator Leahy.

RESPONSE TO QUESTION 9 FROM SENATOR LEAHY

Yes, we share the concern expressed by some that unreasonably high expectations may be created if our industries were exempted from antitrust laws and encouraged to collaborate on content codes of conduct and ratings enforcement mechanisms, and my written testimony addresses our First Amendment concerns.

RESPONSE TO QUESTION 10 FROM SENATOR LEAHY

Yes, IDSA shares in some of these observations and concerns, a few of which have been outlined above.

For example, suppose retailers and publishers agree on a policy barring all retailers from selling M rated games to persons under 17. In effect, this policy means that a company with an M rated game cannot sell it to persons under 17, even though the product is legal and the actual rating itself does not actually bar that person's use of the product. By denying this company access to under-17 consumers with a legal product, IDSA could be open to civil lawsuits under state antitrust laws or the numerous state laws that regulate commercial conduct. For example, a publisher could claim that the standards were applied in a discriminatory manner to exclude its kind of business and favor large competitors. Or an excluded retailer could claim that publishers tortiously interfered with its contractual relationships.

Beyond this, while the amendment gives antitrust protection to those who seek to enforce the system, we are also concerned about a series of practical issues that make development of a sanctions policy difficult, and I address a number of these in my written testimony.

## RESPONSES OF DOUGLAS LOWENSTEIN TO QUESTIONS FROM SENATOR KOHL

### RESPONSE TO QUESTION 1 FROM SENATOR KOHL

First, it should be noted that the FTC data on GamePro refers to 60% of readers as 17 and under. As you know, by including 17-year-olds, it skews the data since an "M" rating indicates content that may be suitable for persons who are 17 and older. Thus, the key data point would be how many GamePro readers are under 17.

With respect to what percentage represents targeting, a general standard would be if a magazine or TV show's primary target audience is persons under 17, such as Sports Illustrated for Kids, I would regard this outlet as off limits to mature product. As to what an appropriate across the board percentage cutoff would be, I think this is a fair question to ask, and it is an issue we will be discussing within the IDSA in the coming weeks. I will be happy to report back to you when these discussions are complete.

### RESPONSE TO QUESTION 2 FROM SENATOR KOHL

No, no companies have been found in violation of the code for advertising to children. It is important to understand, though, that IDSA does not have access to marketing plans and can only make its findings based on actual ad placements. When IDSA was responsible for enforcing the ad code through February 2000 (as you know this responsibility has been transferred to the new Ad Review Council of the ESRB) we interpreted violations of the ad code's targeting provision to require ads to be placed in outlets primarily targeted at kids. We rarely found such instances. Moreover, we did not regard ads for M rated titles in game enthusiast magazines—all of which routinely review Mature rated games as part of their editorial sections—to constitute a violation of the anti-targeting provision so omission would not have acted in such cases. We understand that the FTC and others believe that ads for M rated games in outlets where 35 percent or more of readers are under 17 (an M rating is for persons 17 and older so this is the standard which should be applied) could be construed as targeting to minors and, as noted, this is an issue we will be discussing internally in the coming weeks.

### RESPONSE TO QUESTION 3 FROM SENATOR KOHL

No, we have not considered doing so to date. However, as the FTC itself noted, some companies have started to move voluntarily to require that the packaging for action figures based on Mature rated games (many of which are sold to collectors over the age of 17, by the way) carry information about the game's ratings. IDSA intends to actively encourage this as an industry practice.

In addition, I understand the new Ad Review Council is examining this issue as well. As a footnote, it is important to understand that some of the action figures frequently offered as examples of target marketing by video game companies are actually products licensed by independent businesses and the publisher of the game associated with the character is not involved in any way.

### RESPONSE TO QUESTION 4 FROM SENATOR KOHL

The ESRB, with the support of the IDSA, has and continues to engage in a series of steps to raise parental awareness of the rating system. Last Fall, ESRB launched an extraordinary campaign to raise awareness and use of its ratings, with the centerpiece being a PSA featuring Tiger Woods urging parents to "Check the Rating" of games they buy; we purchased advertising in major national publications with significant parent readership, such as Good Housekeeping, Parenting, and Newsweek, ESRB placed pull-out flyers in major parent-oriented publications, such as Child Magazine, it redesigned its consumer brochures, and distributed millions to leading retailers, and we reached out to leading national grassroots organizations with ties to schools and parents, such as Mothers Against Violence in America and the PTA seeking ways to partner with them to get the word out to consumers, especially parents, about ESRB ratings and how to use them. We were disappointed that some groups critical of the industry, such as the American Academy of Pediatrics (check if this is group we approached) who can reach millions of parents, declined to partner with ESRB to distribute its parent's guide to video game ratings.

In addition to our grassroots efforts, the IDSA sent letters to major national retailers asking them to make a commitment to consumers to use their best efforts not to sell Mature rated games to persons under 17, a step we had also taken in October, 1998. As you know, Toys 'R' Us was the first retailer to adopt this policy and in the last week K-Mart, Wal-Mart and Target have as well. IDSA supports those efforts. We believe other retailers will soon follow suit.

This past July, the industry renewed its commitment to another paid media campaign this holiday season to promote the ESRB. Further, IDSA has offered to fund 50 percent of the cost of producing in-store educational materials for retailers on the ESRB. To that end, we met individually with every major retail chain and presented a series of in-store promotional options for them to consider based on what is best for them. We are currently working closely with several major chains to implement this co-op program.

We're proud that Sen. Lieberman continues to call the ESRB the best rating system in the country and we've appreciated your supportive remarks about ESRB over the years as well. We are committed to raising awareness of the ESRB. We would welcome your support and help in working with other groups to get the word out about the ESRB ratings and hope we can find common ground on some initiatives in this area. Finally, one must note that the FTC report found that 49 percent of parents who are familiar with the rating system do not use it. No amount of industry promotional efforts can force parents to use the tools we provide. The control is ultimately in their hands.

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## RESPONSES OF DOUGLAS LOWENSTEIN TO QUESTIONS FROM SENATOR GRASSLEY

### RESPONSE TO QUESTION 1 FROM SENATOR GRASSLEY

In fact, "adult" games do not sell more quickly than other games, nor are they more popular. In 1999, Mature rated games represented five percent of all computer and video games sold in the United States; none of the top 20 best selling computer and video games in 1999 were rated M and so far in 2000, only 1 of the top 20 best sellers are M rated titles. Finally, only about 10% of the 1,800 games released in the year carried an M rating.

### RESPONSE TO QUESTION 2 FROM SENATOR GRASSLEY

Yes. In the period when IDSA itself was handling ad code enforcement, we sent out scores of letters over the years to companies in connection with potential or actual violations of the advertising code. In some cases, the violations were minor and inadvertent, especially in the early years of the rating system when companies were adjusting to its existence. In some cases, companies were required to take corrective action to remedy more serious ad code violations at their own expense. As we explain in the testimony, earlier this year, we strengthened our commitment to self-regulation by asking the ESRB ratings body to create a new unit solely responsible for monitoring and enforcing the ad code, shifting this mission from the trade association to the autonomous ratings unit. The new ESRB Ad Review Council unit has more resources devoted to this process and considerable teeth. Under its rules, companies that violate ad guidelines face a range of sanctions, from loss of the rating (which would be commercially disastrous) to taking corrective steps, to referrals to the FTC or other agencies.

# ADDITIONAL SUBMISSIONS FOR THE RECORD

## SEPTEMBER 21, 2000

### PREPARED STATEMENT OF DOUGLAS LOWENSTEIN, ON BEHALF OF THE INTERACTIVE DIGITAL SOFTWARE ASSOCIATION

Good morning, and thank you for inviting me to testify today on proposals to provide antitrust immunity for the entertainment industries to develop codes of conduct and retailer enforcement policies. I am testifying today on behalf of the Interactive Digital Software Association,[1] the trade body representing U.S. video and computer game software companies. Our members publish games for use in the home. In 1999, the industry generated $6.1 billion in retail software sales. IDSA's 32 members account for 90 percent of the edutainment and entertainment software sold in the US. While IDSA's member companies publish much of the software sold in the US and elsewhere in the world, it is important to note that many titles are developed by independent small business development teams from literally all over the world. A group called the Computer Game Developers Association represents the industry's creative community and thus has a direct interest in any legislation that would regulate the type of content they can produce and market.

I would like to divide my testimony into three sections: first, a discussion offering some critical and important background about our industry, our markets, and our products; second, a review of self regulatory initiatives we have taken over the years to ensure the responsible labeling and marketing of video and computer games to consumers; and third, comments on the antitrust issues before this hearing.

#### INDUSTRY BACKGROUND

*Majority of game players are adults, not kids*

First, let me address two of the great myths about the video game industry, to wit: (1) video games are played predominantly by teenage boys; and (2) most video games are rated Mature and have significant levels of violence. Both are wrong.

In fact, the primary audience for video games is NOT adolescent boys. According to research by Peter Hart earlier this year, the average age of computer and video game players is 28 years old, and 61 percent of all game players are age 18 and over. A remarkable 35 percent of game players are over 35 years old, and 13 percent are over 50; 43 percent of the 145 million Americans who play computer and video games are women. IDSA's own consumer research reveals that 70 percent of the most frequent users of computer games and 57 percent of the most frequent users of video games are also over 18.

Unlike other entertainment products, most newly released video games cost anywhere from $40–60. Thus, it's not surprising, when you add this to the fact that a majority of consumers are adults, that IDSA research finds that nine out of every ten video games are actually purchased by someone over 18. Furthermore, 84 percent of the kids who do buy games say they have the permission of their parents to do so. Similarly, in a survey completed by Peter Hart last fall, 83 percent of parents said they "try to watch or play at least once every game that their child plays to determine whether it is appropriate."

Notably, the FTC's own survey confirms these findings. "It is clear that most parents are able to play a watchdog role when they choose to do so. . . . According to parents' responses even more parents (83 percent) are involved in the actual purchase transaction; 38 percent report that they usually purchase or rent the games, and another 45 percent of parents do so together with the child."

So any discussion of how our industry's products are marketed or sold must take into account the fact that a majority of those who buy and use our products are

[1] IDSA's members only publish software for the home. The arcade game business is a different sector with its own representatives.

adults, not kids. While it may be accurate to say that a child can still buy an M rated game, the data from both the FTC and IDSA clearly confirm that in the vast majority of cases, a parent is involved in buying the game for the child. Thus, if a 12 year old has a Mature rated game, chances are he or she got it from the parents who either ignored or were not bothered by the game rating information and the quite obvious packaging information establishing the game's theme and content. As the FTC said,

> This level of parental involvement, either at the point of selection or purchase, means that most parents have the opportunity to review rating information or to check the product packaging to determine whether they approve of the game's content.

This does not mean our industry does not have an obligation to market products responsibly and to label them accurately. But it does mean that parents are the first, last, and best line of defense against products that are not appropriate for their children.

*70 percent of games appropriate for everyone; only 9 percent are rated mature*

With the demographics of the industry changing rapidly, so too has the type and mix of products published by game companies. Contrary to popular perceptions, most games do not contain significant levels of violence. In fact, the video game rating system the industry voluntarily set up six years ago, and which Sen. Joe Lieberman has repeatedly praised, has rated over 7,000 titles of which only 9 percent carry a Mature rating. Seventy percent are rated for Everyone over six. In 1999, only 100 out of 1,500 titles released were Mature games, and these represented just 5% of total sales.

Not only are most games appropriate for everyone, but also most of the best sellers are not violent. For example, in the last six months, the top selling games have been Pokemon, Who Wants to be a Millionaire, SimCity 3000, and racing and skateboarding games. So far in 2000, only two of the top selling PC and video games are rated M, and 16 are rated Everyone. What this reflects is the fact that video games are now mass market entertainment and the range and diversity of products has widened, resulting in a substantial market for casual games like puzzle, board, and card games, and hunting and fishing titles, in addition to staples like racing, football, and action games.

In short, this industry has seen its sales double since 1995 and the bulk of that growth has been fueled by consumers over the age of 18 and by games whose content has broad appeal.

COMMITMENT TO EFFECTIVE SELF-REGULATION

The video and PC game industry has been committed to effective self-regulation since the formation of the IDSA in 1994. We have consistently and continuously sought to respond to concerns about the small number of our products that contain significant violence, balancing our absolute commitment of creative freedom with our commitment to empowering consumers to make informed choices. We are guided by our belief that the ultimate responsibility for controlling the games that come into the home lies with parents—not industry, not Congress, and not federal or state governments. According to the FTC, 45 percent of parents who are aware of the video game rating system say they do not use it. I submit to you that no one has yet conceived of a law that can mandate sound parenting.

*Initiatives on game ratings*

In 1995, the IDSA created the Entertainment Software Rating Board, or ESRB, which uses teams of independent, demographically diverse raters to review each and every video game. ESRB issues ratings suggesting—and that is a key word "suggesting" but not dictating—the age appropriateness of a title. An M rating means "the content of this game may be suitable for ages 17 and older." Importantly, and not by accident, it does not say it is unsuitable for those under 17. That's because ESRB felt it should not substitute itself for a parent and make choices for them; rather, it seems its role as providing information and guidance but empowering parents ultimately to decide what is appropriate for their kids. In addition, ESRB ratings provide simple but clear information about the content that influenced the rating, such as animated violence, strong language, or suggestive themes. This content information is unique and is one reason Sen. Joseph Lieberman and others have called ESRB "the best entertainment rating system in the country."

At the same time the ESRB was created, IDSA voluntarily created an Advertising Code of Conduct requiring that the ratings and content information issued by ESRB be placed on packaging and in advertising. The Ad Code also contained a provision

advising that "companies must not specifically target advertising for entertainment software products rated for Teen, Mature, or Adults Only to consumers for whom the product is not rated as appropriate."

Starting in 1995, the ESRB maintained an active program to provide information on the ESRB to retailers and consumers. It established a toll free number which has logged millions of calls since its inception, created a multilingual web site where consumers can get information on the age and content rating of over 6,000 video games, and distributed millions of Parent Guides to ESRB Ratings to retailers and advocacy groups throughout the country, as well as to the Attorney General of Illinois.

In 1997, recognizing the emergence of the Internet, the ESRB launched a new rating service called ESRB Interactive, or ESRBi. Through this service, ESRB offers companies the opportunity to rate their websites and video games distributed online. More and more companies are now rating online games and game websites with ESRBi.

In May 1999, in the weeks after the Columbine tragedy, I appeared before a hearing of the Senate Commerce Committee and made a series of new commitments in response to renewed concerns about entertainment violence. Specifically, IDSA said:

1. we would launch a stepped up campaign to educate consumers about the rating system;

2. we would reach out more aggressively to retailers to encourage them both to increase the amount of rating information available in stores and to enforce the ESRB ratings; and

3. we would examine industry advertising practices and explore ways we could address concerns in this area, both as to the content of ads and to the targeting of these ads.

We have redeemed every commitment made that day.

*Retailer education and enforcement*

We have always believed that it was critical to educate consumers about the rating system and encourage retailers to uphold the integrity of the ratings at the point of sale. We are pleased at the tremendous progress made to date and believe it suggests that this sector is moving on its own to put in place an effective retailer rating enforcement regime.

Specificaly, we have been proactive on retailer enforcement even without the antitrust exemption offered in the pending bill.

In late 1994, we asked major retailers to consider adopting policies pledging not to carry products that did not contain one of two ratings available from competing rating services; and many opted to implement such policies.

Also, as early as 1994, the Video Software Dealers Association (VSDA) representing the video retail community added the enforcement of the ESRB's voluntary ratings to their "Pledge to Parents" in which video retailers pledge to uphold both the ESRB and MPAA's ratings at point of sale. The ESRB has continued to work closely with VSDA to encourage retailer support of the ESRB guidelines including attending the VSDA's yearly convention at which rating brochures, posters and information are distributed.

In early October 1998, we sent a letter to all major retailers asking them to enforce the ratings at the point of sale.

In the fall of 1999, the IDSA sent letters to major national retailers asking them to make a commitment to consumers to use their best efforts not to sell Mature rated games to persons under 17. We were pleased when Electronics Boutique, Babbage's, and Funcoland all signed the pledge. We were especially pleased when Toys 'R Us announced its new policy to seek IDs from people purchasing M rated games.

In July, I met individually with every major retailer and urged them to adopt some form of control system. As you know, most recently, K-Mart, Wal-Mart, and Target have all adopted policies to prevent the sale of M rated games to persons under 17. IDSA supports those efforts and we believe other retailers will soon follow suit. (It's worth noting that while this is a legitimate issue for discussion, retailers universally report to us that they have never received a complaint from a parent about the purchase of an M rated game.)

In addition to all these steps, the IDSA Board this past July renewed its commitment to another paid media campaign this holiday season to promote the ESRB, and offered to fund 50 percent of the cost of producing in-store educational materials for retailers on the ESRB.

*Initiatives on advertising and marketing*

In September 1999, the IDSA Board took the extraordinary and far reaching step of asking the ESRB to create a new Advertising Review Council (ARC) within the ESRB. The ARC is empowered to ensure that all advertisements by those who use ESRB ratings adhere to strict content standards covering such areas as violence, sex, and language, and to enforce compliance with all other provisions of the industry ad code, including the anti-targeting provision. In addition, the IDSA shifted responsibility for the ad code and its enforcement from the association to the new ESRB ad council, and provided a major increase in resources to support expanded staffing and more aggressive monitoring and enforcement of advertising standards. This initiative was undertaken long before the FTC report was completed, and reflected our own judgment that our industry needed to revamp and step up our approach to monitoring and enforcing our advertising standards. The ARC unit began operations February 1—coincidentally the cutoff date by the FTC of its monitoring effort—and one of its first successes was convincing virtually all the top game enthusiast magazines—the primary advertising vehicles for our industry—to adopt the ARC principles and guidelines as their own. In addition, Ziff-Davis, IDG, and Imagine, the three top publishers of game magazines, sit on the ARC Board of Directors. Since February, ARC has been meeting extensively with IDSA members to educate them on the ad code and ensure compliance.

ANTITRUST EXEMPTIONS FOR RETAIL ENFORCEMENT AND INDUSTRY CODES OF CONDUCT

I'd like to comment here on the proposal to offer a limited antitrust exemption to various industries for the purposes of developing ways to enforce existing rating and labeling systems. We understand and sympathize with the motives behind this proposal. Undeniably, it would be helpful to find ways to ensure universal enforcement of ratings at the retail level, even if different enforcement methods are used. And it makes sense to seek ways to give those enforcement systems teeth. but as I said above, we believe the existing voluntary approach is working and no legislation is required.

Nonetheless, if the Committee does proceed, we certainly welcome the concept of an antitrust exemption and were it to be enacted, we would take advantage of its protection to, at a minimum, discuss within our industry and with our retailers, whether there are reasonable and practical ways to accomplish the goals without creating secondary problems down the road.

At the outset, it must be noted that we are talking about restrictions on the sale of a legal and constitutionally protected product. While there is considerable medical opinion that violent video games are harmful, there is also—though many choose to ignore it—a large body of independent scientific literature from all over the world that takes issue with these oft-stated claims. For example, the Government of Australia completed an exhaustive report last December examining all the research over a twenty-year period on video games and aggression, including that most recent research, to determine whether there is a basis for regulating such products. The conclusion was absolutely unambiguous:

> After examining several attempts to find effects of aggressive content in either experimental studies or field studies, at best only weak and ambiguous evidence has emerged. Importantly, these studies have employed current games or concerned contemporary young players who presumably have access to the latest games. The accumulating evidence provided largely by researchers keen to demonstrate the games, undesirable effects does indicate that it is very hard to find such effects and that they are unlikely to be substantial.

So while we support voluntarily efforts by retailers to adopt policies appropriate for their stores to enforce the ESRB ratings, we are very wary of more formalized approaches that are based on claims that games themselves are harmful to the tens of millions of children who play them routinely without any adverse reactions.

In thinking about retailer enforcement issues, we see two challenges: first, how to develop a uniform system which works for all retailers. Each retailer is different in terms of its relationships to its customers, the products it carries, the systems it uses at check out, its computer technology, the layout of its store, the number and experience of people it hires, etc. Seeking to impose a uniform approach on all retailers, regardless of their many differences, will be difficult and quite costly to many of them. What might work for a mass merchant might not work in a smaller, mall-based store. For example, I am advised that it could literally cost a million dollars or more to install a register prompt system to trigger clerks to ask for IDs. Developing a sanctioning system for retailers who violate rating enforcement policies

would be quite challenging as well, and would bring with it some practical and legal risks, notwithstanding the antitrust protection in place.

For example, suppose retailers and publishers agree on a policy barring all retailers from selling M rated games to persons under 17. In effect, this policy means that a company with an M rated game cannot sell it to persons under 17, even though the product is legal and the actual rating itself does not actually bar that person's use of the product (remember, ESRB ratings are advisory—an "M" rating says "content may be suitable for persons ages 17 and older"; it does not say content is unsuitable for persons 17 and under). By denying this company access to under-17 consumers with a legal product, IDSA could be open to civil lawsuits under state antitrust laws or the numerous state laws that regulate commercial conduct. For example, a publisher could claim that the standards were applied in a discriminatory manner to exclude its kind of business and favor large competitors. Or an excluded retailer could claim that publishers tortiously interfered with its contractual relationships.

Beyond this, while the amendment gives antitrust protection to those who seek to enforce the system, we are also concerned about a series of practical issues that make development of a sanctions policy difficult.

For example, Wal-Mart has over 3,000 stores across the country. How does industry actually monitor compliance with Wal-Mart's policy not to sell to underage users? Does industry have to hire its own cadre of expensive agents to conduct regular sting operations of its own retailers? How often would we have to do so?

Another problem is what triggers a violation of the enforcement standard? A single incident? Ten incidents a week? 100 incidents over a year? If Wal-Mart sells one million M rated video games and in the course of a year 100 are sold to minors, that's a pretty low violation rate. Does it trigger sanctions? When do sanctions get imposed, how, and by whom? Let's assume that we learn of violations at some Wal-Mart stores. Do you punish only those stores or the entire chain? Do we strip product off the shelf immediately? Do we withhold future M rated product or all titles, thus potentially putting a speciality software retailer out of business? Who does that? How long does the sanction last? What does Wal-Mart have to do to return to good grace and who judges that? None of these questions lend themselves to simple answers.

In discussions with staff, and reading the FTC report, the notion has been floated that companies individually or collectively could withhold product from offending retailers as a punishment for violating the rating enforcement guidelines, and as a way to incentivize good conduct by retailers.

Let me address this briefly. It takes software companies two years or more to develop a single game, and the average development cost is about $4–5 million, and continues to skyrocket as new technology and computing power permits creators to do even more than they could even six months earlier. The development process is so intense that many products literally go to final code days before shipping. An entire company's future might well ride on sales of its product. In the weeks and months leading up to release, it has likely been heavily reviewed in the game enthusiast publications; a website has probably been up to preview the game to potential consumers; demand is building; and release dates have been widely published.

Given these realities, it is highly unlikely and perhaps even a breach of fiduciary responsibility that a company, given the enormous investment and stakes in a product's timely release, would voluntarily withhold product from the retail channel when it's ready to ship because a retailer failed to enforce an ESRB rating at some point. Understand that most products have about a 30-day window to take off in the market and the loss of a single day of potential sales could be devastating.

While it may be seen that publishers have the clout in the retail relationship, bear in mind that for many retailers game sales are a tiny portion of their overall product mix. They sell everything from lawnmowers and barbeque grills to clothes and software, and the possible loss of a few games, many of which don't generate significant revenue, may be a blip on their balance sheets. But for a publisher, loss of access could literally wipe out the business and an investment of $5 million or more, not to mention 24 months of work.

Finally, it must be said that there may be a point where self-regulation becomes so onerous that the regulated themselves question its value. In the case of retailers, we'd be very concerned that excessive self-regulation could lead many to reconsider their interest in carrying all or certain titles, endangering the continued growth of the industry. In the case of publishers, perhaps we'd reach a point where some would question the very essence of a rating system which, in its original form was meant to be an advisory to empower consumers, and has evolved into a hard and fast standard with the force of law behind it, controlling the sale of an entirely legal and constitutionally protected product.

SUMMARY

In the end we believe the voluntary efforts already underway are delivering the results many seek and they remain the preferable way to reach the goal of effective enforcement of video game rating systems. We know from the FTC's own report, and IDSA's own data, that 83 percent of parents are involved in buying the games their kids play. There is, in fact, no evidence of an epidemic of 12 year olds buying Mature rated video games without their parents' knowledge. We submit that a combination of continuing to strengthen existing efforts at retail enforcement, coupled with continued stepped up consumer education, is a combination that will reach the shared goal of enhance retailer enforcement of rating labels without government involvement.

CODES OF CONDUCT

Proposals to give our industry antitrust immunity to develop voluntary codes of conduct are well meaning. They are an appealing way to try to rid the market of content some find objectionable. But proposals for content codes, voluntary or otherwise, suffer from one major and overriding defect: they inevitably represent the collective views of a self-appointed few who would censor and even chill the creative expressions of others. Whether that censorship is coming from the government, or whether it is coming from within an industry, it is equally troublesome. In the case of the electronic entertainment industry, we depend on the First Amendment, and creative freedom. Sometimes this freedom takes authors to places we with they hadn't gone, and perhaps even to places some of us would even agree are lacking in artistic merit. But many others soar to extraordinary creative heights. In either event, I do not believe anyone in this industry believes we can impose the collective views of an elite group of what is art and what is not, on the development and publishing community we serve.

This Committee is well aware of some of the difficulties. How do you define too much violence? How can you write standards that are so specific and bright that creators know in advance what is and is not permissible since failure to be precise is clearly chilling? Whose standards will inform these guidelines? The standards of people in New York, in Utah, or in Kansas, for it's clear that people in different regions and of different backgrounds are willing to accept different types of content? Then there is the question of definition: how many limbs must be severed in Saving Private Ryan before it becomes excessive and gratuitous? Who can say? How many Germans must die in a video game based on liberating a concentration camp before it is excessive and gratuitous? How much blood and gore in a civil war computer game is too much blood and crosses the line? Some may be comfortable answering these questions. We are not.

Part of the problem, of course, is in the eye of the beholder, and the morals, values, and sense of art he or she brings to the discussion. I can say with all candor that if you put three groups of 20 game developers, designers, and publishers in a room, none would reach any agreement on an industry standard for content. This is not because they wouldn't try, but because they simply won't be able to mesh conflicting views and perceptions into a common standard acceptable to people of varying tastes. We also struggle with the constitutional issue of developing a code which could have the effect, if enforced, of denying adults access to material they are constitutionally entitled to view. For the fact remains that the average age of game players is 28 years old; many are adults with varied tastes. Content codes raise the risk of homogenizing games, forcing people to write to a single standard, and striking at the very creativity and originality which has helped spur this industry's growth.

Further, one struggles to find an effective enforcement mechanism. There are hundreds of developers and dozens of publishers, and many are not in the IDSA. It seems highly doubtful that effective sanctions exist to force people to conform to industry content standards. More to the point, it strikes us as clear and wholly inappropriate to seek to impose such standards.

Finally, while it takes two years or longer to develop computer and video games, the technology changes almost monthly. Things not possible during the initial game design phase suddenly become possible along the development curve. Any content code for this industry would literally have to be revisited annually to keep it current with technological change. This raises the awkward prospect of a company starting a product while one code is in place and finishing while another is in place, adding a layer of uncertainty and confusion to an already difficult process.

A BRIEF WORD ON THE FTC REPORT

We were pleased that the recent FTC report described our industry's overall self-regulatory program as "the most comprehensive of the three industry systems studied by the Commission" and that it recognized that "it is widely used by industry members and has been revised repeatedly to address new challenges, developments, and concerns regarding the practices of our members." The FTC also pointed out that quite the opposite of standing by idly, we have been aggressive in seeking compliance with our standards. As it put it, "to its credit, the IDSA has taken several steps to encourage industry members to comply with" the industry's various ratings and advertising requirement. Also perhaps lost in the hubbub over the report is the recognition by the FTC that the independent rating system used by the video game industry "appears to be helpful to those parents who actually use it" and that a majority of these parents say it does an excellent or good job in advising them on the levels of violence in our products.

In this regard, Peter D Hart Research Associates completed a new survey this past July seeking to gauge whether consumers themselves believe that ESRB ratings are accurate. The research involved mall-intercept interviews with 410 adults nationwide, including 246 parents who were shown videotapes of game clips and asked to rate them based on the ESRB standards. The survey found that "in 84% of all instances, games are rated equal to or less strictly than the official ESRB rating." Hart found that the ESRB is "twice as likely to be more conservative than the public" in rating decisions. With respect to the content descriptors, the survey found "participants are generally in agreement with the ESRB on violence descriptors, and in instances in which there is disagreement, they are usually less strict than the ratings board." In short, the ESRB ratings are reliable and effective.

It is clear, though, that the FTC uncovered individual marketing plans that indicate that some of our members, in violation of long standing industry guidelines, planned to, and may have, marketed games rated for Mature users to young people. Let me make it clear to this Committee that the IDSA does not condone or excuse the marketing of Mature rated products to persons under 17 and, indeed, we condemn it. As I noted, six years ago and long before the recent outcry over media violence, we ourselves voluntarily created an advertising code of conduct, which contained an anti-targeting provision.

But it also must be pointed out that we have some legitimate business disagreements with the FTC's analysis of industry practices and the impression the report conveys of our industry's markets and marketing. Thus, let me take a moment to address several facts ignored by the FTC.

According to statistics collected by the ESRB's new Advertising Review Council, since February 1, 2000, the 16 leading game enthusiast magazines, noted by the FTC as the primary vehicle for industry marketing, ran a total of 1,830 ads for games. Of these, only 188, or about 10 percent, were for Mature rated product. The most M rated ads in a single issue was 7, and typically, each issue contains only 3 or 4 ads for mature rated product. This relative paucity of ads for M rated product reflects the fact, as I pointed out earlier, that M rated games are actually a small portion of the overall game market both in total releases and retail sales. The question of whether those ads should or should not appear in these publications is a fair point of discussion, but let's all understand that any suggestion that companies are flooding consumers with ads for Mature rated product is simply not accurate.

One of our major quarrels with the FTC report is the apparent assumption that magazines with what it calls "a majority under-17 readership" are not appropriate outlets for advertising of Mature rated games, and that websites or TV shows that are "popular" with kids are similarly inappropriate outlets for advertising Mature product. We agree that placing an ad for a Mature rated product in a publication which is clearly and squarely aimed at young readers, such as Nickelodeon or SI for Kids, is a violation of our standards. But we reject the FTC's operating assumption that ads in publications that happen to have some noteworthy percentage of young readers, but a substantial and perhaps even dominant share of older readers and users, is inappropriate.

In the same vein, FTC's use of a "popularity" test to rule out other advertising outlets is restrictive and commercially impractical. "Popularity" is not much of a bright line standard. Using this guidepost, virtually every game website and sites like mtv.com would be off limits to advertisers of Mature products even though a majority of viewers may be in the target demographic. This is unreasonably restrictive.

CONCLUSION

We are committed to continuing our efforts to educate consumers about ESRB ratings and to work with retailers to enforce those ratings. We have put in place procedures to address legitimate criticisms of occasional companies in our industry improperly marketing Mature rated products to children. We will continue to do our part. But we note in closing that in the final analysis, government and industry can only do so much. While the FTC noted that 83 percent of parents are involved in buying video games for their kids, and while research also shows that 73 percent of those familiar with the ESRB ratings find them helpful, the fact remains that the FTC found that 45 percent of parents who do know about the ratings don't use them. Congress has yet to come up with a way to mandate sound parenting. That means we all have an extremely important obligation to continue to take all reasonable steps to raise awareness among parents of the existing tools available to them and to get them to use them.

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PREPARED STATEMENT OF CASS R. SUNSTEIN, KARL N. LLEWELLYN DISTINGUISHED SERVICE PROFESSOR OF JURISPRUDENCE, UNIVERSITY OF CHICAGO LAW SCHOOL

I am pleased to appear before the subcommittee to testify on the constitutional issues raised by the proposed Children's Protection Act. For constitutional purposes, the key provisions of the bill are sections 404 and 405. Section 404 would exempt from the antitrust laws agreements by "persons in the entertainment industry for the purpose of developing and disseminating voluntary guidelines designed—(1) to alleviate the negative impact of telecast material, video games, Internet content, and music lyrics containing violence, sexual conduct, criminal behavior, or other subjects that are not appropriate for children; or (2) to promote telecast material that is educational, informational, or otherwise beneficial to the development of children." Section 405 would create a similar exemption for discussions designed to create "ratings and labeling systems to identify and limit dissemination of sexual, violent, or other indecent material to children."

I believe that sections 404 and 405 are constitutional, and that if enacted, they would and should be upheld by the United States Supreme Court. In these remarks, I will restrict myself to the first amendment issues raised by the bill. I will deal only briefly with the question whether the bill is desirable as a matter of policy. (Because I served on the President's Advisory Committee on the Public Service Obligations of Digital Television Broadcasters, I would be happy to respond to questions about policy issues as well.) I will also venture some brisk remarks on related constitutional questions that have been raised as a result of recent discussions of the entertainment industry. The basic conclusion here is that direct regulation is more doubtful than labeling requirements, which are in turn more doubtful than exemptions from the antitrust law. But it is important to see that the law is not yet defined in this area, and narrow measures designed to protect children might well be acceptable, at least if they involve violence, even if they take the form of direct labeling requirements and direct regulation.

Briefly, the reasons for my principal conclusion is as follows. Sections 404 and 405 do not regulate or prohibit speech. Their only effect is to authorize voluntary action within the entertainment industry. In this particular respect, they increase rather than decrease the freedom of the relevant companies, by reducing the pressures of the marketplace with respect to educational programming, violence, sexually explicit materials and related issues. The most powerful attack on the bill would be that the selective exemption it creates is based on the content of speech, and that content-based regulation is subject to careful judicial scrutiny, which the bill could not survive. This attack is, however, unpersuasive in light of the fact that sections 404 and 405 (a) do not require or prohibit speech at all, and (b) do not discriminate on the basis of point of view, but are instead a legitimate effort to combine genuine harms. To the extent that the bill is directed at the television industry, Congress has particular room to maneuver. The safest conclusion is that a facial attack on the bill would fail.

My testimony is divided into three parts. The first deals briefly with general considerations bearing on legislative efforts to improve the performance of the entertainment industry, and with the connection of those considerations to the proposed legislation. The second part outlines the principal constitutional objections to the bill, and argues that they are unpersuasive. The third ventures some more general remarks about the constitutional issues in this domain. The basic conclusions here are that (a) exemptions from the antitrust law are least controversial from the constitutional standpoint, (b) direct regulation is most troublesome from that point of

view, though there are uncharted constitutional waters here, and (c) labeling requirements are somewhere between antitrust exemptions and direct regulation, with the best guess being that such requirements, giving flexibility to the private sector and narrowly drawn to protect children, are constitutionally acceptable.

I

It will be useful to begin the discussions with some general points relating the proposal here to constitutional doctrine in this area.

1. The proposed bill would not directly regulate speech; it is entirely noncoercive. See *Denver Area Educational Telecommunications Consortium* v. *FCC,* 116 S. Ct. 2374 (1996), emphasizing this point in upholding a content-based, permissive law. In an important sense, the bill enhances the freedom of speech of members of the entertainment industry, by removing a governmental constraint (the antitrust laws) that prohibits people from acting as they wish, and from speaking among each other about their action. If the bill does in fact have the intended effects, by (for example) increasing educational programming and reducing the amount of violence seen by children, it will be largely because the bill eliminates the competitive pressures that force members of the industry to produce violent and other inappropriate materials even though (and this is the key point) they would in a sense prefer not to produce such products. The creation of an antitrust exemption would merely free companies from competitive pressures in this context. (1) The old "code" of the National Association of Broadcasters was designed precisely to promote the public service role of television broadcasters, and to do so by diminishing some of the harmful effects of the marketplace.

In this respect, the proposal belongs in the same category as other antitrust exemptions, most notably the labor exemption, which is designed to ensure that workers do not have to compete with each other to their collective harm. Because of its entirely noncoercive character, the bill does not raise questions akin to those in *Bantam Books* v. *Sullivan,* 372 U.S. 58 (1963), in which the Court invalidated a state commission embarking on a range of censorial activities.

2. The Court has offered some indication that regulation designed to produce more and better information, for children and in general, is not unconstitutional for that reason, and indeed that this goal is consistent with the first amendment. See *Turner Broadcasting System* v. *FCC,* 117 S. Ct. 1174 (1997). In upholding the "must-carry" rules, which require cable operators to carry local broadcast stations, the Court emphasized the value of promoting the widespread dissemination of information. In his concurring opinion, Justice Breyer was especially emphatic on the point, stressing the roots of the first amendment in democratic self-government. See id. at 1204. Insofar as the bill is designed to promote more in the way of educational programming for children, it rests on an especially secure constitutional foundations. See *Denver Area Educational Telecommunications Consortium,* supra.

3. As a matter of history, the Supreme Court has traditionally applied more lenient standards to government regulation of broadcasting than to regulation of other media, even when such regulation is based on content. See *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969); *FCC* v. *League of Women Voters,* 144 S. Ct. 3106 (1948); *FCC* v. *Pacifica Foundation,* 438 U.S. 726 (1978). It is unclear, however, whether and to what extent the Court's understanding has been based on the now-obsolete "scarcity" rationale, and whether the legal standards will change as a result of the changing nature and increased diversity of the broadcasting industry. See Turner Broadcasting System, supra; *Turner Broadcasting System* v. *FCC,* 512 U.S. 622 (1994). There is some evidence that the standards for broadcasting are converging toward the standards for everything else. See *Turner Broadcasting Sys.* v. *FCC,* 512 U.S. 622, 634 (1994). This may well be the coming view. But it is notable in this regard that in Pacifica, supra, a plurality of the Court emphasized not scarcity, but the pervasive and intrusive character of broadcasting, and its possibly adverse and not always avoidable impact on children and other unwilling viewers. If the Court is prepared to accept this view, broadcasting will, along one dimension, continue to be subject to special standards no matter how numerous the relevant stations.

Of course the bill extends beyond broadcasters, to areas where the ordinary first amendment standards are likely to apply. Here the constitutional analysis will be somewhat more complicated.

4. It is currently unclear to what extent, and upon what findings, government may directly regulate violence or sexually explicit speech. Such regulations raise questions of (a) vagueness, (b) overbreadth, and (c) content discrimination. See *Reno* v. *ACLU,* 117 S. Ct. (1977), striking down the Communications Decency Act on vagueness grounds.

Any governmental controls—if they amount to controls—would have to be closely tailored to harms that government has a right to prevent. An open-ended prohibition of "violence" would certainly be unconstitutional. Compare *Reno* v. *ACLU,* supra (striking down the prohibition of "indecent" speech in the Communications Decency Act). On the other hand, a narrowly-drawn restriction might be upheld on a sufficient record, whether or not the Court continues to treat broadcasting differently from other media. See *Pacifica,* supra.

5. It is generally agreed that the antitrust laws are not constitutionally compelled. Whether the government must ensure competition, by banning monopolistic practices, in the particular context of media products is an unsettled question. The Supreme Court has never indicated that the government is under an affirmative obligation to ensure a "free market" in speech by banning collusive practices.

On the other hand, it is quite possible that a governmental decision to permit collusion and monopoly in some parts of the entertainment industry would raise serious constitutional questions. Under current law, the matter is not free from doubt. In *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969), the Supreme Court upheld the fairness doctrine in part on the ground that "It is the right of the viewers and listeners, not the right of broadcasters, which is paramount . . . . There is no sanctuary in the First Amendment for unlimited private censorship, operating in a medium not open to all." This language suggests that congressional license for collusive behavior might interfere with the rights of viewers and listeners. But in *CBS* v. *DNC,* 412 U.S. 94 (1973), the Court said that the first amendment did not require broadcast licensees to sell advertising time to groups or individuals wishing to express their views on issues of public importance. Three justices suggested that there was no "state action" subject to first amendment challenge.

In my view, a general grant of permission, by the Congress, for broadcasters to engage in collusive behavior would probably be unconstitutional—at least if the consequence of the grant was sharply to reduce diversity over the airwaves. But this conclusion is not compelled by existing law, and in any case it would depend on a judgment that, in practice, legislative authorization for concerted action had serious consequences in limiting diversity for the viewing public. A statute that allowed collusive and monopolistic activity would of course count as state action.

6. Content-based regulations or laws involving speech are subject to substantial first amendment scrutiny. See, e.g., *Denver Area Educational Telecommunications Consortium,* supra; *FCC* v. *Pacifica Foundation,* 438 U.S. 726 (1978). This means that a selective exemption from the antitrust laws could run afoul of constitutional restraints. Thus, for example, a law that exempted from the antitrust laws voluntary efforts by broadcasters "to alleviate the negative impact of" criticism of the President would be state action, and it would in all likelihood be unconstitutional on its face.

7. The discussion thus far suggests a simple conclusion: It is inadequate, although tempting, to say that because the proposal allows for voluntary guidelines, and is not mandatory, and because the antitrust laws are not constitutionally compelled, the bill raises no serious constitutional question. A voluntary exemption might be unconstitutional either because it eliminates diversity in broadcasting, because its selectivity amounts to impermissible discrimination on the basis of content, or because it amounts to a kind of threat. It is to these issues that I now turn.

II

I now deal with the principal objections to the proposed bill.

A. The diversity objection. The first constitutional objection to the proposed legislation is that the government may not reduce diversity in the mass media by authorizing collusive behavior. See *Red Lion,* supra, which indicates that the rights of listeners and viewers are the central first amendment concern in this context.

The first problem with this objection, referred to above, is that the bill might well increase diversity, and operate against marketplace pressures that produce not only poor quality, and harms to children, but also a kind of uniformity. If Congress believes that this is true, it might add a finding to this general effect, saying, for example, that marketplace pressures are sometimes stifling creativity and diversity, and that in this unusual context, collusive behavior is likely to create more quality and in some ways more diversity.

The second and more fundamental problem with this objection is that even if governmental authorization of collusive behavior here might sometimes be constitutionally objectionable, it is probably not plausible to say that the mere possibility of collusion and of factually reduced "diversity" create a successful constitutional challenge to the bill on its face. Much remains to be seen as the bill is implemented. If, for example, broadcasters—acting voluntarily and in concert—entered into "vol-

untary agreements" to alleviate "the negative impact" of television violence, any reduction in diversity may well be too minor, too difficult to attribute to government, and too connected to legitimate public and private goals to permit a successful constitutional challenge. Such agreements would not, in short, violate the first amendment rights of listeners and viewers. It is conceivable that the bill could be implemented in such a way as to decrease diversity in a constitutionally troublesome way, but this possibility would not mean that the bill is unconstitutional on its face.

Consider an analogy. Suppose that during wartime, members of the media decided, on their own, not to publish certain materials deemed by them to be dangerous to national security; or that during a period of racial strife, members of the media voluntarily agreed not to publish or broadcast inflammatory material. Behavior of this general sort has of course occurred throughout our history. Whether or not such behavior is commendable, one could not plausibly argue that such behavior violates the first amendment.

All this suggests that the most that one can say for this objection to the bill is that if the voluntary agreements that resulted were very broad in their intrusiveness on diversity, and also in the number of outlets that they covered, the bill might conceivably be unconstitutional as applied. But I do not believe that this objection could provide a plausible basis for saying that the bill is unconstitutional on its face.

B. Coercive in practice and implied threat. A second possible objection is that the bill is less permissive and innocuous than it seems, because it is undergirded by an implied threat on government's part: to regulate if voluntary measures are not taken. In these circumstances, any voluntary measures do not really qualify as such; they are a product of the coercive force of government.

The strongest precedent in this regard is *Bantam Books,* supra, where the Court struck down a New Jersey law creating a Commission whose purpose was "to encourage morality in youth" by educating the public about certain publications "tending to the corruption of" young people. The Commission did not engage in coercion, but it did notify distributors, on official stationery, that it found certain books objectionable for sale or display to youths under 18 years of age. The Court said that the Rhode Island practice was unconstitutional, notwithstanding Rhode Island's argument that no coercion was involved—merely information and exhortation. On the Court's view, the Commission "deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim." Id. at 67. The Court thought it important to look beyond the mere forms, and here it found "informal censorship." Id.

It would be possible to urge that the bill is also a form of informal censorship, especially in light of its background. But the bill is a far cry from the system struck down in *Bantam Books.* No Commission is given authority to pressure distributors to remove particular items that it dislikes. Indeed, the FCC has no role to play here. A full factual record showed that the Rhode Island system had coercive effects. There is only speculation, and no such record here. Under the Simon bill that served as predecessor to the bill, there is no evidence of government pressure, and little or no evidence of serious adverse effects on the broadcasting market. At this stage, the facts in Bantam Books presented a far stronger case for invalidation than this bill.

C. Content regulation. The third and probably most substantial objection to the bill is that it amounts to impermissible content regulation. The basic argument here would be that government cannot enact selective exemptions from the antitrust laws in order to encourage speech that it prefers, or discourage speech that it dislikes. For example, it would be impermissible to manipulate the antitrust exemption to allow cooperative behavior to ensure against criticism of governmental policy, of Republicans, or of the Supreme Court.

In my view, this objection is unpersuasive. The most general point to make in response is that the Supreme Court has never held that content regulation is subject to a per se ban, and frequently held the opposite. The "question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech." *Young* v. *American Mini-Theatres,* supra. See also *Denver Area Educational Telecommunications Consortium,* supra. The Court's decisions reveal that content regulation is likely to be upheld when (a) it does not suppress, and is not intended to suppress, a particular point of view, and (b) it is a legitimate effort to prevent serious social harms. See id.; Pacifica, supra.

These considerations, together with recent Supreme Court decisions and several other factors distinctive to the bill, strongly suggest that the bill is constitutional, certainly insofar as it attempts to promote educational programming, and almost certainly insofar as it attempts to reduce violence. Indeed, the constitutional arguments for the bill are, on balance, significantly stronger than arguments in favor of content-based regulation that the Supreme Court has accepted in other contexts.

It is important to add, however, my conclusion depends on an assumption (on which I take no position here) that the evidence about the harmful effects of violence in the entertainment industry is in fact substantial. My analysis comes in four basic steps.

1. Strictly speaking, the bill is not content "regulation" at all. It bans no speech; it requires no speech. This fact is not decisive in its favor. But it makes the case for its constitutionality significantly stronger. The Court would be likely to accept at least plausible claims of legitimate justifications if those justifications are made in favor of authorization of voluntary agreements. The Court would require a greater showing of harm to support direct regulation.

The strongest precedent in this regard—and it is a strong one indeed—is Denver Area Educational Telecommunications Consortium, supra. In that case, the Court upheld a provisions by which Congress granted cable operators "permission" to exclude indecent programming from the airwaves. Justice Thomas offered a simple analysis: because the relevant First Amendment rights are those of the operators, of course Congress could do this; Congress was merely giving operators permission that they would have had without governmental restriction. This argument appears to support the bill, for this bill too enables broadcasters to do something that they would be permitted to do without the restrictions of the antitrust laws. But the key opinion came from Justice Breyer. Instead of adopting any simple rule, Justice Breyer's opinion emphasized several factors. First, the regulation was based on content but not on viewpoint. Second, it was designed to protect children, a distinctly important interest. Third, it was in some ways reminiscent of the regulation upheld in Pacifica. Fourth, it was permissive rather than mandatory.

All of these factors are present here. Justice Breyer's opinion also emphasized the fact that without a regulatory system, programmers with indecent programming would have no guaranteed access to the operators' systems, a factor not present here. On the other hand, there is a parallel in the fact that without an antitrust law companies would be free to produce voluntary guidelines for children.

We should distinguish here between the two different components of the bill. Promoting educational and informational programming for children is unquestionably legitimate. If the goal was to be maximally cautious, this section might be clarified by deleting "otherwise beneficial"; permission for broadcasters to get together to ensure more and better educational programming is certainly constitutional, and the "otherwise beneficial" language raises some of the concerns of vagueness and overbreadth found decisive in the coercive context in *Reno* v. *ACLU,* supra. Promoting guidelines that would control violence, sexual content, criminal behavior, and other material with a negative impact does raise some concerns about vagueness, overbreadth, and perhaps viewpoint discrimination. It would be safest, from the legal point of view, to limit this provision to violence, as indeed Senator Simon's predecessor provision did. I return to this point below. But I should say that the provision is very probably constitutional in its current form.

2. To the extent that the bill applies to the broadcasting industry, the government has traditionally had greater flexibility, and insofar it is attempting to protect children from material with a kind of "immediacy," the traditional view may well continue to hold.

3. The bill discriminates on the basis of content, but it is not best understood a form of viewpoint discrimination. Like the statute upheld in American Mini-Theatres, it draws a line "on the basis of content without violating the government's paramount obligation of neutrality in its regulation of protected expression." Its line "is unaffected by whatever social, political, or philosophical message a (broadcast) may be intended to communicate." Certainly this is true for most of the bill. Insofar it is directed against violent material, it stands on secure ground. The reference to "criminal behavior" may raise a few questions of viewpoint discrimination, but even that provision is probably safe.

This conclusion draws considerable support from Denver Area, supra, where the Court similarly upheld a content-based but viewpoint-neutral grant of permission to those who provide programming. It draws some support as well from the Court's decision in *City of Renton* v. *Playtime Theatres,* 475 U.S. 41 (1986). There the Court upheld a zoning ordinance restricting sexually explicit materials on the ground that ordinance was directed at "secondary effects" on the community rather than at a point of view. Indeed, the Court concluded that a measure directed at such secondary effects was "content neutral."

Secondary effects are of course the reason for the authorization in the bill. Indeed, the argument for the bill seems in most respects significantly stronger than that for the direct regulation upheld in Renton. (I might add that whether the Renton regulation was "content-neutral" because of "secondary effects" is highly questionable; secondary effects are frequently invoked in favor of content-based laws.)

I have only looked briefly at the evidence on which the bill is based, and take no position on it here. But if that evidence is substantial, the bill is based on a legitimate effort to control serious social harms. At least this is true insofar as the bill is focussed on educational programming and on television violence. See Hamilton, Channeling Violence (1999); Minow and LeMay, Abandoned in the Wasteland (1995). Protection of the public from violence is of course a principal responsibility of government. Protection of children from unwilling exposure—a principal purpose of the bill—is also a legitimate and perhaps especially strong interest. See *Denver Area,* supra; *Pacifica,* supra. (Frequently, the violence on television is sexual in nature—a particularly troublesome problem for viewers who are children and indeed for adults as well.) The argument for the constitutionality of the bill is exceedingly powerful if the evidence in its support is convincing; if it is weak or thin, the argument against the bill is considerably stronger. But in light of the peculiar characteristics of the bill—its noncoercive quality and its viewpoint-neutrality—even a plausible showing of harm would probably provide a sufficient evidentiary basis to survive first amendment scrutiny. In particular, invalidation of the bill on its face—in advance of concrete experience with any "voluntary guidelines"—is exceptionally unlikely.

I must close, however, with a qualification, signalled by part of the discussion above. Some of the bill covers materials on which (so far as I am aware) there is little factual record. With respect to television violence, the record is sufficiently clear, or so Congress could constitutionally find. Things are more complicated with respect to sexual content, criminal behavior, and other materials. With its current breadth, the current language is more vulnerable to the argument that Congress is not combating actual or demonstrated harms, but instead seeking to create an exemption so as to reduce that form of programming of whose content it disapproves. But I do not believe that the bill is and would be found unconstitutional.

III

Thus far I have suggested that the bill is constitutional, because it amounts to a noncoercive exemption from the antitrust laws, an exemption that is based on content, but not on point of view. Of various possible responses to inappropriate material for children, this bill takes the least intrusive of approaches. But there are two obvious alternatives that have received considerable discussion in the recent past, and it will be worthwhile to venture some brief remarks about those alternatives.

If Congress is concerned about material that is violent or otherwise inappropriate for children, it might consider, as a last resort, express regulation. Such regulation could take the form of time, place, and manner restrictions (forbidding certain material during hours when children will be watching television) or more across-the-board bans (forbidding children from attending movies with certain ratings). Of the various possibilities, this is the most troublesome from the constitutional standpoint. There is a risk of unacceptable vagueness, see *ACLU* v. *Reno,* supra. There is a risk of overbreadth. There is also a risk of unacceptable content regulation. See Denver Area, supra. Of course a time, place, and manner restriction would be more likely to be acceptable than a flat ban. See *ACT* v. *FCC,* 59 F.3d 1249 (DC Cir 1995) (upholding restrictions on times when "indecent" materials may be broadcast on television).

These are general propositions on which there is a broad consensus. But notably, Congress has not generally regulated violent materials, and the law is far more developed with respect to sexually explicit materials. It is possible that courts will allow Congress to build on the law of obscenity to have some control over violent material. Current law allows Congress to ban "obscene" materials and to regulate "indecent" materials. It is possible that Congress could create similar categories for violent material. The problems of definition are formidable here, of course.

Labeling requirements, building on the "v-chip" legislation and recently proposed by Senator McCain, should be understood as falling somewhere between exemptions from the antitrust law and direct regulation. (See S. 1228, the proposed Media Violence Labeling Act of 1999.) In fact there is surprisingly little law on the extent of Congress' power to require labels. In the context of commercial advertising, it seems well-settled that labeling requirements are permissible, as in the context of cigarette warnings. But things are less clear with respect to labeling requirements. Clearly it would be impermissible for Congress to require "politically controversial" or "out of the mainstream views" to be labeled as such. In cases of that kind, labeling would be a form of viewpoint regulation. The question here is whether labeling requirements can be justified as legitimate content regulation. That question will in turn depend on whether the requirements are narrowly tailed to harms that government has a right to prevent. In the context of disclosure mandates for dangerous or poten-

tially dangerous products, such as cigarettes or certain children's toys, the legal test is clearly met. With respect to violent material, there is a good chance that the test is met as well. See Note, Don't Touch That V-Chip, 8 Geo. L. J. 823 (1999); Cass R. Sunstein, One Case At A Time (1999). The safest course, however, would build on the approach used in the "v-chip" legislation, in which government does not mandate a labeling system on its own, but instead authorizes private efforts in this direction.

CONCLUSION

In all likelihood, the bill would not be subject to a successful first amendment challenge, certainly insofar as it is designed to promote educational programming and to reduce exposure to violent programming. Exemptions from the antitrust law are constitutionally permissible if they do not discriminate on the basis of viewpoint, are unlikely to decrease diversity in a constitutionally troublesome way, and have as their purpose and effect the reduction of harms that Congress has a right to prevent.

NOTES

1. See generally Robert Frank and Philip Cook, The Winner-Take-All Society 207–09, 228 (1995), for an illuminating discussion, from the economic point of view, of how marketplace pressures can produce an outcome that people generally do not like, and how regulatory provisions can increase freedom by removing those pressures.

2. See Frank and Cook, supra note 1, for some theoretical and empirical support.

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