

# **Dr. Strange-rating or: How I Learned that the Motion Picture Association of America's Film Rating System Constitutes False Advertising**

## **ABSTRACT**

*The Motion Picture Association of America (MPAA), a trade association whose members include film production studios, distributors, and theater chains, administers the most popular system for rating the content contained in the vast majority of publicly exhibited motion pictures in the United States. The stated goal of the rating scheme is to caution parents about any objectionable content that a film contains in order to allow them to make informed decisions about which films they will allow their children to see. While the rating scheme has undergone several changes since its establishment to further its stated goal, a fundamental conflict of interest exists because the MPAA has the dual responsibilities of rating films that are often produced by its own members and simultaneously advancing those members' commercial interests within the film industry. Despite the criticisms that the MPAA's rating system has received, legislatures and courts have largely refrained from taking action to correct its problems due to the United States' historical ambivalence toward government-imposed censorship.*

*This Note examines the United States' state and federal governments' past and current attitudes toward censorship of motion pictures. Then, it analyzes the MPAA rating scheme's flawed attempt at creating an independent means of protecting children from potential infliction of psychological harm from films. Finally, this Note demonstrates that the rating scheme constitutes false advertising and advocates that the Federal Trade Commission, under its congressional mandate to prevent such advertising practices, should order the MPAA to prepare and make available to the public an objective evaluation of each newly rated film's objectionable content in a manner that is both more detailed and more cognizant of the context in which the objectionable content appears.*

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In July 1978, Universal Studios released the now-famous college film *Animal House*<sup>1</sup> to rave reviews.<sup>2</sup> As a result of the enormous and enduring popularity of the film, which portrays the antics of the members of a raucous college fraternity house,<sup>3</sup> it has grossed more than \$141 million to date.<sup>4</sup> Before its release, *Animal House* received a *Restricted* rating, abbreviated as *R*, from the Motion Picture Association of America (MPAA),<sup>5</sup> a trade association comprised largely of film production studios and distributors.<sup>6</sup> Movie theaters that abide by the MPAA's rating scheme, often members of the motion picture theater trade group that jointly sponsors the scheme, the National Association of Theatre Owners (NATO), will refuse to admit children under the age of seventeen to showings of *R*-rated films like *Animal House* without the accompaniment of a parent or legal guardian due to such films' "adult material."<sup>7</sup> However, given *Animal House*'s focus on a relatively youthful cast of characters and the positive press that it received, scores of children under eighteen

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1. *National Lampoon's Animal House* (Universal Studios 1978) [hereinafter *Animal House*].

2. Roger Ebert, *National Lampoon's Animal House*, CHICAGO SUN-TIMES, Jan. 1, 1978, available at <http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/19780101/REVIEWS/801010308/1023>; Frank Rich, *School Days*, TIME, Aug. 14, 1978, available at <http://www.time.com/time/magazine/article/0,9171,946996,00.html>; *Year's Best*, TIME, Jan. 1, 1979, available at <http://www.time.com/time/magazine/article/0,9171,916590,00.html>. Rotten Tomatoes, a website that issues analyses of critical reception to films indicates that 89% of reviewers recommended *Animal House* to readers. Rotten Tomatoes, *National Lampoon's Animal House*, [http://www.rottentomatoes.com/m/national\\_lampoons\\_animal\\_house/](http://www.rottentomatoes.com/m/national_lampoons_animal_house/) (last visited Nov. 2, 2009); Rotten Tomatoes, What is the Tomatometer?, [http://www.rottentomatoes.com/help\\_desk/faq.php#tomatometer](http://www.rottentomatoes.com/help_desk/faq.php#tomatometer) (last visited Nov. 2, 2009).

3. See *Animal House*, *supra* note 1.

4. *Id.*

5. *Id.*; Internet Movie Database, Parents Guide for *Animal House*, <http://www.imdb.com/title/tt0077975/parentalguide> (last visited Aug. 19, 2009) (noting that *Animal House* contains scenes that portray sexuality, nudity, profanity, and drug content).

6. Motion Picture Association of America, Members Page, <http://www.mpa.org/AboutUsMembers.asp> (last visited Aug. 19, 2009) [hereinafter MPAA Members]. The MPAA also has members hailing from the television industry, but they are irrelevant to this Note's discussion. Motion Picture Association of America, About the MPAA, <http://www.mpa.org/AboutUs.asp> (last visited Aug. 19, 2009).

7. Motion Picture Association of America, Ratings, [http://www.mpa.org/FlmRat\\_Ratings.asp](http://www.mpa.org/FlmRat_Ratings.asp) (last visited Aug. 19, 2009); National Association of Theatre Owners, About the Movie Ratings System, <http://www.natoonline.org/ratingsabout.htm> (last visited Aug. 19, 2009).

went to see the movie in theaters, including Scott and Richard Hamilton and the four children of William and Linda Cheeseman.<sup>8</sup>

In January 1979, the parents and step-parents of these six children, whose ages ranged from six to fifteen, purchased tickets for them to attend screenings of the film, but sent them into the theater unaccompanied.<sup>9</sup> When the NATO-member movie theater refused to admit the children to the exhibition, they sued the owner of the theater under the age discrimination provisions of the Michigan Civil Rights Act.<sup>10</sup> The Michigan Court of Appeals held that while the MPAA ratings carry no legal force, theaters may still deny minor children admission to the films that they exhibit on the basis of those ratings—even if the film is not “obscene” and parental consent is given.<sup>11</sup> Relying on the United States Supreme Court’s past jurisprudence regarding statutes and regulations that attempt to control the dissemination of potentially obscene materials to children, as well as the State of Michigan’s own legislative actions in this area,<sup>12</sup> the *Cheeseman* court reasoned that the Act was not intended to prevent theaters from enforcing the MPAA rating recommendations.<sup>13</sup> The court further justified its holding on the grounds that movie theaters are subject to heightened tort liability regarding minor patrons due to children’s “immaturity and inexperience” and that, by excluding minors from exhibitions of films that contain “adult material,” theaters are insulating themselves from any civil liability stemming from psychological trauma potentially inflicted on a child who views such films.<sup>14</sup>

The *Cheeseman* case illustrates the central problems that arise when society attempts to maximize its citizens’ freedom of expression while simultaneously safeguarding its children from the potential psychological damage that some of those expressions may cause in immature minds. For motion pictures in the United States, the best solution advanced to date is the use of content guidelines set by the MPAA, a private industry organization independent of government influence. However, despite the MPAA’s attempts to portray its rating system as an evolving comprehensive solution to the problems facing parents in making decisions regarding what films they allow their children to watch,<sup>15</sup> critics have complained about the rating system’s

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8. *Cheeseman v. Am. Multi-Cinema, Inc.*, 310 N.W.2d 408, 410 (Mich. Ct. App. 1981).

9. *Id.*

10. *Id.*

11. *Id.* at 410, 414-15.

12. *Id.* at 412-13.

13. *Id.* at 415.

14. *Id.* at 411-12.

15. *See infra* note 139 and accompanying text.

lack of specificity and the varying levels of attention it gives to different types of objectionable content and also alleged that conflicts of interest within the MPAA cause it to use its rating system to influence the commercial success of the films it rates.<sup>16</sup>

Part I of this Note outlines the analytical framework created by the Supreme Court's interpretation of the First and Fourteenth Amendments to the United States Constitution, which provide freedom of speech through the medium of motion pictures. Until 1952, films did not fall under the ambit of constitutional protection.<sup>17</sup> Once the Supreme Court finally decided to consider films to be constitutionally protected speech,<sup>18</sup> they then became subject to the body of law that addresses, and largely prohibits, "obscene" speech. Since it established what it felt to be a sufficiently conclusive definition of obscenity,<sup>19</sup> the Court has largely refrained from refining it further, choosing instead to allow the states a degree of independence to create their own legislative designs.<sup>20</sup> However, the Court has not been totally absent from commenting on the constitutionality of state obscenity statutes.<sup>21</sup>

Part II of the Note analyzes the history of film content ratings within the United States. Beginning with the history of the MPAA, the Note discusses its current ratings procedures and the criticisms and legal attacks it has received. The Note also addresses the legal definition and prohibition of "false advertising" and its potentially serious implications for rating systems, as well as the method used by the Federal Trade Commission (FTC) to determine whether an advertisement meets this definition and the remedial measures that it may prescribe.

Part III applies the FTC's analytical method to the MPAA film rating system. The current system's usage of five categories to classify escalating levels of objectionable content within a rated film<sup>22</sup> sets up

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16. See discussion *infra* Part II.B.

17. See generally *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (concluding that cinematic expression was included within the free speech and free press guarantees of the First and Fourteenth Amendments).

18. *Id.*

19. See *Roth v. United States*, 354 U.S. 476, 489 (1957) (establishing that the standard for obscenity is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest"); see also *Miller v. California*, 413 U.S. 15, 24 (1973) (quoting in part *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)).

20. *Miller*, 413 U.S. at 25 (emphasizing that it is not the function of the Court to suggest regulatory schemes for the States).

21. See *Sable Comm'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975).

22. Motion Picture Association of America, *supra* note 7.

an arbitrary framework that lacks specificity. This deficiency in clarity of the ratings' connotations creates a strong potential to materially mislead consumers as to the attributes of a rated film; such a potential is the touchstone of false advertising.<sup>23</sup>

In Part IV, the Note surveys the three main approaches taken by foreign countries to regulate the content of films: state-mandated submission to a governmental ratings board before exhibition; intra-country provincial regulations; and voluntary, privately-funded systems similar to the MPAA. After analyzing these approaches, the Note concludes that the FTC should order the MPAA to supplement its ratings with a publicly available objective evaluation of all objectionable content contained within each newly rated film that involves a greater level of detail than the current ratings and takes into account the cinematic context that surrounds the objectionable content.

## I. INTRODUCTION: CENSORSHIP LAW AND CONTEMPORARY CINEMA

### A. *The Constitution and Motion Pictures*

The law excluded motion pictures from the sphere of First Amendment protection for approximately the first seventy years of their existence.<sup>24</sup> Due to this lack of constitutional protection, many states required prospective exhibitors of motion pictures to obtain a license from the government—usually at the municipal level—before they could show any film to the general public.<sup>25</sup> In cases where such licensing statutes came under legal attack, the judiciary tended to defer to the judgment of the entity responsible for the licensing decision, so long as it exercised its judgment “fairly, honestly, upon correct information, and with a view to the moral and physical welfare

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23. See *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976).

24. See *Mut. Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 243-44 (1915); *Thayer Amusement Corp. v. Moulton*, 7 A.2d 682, 686 (R.I. 1939) (“Motion pictures are undoubtedly within the category of shows and exhibitions, and for more than a century these have been considered along with rope or wire dancing, wrestling, boxing, and sparring matches and also roller skating and dancing in rinks and public halls, as subject to regulation and even prohibition under the police power of the state.”). See also Microsoft Encarta Online Encyclopedia, History of Motion Pictures, [http://encarta.msn.com/encyclopedia\\_761567568/History\\_of\\_Motion\\_Pictures.html](http://encarta.msn.com/encyclopedia_761567568/History_of_Motion_Pictures.html) (last visited Nov. 2, 2009) (noting that, depending on how one defines “motion picture,” the technology was invented sometime between the 1870s and the 1890s).

25. See, e.g., *United Artists Corp. v. Thompson*, 171 N.E. 742 (Ill. 1930); *Edwards v. Thompson*, 262 Ill. App. 520 (Ill. App. Ct. 1931); *Illinois ex rel. Guggenheim v. City of Chicago*, 209 Ill. App. 582 (Ill. App. Ct. 1918); *Bainbridge v. City of Minneapolis*, 157 N.W. 964 (Minn. 1915); *Message Photo-Play Co. v. Bell*, 179 A.D. 13 (N.Y. App. Div. 1917); *In re Goldwyn Distrib. Corp.*, 108 A.2d 816 (Pa. 1919).

of the public.”<sup>26</sup> While these restrictions on constitutionally protected speech—referred to as “prior restraints”<sup>27</sup> or “previous restraints”<sup>28</sup>—would normally violate the Constitution,<sup>29</sup> they have been permitted “[i]f there be capacity for evil.”<sup>30</sup> When the Supreme Court determined in *Joseph Burstyn, Inc. v. Wilson* that motion pictures did, in fact, qualify as protected speech because they serve as meaningful vehicles for conveying ideas, the very criteria that had justified prior restraints on exhibiting them suddenly signified the value that they contribute to society.<sup>31</sup> The result was that films began to enjoy the same First

26. *Silverman v. Gilchrist*, 260 F. 564, 566 (2d. Cir. 1919); *accord Edwards*, 262 Ill. App at 523 (“Considering the picture before us, we have no hesitation in saying that . . . there would be such a difference of opinion as to its character that it must be held . . . that the municipal officers in refusing a permit did not abuse the discretion lodged in them.”); *Guggenheim*, 209 Ill. App. at 584 (“The fact that the witnesses entertained different views as to the immoral character of the picture . . . indicates that there was room for a difference of opinion on the subject . . . . If there is a reasonable basis for the censor’s opinion, then a refusal of the permit based thereon could not be deemed an abuse of power . . . .”); *Bainbridge*, 157 N.W. at 965-66 (“[T]he statute gives the mayor power to revoke licenses . . . . It cannot be used capriciously, or arbitrarily or oppressively, but only in the exercise of an honest and reasonable discretion . . . . [I]f there is room for honest difference of opinion, and the determination requires judgment and discretion, the action of the officer will be conclusive upon the courts.”); *Message Photo-Play*, 179 A.D. at 20 (“[T]he matter must be left to the official whom the Legislature has delegated authority, and his action . . . cannot be annulled or controlled collaterally by mandamus or injunction.”); *In re Goldwyn*, 108 A. at 818 (“[T]he discretion here committed to the board of censors is not to be narrowed by technical and official rules when the exercise involved is one of judicial discretion . . . . What is required is that it must be . . . associated with an honest desire and endeavor on its part to impartially enforce its provisions.”).

27. BLACK’S LAW DICTIONARY 1232 (8th ed. 2004).

28. *See generally Joseph Burstyn, Inc.*, 343 U.S. at 503 (using the terms “prior restraint” and “previous restraint” interchangeably within the same paragraph).

29. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”). *See also Joseph Burstyn, Inc.*, 343 U.S. at 503 (“New York requires that permission to communicate ideas be obtained in advance from state officials who judge the content of the words and pictures sought to be communicated . . . . [S]uch a previous restraint is a form of infringement upon freedom of expression to be especially condemned.”).

30. *Joseph Burstyn, Inc.*, 343 U.S. at 502 (“It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and places.”); *see also Times Film Corp. v. City of Chicago*, 365 U.S. 43, 47 (“Nor has it been suggested that all previous restraints on speech are invalid.”).

31. *Compare Kingsley Int’l Pictures Corp. v. Regents of the Univ. of the State of N.Y.*, 360 U.S. 684, 689 (1959) (noting that Constitutional protection of speech “is not confined to the expression of ideas that are conventional or shared by a majority”), 343 U.S. at 505 (emphasizing the social value of the freedom of expression of *differing* opinions regarding religion) (emphasis added), and *Gelling v. Texas*, 343 U.S. 960, 961 (1952) (“If a board of censors can tell the American people what it is in their best interest to see or to read or to hear . . . then thought is regimented, authority substituted for liberty, and the great purpose of the First Amendment to keep uncontrolled the freedom of expression defeated.”(internal citations omitted)), *with Guggenheim*, 209 Ill. App. at 584 (indicating that differing points of view on a subject created justifiable grounds for deferring to a censor’s judgment) and *Bainbridge*, 157 N.W. at 966 (“It is useless to spend time arguing the question whether reasonable people might differ as to the advisability of permitting the [expression] . . . . The question is one that calls for the exercise of

Amendment protection as books, newspapers, and radio broadcasts; however, they also became subject to the limits of that protection.<sup>32</sup>

### *B. Censorship Law in the United States*

The Free Speech Clause of the First Amendment to the Constitution of the United States mandates that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”<sup>33</sup> However, the Supreme Court has held that this does not protect *all* forms of communication.<sup>34</sup> While not wishing to understate the importance of the Amendment’s primary underlying purpose “to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people,”<sup>35</sup> the Court has noted that several forms of communication, such as obscenity, do not warrant constitutional protection because of the scant social value that they possess and the potential societal harm they might cause.<sup>36</sup> Until 1934, an expression could be deemed obscene and suppressed by the government if an excerpt of it, when considered *without* regard to the context in which it was found, tipped the balance in favor of censorship.<sup>37</sup> While the Court later overturned that approach and held that evaluation of the “dominant effect” of a communication is the proper method of determining whether it constitutes obscenity, the actual definition remained somewhat ambiguous until the Court decided *Roth v. United States* in 1957.<sup>38</sup>

In *Roth*, the Court rejected the historical English approach to labeling speech obscene<sup>39</sup> and instead approved the following test: “whether to the average person, applying contemporary community

official discretion, and the courts should not direct or enjoin [the censor’s] action.”). *But see* *Freedman v. Maryland*, 380 U.S. 51, 58 (1965) (“[A] noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system . . . . [O]nly a procedure requiring a judicial determination suffices to impose a valid restraint.”).

32. *See infra* notes 34-36.

33. U.S. CONST. amend. I.

34. *Roth v. United States*, 354 U.S. 476, 484 (1957).

35. *Id.*

36. *See Chaplinsky*, 315 U.S. at 572 (1942) (“[T]he lewd and *obscene*, the profane, the libelous, and the insulting or ‘fighting’ words . . . are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”(emphasis added)).

37. *See United States v. One Book Entitled Ulysses*, 72 F.2d 705, 708 (2d. Cir. 1934) (observing that evaluating whether an expression is obscene based upon selected contents taken out of context “would exclude [from society] much of the great works of literature and involve an impracticability that cannot be imputed to Congress.”).

38. *Id.*; *see also Roth*, 354 U.S. 476.

39. *Roth*, 354 U.S. at 489-90 (criticizing *Regina v. Hicklin*, [1868] 3 L.R.Q.B. 360 (U.K.)).

standards, the dominant theme of the material taken as a whole appeals to prurient interest.”<sup>40</sup> This definition underwent further specification in *Miller v. California* and now requires, in addition to the *Roth* test, that the communication contain specific, statutorily defined sexual content or excretory function that is “patently offensive” and that the work, as a whole, “lacks serious literary, artistic, political, or scientific value.”<sup>41</sup>

Under 18 U.S.C. § 1461, the federal government prohibits the mailing of obscene materials, among other items.<sup>42</sup> All fifty states have also enacted statutes or regulations pertaining to obscene materials, especially targeting their dissemination to children.<sup>43</sup> Oftentimes, the regulations concerning children’s access to obscene materials also apply to the distribution of protected speech that contains sexual material—such as pornography—since, while not obscene for adults, it qualifies as obscene for minors.<sup>44</sup> Dicta in *Jacobellis v. Ohio* provided the first indication that the Court approved of a state’s ability to restrict minors’ access to certain forms of protected speech even though such restrictions curtail their First Amendment rights as applied to states through the Fourteenth Amendment.<sup>45</sup>

The Court squarely addressed this issue in *Ginsberg v. New York*, a case involving a New York statute prohibiting the sale to minors of pictures depicting nudity.<sup>46</sup> In holding the statute constitutionally valid, the Court found that the State did not act irrationally by restraining children from viewing this potentially “harmful” material, which it defined using language that echoed, but did not entirely copy, the Court’s established definition of obscenity.<sup>47</sup> The essential difference between the definitions is that “harmful”

40. *Id.*

41. *Miller v. California*, 413 U.S. 15, 39 (1973).

42. 18 U.S.C. § 1467 (2009).

43. National Obscenity Law Center, <http://www.moralityinmedia.org/nolc/index.htm?statutesIndex.htm> (last visited Sept. 5, 2009).

44. *See, e.g.*, ALA. CODE § 6-5-160 (2009).

45. The case addressed an Ohio obscenity statute under which the appellant was convicted for exhibiting a French film that contained a brief, but graphic, adulterous sex scene. 378 U.S. 184, 195-96 (1964). While six of the Justices voted to reverse the conviction, they could not agree on a legal basis for doing so. *Id.* at 185-204. Five explicitly agreed that the film was not obscene and, in the plurality opinion agreed upon by three of them, they “recognized the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children. But that interest does not justify a total suppression of such material, the effect of which would be to ‘reduce the adult population . . . to reading only what is fit for children.’” *Id.* at 195 (quoting in part *Butler v. Michigan*, 352 U.S. 380, 383 (1957)).

46. 390 U.S. 629 (1968).

47. *Id.* at 633, 641-43.

material is meant to be construed by the “adult community” with regard to the material’s appeal to the prurient interest of, and lack of social importance to, *minors*, while “obscenity” is interpreted based upon general “community standards.”<sup>48</sup> Later cases examined the government’s power to impose other types of limits on the dissemination of potentially offensive material.<sup>49</sup>

For the government to regulate constitutionally protected speech, the legislation must (1) serve a compelling government interest and (2) be narrowly drawn to serve that interest without unduly interfering with First Amendment rights by using the least restrictive means possible to do so.<sup>50</sup> Protecting the physical and mental well-being of children has consistently been held to satisfy the compelling interest element,<sup>51</sup> as have comparable efforts at preventing neighborhood blight,<sup>52</sup> maintaining the public peace, and preventing violence.<sup>53</sup>

In order to be sufficiently narrowly drawn, the statute should specifically enunciate the content that it seeks to regulate as well as the context that would make it indecent.<sup>54</sup> The requirement of using the least restrictive method of regulation possible may be satisfied by allowing for an expeditious process for classifying the regulated material with the added ability to appeal to the courts.<sup>55</sup> This element likely poses the greatest challenge to drafters of legislation,<sup>56</sup> especially with regard to mainstream motion pictures, because the level of a popular film’s offensiveness is a necessarily subjective determination.<sup>57</sup> While defining and regulating “pornography” has

48. *Id.* at 636 (“Material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children . . . [T]he concept of obscenity . . . may vary according to the group whom the questionable material is directed or from whom it is quarantined.”) (quoting *Bookcase, Inc. v. Broderick*, 218 N.E.2d 668); *see also* *Roth v. United States*, 354 U.S. at 489.

49. *See* *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (finding an ordinance prohibiting the exhibition of films containing nudity at drive-in theaters on screens which are visible from public places unconstitutional for lack of legislative specificity). *See also* *Young v. American Mini-Theaters, Inc.*, 427 U.S. 50 (1976) (upholding an ordinance prohibiting operation of “adult theaters” within 1,000 feet of two other adult establishments, or within 500 feet of a residential area).

50. *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

51. *See id.* at 119; *Erznoznik*, 422 U.S. at 213; *Miller v. California*, 413 U.S. 15, 18-19 (1973); *Ginsberg*, 390 U.S. at 636; *Action for Children’s Television v. FCC*, 313 U.S. App. D.C. 94 (D.C. Cir. 1995); *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684, 689 (8th Cir. 1992).

52. *See* *Young*, 427 U.S. at 75.

53. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-73 (1942).

54. *See* *Erznoznik*, 422 U.S. at 217-18; *Video Software Dealers Ass’n*, 968 F.2d at 689.

55. *See* *Freedman v. Maryland*, 380 U.S. 51, 61 (1965).

56. *See* *Winters v. New York*, 333 U.S. 507, 525-26 (1948).

57. *See* *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684, 689 (8th Cir. 1992).

been sufficiently easy for governments due to the relative ease of enumerating the qualifying content, impeding minors' access to other types of films that, while not obscene, might still be judged by parents as inappropriate for their children, has proven itself to be a thornier issue. Enter the MPAA.

## II. BACKGROUND: AMERICAN FILM RATINGS AND FALSE ADVERTISING

### A. *The Motion Picture Association of America Rating System*

In response to public objection to the perceived depravity of mainstream films and the growing efforts of city and state governments to censor films, the Motion Pictures Producers and Distributors Association (MPPDA) was established in 1922 to advance the interests of the motion picture industry.<sup>58</sup> This nonprofit trade association, whose members include motion picture production studios and distributors,<sup>59</sup> became the MPAA in 1945.<sup>60</sup>

The MPAA took its first step in assuming the responsibility of controlling the content of publicly exhibited films in 1930 with the adoption of the Motion Picture Production Code, a list of subject matter and content prohibited from depiction in cinema.<sup>61</sup> An amendment to the Code in 1934 created the Production Code Administration which enforced the requirement that all films designed for public exhibition in MPAA-member theaters abide by the Code's guidelines and earn the MPAA's seal of approval prior to exhibition.<sup>62</sup> Filmmakers who wished to eschew the MPAA's evaluation and release their films without an MPAA seal faced potential boycott from the influential National Legion of Decency<sup>63</sup>

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58. Encyclopædia Britannica Online, Motion Picture Association of America, <http://www.britannica.com/EBchecked/topic/394174/Motion-Picture-Association-of-America> (last visited Nov. 3, 2009).

59. MPPA Members, *supra* note 6 (disclosing that members of the MPAA include Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLLP, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc.).

60. See Microsoft Encarta Online Encyclopedia, Hays Office, [http://encarta.msn.com/encyclopedia\\_762505864/Hays\\_Office.html](http://encarta.msn.com/encyclopedia_762505864/Hays_Office.html) (last visited Nov. 3, 2009). For the sake of clarity and ease of reading, the subsequent discussion will only use the term "MPAA," even though "MPPDA" is the technically accurate term for the organization when referring to events occurring prior to 1945.

61. *Id.*

62. David P. Hayes, The Production Code of the Motion Picture Industry (1930-1967), [http://productioncode.dhwritings.com/multipleframes\\_productioncode.php](http://productioncode.dhwritings.com/multipleframes_productioncode.php) (last visited Nov. 3, 2009).

63. The two million members of the National Legion of Decency, a Catholic organization that also incorporated Protestants and Jews, pledged to "remain away from all motion pictures

and may have had to obtain approval from government censorship boards;<sup>64</sup> the latter consequence existed only until the Supreme Court outlawed government censorship of motion pictures in 1952.<sup>65</sup> However, such a boycott would almost certainly spell commercial failure for the film. Spurred by the desire for commercial success and a preference for self-regulation over government censorship, film producers' near-universal adherence to the Code resulted in the issuance of the seal to the vast majority of films released between 1934 and 1968.<sup>66</sup>

During the American cultural revolution of the 1960s, the MPAA, the NATO, and the International Film Importers and Distributors of America designed and implemented the forerunner to the current rating system in order to "fulfill[] the movie industry's self prescribed obligation to the parents of America" to protect children from objectionable cinematic content.<sup>67</sup> Then, as now, the submission of a film to the ratings board was completely voluntary, although it was not free.<sup>68</sup> However, as parents grew to trust and rely upon the MPAA's discretion in rating films, mainstream theaters began showing only MPAA-rated films that received a rating less severe than *X*.<sup>69</sup> The rating scheme has since undergone several revisions and upgrades in its transformation to the system of *G*, *PG*, *PG-13*, *R*, *NC-17* that exists today, including the creation of the *PG-13* rating, the replacement of the *X* rating with *NC-17* (due to the near total appropriation of the *X* rating by the adult film industry to pornographic films), and the addition of brief justifications for the particular rating given.<sup>70</sup>

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except for those which do not offend decency and Christian morality." *Religion: Legion of Decency*, TIME, June 11, 1934, available at <http://www.time.com/time/magazine/article/0,9171,762190-1,00.html>. The pledge was "recited in unison at Sunday Masses, Knights of Columbus meetings, and parochial school assemblies." Thomas Doherty, *Church's Reach Diminished – At Least When it Comes to Films*, BRANDEIS UNIVERSITY, May 22, 2006, available at [http://my.brandeis.edu/news/item?news\\_item\\_id=105052&show\\_release\\_date=1](http://my.brandeis.edu/news/item?news_item_id=105052&show_release_date=1).

64. See *supra* note 25.

65. See *Joseph Burstyn, Inc.*, 343 U.S. 495.

66. Doherty, *supra* note 63.

67. Motion Picture Association of America, Ratings History, [http://www.mpa.org/Ratings\\_history1.asp](http://www.mpa.org/Ratings_history1.asp) (last visited Aug. 19, 2009).

68. *Id.*

69. *Id.* ("[A]nyone who did not submit his or her film for rating could self-apply the X [rating] . . . NATO urged the creation of an adult-only category . . . Hence, the four-category system, including the X rating was installed . . . The X rating over the years appeared to [take] on a surly meaning in the minds of most people . . .").

70. Motion Picture Association of America, *supra* note 7 (listing the content, ratings, and criteria that warrant each rating); Motion Picture Association of America, Ratings Revisions, [http://www.mpa.org/Ratings\\_hstry\\_Rvsns.asp](http://www.mpa.org/Ratings_hstry_Rvsns.asp) (last visited Aug. 19, 2009).

Ratings are issued by the Classification and Rating Administration (CARA), which is organized as a division of the MPAA and is composed of ten to thirteen raters who serve seven-year terms.<sup>71</sup> The only qualifications of these raters are that they “have a shared parenthood experience, [are] possessed of an intelligent maturity, and . . . have the capacity to put themselves in the role of most American parents” while viewing and rating a film.<sup>72</sup> The MPAA Chairperson, with the concurrence of the President of the NATO, appoints one member of the CARA as Chairperson of the CARA Ratings Board who then chooses the other raters.<sup>73</sup> Once every rater has viewed a film, assigned it a rating, and justified that rating to the others, they take a majority vote.<sup>74</sup> Factors the board considers include “sex, violence, nudity, language, adult topics and drug use.”<sup>75</sup>

If the producer(s) and/or distributor(s) of a film are displeased with the rating it receives, they may either re-submit it after further editing or appeal the rating decision to the Classification and Rating Appeals Board (Appeals Board).<sup>76</sup> The Appeals Board can vary in size from nine to seventeen people and consists of a large number of motion picture industry insiders, including the Chief Executive Officer (CEO) of the MPAA, the President of the NATO, and three representatives chosen by the member companies of the MPAA. The Appeals Board may also include up to four individuals unaffiliated with the motion picture industry who meet the requirements to serve as raters for the CARA and are chosen by the CEO of the MPAA and the President of the NATO.<sup>77</sup> Any member of the Appeals Board that has any economic interest in the specific film under scrutiny must recuse him or herself from the appeals proceedings.<sup>78</sup> Calling the legitimacy of the Appeals Board’s impartiality into question, more than three-quarters of the potential seventeen members have unquestionable commercial ties to the motion picture industry and thus, even in the scenario that maximizes the power of the impartial voice, the four representatives unaffiliated with the industry will always constitute less than half of the Appeals Board.

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71. Motion Picture Association of America, How Movies are Rated, [http://www.mpa.org/Ratings\\_HowRated.asp](http://www.mpa.org/Ratings_HowRated.asp) (last visited Aug. 19, 2009).

72. *Id.*

73. *Id.*; National Association of Theatre Owners, Classification and Rating Rules, [http://www.natoonline.org/CARA%20Rules%20ShoWest%202007%20official%20version\\_.pdf](http://www.natoonline.org/CARA%20Rules%20ShoWest%202007%20official%20version_.pdf) (last visited Aug. 19, 2009).

74. Motion Picture Association of America, *supra* note 71; National Association of Theatre Owners, *supra* note 73.

75. National Association of Theatre Owners, *supra* note 73.

76. *Id.*

77. *Id.*

78. *Id.*

After the Appeals Board views a film, it hears oral arguments from the film's producer or distributor in favor of a less restrictive rating and from the Chairperson of the Ratings Board in favor of the issued rating.<sup>79</sup> The Appeals Board will overturn a rating only if, after private deliberations, two-thirds of the members believe the rating issued by the Ratings Board "is inconsistent with the standards for that rating;" there exists no opportunity for further appeals, aside from resorting to judicial arbitration.<sup>80</sup> As a preemptory rebuttal to potential allegations of a conflict of interest in the ratings process, the MPAA asserts, without any support, that "[n]o one in the movie industry has the authority or power to push the [CARA Ratings] Board in any direction or otherwise influence it."<sup>81</sup> Of course, this ignores the fact that the Chairperson of the MPAA chooses the Chairperson of the CARA Ratings Board who then chooses the remaining raters.<sup>82</sup>

### B. Criticisms of the MPAA Ratings

#### 1. Organizational and Individual Commentary

Notwithstanding the MPAA's claims of independence, it is not surprising that in undertaking the responsibility of rating films produced by members and non-members alike, the MPAA has drawn considerable criticism. According to a study conducted by the Harvard School of Public Health in 2004 comparing the content of films released in 2003 with similarly rated films from 1992, ratings had "creeped" over time, meaning that the MPAA has progressively allowed films to contain significantly more sexual content, violence, and profanity.<sup>83</sup> Especially alarming was the higher amount of violence contained in G-rated films, which are usually intended to appeal to young children.<sup>84</sup>

The perceived arbitrariness of the rating system has also attracted much attention. Famed film critic Roger Ebert has been an especially outspoken critic of the ratings process, particularly with regard to what he sees as an undue sensitivity to sexual content and

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79. Motion Picture Association of America, *supra* note 71; National Association of Theatre Owners, *supra* note 73.

80. *Id.*

81. Motion Picture Association of America, *supra* note 71.

82. Motion Picture Association of America, *supra* note 71; National Association of Theatre Owners, *supra* note 73.

83. Kimberly M. Thompson & Fumie Yokota, *Violence, Sex, and Profanity in Films: Correlation of Movie Ratings With Content*, MEDSCAPE GENERAL MEDICINE, Vol. 6, No. 3, July 12, 2004, available at <http://www.kidsrisk.harvard.edu/images/MGMmovies.pdf>.

84. *Id.*

complacency with violence.<sup>85</sup> Since films are submitted to the MPAA voluntarily, there exists precious little ground for their creators to take legal action against the MPAA for allegedly improper ratings. However, the D.C. Circuit Court of Appeals and the Supreme Court of New York have tried cases considering the flaws in the MPAA ratings.<sup>86</sup> In both cases, the MPAA and its ratings prevailed, but the courts intimated that the outcome of future cases with stronger facts might differ.<sup>87</sup>

## 2. Judicial Commentary

In 1988, Maljack Productions, an independent movie production studio, submitted *Henry: Portrait of a Serial Killer* to the CARA for a rating.<sup>88</sup> Maljack was not a member of the MPAA.<sup>89</sup> Based largely upon four particularly offensive sequences, the film received an X rating.<sup>90</sup> Instead of editing the film, Maljack appealed the rating, and the Appeals Board affirmed.<sup>91</sup> Ultimately, Maljack decided to release the film without a rating and later filed a breach of contract suit against the MPAA for violation of an implied covenant of good faith and fair dealing.<sup>92</sup> Maljack alleged that, because many theaters refuse to exhibit X-rated or unrated films, the film earned less money than it would have if it had been released with an R rating, which Maljack claimed that it deserved.<sup>93</sup>

The district court dismissed the claim as “devoid of non-conclusory factual allegations capable of supporting an inference that the [MPAA] had acted unfairly or in bad faith” and denied Maljack’s

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85. See Roger Ebert, *The Passion of the Christ*, CHICAGO SUN-TIMES, Feb. 24, 2004, available at <http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/20040224/REVIEWS/402240301/1023>. In his review of the film *The Passion of the Christ*, which depicts the crucifixion of Jesus Christ in explicit detail, Ebert calls it “the most violent film [he has] ever seen” and cites the film’s R rating as proof that the MPAA either refuses to issue the NC-17 rating for a film based solely upon violent content, or is susceptible to intimidation by films’ subject matter because “[i]f it had been anyone other than Jesus up on that cross, [he feels] that NC-17 would have been automatic.” *Id.*

86. *Maljack Prods. v. Motion Picture Ass’n of Am.*, 52 F.3d 373 (D.C. Cir. 1995); *Miramax Films Corp. v. Motion Picture Ass’n of Am.*, 560 N.Y.S.2d 730 (N.Y. Sup. Ct. 1990).

87. *Id.*

88. *Maljack*, 52 F.3d at 374.

89. *Id.* at 375.

90. *Id.* at 374-75. While the opinion did not specifically enunciate the content of these sequences, the film itself was loosely based on the real-life serial killer Henry Lee Lucas who claimed to have killed one hundred or more people and was ultimately convicted of eleven homicides. See Katherine Ramsland, *Henry Lee Lucas*, TRUTV CRIME LIBRARY, available at [http://www.trutv.com/library/crime/serial\\_killers/notorious/henry\\_lee\\_lucas/1.html](http://www.trutv.com/library/crime/serial_killers/notorious/henry_lee_lucas/1.html).

91. *Maljack*, 52 F.3d at 375.

92. *Id.*

93. *Id.*

motion to amend its complaint.<sup>94</sup> The thrust of Maljack's argument on appeal was that the MPAA and its ratings process are biased against independent non-member studios.<sup>95</sup> The D.C. Circuit Court of Appeals found that an implied covenant of good faith and fair dealing did exist, and that, if Maljack could prove that the MPAA had acted as alleged, a breach of that covenant had occurred.<sup>96</sup> From a procedural standpoint, because the applicable standard merely required the facts to support the allegation of deliberate and conscious bad faith, the court reversed, but it made no comment on the validity of Maljack's claim or the likelihood of its success upon remand.<sup>97</sup> However, it did note that if Maljack could adduce evidence of some bias in the ratings criteria, a pattern of the CARA assigning unwarranted X ratings to independent films, or an interest of the MPAA's members in causing *Henry* to be less profitable, its claim would carry more weight than the bare assertions of discrimination that it had offered.<sup>98</sup> While the *Maljack* case does not refute the MPAA's assertion that "there has never been even the slightest jot of evidence that the rating system has deliberately fudged a decision or bowed to pressure,"<sup>99</sup> the basic conflict of interest that Maljack claimed caused *Henry* to be rated X does not seem fantastic given the structure of the MPAA. After all, the absence of evidence of discrimination is not necessarily evidence of an absence of discrimination.

The MPAA received a thorough lambasting from the judicial system in *Miramax Films Corp. v. Motion Picture Association of America*, a case specifically highlighting several of the major problems with the MPAA rating system. Like Maljack, Miramax sought a judicially-mandated modification of the rating for its film *Tie Me Up! Tie Me Down!* from X to R.<sup>100</sup> The court noted that "[t]he negative economic impact of not obtaining a satisfactory rating is clear and severe."<sup>101</sup> Miramax claimed, as did Maljack, that the Appeals Board is unduly influenced by the motion picture industry but, like Maljack, could not put forth any evidence of such influence.<sup>102</sup>

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94. *Id.*

95. *Id.*

96. *Id.* at 376.

97. *Id.* at 376-77.

98. *Id.* at 376.

99. *Motion Picture Association of America*, *supra* note 71; *National Association of Theatre Owners*, *supra* note 73.

100. *Miramax Films Corp. v. Motion Picture Ass'n of Am.*, 560 N.Y.S.2d 730, 731 (N.Y. Sup. Ct. 1990). Maljack filed a similar claim at the trial level, but it was dismissed on jurisdictional grounds and not appealed. *Maljack*, 52 F.3d at 375.

101. *Miramax*, 560 N.Y.S.2d at 732.

102. *Id.* at 733.

While the court ultimately denied Miramax's claims, it did so only after pointing out the many flaws in the MPAA rating system.<sup>103</sup> Its criticisms included: the MPAA's ability to affect a film's profitability as a result of its evaluation based on standards that, while reflective of the average parent, are ultimately subjective and by no means universally appealing; the sparse qualifications required to be a part of the CARA; the disproportionate focus of the CARA on sexual content as opposed to violence and drug use; a lack of input from experts in the area of child psychology; and the ability of producers and directors to negotiate for a film's rating, which, in the court's opinion, makes it little more than a marketing tool to promote a given film to a target audience.<sup>104</sup> While one could certainly question the appropriateness of the court's decision to include so much editorial dicta in its opinion, the utility of the court's comments to guide the creation of a better system of educating parents about the content of the films they allow their children to see should not go unheeded.

### C. False Advertising

#### 1. Statutory Definitions

Pursuant to 15 U.S.C. § 45, the FTC is charged with preventing unfair or deceptive methods of corporate competition that are likely to cause substantial injury to consumers and that consumers cannot reasonably avoid.<sup>105</sup> The definition of "corporations" includes an association "which is organized to carry on business for its own profit or that of its members."<sup>106</sup> One prohibited method of competition that the FTC's Bureau of Consumer Protection regulates is the dissemination of false advertisements,<sup>107</sup> defined as "advertisement[s], other than labeling, which [are] misleading in a material respect" and are likely to induce a consumer to purchase a service.<sup>108</sup> An advertisement is misleading in a *material* respect if a reasonable person would attach importance to the advertisement's message but would likely be misled by that message.<sup>109</sup> An advertisement may be misleading as a result of representations, omissions, or behavior on

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103. *Id.* at 732-36.

104. *Id.*

105. 15 U.S.C. § 45(a), (n) (2009).

106. *Id.* § 44.

107. FTC Bureau of Consumer Protection – Division of Advertising Practices, <http://www.ftc.gov/bcp/bcpap.shtm> (last visited Aug. 19, 2009).

108. 15 U.S.C. § 55(a) (2009).

109. *Id.* § 55(a)(1); *see also* RESTATEMENT (SECOND) OF TORTS § 538(2) (1977).

behalf of the seller,<sup>110</sup> including the act of providing a document that indicates that the product or service meets an objective performance standard.<sup>111</sup> Additionally, the issue is neither whether an advertisement actually does, in fact, mislead consumers nor whether the advertiser actually intended to deceive anyone; rather, the applicable standard is *the likelihood or propensity* to deceive.<sup>112</sup> The injury that the FTC seeks to prevent occurs when consumers obtain products or services that differ from what they sought as a result of a misleading advertisement issued by an FTC-regulated corporation, regardless of the objective wisdom of the consumer's pursuit of the sought-after product.<sup>113</sup>

## 2. The FTC's Method of Evaluation

The FTC analyzes advertisements as a whole to determine whether they are deceptive.<sup>114</sup> While an advertisement is not considered "false" if it conveys a message that *could be* misinterpreted if its representations are grossly contorted, it will not be found truthful if, among the message's many reasonable interpretations, only one is true.<sup>115</sup> When determining whether an advertisement has the propensity to mislead, the FTC views it from the perspective of an average person in the class of people targeted by the advertiser.<sup>116</sup> For example, if an advertisement for a toy is directed towards children, it is misleading if it would deceive the average *child* with regard to the

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110. 15 U.S.C. § 55(a)(1) (2009). The justification for finding the potential for deception in omissions is that consumers should be protected from having to scrutinize closely and critically think about each and every advertisement they encounter. *See Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 188-89 (1948). A seller's actions have been found to create representations of the nature of a product or service because they have the capacity to induce consumers into making incorrect assumptions. *See In re Peacock Buick, Inc.*, 86 F.T.C. 1532 (1975).

111. *See Chrysler Corp.*, 99 F.T.C. 347 (1982).

112. *See Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976).

113. *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 78 (1934).

114. *See* 15 U.S.C. § 55(a)(1) (2009) ("[I]n determining whether any advertisement is misleading, there shall be taken into account (among other things) . . . representations made . . . by statement, word, design, device, sound, or any combination thereof." (emphasis added)); *Am. Home Prods. Corp. v. FTC*, 695 F.2d 681, 688 (3d Cir. 1982) (noting that the FTC scrutinized the message contained in the "aural-visual" pattern of a deceptive television commercial).

115. *See Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 303 (7th Cir. 1979).

116. *See Heinz W. Kirchner Trading As Universe Co.*, 63 F.T.C. 1282 (1963) ("If . . . advertising is aimed at a specially susceptible group of people (e.g., children), its truthfulness must be measured by the impact it will make on them, not others to whom it is not primarily directed."). *See also Avalon Indus. Inc.*, 83 F.T.C. 1728 (1974); *Ideal Toy Corp.*, 64 F.T.C. 297 (1964).

toy's attributes.<sup>117</sup> In situations where an advertisement's target audience lacks the maturity, sophistication, or mental capacity to fully criticize the representations, actions, and potential omissions that the advertisement makes, "deception is most serious"<sup>118</sup> and "such claims may be so likely to be misleading as to warrant restriction."<sup>119</sup>

Since propensity for deception is the operable criterion, the FTC is not required to find intent with regard to misrepresentations made by the seller or to produce evidence of any actual deception among consumers unless the alleged deception is not apparent.<sup>120</sup> This is not to say that a complete absence of evidence will suffice, but rather that courts will give generous deference to the FTC's findings so long as they are based upon substantial evidence.<sup>121</sup> As such, courts have likened the finding of an advertisement's potential for deception to a finding of fact rather than a conclusion of law.<sup>122</sup>

### 3. Remedies for False Advertising

Although the First Amendment protects commercial speech, its protection yields in cases of deceptive advertising.<sup>123</sup> As a result, the FTC is also afforded wide discretion to prescribe remedies for false advertising.<sup>124</sup> Most often, the FTC orders the advertiser to cease disseminating the advertisement.<sup>125</sup> Where an advertisement has substantially permeated society, and thereby increased the likelihood of injury, the FTC may order the seller to take proactive remedial measures and issue corrective advertisements.<sup>126</sup> However, cease and

117. The FTC tends to give extra scrutiny to advertisements directed at children because it recognizes the undoubted influence children can have over their parents' purchasing decisions. *See, e.g., Avalon Indus. Inc.*, 83 F.T.C. 1728 (1974); *Ideal Toy Corp.*, 64 F.T.C. 297 (1964).

118. *Heinz W. Kirchner Trading As Universe Co.*, 63 F.T.C. 1282 (1963).

119. *Bates v. Arizona*, 433 U.S. 350, 383-84 (1977).

120. *See Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976). *See also* *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 872 (2d Cir. 1961). *But cf. Leonard F. Porter, Inc.*, 88 F.T.C. 546 (1976).

121. *See FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965) (finding that the statutory scheme charging the FTC with regulating false advertising grants it influence in applying the law and determining when advertisements are "deceptive"). *See also* *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 300 (7th Cir. 1979); *Simeon Mgmt. Corp. v. FTC*, 579 F.2d 1137, 1145 (9th Cir. 1978); *Pfizer, Inc.*, 81 F.T.C. 23 (1972) (noting that the FTC's accumulated "expertise" in deciding false advertising cases justifies judicial deference).

122. *See Beneficial Corp.*, 542 F.2d at 617.

123. The Court has permitted this abrogation of First Amendment protection because sellers are usually better able to evaluate the quality of their products and services than consumers, and their commercial interest in communicating their findings to consumers obviates the potential for undue restraint on speech. *See Bates v. Arizona*, 433 U.S. 350, 383 (1977).

124. *See Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611-12 (1946).

125. *See, e.g.*, 15 U.S.C. § 45(b) (2009); *FTC v. Algoma Lumber*, 291 U.S. 67 (1934).

126. *See, e.g., Warner-Lambert Co. v. FTC*, 562 F.2d 749, 762 (D.C. Cir. 1977).

desist orders are not always the FTC's preferred course of action. Other remedies include ordering the seller to provide consumers with more or different information and more extensively training the representatives of the seller.<sup>127</sup> The FTC may even take prophylactic measures and prohibit the practices deemed deceptive for all businesses in a given industry, even those that did not engage in the deceptive advertising prior to the issuance of a remedial order.<sup>128</sup> In analyzing the remedy employed by the FTC, the important factor for courts to consider is whether the remedy is reasonably related to curing the deception and is narrowly tailored to accomplish that goal.<sup>129</sup>

### III. THE MPAA RATINGS CONSTITUTE ILLEGAL FALSE ADVERTISING

The content ratings that the MPAA applies to films create material representations about the content of those films that are likely to influence consumers' purchasing decisions. Additionally, the subjective nature of evaluating a film's objectionable content makes it more likely that the ratings will mislead reasonable consumers. For these reasons, the current process constitutes false advertising under 15 U.S.C. § 52 and, as a result, the FTC should order the MPAA to augment its ratings procedures to eliminate the potential for deception.

#### *A. Applicability of the Law*

The MPAA, which exists solely to advance the commercial interests of its members in the motion picture and television industries,<sup>130</sup> fits squarely within the mandate of Congress that the FTC regulate corporations, including associations, that engage in commerce and are organized to conduct business for the profit of their members.<sup>131</sup> Under that regulatory power, the FTC may police any unfair or deceptive practices of the MPAA regarding false advertising for five types of products, including "services."<sup>132</sup> While the statutes

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127. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976); *Litton Indus., Inc. v. FTC*, 676 F.2d 364, 373 (9th Cir. 1982); *Encyclopaedia Britannica, Inc.*, 87 F.T.C. 421 (1976).

128. See *Jay Norris, Inc. v. FTC*, 598 F.2d 1244, 1250 (2d Cir. 1979).

129. *Id.* at 384; see also *Va. State Bd. of Pharmacy*, 425 U.S. at 771.

130. See Motion Picture Association of America, About the MPAA, <http://www.mpa.org/AboutUs.asp> (last visited Aug. 19, 2009).

131. 15 U.S.C. §§ 44-45 (2009).

132. 15 U.S.C. §§ 45, 52(a)(2) (2009).

define four of those five products, they do not define services.<sup>133</sup> Thus, while no relevant statutory definition of “service” exists for the purposes of false advertising, Black’s Law Dictionary defines it generally as “[t]he act of doing something useful for a person or company for a fee.”<sup>134</sup> When contrasted with the relevant definition of “goods” in Black’s Law Dictionary, which requires an element of tangibility,<sup>135</sup> it becomes clear that the exhibition of films in theaters to paying customers satisfies the definition of a service.<sup>136</sup>

While film production studios are the parties directly responsible for representing the content of their films to the public through advertisements that denote each film’s MPAA rating, it is the MPAA that is responsible for preparing those ratings.<sup>137</sup> Therefore, even though the MPAA makes its potentially deceptive representations to the public only indirectly, this distinction makes little difference as, even if the FTC were to take action against production studios for using the misleading MPAA ratings in their advertisements, the root cause of the problem is the MPAA itself. Considering the FTC’s wide discretion in ordering remedial actions, any directive it imposes must ultimately reach the MPAA’s rating process itself in order to effectively preserve the social utility of providing film content ratings to the public while eradicating the deceptive elements of the current process. As a result, the MPAA, either directly or indirectly, falls within the FTC’s jurisdiction and its film ratings constitute representations of the characteristics of a service—namely, the content of exhibited films. Therefore, if the FTC finds that the ratings constitute material representations of rated films’ attributes and have the propensity to mislead consumers as to those attributes, then the MPAA has engaged in an illegal method of unfair competition.<sup>138</sup>

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133. *See id.* § 55.

134. BLACK’S LAW DICTIONARY 1399 (8th ed. 2004).

135. *Id.* at 714.

136. While sales of copies of films for home viewing, such as DVDs or videocassettes, would likely qualify as transactions involving “goods,” this Note’s focus is restricted to the exhibition of films in theaters and similar establishments where the only tangible item that customers purchase is their admission ticket (and, perhaps, their popcorn). However, none of the tangible items that customers interact with at a theater allow them to experience the film at their leisure; they purchase admission to a *showing* of a film, not an actual copy of the film itself.

137. This can be likened either to providing documentation of the films’ fitness for particular audiences or to “packaging” the films to create an impression of their nature or quality.

138. *See* 15 U.S.C. §§ 52(a)(2)-(b).

### *B. Materiality of the Representations*

By examining admissions made by the MPAA, the FTC could easily find that the representations made through the film ratings fulfill the statutory materiality requirement. The MPAA boasts on its web site that

Nationwide scientific polls . . . have consistently given the rating program high marks by parents throughout the land. The latest poll results show that 76% of parents with children under 13 found the ratings to be “very useful” to “fairly useful” in helping them make decisions for the moviegoing of their children.<sup>139</sup>

With this statement, the MPAA explicitly admits that its ratings are proven to directly and strongly influence parents’ decisions regarding which service they will either purchase themselves or allow their children to purchase. It is important to note that the element of materiality does not hinge on the seller making representations of *fact*; statements of opinions are also sufficiently influential representations.<sup>140</sup>

### *C. Propensity for Deception*

As noted above, there is increased potential for deception in advertising targeted at children.<sup>141</sup> However, even if children are not the *sole* intended audience for a particular advertisement, as long as they constitute a part of the advertisement’s larger consumer target, the FTC will evaluate the potential for deception based upon the advertisement’s likelihood to mislead children.<sup>142</sup> When the MPAA issues a rating for a film, it implies that the film is appropriate for a particular audience because its content meets some minimum standard of decency.<sup>143</sup> The qualitative subjectivity of any attempt at standardizing the morality of First Amendment expressions forms the crux of the rating system’s deception because it imbues the ratings with a misleading notion of precision and conveys a message to the public that rated films meet a nonexistent objective standard. Therefore, when a child views an advertisement for a film that denotes the film’s MPAA rating and wishes to see it and, after inquiring as to the film’s rating, the child’s parent grants permission

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139. Motion Picture Association of America, Ratings Today, [http://www.mpa.org/Ratings\\_hstry\\_RtTday.asp](http://www.mpa.org/Ratings_hstry_RtTday.asp) (last visited Aug. 19, 2009).

140. See, e.g., *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294 (7th Cir. 1979) (finding statements asserting the non-scientific extent of the efficacy of diet pills created a false impression).

141. See *supra* notes 117-119.

142. *Heinz W. Kirchner Trading As Universe Co.*, 63 F.T.C. 1282 (1963).

143. See Motion Picture Association of America, *supra* note 7.

based upon the rating, both the parent and the child have been deceived into believing that the rating certifies the appropriateness of the film according to an objective standard.

Because the MPAA has undertaken the responsibility of representing films' content through its ratings, information which would otherwise be unknown to consumers who have not actually watched the films, the MPAA is obligated to use as precise an evaluative method as possible and to communicate its findings unambiguously so as to minimize the possibility of deception.<sup>144</sup> Here, where the ratings are powerful and ubiquitous, the MPAA's quiet assertion that parents should consult additional sources of information regarding films' content and refrain from using the ratings as the sole basis for their choices of which films they allow their children to see is utterly ineffective as a safeguard against possible deception.<sup>145</sup> By assuming the role of an organization that operates on behalf of families' interests, the mere act of issuing ratings for films causes the MPAA to represent the quality and nature of those films.<sup>146</sup> If a family attends a film that contains objectionable content after relying on a MPAA rating that did not indicate as much, then the MPAA has engaged in deception and injury has occurred.<sup>147</sup>

#### IV. SOLUTION: RECOMMENDED FTC REMEDIAL ORDER

While this Note has been highly critical of the MPAA, it still recognizes the social utility of rating systems in general and therefore does not advocate for the total elimination of the MPAA system. Instead, it proposes a twofold remedial modification of the system that would eliminate the conflict of interest inherent in the current system

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144. See *Bates v. Arizona*, 433 U.S. 350, 383-84 (1977) (“[A]dvertising claims as to the quality of services . . . are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction.”). Cf. *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246 (6th Cir. 1973) (upholding the Commission’s finding of deception in an advertisement that marketed a “safe” automobile tire which implied that all such tires are absolutely certain to be free of defects); *Chrysler Corp.*, 99 F.T.C. 347 (1982) (finding assertions to be misleading that certain engine parts would be substantially fit for use if they met certain criteria).

145. See Motion Picture Association of America, Parent Information, <http://www.mpa.org/RatingsParentInfo.asp> (last visited Aug. 19, 2009) (urging parents to “learn as much about a film as possible” before allowing their children to view it). Cf. *Firestone*, 481 F.2d at 248 (finding a “safe” tire advertisement misleading for failing to indicate the limitations on safety).

146. Cf. *Peacock Buick, Inc.*, 86 F.T.C. 1532 (1975) (finding that selling used late-model cars at prices near list prices creates a misleading impression in the minds of consumers that the vehicles are new).

147. See *FTC v. Algoma Lumber, Co.*, 291 U.S. 67, 78 (1934) (“The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else.”).

and adequately minimize the ratings' potential for deception without running afoul of First Amendment protections. However, before making these recommendations, it is helpful to consider other countries' methods of rating and censoring films.

*A. Possible Alternatives: International Approaches to Film Ratings*

Foreign countries' solutions generally fall under three broad categories: voluntary rating of films by an independent organization, government-required rating of films by an independent organization prior to exhibition, and government-sanctioned censorship. The first approach, which most resembles the current system in the United States, exists in countries such as Canada, Denmark, Germany, Iceland, Japan, and the United Kingdom.<sup>148</sup> The Canadian and British approaches vary from the American system in several respects. In Canada, seven provincial review boards assign a rating to a given film for its theatrical release within each respective province's boundaries;<sup>149</sup> then, in preparation for home video distribution, an independent organization aggregates the provincial ratings, with the exception of Quebec's, to issue an additional nationwide rating.<sup>150</sup> At the provincial level, the government itself may be involved in assigning ratings, as is the case in Saskatchewan and Quebec.<sup>151</sup> In the United Kingdom, an independent organization issues the ratings, but municipalities retain the legislative power to supersede them.<sup>152</sup> It may behoove the FTC to investigate the effect and manageability of similar rating systems in America that could vary between states to

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148. See British Board of Film Classification, About the BBFC, <http://www.bbfc.co.uk/about/index.php> (last visited Aug. 19, 2009); Canadian Motion Picture Distributors Association, Theatrical Release Classification, <http://www.cmpda.ca/?q=content/theatrical-release-classification> (last visited Aug. 19, 2009); Film Classification and Rating Committee, Introduction to EIRIN, <http://www.eirin.jp/english/index.html> (last visited Aug. 19, 2009); Medierådet, About the Media Council for Children and Young People, <http://eng.medieraadet.dk/About%20Us/About%20us.aspx> (last visited Aug. 19, 2009); Samtök Myndretthafa á Íslandi, <http://www.smais.is/template25024.asp?pageid=4658> (last visited Aug. 19, 2009); Spitzenorganisation der Filmwirtschaft e.V., [http://www.spio.de/media\\_content/607.pdf](http://www.spio.de/media_content/607.pdf) (last visited Aug. 19, 2009).

149. Canadian Motion Picture Distributors Association, Film Classification Boards, <http://www.cmpda.ca/?q=content/film-classification-boards> (last visited Aug. 19, 2009).

150. Canadian Motion Picture Distributors Association, Home Entertainment Classification, <http://www.cmpda.ca/?q=content/home-entertainment-classification> (last visited Aug. 19, 2009).

151. Canadian Motion Picture Distributors Association, Film Classification Boards, *supra* note 149; Régie du Cinéma Québec, <http://www.rcq.qc.ca/mult/home.asp?lng=en> (last visited Aug. 19, 2009).

152. British Board of Film Classification, About the BBFC, <http://www.bbfc.co.uk/about/index.php> (last visited Aug. 19, 2009).

the extent it finds that the benefits of such an approach would outweigh the costs of administering it.

Even more valuable to the FTC in its evaluation of prescriptive remedies to the MPAA ratings is the evolution of the rating process in Japan. After World War II, the Japanese motion picture industry created a self-regulating organization modeled off of the MPAA named the Film Classification and Rating Committee (EIRIN), which had the responsibility to rate the content of films exhibited in Japan.<sup>153</sup> In the 1950s, EIRIN was criticized for several reasons, one of which was that the individuals in charge of administering the organization's bylaws and examining films also belonged to the very industry that financed it, thereby creating the potential for manipulation of the ratings to satisfy commercial, rather than public, interests.<sup>154</sup> In order to remove this conflict of interest, EIRIN reorganized itself and recruited professors, lawyers, and teachers from outside the motion picture industry to join the organization's members in certifying films for exhibition.<sup>155</sup> While the Japanese government's requirement that a film have an EIRIN certificate before being shown at EIRIN theaters<sup>156</sup> is a "prior restraint" on speech that is likely illegal under United States' law,<sup>157</sup> the organization's solution to its conflict of interest would provide useful direction to the FTC in remedying the similar problem with the MPAA.

The second approach, used in France, the Netherlands, Norway, and Singapore, involves the government-imposed requirement that a film meet certain criteria, either statutorily or independently created, prior to public exhibition.<sup>158</sup> This arrangement resembles the restrictive state of cinema in the United States prior to the Supreme Court's decision to grant First Amendment protection to motion pictures,<sup>159</sup> but the content regulations are often codified in the

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153. Film Classification and Rating Committee, Introduction to EIRIN, <http://www.eirin.jp/english/index.html> (last visited Aug. 19, 2009).

154. *Id.*

155. *Id.*

156. *Id.*

157. *See supra* note 29.

158. *See* Centré National du Cinéma et de l'Image Animée, Regulatory Function, <http://www.cnc.fr/Site/Template/T9B.aspx?SELECTID=2063&id=1326&t=2> (last visited Aug. 19, 2009); Centré National du Cinéma et de l'Image Animée, Film Classification, <http://www.cnc.fr/Site/Template/T9B.aspx?SELECTID=2102&id=1364&t=2> (last visited Nov. 3, 2009); Media Development Authority, Film Policies and Guidelines, <http://www.mda.gov.sg/wms.www/devnpolicies.aspx?sid=93> (last visited Aug. 19, 2009); Netherlands Institute for the Classification of Audio-Visual Media, <http://www.kijkwijzer.nl/pagina.php?id=3> (last visited Aug. 19, 2009); Norwegian Media Authority, Organization of the Norwegian Media Authority, <http://www.medietilsynet.no/en-gb/The-Norwegian-Media-Authority/English-Menu/The-Media/> (last visited Aug. 19, 2009).

159. *See supra* notes 25-26 and accompanying text.

law of these countries.<sup>160</sup> The French government requires that production companies receive an operating license prior to making a film and a distribution certificate prior to contracting with a theater to show a film.<sup>161</sup> In the Netherlands, the film rating process has progressed further from government influence since 1997 when the confluence of growing political pressures and an influx of a critical mass of audiovisual media into the country prompted the Dutch government to explore the option of creating an independent regulatory body responsible for rating the content of all audiovisual media, including films.<sup>162</sup> The government's efforts culminated in 1999 with the creation of the Netherlands Institute for the Classification of Audiovisual Media (NICAM), a self-regulating organization that, while independent in form, is still closely monitored by the Dutch government's Media Authority to ensure that the motion picture industry complies with the law.<sup>163</sup> In Norway, films intended for commercial exhibition to minors must be approved and classified by the Norwegian Media Authority, an independent organization designed to apply and uphold government regulations.<sup>164</sup> The process in place in Singapore mirrors that of Norway.<sup>165</sup>

The third approach is government-sanctioned censorship—either explicitly termed as such or implied by the process—and is used in Ireland, New Zealand, Sweden, Australia, and Finland.<sup>166</sup> Even

160. See *supra* note 158.

161. Centre National de la Cinématographie, Regulatory Function – Operating License, <http://www.cnc.fr/Site/Template/T9B.aspx?SELECTID=2071&id=1334&t=3> (last visited Aug. 19, 2009); Centre National de la Cinématographie, Film Classification, <http://www.cnc.fr/Site/Template/T9B.aspx?SELECTID=2102&id=1364&t=2> (last visited Nov. 3, 2009).

162. Netherlands Institute for the Classification of Audio-Visual Media, <http://www.kijkwijzer.nl/pagina.php?id=3> (last visited Aug. 19, 2009).

163. *Id.*

164. Norwegian Media Authority, Introduction to Media in Norway, <http://www.medietilsynet.no/en-gb/The-Norwegian-Media-Authority/English-Menu/The-Media/> (last visited Aug. 19, 2009); Norwegian Media Authority, Organisation <http://www.medietilsynet.no/en-gb/The-Norwegian-Media-Authority/English-Menu/The-Organisation/> (last visited Aug. 19, 2009).

165. Compare Norwegian Media Authority, Introduction to Media in Norway, <http://www.medietilsynet.no/en-gb/The-Norwegian-Media-Authority/English-Menu/The-Media/> (last visited Aug. 19, 2009), with Films Act, 1981, Act 22, Ch. 107 §§ 3, 6, 14-16, (1981) (amended 1997, 1998, 2002, and 2009) (Sing.), available at [http://agevldb4.agc.gov.sg/non\\_version/cgi-bin/cgi\\_retrieve.pl?actno=REVED-107&doctitle=FILMS%20ACT%0a&date=latest&method=part](http://agevldb4.agc.gov.sg/non_version/cgi-bin/cgi_retrieve.pl?actno=REVED-107&doctitle=FILMS%20ACT%0a&date=latest&method=part), and Media Development Authority, Film Policies and Guidelines, <http://www.mda.gov.sg/wms.www/devnpolicies.aspx?sid=93> (last visited Aug. 19, 2009).

166. See Commonwealth of Australia, Classification in Australia, [http://www.classification.gov.au/www/cob/classification.nsf/Page/ClassificationinAustralia\\_Whow\\_eare\\_Whow\\_eare](http://www.classification.gov.au/www/cob/classification.nsf/Page/ClassificationinAustralia_Whow_eare_Whow_eare) (last visited Aug. 19, 2009); Commonwealth of Australia, Classification Board, [http://www.classification.gov.au/www/cob/classification.nsf/Page/ClassificationinAustralia\\_Whow\\_eare\\_ClassificationBoard\\_ClassificationBoard](http://www.classification.gov.au/www/cob/classification.nsf/Page/ClassificationinAustralia_Whow_eare_ClassificationBoard_ClassificationBoard) (last visited Aug. 19, 2009); Finnish Board of Film Classification, Overview of the Finnish Board of Film Classification, <http://www.vet.fi/english/>

though the Irish Film Classification Office (IFCO) is responsible for *classifying* all films prior to their distribution within Ireland, the IFCO was headed by the Official Film *Censor* (an undeniably obvious sign of censorship) until the IFCO renamed the position as the “Director of Film Classification.”<sup>167</sup> In New Zealand, the Office of Film & Literature Classification has the statutory responsibility for censoring and regulating films that are “likely to be harmful, or injurious to the public good”<sup>168</sup> because they depict “matters such as sex, horror, crime, cruelty, or violence in such a manner that . . . is likely to be injurious to the public good.”<sup>169</sup> Swedish law requires a film to be examined by the National Film Board of Censors prior to public exhibition with some limited exceptions not relevant here.<sup>170</sup>

In contrast to Ireland, New Zealand, and Sweden, which seem more comfortable with referring to their rating schemes as outright censorship, Australia and Finland prefer to use the term “classification” to define their governmental regulation of films; nevertheless, the actual processes are essentially the same. Australian law requires films to be “classified” by the government Classification Board prior to being made available to the public.<sup>171</sup> A similar requirement exists in Finland, but the Finnish Board of Film Classification, organized under the Ministry of Education, only needs to classify films that are intended for exhibition to minors, while all

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yleista.php (last visited Aug. 19, 2009); Irish Film Classification Office, What the IFCO Does, <http://www.ifco.ie/website/ifco/ifcoveb.nsf/web/mission?opendocument&type=graphic> (last visited Aug. 19, 2009); Office of Film & Literature Classification, Censorship Law in New Zealand, <http://www.censorship.govt.nz/thelaw.html> (last visited Aug. 19, 2009); Statens Biografbyrå, Legal Texts, <http://www.statensbiografbyra.se/legal.htm> (last visited Aug. 19, 2009).

167. Irish Film Classification Office, Director of Film Classification, <http://www.ifco.ie/website/ifco/ifcoveb.nsf/web/filmcensor?OpenDocument&type=graphic> (last visited Aug. 19, 2009); Irish Film Classification Office, What the IFCO Does, <http://www.ifco.ie/website/ifco/ifcoveb.nsf/web/mission?opendocument&type=graphic> (last visited Aug. 19, 2009). Ireland’s complacency with censorship largely stems from the strong historical influence of the Catholic Church within the country. See KEVIN ROCKETT, IRISH FILM CENSORSHIP: A CULTURAL JOURNEY FROM SILENT CINEMA TO INTERNET PORNOGRAPHY (2005), available at [http://www.ifco.ie/ifco/ifcoveb.nsf/lookupreports2/AA073005F7A0F95780256F020055DD28/\\$File/a+history.pdf?openelement](http://www.ifco.ie/ifco/ifcoveb.nsf/lookupreports2/AA073005F7A0F95780256F020055DD28/$File/a+history.pdf?openelement) (synopsis of book). However, standards have liberalized considerably in the last fifty years. *Id.*

168. Office of Film & Literature Classification, Censorship Law in New Zealand, <http://www.censorship.govt.nz/thelaw.html> (last visited Aug. 19, 2009).

169. Films, Videos, and Publications Classification Act of 1993, 1993 S.N.Z. No. 94, Part 1 § 3, available at <http://www.legislation.govt.nz/act/public/1993/0094/latest/DLM313407.html>.

170. Statens Biografbyrå, Legal Texts, <http://www.statensbiografbyra.se/legal.htm> (last visited Aug. 19, 2009).

171. Commonwealth of Australia, What the Classification Board Does, [http://www.classification.gov.au/www/cob/classification.nsf/Page/Classification\\_in\\_AustraliaWhat\\_we\\_do](http://www.classification.gov.au/www/cob/classification.nsf/Page/Classification_in_AustraliaWhat_we_do) (last visited Aug. 19, 2009).

other films simply need to be registered.<sup>172</sup> Regardless of the semantic implications involved in terming these processes as “classification” rather than “censorship,” the high degree of government involvement in the process of regulating the distribution and exhibition of films makes it repulsive to American sensibilities of freedom of expression.<sup>173</sup> As a result, the United States would likely disfavor the use of government-required ratings promulgated by an independent organization, as well as government-imposed censorship in regulating the content of films, due to American courts’ general resistance to government involvement in the regulation of speech.<sup>174</sup>

*B. Enhanced Qualifications and Appointment Procedures for the  
CARA Members*

The fact that the MPAA does not require those who actually rate films to have any special knowledge in the areas of child psychology or children’s mental development<sup>175</sup> raises doubts as to their qualifications to evaluate the content of the vast majority of films as acceptable or not for particular age groups. Taking guidance from Japan, part of the FTC’s remedy for the MPAA’s false advertising should, at the very least, require the CARA to consult with certified child psychologists regarding films’ content before issuing a rating. Ideally, several positions should be reserved solely for individuals with qualifications in the fields of child or even general psychology.

While the MPAA emphasizes that the CARA remains fully independent and immune from industry influence,<sup>176</sup> the fact that the MPAA Chairperson appoints the CARA’s chairperson calls this claim into question.<sup>177</sup> Since the MPAA ratings have substantial power to influence the commercial success of films,<sup>178</sup> the FTC should also order

172. Finnish Board of Film Classification, <http://www.vet.fi/english/yleista.php> (last visited Feb. 2, 2009).

173. See U.S. CONST. amend. I; *Kingsley Int’l Pictures Corp. v. Regents of the Univ. of the State of N.Y.*, 360 U.S. 684, 689 (1959); *Gelling v. Texas*, 343 U.S. 960, 961 (1952); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952).

174. See *supra* note 29 and accompanying text.

175. See *supra* note 72 and accompanying text.

176. *Id.*

177. See *supra* note 73 and accompanying text.

178. As of August 19, 2009, 92 of the 100 highest grossing films of all time in the United States were released after the introduction of the *PG-13* rating in 1984. Box Office Mojo, All Time Box Office: Domestic Grosses, <http://www.boxofficemojo.com/alltime/domestic.htm> (last visited Aug. 19, 2009). More than half of those films, fifty-one in all, actually received a *PG-13* rating, the rating that appeals to the widest audience range because theaters may allow children of any age to view a film rated *PG-13* without a parent or guardian and also because the content of films rated *PG-13* is more likely to appeal to adults than films rated *G* or *PG*, as the films with the latter two ratings tend to contain more juvenile subject matter. *Id.*; see also Motion Picture

the MPAA to augment the procedures for appointing the CARA members so as to avoid empowering a select few within the MPAA to choose those who rate films produced by MPAA members. A more democratic process in choosing the raters that takes into account the concerns of both filmmakers that are members of the MPAA and those that are not would produce a much more commercially fair ratings system. The FTC should therefore investigate this question further and consider requiring the CARA to separate completely from the MPAA.

The proposals to improve the qualifications of the CARA members and revise the process of appointing them would ensure that a more intelligible basis is given for a film's rating than the sum of lay parents' capricious conjectures as to what the majority of American parents would find appropriate for their children. At the same time, these proposals would also safeguard against the potential for a conflict of interest between the goals of the individuals rating the films and commercial pressure from filmmakers.<sup>179</sup>

### C. Comprehensive Content Evaluations

In addition to requiring the CARA to take the evolving body of knowledge surrounding adolescent psychological development into account when issuing ratings, the FTC should also require it to prepare a detailed list of the instances of potentially objectionable content within a film, along with the context in which the content appears, and to make this list available to parents so that they may use it as part of their decision-making process when purchasing theater tickets for their children.<sup>180</sup> This could be achieved by making

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Association of America, Ratings Revisions, [http://www.mpa.org/Ratings\\_hstry\\_Rvsns.asp](http://www.mpa.org/Ratings_hstry_Rvsns.asp) (last visited Aug. 19, 2009) (noting that the *PG-13* rating was created in 1984). *See generally* Internet Movie Database, <http://www.imdb.com> (last visited Aug. 19, 2009) (containing MPAA ratings for all of the films that the MPAA has rated). Moreover, sorting the twenty highest grossing films of each year between 1985 and 2008 by their ratings reveals that films rated *PG-13* constituted either the largest or second largest proportion of those films in all but two years. National Association of Theatre Owners, Top Movies by Rating, <http://www.natoonline.org/statisticsratings.htm> (last visited Aug. 19, 2009).

179. *See supra* notes 62, 77-78 and accompanying text.

180. Care should be taken to avoid ruining the movie-going experience. While the FTC should require posters, printed advertisements, and trailers or previews that advertise a film and indicate its rating to also inform the public of this new approach to rating films, including the availability of the lists of objectionable content, it should not order the MPAA to include the actual lists of objectionable content within the advertisements themselves. Since the lists should be required to contain explicit, but objective, detail in their description of the instances of objectionable material, there would be a strong potential for providing information regarding a film's plot that would spoil the movie for those who would prefer not to learn such information before seeing the movie.

such lists available on the Internet and distributing them to all theaters that screen MPAA-rated films. Those theaters could then provide their customers with copies of the lists upon request.

This requirement would obviously entail more effort from the MPAA and may consequently cause it to increase the fee that it charges to rate films, which could have the indirect effect of increasing theater ticket prices. Consequently, independent studios, which often have fewer capital resources than large major studios to produce their films, may find it more difficult to produce smaller-scale films. Notwithstanding these considerations, the potential for injury to the public as a result of the current rating system's deceptive tendencies justifies the issuance of a remedial order that has the abstract potential to increase the fees that filmmakers must pay to the MPAA in order to have their films rated. In addition, the severity of this public injury, along with the fact that many consider the MPAA the de facto film content evaluation source, justifies the FTC's mandate that the MPAA provide such content evaluations to the public even though other organizations already make them available.<sup>181</sup>

The greatest advantage of this remedy is that it enhances the social utility provided by film ratings while remaining entirely in alignment with the First Amendment.<sup>182</sup> The government would have no involvement with the actual adjudication of films' appropriateness for different audience demographics,<sup>183</sup> and, more importantly, the process would not constitute a prior restraint on speech because films would not be legally required to receive an MPAA rating prior to exhibition or distribution.<sup>184</sup> The result would be a rating scheme that better informs parents about the content of films in order for them to make adequately educated decisions about their children's film-viewing habits, as well as their own, while assuaging the fear of undue suppression of the expression of ideas in the United States.

## V. CONCLUSION

Motion pictures have come a long way from their origin as a novelty exhibition.<sup>185</sup> The more recent notion that films actually possess the ability to contribute to society's progress by communicating ideas and opinions has garnered them the privilege of

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181. See, e.g., Critics, Inc., Kids-in-Mind, <http://www.kids-in-mind.com> (last visited Aug. 19, 2009); Screen It, Inc., Entertainment Reviews for Parents, <http://screenit.com> (last visited Aug. 19, 2009).

182. See *supra* note 50 and accompanying text.

183. See discussion *supra* Part IV.B-C.

184. See *supra* note 29 and accompanying text.

185. See *supra* note 24 and accompanying text.

protection from undue government influence that is provided by the First Amendment to the United States Constitution.<sup>186</sup> That is not to say, however, that all films are appropriate for exhibition in all places at all times for all people. Indeed, while some films contain material that may have a strong influence in advancing ideas that are important to society, those same films may also have a negative psychological impact upon minds that are not mature enough to fully comprehend and appropriately interpret the portrayed subject matter. This ability of films—and, indeed, all forms of communication—to convey a message that, as a result of misinterpretation by the message's recipient, differs from what the speaker intended to express has formed the problematic basis that underlies much of the debate surrounding the extent of First Amendment freedoms. Where the law falls short of discovering a universal solution to the issue of balancing expressions' social value with their potential social harm, the private sector often steps in and attempts to provide its own remedy. In the film industry, the MPAA serves as the private actor that has most prominently undertaken this challenge.

The nobility of the MPAA's stated goal of educating parents about films' content prior to allowing their children to watch them should not be understated. The rating scheme derived by the MPAA marks undeniable progress towards a comprehensive approach to safeguarding the best interests of children while maximizing individual liberty. However, the current system has numerous faults. There exists an immutable conflict of interest when the MPAA, in its role as an industry association, is responsible for advancing the interests of the film industry while, in its role as a sort of oversight committee, issues recommendations about the age-appropriateness of films created by its members<sup>187</sup> that have great potential to impact the financial performance of those films.<sup>188</sup> Moreover, the qualifications—or lack thereof—required for an individual to serve on the CARA Ratings Board that actually rates the films submitted to the MPAA have, at best, a questionable relation to the ability to make intelligent decisions regarding the appropriateness of a film's content for a given age demographic.<sup>189</sup> Ultimately, the MPAA has been only slightly more successful than the legal system in solving the problem of attempting to use objective bases to evaluate communications which are largely subjective in their nature.

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186. See *supra* note 31 and accompanying text.

187. See *supra* notes 73, 77-78 and accompanying text.

188. See *supra* note 178.

189. See *supra* note 72 and accompanying text.

Due to the MPAA's shortcomings, the ratings that it assigns to films have the potential to mislead consumers about a given film's true content.<sup>190</sup> It is of no matter whether the ratings actually have, in fact, misled anyone.<sup>191</sup> Rather, the issue is whether the inclusion of a letter or alphanumeric symbol that broadly indicates a film's content in its advertisements is *likely* to mislead consumers because the symbol takes no account of the context in which that content is portrayed.<sup>192</sup> Since this falls under the definition of an unlawful "false advertisement"—an advertisement that has the potential to mislead consumers in a material respect with regards to the service being advertised<sup>193</sup>—the FTC should exercise its power over the MPAA and deem the current film ratings as false advertising. However, due to the social utility of content ratings, the FTC should use its wide discretion in prescribing remedies and order the MPAA to send its rating system back to the editing room for further refinement in order to maximize commercial fairness and consumer access to information, rather than fading to black on the system altogether.

*Jason K. Albosta\**

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190. See *supra* notes 132-138 and accompanying text.

191. See *supra* note 112 and accompanying text.

192. See *id.*

193. See *supra* notes 107-113 and accompanying text.

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