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Panel 1: The V-Chip and the Constitutionality of Television Ratings

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Participants: Eric Burns**

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MR. ZIPURSKY: Welcome to the *Fordham Intellectual Property, Media & Entertainment Law Journal's* Sixth Annual Symposium on the First Amendment and the Media. I am Professor Benjamin Zipursky of Fordham University School of Law.

Our first panel discussion covers one of the hot topics in both the television industry and the legal profession, the V-chip and the constitutionality of the associated television ratings that will be required to make the chip work properly. I would like to introduce today's panelists.

Our first speaker is Eric Burns. He is a media analyst with Fox News Channel. He has covered the television ratings issue exten-

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sively over the past year or so. Next, we will hear from David Moulton, chief of staff for United States Representative Edward Markey of Massachusetts. Mr. Moulton was the principal House staff member during the drafting of the V-chip law. He was also influential in the television industry's development of the rating system that works in connection with the V-chip. We also will hear from Robert Peters, president of Morality in Media. Mr. Peters has been very active on the V-chip and television ratings issue, having submitted official comments to the Federal Communications Commission ("FCC"). Next, we will hear from Thomas Johnson, a senior writer from the Media Research Center in Alexandria, Virginia. He has written extensively on the subject of television ratings. Our next speaker will be Donald Hawthorne an associate with Paul, Weiss, Rifkind, Wharton & Garrison. He has written widely on communication law topics.

After all the presentations we will have a roundtable discussion and then I will open up questions to the audience. Let's start with Eric Burns.

MR. BURNS: Let me start with a joke that is very popular among lawyers. It involves a client who is terribly upset because his lawyer keeps giving him advice that seems to be contradictory. At one point the client says to a friend, "The next time I retain a lawyer, it will be a lawyer who has just one arm."

His friend asks, "Why?"

The client responds, "So that I cannot hear 'on the one hand and then on the other hand.'"

I did not start with that joke to indicate that lawyers either do or do not collectively have a great sense of humor. Instead, I told it because, regrettably, my position on the issue of television ratings is a matter of on-the-one-hand and on-the-other-hand.

On the one hand, I fail to see how people can have great disagreement with it. As has been said many times, what the rating system does, however imperfectly, is provide more information.¹ More information can only be good. If the information is deemed

1. See Edward J. Markey, *Opportunity to Create a 'Safe Harbor'*, TIMES UNION (Albany, N.Y.), Oct. 12, 1997, at B1.

faulty by a viewer, the viewer can disregard it.

The information, however, is criticized by some as being arbitrary,² which it has to be. But it is certainly less arbitrary than the movie rating system.³ The movie rating system, for me as a parent, has some value. It is obviously not perfect. I have been surprised by some “PG” movies that I thought should have been “R” or worse. Sometimes, although not terribly often, I may see an “R” movie and wonder why it is not “PG.” But the rating system for movies is more arbitrary than television, because fairly recently the television rating system has provided more information.⁴

At the movies, the big surprise is whether the “R” rating is related to language or violence.⁵ That is not a surprise on television anymore because the rating system is specific. It has distinct ratings that are assigned because of violence, sexual situations, or language.⁶ I fail to see how there can be serious objections to this kind of information, which may be disregarded if one so chooses.

On the other hand, I do not watch much television. In fact, I have never seen a complete episode of *Seinfeld*; I have never seen

2. See Aaron Barnhart, *TV Ratings Headed for Rewrite to Give Parents More Guidance Compromise Adds Labels to Age-based Voluntary System*, KANSAS CITY STAR, Jun. 25, 1997, at A1 (discussing survey that found that a majority of parents with young children were not using the system because of the arbitrary nature of the ratings assigned to shows); see also Lawrie Mifflin, *Parents Give TV Ratings Mixed Reviews*, N.Y. TIMES, Feb. 22, 1997, at C8 [hereinafter Mifflin I] (quoting a mother of a thirteen year old daughter complaining about the “arbitrary nature of [the] ratings”).

3. See J.M. Balkin, *Media Filters, the V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1170 (1996) (discussing the “coarseness” of the movie rating system).

4. See Matthew L. Spitzer, *An Introduction to the Law and Economics of the V-Chip*, 15 CARDOZO ARTS & ENT. L.J. 429 (1997) (describing the evolutionary stages of the television rating system).

5. See Balkin, *supra* note 3, at 1170.

6. See Lawrie Mifflin, *Senator Tells Networks to Revamp New Ratings*, N.Y. TIMES, June 4, 1997, at C13 [hereinafter Mifflin II] (discussing Senator John McCain’s instruction to the television networks to make the ratings content specific); Mifflin I, *supra* note 2; Sheryl Stolberg, *How Are Ratings of TV Programs Working So Far?*, SEATTLE TIMES, Feb. 12, 1997, at A3.

In addition to the age based ratings, the following content specific ratings were added: “V” for violence, “S” for sexual content, “L” for vulgar language, “D” for suggestive dialogue, and “FV” for fantasy violence in children’s programs.

an entire episode of a program produced by Steven Bochco.⁷ It is not uncommon for people who work in television to watch television less than others.

I say this to point out my ignorance of television, which is important to my point. If someone who watches as little television as I do knows the approximate content of every television show before viewing it, other people should know too. Any situation-comedy on one of the six networks⁸ today, which is on after 8 p.m., will have many breast or derriere jokes with much sexual innuendo, if not sexual situations. If a situation comedy rises above this level of body parts and lack of imagination, there is so much publicity that you cannot help but notice. I do not understand why people need a rating system in order to tell their children not to watch a particular show.

I never saw an episode of *The Cosby Show* either, but I live in this culture, so I know that *The Cosby Show*—not the one now, but the one in the 1980s⁹—was a clean show. By the same token, for a Steven Bochco television program on after 9 p.m., do you really need to see the rating to know that the program will contain violence? The need for ratings surprises me to some extent.

I applaud the coming of the V-chip,¹⁰ and I think I will be able to operate it quite well without ever looking in the upper left-hand corner of the television screen.¹¹ One of my preliminary points is that, although my two-handed view of the television rating system has enabled me to discuss it with people of both points of view, I am completely stunned when the issue of censorship is raised.¹²

7. Steven Bochco's television credits include the programs *Hill Street Blues*, *NYPD Blue*, *Brooklyn South*, and *Murder One*.

8. The six networks are ABC, CBS, Fox, NBC, UPN, and WB.

9. *The Cosby Show* aired on NBC on Thursday nights from 1984 through 1992.

10. See Mary Deibel, *How V-Chip Rating Plan Will Operate*, PATRIOT LEDGER, Mar. 13, 1998, at 11 (noting that, according to the Federal Communications Commission, at least half of all television sets with 13-inch screens or larger will be built with V-chips by 1999, with the remaining half to be equipped by January 1, 2000).

11. See Spitzer, *supra* note 4 (describing the V-chip). Television ratings appear in the upper left-hand corner of television screens at the beginning of a program.

12. See Steve Johnson, *V-Chip Fueling Censorship Debate: The Government Could Be Buried Up to Its Eyeballs in Controversy If It Insists on Creating a Ratings System to Curb Violence and Sex on Television*, CHI. TRIB., Feb. 11, 1996, at 1 (describing the de-

Censorship is something that, by definition, is forced. It is the removal of an object of art, loosely defined, by legal sanction.¹³ I was on television once when someone compared the television rating system to what happened to James Joyce's *Ulysses*,¹⁴ which is a very hard thing to listen to with a straight face or in a restrained manner.

In regard to the television rating system, they seem analogous to product ingredient lists on the items you buy in the supermarket.¹⁵ The television rating system provides viewers with a list of ingredients found in a particular television program. For example, one program may contain sexual content and violence.

I am startled when this is considered a censorship issue. It surprises me more than Frank Zappa's¹⁶ lame insistence in the 1980s, when Tipper Gore wanted labels on records, that it was a form of censorship.¹⁷ It is a form of information that may be regarded or

bate caused by the television ratings system); Tom Shales, *Chip of Fools; Any way you Program it, the V-Chip is a Long Stride Toward Censorship*, WASH. POST, Mar. 10, 1996, at G1 (discussing censorship and the V-chip).

13. See BLACK'S LAW DICTIONARY 224 (6th ed. 1990) (defining censorship as the "review of publications, movies, plays, and the like for the purpose of prohibiting the publication, distribution, or production of material deemed objectionable as obscene, indecent, or immoral," and noting that "[s]uch actions are frequently challenged as constituting a denial of freedom of press and speech").

14. JAMES JOYCE, *ULYSSES* 11 (Hans Walter Gubler et al. eds., Garland Publishing 1986) (1900). See generally *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934) (striking down a prohibition against selling James Joyce's *Ulysses*).

15. See Nutrition Labeling and Education Act of 1990 (NLEA), Pub. L. No. 101-535, 104 Stat. 2353 (1990) (codified as amended in 21 U.S.C. § 343-1 (1998)) (governing the nutritional labeling of food products).

16. Rock musician Frank Zappa was one of the most vociferous opponents of proposed legislation to require content labels on music recordings. See Richard Harrington, *The Capital Hill Rock War; Emotions Run High as Musicians Confront Parents' Group at Hearing*, WASH. POST, Sept. 20, 1985, at B1; see also John Horn, *Zappa, Snyder Take on Lyric Critics*, L.A. TIMES, Sept. 19, 1985, § 6, at 12. Zappa testified before the Senate Subcommittee on Communications and stated that the proposal "is an ill-conceived piece of nonsense which fails to deliver any real benefits to children, infringes on the civil liberties of people who are not children and promises to keep the courts busy for years, dealing with the interpretational and enforcement [sic] problems inherent in the proposal's design." Harrington, *supra*; see also Horn, *supra*.

17. In 1985, Tipper Gore, wife of Vice President Al Gore and a member of the Parents Music Resource Center, proposed legislation requiring warning labels to be placed on sound recordings. See Harrington, *supra* note 16; see also Horn, *supra* note 16.

disregarded as people choose.

MR. ZIPURSKY: Thank you. Mr. Moulton is next.

MR. MOULTON: I am the Chief of Staff to Congressman Edward Markey,¹⁸ who was the primary architect of the V-chip bill¹⁹ in Congress. I have been with him for quite a while, in fact, going back to the origins of this.²⁰

I thought I would talk a little bit about the origin of the V-chip because I find that many times, when speaking about it, the speakers make assumptions about how much information the audience has. So if you will bear with me for a moment, I am just going to run through some of the highlights of how we got the V-chip. It will help us understand how the government and the industry can work together in the future.

I am a lawyer, but I am not going to make a lot of references to case law. I am here as a policymaker and as a parent. My children are eight years and twelve years old now; during the course of this debate, they were around ages four and eight. Children's age is important to the ratings debate.

Many people, especially parents, think that the V-chip will be most useful when children are quite young—two, three, four, five, six, seven years old. When you start having arguments with your children about whether they can watch *Seinfeld* or not, they are at a stage where they are starting to make decisions for themselves, which you as a parent will likely want to encourage. You may have your debates, but they are not likely to be resolved by using the V-chip. The V-chip is just a way to block out material that parents do not want to see during a certain stage in their child's development.

The V-chip broke the cycle of sympathy that had been substituted for solutions to television violence for many decades. Since the 1960s, parents have cried out for relief for their children from

18. D-Mass., 7th Cong. Dist. Markey sponsored the original legislation mandating a V-chip electronic blocking device for new television sets and the ratings system that accompanies it.

19. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

20. See 139 CONG. REC. 2011 (1993) (introducing Rep. Markey's Television Violence Reduction Through Parental Empowerment Act of 1993).

the diet of mayhem and violence found on television. Congress listened to their cries and held hearings, shedding a spotlight on the industry.²¹ Almost routinely, the industry would mount a counter-offensive, declaring parents to be irresponsible for not policing their children themselves, and criticizing the government for censorship in violation of the First Amendment. The press and pundits used barrels of ink, to do an on-the-one-hand, on-the-other-hand analysis. The media recognized that the politicians were justified in criticizing the television industry for negatively influencing children, and that the industry had a valid concern over governmental censorship. After the press urged both sides to work it out, nothing would change; parents would receive no help.

In 1993, we started to break that cycle because technology made it possible to take a whole new approach. This is where the V-chip enters the fray. The V-chip is full of paradoxes. The first paradox is that the V-chip, which is technology designed to help parents detect violence, was made possible by the technology responsible for closed captioning on television for the deaf and hard of hearing.

In 1990, we passed a whole different law, the Television Decoder Circuitry Act,²² which had nothing to do with television violence. It became the platform on which we built the V-chip, but it was built for a different purpose. That statute required that, as of 1993, every television set larger than thirteen inches contain the electronics needed to provide closed captioning for the deaf,²³ making it viable to send electronic information to your television set over the vertical blanking interval. The vertical blanking interval is part of the signal that carries the television show to your television set but is not visible; thus, closed captioning can be sent to television receivers and remain invisible unless and until the

21. *See generally* 139 CONG. REC. 5050 (1993) (containing Senator Paul Simon's testimony concerning current activities by the industry to limit television violence and the public's opinion on media violence); 132 CONG. REC. 7960 (1986) (containing Senator Paul Simon's introduction of Senate Bill 2322, which provided for a study of any impact television violence has on the population, and Senate Bill 2323, which created an anti-trust exemption to allow television and cable networks to act jointly in establishing guidelines).

22. Pub. L. No. 101-431, 104 Stat. 960 (1990).

23. *See id.*

consumer activates the decoder chip.²⁴ So when you go into a bar and see words crossing the bottom of the screen, the bar has activated the decoder chip in the television.

The technology is wonderful. We sell somewhere between 20 million and 25 million television sets a year,²⁵ which is an extraordinary number. That allows closed captioning technology to be installed in new television sets for less than five dollars per set.²⁶ So it has been a boon, not just for the hearing impaired, but for those struggling to hear televisions, like barflies.

It turns out that this electronic platform that decodes closed captioning can also be used to decode other information.²⁷ Now, this was not initially Congressman Markey's idea. When he was chairman of the Telecommunications Subcommittee,²⁸ the Electronics Industries Alliance, a trade association,²⁹ came to the Congress and asked for our support. That association wanted to activate a series of features using the decoder circuitry electronics and the vertical blanking interval to send information.³⁰ Now, they were talking about a whole range of features. They wanted support for almost forty different features.³¹ For example, one feature allowed you to push one button and force your television to show you only sports or show you only public affairs.

One of the things that they wanted to do was provide blocking

24. See Barry Chamish, *New Technologies Pack More Value into Satellite Channels*, SATELLITE COMM., Feb. 1996, at 22.

25. See Evan Ramstad, *Christmas '96: Dear Santa, Skip the VCR, I Want Clothes*, WALL ST. J., Dec. 6, 1996, at B1 (noting that a record 25.4 million televisions were sold in the United States in 1994; estimating that 23 million televisions would be sold in the United States in 1996).

26. See Robert J. Hawkins, *Technology to Block Programs Already in Place*, SAN DIEGO UNION-TRIB., Feb. 11, 1994, at E12 ("During hearings on closed-caption technology, opponents claimed it would add as much as \$40 to the cost of a television set The real cost has turned out to be under \$10 and as low as \$5.").

27. See Chamish, *supra* note 24.

28. Rep. Edward J. Markey chaired the House Telecommunications and Finance Subcommittee of the Energy and Commerce Committee from 1987 through 1994.

29. See Electronics Industries Alliance (visited Apr. 14, 1998) <<http://www.eia.org>>; see also Consumer Electronics Manufacturers Association (visited Apr. 14, 1998) <<http://cemacity.org>>.

30. See Representative Edward Markey, *How the V-chip Came to Pass: A Paradoxical History*, ROLL CALL, Mar. 11, 1996.

31. See *id.*

for violence, sex, and language on the basis of the broadcast, which we thought was a good idea and would be very helpful to parents.³² But it was the television set industry that initially came up with this idea, based on their offering of V-chip features that they thought would help sell television sets.

This is where the broadcasters came in. They lacked formal status on the board of the Electronics Industries Alliance,³³ but they had traditionally been afforded great deference in the consensus standards that the association puts together to control what goes into television sets.³⁴ In 1992, when the Electronics Industry Alliance suggested adding a blocking-by-rating system in the closed captioning chip,³⁵ the broadcasters refused.³⁶

This is the second major paradox. Here, with the broadcasters' refusal, this became a story not of government versus industry, but rather a story of industry versus industry. The sellers of television sets wanted to provide customers with an additional feature and the broadcasters did not allow it because they viewed the system as a threat.

The Electronics Industry Association needed FCC approval, and that is why they had come to us. When Congressman Markey and the House Telecommunications and Finance Subcommittee of the Energy and Commerce Committee learned that this feature had been vetoed by the broadcasters, we decided that Congress would probably have to play a role in this battle.³⁷ So the paradox is that the television industry itself, not Congress, conceived of the feature, and the government's role was to put this feature back on track after it was derailed initially by the broadcasters' objections.³⁸

This brings us to the third paradox, which is that the broadcasters, in a vain attempt to avoid ratings, actually made the case for

32. *See id.*

33. *See supra* note 29 (providing the web site for the Electronics Industries Alliance).

34. *See* Markey, *supra* note 30.

35. *See id.*

36. *See id.*

37. *See id.*

38. *See id.*

ratings by initially airing advisories.³⁹ We had begun to convene hearings in order to explore the impact of television violence on children; one such hearing was scheduled with the executives of the major networks.⁴⁰ On the eve of that hearing, knowing that they were going to be quizzed about ratings and about the feature, the broadcast industry took an initiative and made an announcement that they had come to an agreement to begin airing advisories, which is the process of providing information on the screen about the violence, sex, and language of shows.⁴¹

Now, this was back in 1993, and one of the objections raised by the broadcasters was that the V-chip would lead to bigger problems.⁴² The broadcasters understood why violence was an issue, and they knew that it would quickly become more involved, resulting in ratings for sex and other things.⁴³

The press conference announcing the advisories was very interesting. The executive for ABC stepped out and said, "We are going to be the first to actually put an advisory on one of our shows. It is coming out this fall. It is *NYPD Blue*, and we are putting the rating on not because of violence, but because of some of the sexual material and content."⁴⁴ So, in fact, after the broadcasters expressed displeasure about moving into an area where they did not want to go, an executive stood up at our press conference and volunteered to put a rating on a program for sexual content, which is another paradox.⁴⁵

Once they started providing advisories, that was the beginning of the semantic game, namely, trying to distinguish advisories

39. See H.R. REP. NO. 103-417 (1993) (noting that the four major networks and fifteen of the largest cable programmers implemented an advanced parental advisory system); see also Markey, *supra* note 30.

40. See Markey, *supra* note 30.

41. See H.R. REP. NO. 103-417; see also Markey, *supra* note 30.

42. See, e.g., Newton J. Minnow, *How to Zap TV Violence*, WALL ST. J., Aug. 3, 1993, A14 (noting that Lucie Salhany, Chairman of the Fox television network, was concerned that the V-chip would result in more problems).

43. See, e.g., Minnow, *supra* note 42 ("Fox TV Chairman Lucie Salhany argues, 'Quite frankly, the very idea of a V-chip scares me. I'm also very concerned about setting a precedent. Will we have a 's-chip' for sex?").

44. See *Networks Oppose "Violence Chip"*, TELEVISION DIG., June 28, 1993, at 1.

45. See *id.*

from ratings. The industry was adamantly opposed to ratings but provided advisories.⁴⁶ That was a major slippery slope for them. The broadcasters changed their practices when they began to provide advisories. They needed to look at a television show ahead of time, make some judgments about what information a parent would like to have, and provide that information. Well, that is very close to providing ratings.

Ratings involve more formalism because of the need for consistency from network to network. It requires some group to oversee the ratings in order to maintain consistency. But still, it is just a process of providing information earlier. In any case, trying to distinguish advisories from ratings became somewhat adverse. In the end, it became a distinction that was impossible to maintain.

By 1993, the networks were providing advisories in order to head off the V-chip.⁴⁷ The networks felt that the advisories were enough, and were quick to point out that they were completely voluntary. The networks did not want Congress to pass any bill, and they argued that it would constitute censorship in violation of the First Amendment. The censorship and First Amendment arguments were flawed because the bill does not impact the broadcasters.⁴⁸ The bill effects television set manufacturers, who actually wanted to use the V-chip.

The networks continued to maintain that ratings were anathema and that allowing blocking technology to block shows that were rated was heresy. At the hearings, they contended that the blocking technology was unfair because it would cause the loss of advertising revenue.⁴⁹ They knew that the V-chip could have a bigger impact on the network-television industry, which depends on advertising revenues, than it would have on the cable television in-

46. See Donna Kelly, *Reno Speaks to Senate on TV Violence*, TELEVISION DIG., June 28, 1993, at 1.

47. See H.R. Rep. No. 103-417 (1993) (noting that the four major networks and fifteen of the largest cable programmers implemented an advanced parental advisory system).

48. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996); see also H.R. 2888, 103d Cong. (1993).

49. See also Minnow, *supra* note 42 (noting the industry concerns that “the V-chip might cut into advertising revenues”).

dustry, which thrives on revenues from monthly subscription fees.⁵⁰

So we proceeded with the bill and introduced it in 1993.⁵¹ Next, a period ensued where not much progress occurred legislatively. After introducing the bill, the Electronics Industry Association was now in a position to set standards and develop the technology. They were at the stage where a standard could be written for the technology, where the industry could agree on what codes would be used and so forth. At that point in time, the only thing preventing the television set manufacturers from building new sets with the technology was the lack of cooperation by the broadcasters, who still maintained that they would not send any signals. The television set manufacturers did not want to spend money to include a feature that consumers would never be able to use.

Nonetheless, with the support of the bill, they proceeded to write the standards. Since 1994, we have actually had a standard for the V-chip that has been totally aired among all industry television set manufacturers and participants, and is ready to go.

It was then time for Congress to pass a bill to prevent broadcasters from refusing to send any signals to the V-chip.⁵² Now, we had always maintained that we were not going to force broadcasters to send those signals, and that is the way we wrote the law.⁵³ So there was a little game going on here. If we could not get voluntary cooperation from the broadcasters, we would proceed to require that V-chips be placed in television sets, thereby providing millions of Americans with the means to block out material. Then, we would mount a public relations campaign, highlighting the fact that the only reason parents were unable to block out shows is the broadcasters' refusal to send signals.

That was the kind of dynamic associated with the passage of the legislation. We ended up, however, getting much more coop-

50. *See id.*

51. The Television Violence Reduction Through Parental Empowerment Act, H.R. 2888, 103d Cong. (1993).

52. *See supra* text accompanying notes 35-38 (describing the broadcasters' refusal to send signals to the V-chip).

53. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996); *see also* H.R. 2888, 103d Cong. (1993).

eration from the broadcasters than we had anticipated.⁵⁴ But we never did anticipate forcing them to rate anything, and we did not.⁵⁵ That is important to keep in mind.

We finally passed the bill in 1996. It became a rider on the Telecommunications Act of 1996,⁵⁶ which was a bill that had broad bipartisan support moving through Congress. The V-chip requirement became an amendment to it—relatively minor requirement, considering the scope of the entire piece of legislation. In any case, it was one of the provisions of the Telecommunications Act of 1996 that received much publicity because it was easy to understand and the President brought it to the public's attention.⁵⁷

The legislation passed over very strong objections from the broadcasters.⁵⁸ In fact, the broadcasters initially prevented us from amending the Telecommunications Act of 1996 to include the V-chip provision at the Committee level. Then, Senators Conrad and Lieberman took it to the floor of the Senate, where it was opposed by Senators Dole and Simon, a bipartisan pair. They argued against passage of the bill, maintaining that more studies were necessary.⁵⁹ Nonetheless, their efforts were unsuccessful; Senator Dole was unable to gain enough votes to defeat the amendment. When he released the votes that he had managed to procure by virtue of his seniority, those votes switched over to support the amendment, and the ultimate vote was something like seventy-six to twenty. Although it looked overwhelming for the V-chip on pa-

54. See Markey, *supra* note 30.

55. See *id.*

56. Telecommunications Competition and Deregulation Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

57. See, e.g., Rick Marin, *Blocking the Box*, NEWSWEEK, Mar. 11, 1996, at 60 (discussing the V-chip); *Q and A with President Clinton; The V-Chip May Simply Give Viewers Another Way to Vote*, L.A. TIMES, Mar. 2, 1996, at 1 (noting that President Clinton supports the V-chip); *Clinton Sells V-Chip and TV Ratings System*, STAR-TRIB. (St. Paul, Minn.), Mar. 2, 1996, at 9A (same).

58. See, e.g., *To V or not to V*, BROADCASTING & CABLE, Nov. 20, 1995, at 70 (noting that the broadcasters objected to the passage of the V-chip provision); Steven McClellan, *It's Markey v. Industry on V-Chip: IRTS Panel Debates Program-blocking Technology*, BROADCASTING & CABLE, Oct. 30, 1995, at 28 (same).

59. See *The Mysterious V-Chip*, 141 CONG. REC. S12,208 (1995) (statement of Sen. Dole); *The V-Chip*, 141 CONG. REC. S10,661 (1995) (statement of Sen. Simon).

per, in fact it was a very close vote.

Then, in the interval between the Senate consideration and the House consideration of the bill, the President weighed in through a conference with the FCC. We took the bill to the House floor in August 1995.⁶⁰ Although we were initially defeated, we ultimately succeeded by a half-a-dozen votes. Finally, it became law when the President signed the Telecommunications Act in February 1996.⁶¹

Now, the industry completely changed its position and volunteered to put together a rating system. One of the reasons behind the industry's change was a study that they themselves had commissioned several years earlier in an attempt to prevent use of the V-chip.⁶² Coincidentally, that study was completed and publicized during February of 1996, and it clobbered the industry.⁶³

It is certainly ironic that every study commissioned by the industry on the subject of television violence results in damage to the industry. To some extent, the industry may be harmed as a result of the way the press characterizes those studies, because many of the industry studies are much more moderate than reported in the press. But that study in particular backfired.

The industry had not yet decided what to do about the V-chip and its lawyers were recommending legal action. Then the study hit, and the industry changed its position. Television industry leaders volunteered to come to the White House and attend a goodwill summit held by the President, in which everyone would say nice things about each other and would pledge to begin their rating systems.⁶⁴

60. See *Introducing the Markey-Moran-Burton-Spratt Amendment on Parental Blocking of TV Shows that Harm Children*, 141 CONG. REC. E1565 (1995) (statement of Rep. Markey).

61. See Jonathan Weber, *War Over Net Restrictions Just Beginning*, L.A. TIMES, Feb. 8, 1996, at D1 (noting that President Clinton signed the legislation on February 8, 1996).

62. See *CBS This Morning* (CBS television broadcast, Feb. 7, 1996) (discussing the industry-study released in September 1995).

63. See Elizabeth Jensen, *Violence Floods Children's Television, New Study Says*, WALL ST. J., Sept. 20, 1995, at B1 (reporting that Senator Markey stated that the study would encourage parents to use the V-chip).

64. See Chris McConnell, *Broadcasters will meet with Clinton, but . . . ; industry*

The industry then spent six months putting a rating system together, which looked exactly like the movie rating system.⁶⁵ This resulted in vigorous criticism from parents' groups and public advocates, accusing the industry of taking the "V" out of the V-chip. Many critics of the industry's television rating system charged that it did not provide parents with what they wanted. They wanted a rating system that told when there was violence. They did not want a rating system that gave the opinion of the industry as to whether material is appropriate for a child under a specific age. The parents wanted to know the level of violence and sex contained in a television program, to assist them in deciding whether to watch or turn off the show.⁶⁶ So, within four months of an initial refusal by the industry to make voluntary changes, they actually established a rating system that identifies violence, sex, and language, which we are now beginning to see on television.⁶⁷

I agree completely with the notion that the ratings that appear up in the corner of the screen are of little utility to most parents.⁶⁸ Part of that is associated with the fact that they appear for a mere five seconds, so unless you are watching at the beginning of the show, you will not see the rating. If you start viewing in the middle of the show, you cannot find out the rating.

It is important to note that the only reason we have this rating system is because of the law. Hopefully, within time, the ratings will not only be provided on screen at the time the show is aired, but will also be provided ahead of time. Such information can be distributed through newspapers, which is not happening yet.

remains opposed to V-chip, BROADCASTING & CABLE, Jan. 29, 1996, at 7.

65. See Heather Fleming, *Valenti Delivers V-Chip Code: Says Industry Will Go To Court If Government Tries To Change It*, BROADCASTING & CABLE, Dec. 16, 1996, at 6 (noting that Motion Picture Association of America President Jack Valenti announced the industry's proposed age-based television rating system, which is similar to the movie rating system).

66. See *id.*; Ellen Goodman, *Ratings System Won't Tell Parents Very Much; Industry Wants the V in V-Chip to Stand for Vague and Vacuous*, STAR TRIB. (St. Paul, Minn.), Dec. 18, 1996, at A25.

67. See Paige Albiniak, *Ratings Get Revamped: Networks, Except for NBC, Agree to Add Content Labels*, BROADCASTING & CABLE, July 14, 1997, at 4; *Finally, Some Light for Parents in the TV Issue, Better Ratings System Opens the Way for Use of the V-chip*, L.A. TIMES, July 11, 1997, at B8.

68. See discussion *supra* note 11.

From my perspective, providing information to viewers is the only purpose of the rating system. Again, my fellow panelist Eric Burns had it right when he described the ultimate purpose. Moreover, you do not actually need the rating to appear on the screen in order to be useful. The point is, a signal will be sent over the air to V-chips that, if activated by the owner of a television set, will block out specific programs, preventing viewers from ever seeing that material.

Some members of the industry understands this. Leslie Moonves, the president of CBS, does not have any problem with the V-chip and the rating system because he does not think it will have any effect on his business. On the other hand, Warren Littlefield, the president of NBC, warns of the dangers found in the present framework. Those warnings are absolutely preposterous when we are talking about providing information about violence, sexual content, and indecent language.

This past October, they began implementing the rating system. The American Civil Liberties Union (“ACLU”) and others have strained to find a First Amendment violation in the system, which most non-parents consider irrelevant to their lives and most parents consider a welcome development. I do not begrudge the ACLU’s vigilance, but, in this case, its fears are simply misplaced.

The very invocation of the word censorship in this television ratings debate is completely out of proportion and out of context. Censorship is supposed to mean an official attempt to control what you can see or hear, but the V-chip law does not require the television industry to provide any ratings. Its basic mandate falls, not on the broadcasters, but on the television set manufacturers. It requires that the technology be built into the television sets, but it does not mandate a rating system.

Under the law, the television industry decides which television programs to rate, not the government. The television industry also decides what the rating should be for particular programs. Who decides whether to use the ratings? Parents, not the government. A television rating simply tells the consumer what is in the product. It is similar to a label on a can of soup. While companies always attempt to knock out such labels on the charge of censorship, the courts have time and again found such labels to be consistent

with the First Amendment, even when the government has required a label and specified the words.

In the case of labeling consumer products, the labeling laws often specify the words, the size of the print, and even the placement of the label on the product: none of which is occurring here. After all, giving people more information, not less, is one of the core values of the First Amendment. In fact, parents, not the government, will ultimately decide the value of this whole undertaking, and that is how it should be.

The advance in technology made it possible to provide the V-chip in every new television set. You will likely be able to buy a television set with a V-chip in it this fall. There is a big delay right now because of the slowness of bureaucracy. The FCC must have a meeting to validate the V-chip technology and the rating system. There is no controversy about it; they just have not done it yet. Once the FCC does that, the television set manufacturers will proceed with production. As between 20 million and 25 million television sets are sold each year in the United States of America. With 100 million total households in the country, in a couple of years, V-chips will be in 40 million to 50 million television sets.

In addition, you can attach a black box to an existing television set and achieve the same results as the V-chip television sets. Those boxes are available for fifty or sixty dollars. Furthermore, the cable industry is proceeding with upgrades—not for V-chip purposes, but for many other purposes—and once the specifications are in place, the cable industry will be able to provide V-chips.

So V-chips will come this year.⁶⁹ I consider 1998 the year of the V-chip. This is not a panacea. It is not a substitute for teaching children the difference between right and wrong, but neither is it the government telling industry what to put on the air. Any broadcaster can continue to provide adult programming. The rights of adults to see programming that is violent or sexual is preserved, as are the rights of parents to shield their children from that same material.

69. See Deibel, *supra* note 10.

As technology evolves, society continually will need to find ways to balance both the good and evil that the technology facilitates. Television is not exempt. All America benefits from free over-the-air television that is universally available. It is a great benefit, but it is also pervasive.⁷⁰ By the time the average American child leaves elementary school, he or she has witnessed more than 8,000 murders and 100,000 acts of televised violence. Ratings and the V-chip help busy parents restore their control over this mayhem. The V-chip actually means the end of the trouble. It is parents taking control of the television set away from the brokers of power.

MR. ZIPURSKY: Thank you Mr. Moulton. Mr. Peters, of Morality in Media, is next.

MR. PETERS: During the legislative process, Morality in Media neither supported nor opposed the V-chip provisions of the Communications Decency Act. We remained neutral for two reasons:

Number one, we do not have a very big staff, and our primary focus was the Internet indecency provisions of the Communications Decency Act,⁷¹ not the V-chip. We did not suggest the V-chip; we did not think it was the answer. I took the position that, at least in theory, the V-chip could be helpful to parents.

Not everyone on the staff agreed and, as a compromise, we simply decided to neither oppose nor support the bill. In retrospect, I regret that decision. If I had it to do over again, Morality in Media would have opposed the V-chip provisions for three reasons. First, many within the television industry will use the V-chip and rating system as an excuse for providing morally unacceptable programming. Programming complaints will be met with the industry response advising viewers to use the V-chip to block out unacceptable programming. But no rating system alone can provide adequate protection for all, or even most, children. The obvi-

70. See *FCC v. Pacifica Foundation* 438 U.S. 726 (1978) (holding that broadcasting is uniquely pervasive and accessible to children because it invades the privacy of the home).

71. Telecommunications Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 133-36.

ous limits of any rating system are that no rating system will ever be perfect. Many parents simply will not use it. Of those who do, many will not use it wisely. No V-chip can protect children outside the home, and no rating system will be foolproof. If I were a child, it would not take me very long to figure out my father's code.

The second reason why Morality in Media would oppose the V-chip is because if Congress were really intent upon protecting children from indecency—and this law was based in whole or in part on that concept—it would have first extended the prohibitions against broadcast indecency and indecency on basic cable. The law regulating broadcasts containing obscene or indecent language requires broadcasters, not parents, to restrict indecent programming.⁷² In *Denver Area Educational Telecommunications Consortium v. FCC*,⁷³ a 1996 Supreme Court case, the Court's plurality opinion indicated that the same concerns that justify a restriction on broadcast indecency also justified a restriction on cable television indecency.

The last reason why Morality in Media would have opposed the V-chip is because, as Mr. Moulton indicated, it does not require the industry to do anything. If we are going to have a rating system, we should have a rating system with teeth.

Morality in Media did get involved once the V-chip bill was passed by Congress and the industry came up with its first proposal for ratings. We submitted comments to the FCC opposing those ratings. We also submitted comments opposing the revised proposal, which has been accepted by all but NBC and the Black Entertainment Television cable network, BET.⁷⁴

72. See 18 U.S.C. 1464 (West & Supp. 1998). According to section 1464: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." *Id.*

73. 518 U.S. 727 (1996).

74. See Don Aucoin, *After One Season, TV Ratings Picture is Still Murky*, BOSTON GLOBE, May 28, 1998, at E1 (noting that NBC and BET are "the only two networks that have refused to adopt the ratings"); Laurie J. Flynn, *V-Chip and Ratings Are Close to Giving Parents New Power*, N.Y. TIMES, Apr. 2, 1998, at G6 ("To date, NBC and the BET cable network are still not transmitting the content ratings that the rest of the industry began using last fall."). According to one commentator:

NBC, at least for now, is sticking with the simpler rating system previously

Our reasons for objecting to the proposed television rating systems fall into two broad categories. First, age-based rating systems are inherently problematic because they are almost entirely subjective, and because parents differ over what they consider suitable for their children. The members of the industry will have great difficulty in making intelligent decisions about what is suitable for America's children. I do not think any of us could completely do that task wisely.

Second, the industry-proposed rating systems are not accompanied by published, concrete guidelines to inform television producers. The systems are vague on purpose. Although the proposed ratings seem to make sense, when you look carefully at the language that is used to describe the violent, sexual, or vulgar content, it is broad and hopelessly vague.

Related to that, a third reason why we objected to the proposed television rating system and its revision is that neither proposal provides for an independent review of ratings given to programs. The revised proposal did at least create a board, but in effect the board is controlled by the industry.

And, related to our third objection, there are no sanctions for violations. Just as the Motion Picture Association of America ("MPAA") ratings are toothless, the television industry's rating system, which is patterned after the MPAA system, is also toothless. The ratings are unacceptable as a means of protecting children. Of course, they are acceptable to protect the industry.

A last area for comments is the constitutionality of government mandated rating systems. Some may argue that the First Amendment totally prohibits government from requiring persons to provide information about the property, products, or services they offer to the public, regardless of justification. Clearly, that is not the law today. Some will argue that while government should be able to require food distributors to provide information about the prod-

used by the industry, which omits content descriptions, like S for sexual situations and L for adult language. BET does not rate shows at all. Because the ratings are voluntary, the F.C.C. has no jurisdiction to force these networks to comply.

Flynn, *supra*.

ucts they sell in order to protect public health, government should not be able to require television producers to provide any information about the programming they offer in order to protect children.⁷⁵

I do not think that is the law today. And, if it is not the law, then the issue is not whether but rather what specific types of information government can properly require television producers to provide parents. Now, if government does at some point in the future enact a law or regulation requiring television producers to provide information about program content (keeping in mind that the Communications Decency Act provisions do not require the industry to do anything), it might be well advised to limit the legislation or regulation to depictions or descriptions of sexual or excretory activities or organs, and that includes vulgarity, and to violence. As copy-cat behavior and related phenomena is really the primary concern, the indecency requirement that content be patently offensive should not apply. In one sense, it is irrelevant to the primary concern of this legislation.

Indecency laws were not enacted to prevent copy-cat behavior. They sprang out of the public indecency laws of old that still protect you and I from persons copulating on park benches in broad daylight and going to the bathroom on a street or walking down the middle of the street nude. That is the genesis of the public indecency laws, not the protection of children from violent entertainment. Patent offensiveness⁷⁶ is to some extent irrelevant to the is-

75. Broadcasters argue that the ratings associated with the V-chip impose content-based restrictions as a form of compelled speech. See Steven D. Feldman, *The V-Chip: Protecting Children From Violence or Doing Violence to the Constitution?*, 39 HOW. L.J. 587 (1996). Proponents of the ratings argue that they merely label the contents of the programs, leaving the broadcasters free to transmit any type of protected speech without resort to the safe harbor provisions now included in the Communications Act of 1934. See *Action for Children's Television v. FCC* ("ACT III"), 58 F.3d 654, 669-70 (D.C. Cir. 1995) (en banc) (allowing the FCC to limit indecent broadcasts to a safe harbor period between 10 p.m. and 6 a.m.). The proponents assert that the ratings are analogous to the food and drug labeling rules, which inform the public of ingredients without regulating the contents. See Denise R. Polivy, *Virtue by Machine: A First Amendment Analysis of The V-Chip Provisions of the Telecommunications Act of 1996*, 29 CONN. L. REV. 1749 (1997); Jonathan L. Wolff, *The V-Chip: Giving Parents the Ability to Regulate Television Violence*, SANTA CLARA L. REV. 785 (1997).

76. See *FCC v. Pacifica Foundation* 438 U.S. 726, 743 (1978) (upholding the FCC's

sue of whether a child can be injured by something on television.

I never looked at the V-chip provisions carefully until after they had passed. I was just too busy with other things. If I had really taken a look at this law, I would have used everything in our organization's power to defeat it. My biggest problem with the provisions is that the indecency standard is inappropriate for the purposes of this legislation.

Now, my advice to Congress would be to limit the reach of the law or regulation to content that has been shown in the legislative record to raise the valid concerns that the law or regulation is intended to address. Scientific certainty will not be required by the Supreme Court, but evidence of harm undoubtedly will be. It is a tough question. But it is a question in terms of whether Congress can properly require the television industry to provide information about content. There is a potential problem in this area if Congress does requires the industry to do so.

My advice would be to aim the ratings at behavior that has been shown by some evidence to be connected to harms. I will give you one example. A year or so ago, there was a situation in Hattiesburg, Mississippi, involving some children who watched the television show *The Mighty Morphin Power Rangers*, which typically contains violent sword battles. After viewing the show, the children went out to play, had a sword fight, and one of the children killed a two-year-old girl by poking her in the mid-section with a blunt object. Now, if I were in Mr. Moulton's position, I would make sure to introduce that evidence to help establish how television violence can have a harmful effect on children.⁷⁷ To

definition of indecent language over the airwaves as "patently offensive references to excretory and sexual organs and activities"). The Court ruled that even though some of the language falling within the FCC's definition of indecency may be protected speech, it "surely lie[s] at the periphery of First Amendment concern." *Id.*

77. See Mark Dowdney & David Leigh, Lethal Power Kids' TV Heroes; Hit Show Sparks Storm Over Copycat Violence; Children's TV Show 'Power Rangers' Provokes Copycat Violence Row, *DAILY MIRROR*, Oct. 19, 1994, at 3 ("The chart topping show was axed in Scandinavia following the horrific killing of a five-year-old Norwegian girl by three six-year-old boys."); Vikki Orvice, Copycat Dangers of the Power Rangers; Outcry Over Children's TV Heroes After Young Fan is Hurt, *DAILY MAIL* (London), Oct. 19, 1994, at 3 ("[I]n Norway, broadcasting of Power Rangers has been suspended amid fears that it might have influenced three children—one aged five, two aged six—who al-

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play it safe, Congress should try to connect the regulation, which requires information about content, with the prevention of specified harmful behavior.

Certainly, the Supreme Court could require absolute scientific proof before upholding such a regulation. Most assuredly, the ACLU will argue along those lines. Hopefully, the Supreme Court will not take that position.

My last recommendation, if Congress ever does enact legislation requiring the television industry to provide information, is to be as specific as possible about what information will be required. It would be best to have a focused, clear rating system that the broadcasters and the cable people can understand, supported by evidence. Any broadly worded regulation that tried to encompass everything would likely be invalidated by our Supreme Court.

MR. ZIPURSKY: Thank you. Mr. Johnson is our next participant.

MR. JOHNSON: Inasmuch as I am not a lawyer, I am not going to tell you much about the constitutionality or unconstitutionality of the television ratings. Inasmuch as I am someone who watches a lot of prime-time television, I feel more comfortable talking about that. I believe that discussing a rating system without reference to the content of the programming is somewhat premature.

I do not want to avoid the topic, however, even though in a law school setting I may be leading with my chin. I will state more or less a layman's position. Given that the television industry's rating system is self-imposed, I do not see what the First Amendment has to do with it. The First Amendment, as everyone knows, guards against abridgments of freedom of speech. But describing what is in a package does not change its content. Content ratings are a list of ingredients. As such, you can liken them to food labels that warn those who may be allergic or watching their weight that they should not partake of a product.

It is true that had it not been for the perceived likelihood of federal intervention, the industry probably would not have adopted

legedly kicked and stoned a girl of five, leaving her to die of exposure.”).

an age-based rating system in 1996, and it probably would not have augmented that system in 1997 with content ratings.⁷⁸

I do not want a de facto or de jure ministry of culture rating television shows, much less dictating their content, and I am not comfortable with threats issued from Capitol Hill or anywhere else in government.⁷⁹ Nonetheless, hypothetical situations and congressional bluster do not violate anyone's freedom of speech. Were Congress to become more directly involved, such a power play would not pass muster in the courts.

One reason ratings are talked about in First Amendment terms is that such an approach is in Hollywood's interest. Often it is a scare tactic. Rick Cotton, an executive vice president with NBC, which is not using the content ratings,⁸⁰ has stated that this debate is about censorship, no matter what supporters of a rating system claim. Robert Corn-Revere, a former FCC attorney, argues that ratings contribute to a climate of cultural McCarthyism.⁸¹ Brad

78. See David Hatch, *The Second Front: Legislators Keep Pressure On Ratings*, ELECTRONIC MEDIA, Apr. 14, 1997, at 52 (reporting that a bipartisan coalition of nearly two dozen Senate and House lawmakers "implored" the FCC to reject the age-based system for rating sex and violence on television unless the industry added content icons).

79. See Doug Halonen, *Broadcast, Cable Groups Rebel at Gore's Ratings Intervention*, ELECTRONIC MEDIA, June 23, 1997, at 1A (reporting that broadcast and cable industry representatives broke off compromise talks with watchdog groups just as it appeared that a deal was within reach over a ratings system.) The National Association of Broadcasters, the National Cable Television Association and the Motion Picture Association of America recessed talks on any changes in the TV ratings system after accusing Vice President Al Gore with improper interference in the television ratings debate. *Id.* Before the walkout, sources on all sides of the compromise had been optimistic that a deal would soon be cut and that the centerpiece of the arrangement would be a broadcast industry agreement to add "S," "V" and "L" designations to the ratings to warn viewers about sex, violence and bad language. *Id.*

80. See Aucoin, *supra* note 74; Flynn, *supra* note 74. According to NBC spokeswoman Alex Constantinople: "Right now, [NBC is] sticking with [their] age-based system, which [they] supplement with onscreen and audio advisories where appropriate." Aucoin, *supra* note 74. NBC does not believe that the public is concerned over its lack of participation in the ratings system. See *id.* "An NBC executive who requested anonymity questioned how much parents actually care about television program ratings. 'From the minute this started, we haven't heard a large outcry from parents,' the executive said." *Id.*

81. See Nat Hentoff, *NBC and the Government's Enforcers*, WASH. POST, Oct. 18, 1997, at A23 ("Robert Corn-Revere, a lawyer who has worked at the FCC, emphasizes that 'so long as the government brandishes its licensing power in aid of its programming desires, no self-regulation is truly voluntary no matter how many times that euphemism is

Radnitz, of the Writers Guild, believes that content ratings might have a chilling effect. Dick Wolf, the producer of the television program *Law and Order* and several other shows, asserts that ratings might be the most serious threat to free speech since the beginning of broadcast television.

Today—in fact, I believe at this very hour—at the National Association of Television Programming Executives meeting in New Orleans, there is a seminar called “Big Brother: Does He Have a Chip on His Shoulder?”⁸² As far as I am concerned, that is too clever by at least half, and possibly by as much as three-quarters. Legitimate threats to freedom of speech ought to be identified and denounced, but so should this sort of hysteria.

I must note that when *Law and Order* producer Dick Wolf is not crying his last name he is capable of illuminating contributions to this argument. He is worried that content ratings may cause advertiser skittishness. He wonders if sponsors will buy time on shows that are, as he puts it, stigmatized by, for example, an “L” for harsh language. Stigmatized is an odd choice of words because the basis for such a content rating is self-inflicted by a television show’s producers and writers.

I favor a private sector rating system that accurately informs parents which programs are suitable for children and which are not. The system we have currently does not do that.

Take the television “PG” rating, by far the most common one in prime time. It means, according to the guidelines, that the program in question “contains material that parents may find unsuitable for younger children.” What does that mean in practice? Will the “PG” episode contain cursing or sexual material? Maybe not, but maybe. We did one study that found that a little more than half of “PG” shows contained at least one curse word or sexual message. Parents who want to keep their children away from such content might as well flip a coin to determine whether to watch a

involved.”).

82. *Big Brother: Does He Have a Chip on His Shoulder?; New Orleans NATPE 1998: Insiders’ Guide: Agenda*, ELECTRONIC MEDIA, Jan. 12, 1998, at 94 (reporting that the agenda for the convention included a panel discussion on whether the government has gone too far in regulating the television industry).

show.

As applied, the system is permissive. References to such events as sex on the hood of a car, a man and a woman licking pralines off one another, or a man masturbating by rubbing against a tree, not to mention a plethora of sexual innuendo, have appeared in "PG" rated shows.

With content ratings, we have another definitional problem. Is "ass" considered an obscenity? Does a sexual situation merit an "S" rating? It depends on the network.

To return to the effect of ratings on Hollywood's creative community, we have reason to think that they would not stifle comedic flair or dramatic verisimilitude. The late 1960s and 1970s, right after the Motion Picture Association of America's ratings were enacted, are widely considered the last era in which the major studios encouraged greatness, before the films *Jaws* and *Star Wars* pretty much ruined things for adult moviegoers. When blame is assigned for the dumbing down of Hollywood or the blockbuster mentality, you hear mentioned the names of filmmakers such as Steven Spielberg and George Lucas, not that of Jack Valenti, the head of the Motion Picture Association of America. I doubt that the MPAA ratings are anywhere near the top of the modern filmmaker's list of headaches.

For those who fear that there will be an inhibiting effect in the case of television, we have found that the programs really have not changed since the ratings took effect in January of 1997. We have looked several times at shows in what used to be called the family hour, that is, from eight to nine o'clock in the evening. Beginning a few years ago, the fare traditionally found in this time period, which had been family-oriented, was gradually replaced by adult-oriented offerings. Both before and after the introduction of television ratings, the eight o'clock shows have contained considerable sexual material and language that, not long ago, was uncommon even in the ten o'clock time slot.

At the press conference following the White House TV summit in February 1996, ABC's Robert Iger said, "I don't think issues of taste have anything to do with this ratings system. I don't think it will cause us to change any scheduling attitudes, nor will it cause

us to change broadcast standards.” He was right. And ABC is far from the worst offender. If it moved *Spin City* to 9 o’clock or later, its family hour would be largely clean.

The real problem is that a show rated appropriately is not necessarily an appropriate show for its time slot. Ratings are a distraction. While we dispute whether a program should be “TV PG” or “TV 14,” or whether or not it should carry a certain content letter, we are not focused on the family audience’s severely limited eight o’clock viewing options or, more broadly, on the coarsening of entertainment television.

Under the ratings system, Amanda’s right to call Taylor a bitch on Fox’s *Melrose Place* has not been infringed. Joey’s right to sleep with his girlfriend, and Monica’s right to sleep with her boyfriend, on NBC’s *Friends* remain intact. In prime time, the First Amendment thrives.

MR. ZIPURSKY: Thank you. Our next speaker is Don Hawthorne, an attorney with Paul, Weiss, Rifkind, Wharton and Garrison here in New York City.

MR. HAWTHORNE: I am a litigator, so my comments will address the reach of the V-chip statute and issues about its constitutionality.

At this point in time, this is a hypothetical conversation. There has not been a constitutional challenge to the V-chip provisions of the Choice in Television Act.⁸³ As long as most of the networks continue to find it amenable to go along with the system as it has been implemented now, there may not be any challenge.⁸⁴

I would like to make three points on the constitutionality of this provision.

The first point is that if this were a statute that required ratings to be applied to television shows on the basis of violence and also imposed restrictions on viewing based on that rating, it would al-

83. Pub. L. No. 104-104, § 551(a), 110 Stat. 56 (1996).

84. See generally Denise R. Polivy, Note, *Virtue by Machine: A First Amendment Analysis of the V-Chip Provisions of the Telecommunications Act of 1996*, 29 CONN. L. REV. 1749, 1791 (1997) (discussing the likelihood of successfully challenging the V-chip provisions).

most certainly be unconstitutional.⁸⁵ That is, if the statute required a rating to be put on a program and then, based on that rating, consigned the show to a late night “safe harbor,” it would very likely be held unconstitutional.⁸⁶ The D.C. Circuit Court of Appeals has upheld safe harbors based on indecency. But these cases have been limited to essentially sexual material.⁸⁷ Violence is a different case and any attempt to restrict programming based on violent content would, under considerable precedent, be a very tough row to hoe.

There is actually a fair amount of precedent in this area going back some years. There was a case back in the 1940s about a publication called *Headquarters Detective: True Cases from the Police Life*.⁸⁸ This was a Supreme Court case about a comic book that told stories in very grisly detail about real-life police events.⁸⁹ A law was enacted, largely with these kinds of publications in mind, that restricted distribution of publications that depicted “deeds of bloodshed, lust or crime.”⁹⁰ It was directed toward protecting children from this kind of material.⁹¹ The Supreme Court struck that down years ago, decades ago.⁹² There is a clear legal precedent about that.

The problems found by the Supreme Court with the comic book statute would also be found in a law that attempted to limit programming based on violent content.⁹³ The typical First Amendment analysis would find problems of many kinds.

There is just not a firm enough connection between regulating violence and protecting children to justify substantial limitations on First Amendment freedoms. This lack of causal link explains how courts have resolved “copy-cat” cases of television violence.

85. See *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727 (1996); see also *Action for Children’s Television v. FCC*, 59 F.3d 1249, 1264 (1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 773 (1996).

86. See *Action for Children’s Television*, 59 F.3d at 1264.

87. See *id.*

88. See *Winters v. New York*, 333 U.S. 507 (1948).

89. *Id.* at 508.

90. *Id.* at 507-08 (discussing section 1141(2) of the New York Penal Law).

91. See *id.* at 522.

92. *Id.* at 520.

93. See *id.* at 519.

These cases concern television shows that contain acts of violence or foolishness where some child imitates those acts and injures himself or someone else. Those types of suits are brought and, uniformly, the courts have thrown them out on the issue of causation. There are too many questions about the relationship between the depiction of violence and behavior to permit government to restrict speech based on that supposed causal relationship.

Restrictions on violence also are very unlikely to ever succeed in passing the test of being narrowly tailored. It is very hard to define what violence is. For this reason, statutes regulating violence are routinely seen as being overbroad. Violence is a judgment; it requires a judgment on the part of government.

We are concerned about troubling depictions of violence. But most people would agree that there are some circumstances where objectively violent events should be seen and should be freely available. For example, news programs or actual depictions of war are things we should see on television.

In short, there would be significant First Amendment problems if the statute were different from what it is. Problems would definitely arise if it facially regulated programming based on violent content and placed restrictions on when violent programs could be scheduled for viewing. That is not what the statute does and, therefore, it is a more difficult constitutional case.

There are two reasons why the constitutionality of the V-chip statute is a more difficult issue. First, this statute has the appearance of private action. On its face, the statute does not require the adoption of a specific rating system with specified elements for determining ratings.

Nevertheless, the private action taken by the industry in implementing ratings, as a result of this statute, is not free from government compulsion. According to the statute, the FCC was to adopt recommendations for a rating system in one year after the enactment of the statute, unless the industry first came together with its own rating system deemed acceptable by the FCC.⁹⁴ Thus,

94. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996); see also H.R. 2888, 103d Cong. (1993).

there was clearly pressure here. The networks and the MPAA were pressured into coming up with their rating scheme.⁹⁵

This pressure cannot be viewed as being entirely benign. Some defenders of the statute may say that there really is no government compulsion. They would maintain that even if the FCC introduces its own rating scheme, it is only going to be a set of recommendations, and will not be mandatory.

Broadcasters, however, have to be aware that it is the FCC that makes discretionary determinations about license renewals and the like. There already have been voices raised in Congress that something has to be done about the broadcasters who are not participating in the current proposed rating scheme. Senator McCain has asserted that action should be taken against those networks,⁹⁶ through either a different legislative initiative or the denial of FCC license renewals.

The state action issue, although it is not an easy question, is one that, depending on the circumstance, probably could be surmounted.

The hardest question is the one of determining whether ratings are censorship. It is a question that has been raised by many people here. Are ratings censorship or is this just information being provided? I am not the first one to say that it is a close question. It would depend in large part on how a particular case presented particular facts.

The question is two-fold. First, who is harmed and, second, what is the injury? Well, there are at least a couple categories of harm you could see that might derive from the statute. The statute requires distributors of programming to carry any rating that has

95. See Edmund L. Andrews, *TV Executives Reach Broad Accord on Rating Violent Shows*, N.Y. TIMES, Feb. 29, 1996, at A15 (“Clinton has put heavy pressure on broadcasters . . . to come up on their own with a violence rating system, which is essential in order for a V-chip to block out violent programs.”); *The ratings that Hollywood didn’t want; Something extra for your macaroni*, U.S. NEWS & WORLD REPORT, Mar. 11, 1996, at 13 (noting that “the broadcast and cable networks acceded to public pressure over TV violence . . . and agreed to devise a ratings system for their programs”).

96. See generally Lawrie Mifflin, *Senator Tells Networks to Revamp New Ratings*, N.Y. TIMES, June 4, 1997, at C13 (discussing Senator John McCain’s instruction to the television networks to make the ratings content specific) [hereinafter Mifflin III].

been adopted. That is an instance of compelled speech. Maybe it is de minimis compelled speech; maybe not, if the ratings are considered to express judgment about the content of the programming. It is like requiring the distributors to have a kind of running commentary on programming that they provide to their viewers, and there might be some harm there. The extent of the harm, however, depends on the circumstances.

Another form of harm is the extent to which broadcasters may be inhibited from showing programming because of the effects the rating scheme will have on viewers. Maybe the rating scheme is just providing information, but the information is only as good as the rating. Ratings can be effective ways of filtering information, but they require judgments. The judgments will not be made by the viewers, but will be made by a group of broadcasters under compulsion from the government.⁹⁷

How much violence is too much? How much violence is necessary to make a program inappropriate for viewing by people under a particular age? How much violence does it take to get into the various categories or boxes that are put in by the rating scheme? Those are all judgments. Viewers may not watch a television show based on a rating when, if they actually watched that show, they would disagree with that judgment.

From the broadcasters' standpoint, ratings are important because the rating scheme is linked to a V-chip that will function automatically. In this way, the rating that is applied to a television show will directly affect the number of people who see that show.

Most important of all, ratings could have consequences with sponsors. The presence of a particular rating could become a litmus test for sponsors or advertisers. They might not want to be affiliated with programs that contained a certain type of rating. That type of action would have serious consequences.

An unfortunate thing about our discussion today, which otherwise has been quite illuminating, is that we do not have someone here from the broadcasting industry to talk about the extent to

97. See *supra* note 95 (noting that the broadcasters were pressured into devising their own rating system).

which sponsors' reactions to programming really do impact what we see and what gets made in Hollywood. I think if there were a case that could succeed in challenging the constitutionality of the V-chip, it would be based on that kind of evidence.

In closing, although there has been no challenge yet, these issues may be raised in a future case. There are a lot of interesting questions that are still unsettled or undecided.

One is, what is going to happen about the broadcasters who are not going along? NBC is still insisting on using an age-based system, as opposed to the more content-based system that the other networks have adopted.⁹⁸ I believe that BET, the cable network, will not use any rating system at all.⁹⁹ So what is going to happen? Will the MPAA's rating system be deemed acceptable by the FCC if these other broadcasters do not follow it, and if it is, what are the consequences for those broadcasters at renewal time and the like if they simply say no? There may be a forum in which some of these issues are addressed in the future.

MR. ZIPURSKY: I would like to thank all the participants and start with a few questions of my own. I should say that, as the parent of four-year-old and six-year-old daughters, my gut reaction is: When is the V-chip coming to stores so that I can run out and buy my new television set? But as a professor who teaches the First Amendment, I think it is my duty to start the panel discussion by asking Mr. Moulton some questions about the constitutionality of this legislation.

I think that the Supreme Court's impressive and dramatic treatment of First Amendment issues is characterized by a kind of pragmatism. They do not necessarily look at what the law says; they look at what the law is doing and what the government is doing. And so, it would be premature to conclude in this context that, because the broadcasters are not required by threat of sanction to adopt their system, we are not dealing with a First Amendment violation.

Two key concepts in the First Amendment analysis, content

98. See Aucoin, *supra* note 74 (stating that NBC is "sticking with its age-based system, which [they] supplement with onscreen and audio advisories where appropriate").

99. See Flynn, *supra* note 74 ("BET does not rate shows at all.").

neutrality¹⁰⁰ and chilling effect,¹⁰¹ suggest there may be problems with this regulatory scheme. Certainly it is explicitly content based¹⁰² and, as was pointed out by Mr. Hawthorne, one might well expect it to have very significant effect on what kind of speech occurs, and certainly on what kind of listening and viewing occurs. It certainly could have a very significant effect on the informational marketplace in a way that is content based.

So the question is, whether there is reason to believe that there could be serious First Amendment concerns here, given that the Supreme Court frequently adopts a pragmatic approach to First Amendment issues?

MR. MOULTON: I agree this could turn out to be something that either we did not intend or it could have much more severe effects than we anticipated. It is still a work in progress. NBC producer Dick Wolf has argued that it will have this chilling effect, preventing him from putting on the next *NYPD Blue*, and that it will give the industry an excuse to make things worse. Both of those arguments were suggested here today. They are two com-

100. Justice Brennan's opinion in *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (holding that burning the American flag is protected expressive conduct under the First Amendment), provides a helpful description of content neutrality: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 414. See generally Robert Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189 (1983) (observing that the requirement of content neutrality "is, today, the most pervasively employed doctrine in the jurisprudence of free expression").

101. The Supreme Court has invalidated government action based upon a presumed effect on speech, even without a factual showing that the effect actually existed. See *Secretary of State of Maryland v. Joseph H. Munson Co.*, ___ U.S. ___, ___, 104 S. Ct. 2839, 2853 (1984); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975); *Teitel Film Corp. v. Cusak*, 390 U.S. 139, 141 (1968); *Elfbrandt v. Russell*, 384 U.S. 11, 18 (1966); *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965); *Freedman v. Maryland*, 380 U.S. 51, 59 (1965); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964); *NAACP v. Button*, 371 U.S. 415, 434-36 (1963); *Talley v. California*, 362 U.S. 60, 64 (1960); see also *Smith v. California*, 361 U.S. 147, 153 (1959); *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *Sweezy v. New Hampshire*, 354 U.S. 234, 248 (1957) (plurality opinion); *Watkins v. United States*, 354 U.S. 178, 197-98 (1957); *United States v. Rumely*, 345 U.S. 41, 46 (1953); *Wieman v. Updegraff*, 344 U.S. 183, 190-91 (1952); *Thomas v. Collins*, 323 U.S. 516, 535-36 (1944).

102. See generally *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (describing content neutrality).

pletely opposite reactions to the V-chip.

It could have neither. It could very well have neither. Remember, you have subsets of subsets of subsets of people who have an interest in this debate. We have required one hundred percent of television purchasers to pay for the V-chip, which only a third of them have any real interest in using. Of the parents and families, a subset includes younger children, not older children; and then of that subset, there are the parents who will actually use it. Pretty quickly we are left with a fairly small number of people. On the other hand, it is still in the millions and could affect the Nielsen ratings significantly.

We are not sure yet who will use it and what the effects will be. But still, the difficult situation that any advocate of censorship will face in an argument here is maintaining that the state is making these decisions, because we have not put that decision-making power in the hands of the state.

There was mention of safe harbor legislation. Safe harbor legislation would appoint someone at the FCC to decide whether a show should be inside the safe harbor or outside of it. Therefore, you have a government official making content decisions.

In this case, there is no governmental decision-making with respect to what gets rated and what rating it receives. But, you could have a particular fact pattern where a particular show became a subject of congressional concern leading to action by the FCC. If you were able to tie it all together and establish state action, you might have a harm that was actionable at law. Frankly, the industry has probably adopted that strategy. They will wait for an actionable fact pattern because they do not have a case on its face. They are hoping that Congress or someone at the FCC will make a mistake, and open the door to successful litigation. It is a very difficult situation.

The authors of the V-chip law left it up to the industry to decide what rating system to use and whether to use it.¹⁰³ So if some FCC official turns around and uses it as a litmus test, that would be

103. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996); *see also* H.R. 2888, 103d Cong. (1993).

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a good case for the industry. But I do not think that will happen.

MR. ZIPURSKY: Thank you. I want to focus on constitutional concerns somewhat by asking a hypothetical question of Mr. Johnson. You mentioned McCarthyism. I want to ask whether part of our lack of anxiety about the constitutionalism of this bill has to do with the subjects of speech that are being regulated. Let us suppose hypothetically that the television industry was being encouraged by the government to rate speech on the basis of whether it contained highly liberal or socialist content—not being required on pain of sanction, but simply being encouraged to give it a political rating. Would that trouble you?

MR. JOHNSON: Yes.

MR. ZIPURSKY: Would you think that might present certain constitutional problems?

MR. JOHNSON: You mean as much, if not more, than the case with entertainment television or with language or sex, the sorts of things that people are objecting to? Is rating one worse than rating the other?

MR. ZIPURSKY: Well, the question is, if that regulation would be troubling constitutionally—as I think it would—why is the bill we are talking about today any different?

MR. JOHNSON: I find it troubling as well. I agree with you. I did not refer to the bill in any way in my remarks. Perhaps it would be better if we directed that question to David Moulton.

MR. ZIPURSKY: Okay. Well, the reference to McCarthyism is what prompted my question.

MR. JOHNSON: I was quoting a former FCC attorney without communicating whether or not I approve or disapprove of his point of view, although eventually I made it clear that his position was not the same as mine.

MR. ZIPURSKY: Mr. Burns, would you like to address that question?

MR. BURNS: No, but I would love to defer to Mr. Hawthorne, because it seems to me that it is exactly up his alley.

MR. HAWTHORNE: I would think everyone on this panel is going to be in agreement in finding your hypothetical to be more

problematic. Also, I think that a bill rating political content would never get enacted, for pretty obvious reasons. In sort of a pure legal context, a bill that is content-based and viewpoint-based raises even greater concerns than one that addresses subject matter only, like a prohibition on violence.

The example points out why a prohibition on violence, or any outright prohibition, would be problematic. I do not think that would be any more likely to pass muster with the courts than a prohibition or ban directed towards conservative or liberal content.

MR. PETERS: If I may, the concept of the core value of speech comes to mind. Certainly opinions—whether they be liberal versus conservative, heterosexual versus homosexual, or anything else—opinions and viewpoints on issues are at the core of First Amendment protection.

Depictions of sex and violence, as such, are not a core First Amendment value—at least they should not be. Certainly, if they are indecent, they are not supposed to be, although the Supreme Court seems to bounce back and forth as to the importance, or lack thereof, of indecent communications. But one could make an argument that mere depictions of sex and violence do not raise the kind of concerns that you have addressed.

It is a fine line. All of us would be concerned about Congress somehow wanting to protect our children from a Christian point of view or a Jewish point of view. That raises issues that are not raised by violent or sexually explicit entertainment. But, admittedly, it is a fine line.

MR. MOULTON: One area where this might come up in an interesting way is the reality shows—the police shows. The producers of those shows will have to make decisions under the rating system about whether they are news or not. Most of them are taking the initial position that they are news because all they do is show what the police actually did. We are likely to have a vigorous debate about whether that is news or entertainment, and it will ultimately come down to which department in the network is actually producing it, the news division or the entertainment division. But that is one gray area under this rating system that has not been resolved because news is exempt and the entertainment shows are

not. That seems to be within a gray area.

MR. ZIPURSKY: Don, do you want to respond to that point?

MR. HAWTHORNE: The difficulty of drawing the distinctions Mr. Moulton is talking about is an indication of why, if this law were deemed to be mandatory in some sense, it would be deeply constitutionally problematic. The distinction as to whether something is news or whether it is not is difficult, and limiting speech rights based on such distinctions has traditionally been regarded with great suspicion in the First Amendment arena.

In addition, when you go back to the question of causation, presumably you would need some kind of evidence to justify drawing those distinctions. Certainly, the studies that exist now do not suggest or support the view that violence in the news does not have any of the purported terrible effects that violence in the entertainment context does. In the absence of that kind of evidence, it would be quite difficult to justify a distinction in a mandatory law.

MR. MOULTON: Can I respond to that? Mr. Hawthorne's view of what is harmful about violence and the evidence for it is not the one generally shared. Generally speaking, people think the evidence of harm on children from violence is much longer and stronger in the sociological sense than studies actually show. Psychologists have found that violence has a much stronger and longer effect on child development than sex. That is why, in fact, Congress initially focused on violence in promoting the V-chip.¹⁰⁴ In the end, because we have taken this voluntary approach and because parents want it so badly, information on sex and language will become part of the system.

Nevertheless, if you wanted to defend yourself for taking state action based on content, the literature would be much more supportive of you if you were to make decisions based on the effect violence has on children, rather than based on sex and language.

Let me also say that the harm is not just copy-cat—this gets into this issue of gratuitous violence versus violence. In the early stages of this whole debate, the Motion Picture Association of

104. See Ray Richmond, *Parents want to tune in and turn off*, TIMES UNION (Albany, N.Y.), Apr. 21, 1996, at I1 (noting that the "V" in V-chip "stands for violence").

America planned on using an advisory system to warn people about violence that may be considered gratuitous.

From the point of view of a parent with a young child who faces fifteen over-the-air channels and the possibility of sixty or seventy cable channels, I am at least as concerned about the volume of material that my child views as I am about the art associated with it. Even if every show that will be shown to my child on these stations did not contain gratuitous violence, my child will still see 8,000 televised murders or 100,000 acts of violence simply because everyone considered it good art. There is an effect that the psychologists refer to where you become numb to the meaning of violence and you begin to take it as some sort of norm rather than something that is abnormal.

Anyhow, there is a whole behavioral psychological set of literature on the effect of violence, which do not exist for sex. And yet, we have a situation constitutionally where obscenity is considered unconstitutional and indecency has quite a bit of legal support. But we are just beginning to look at violence.

MR. JOHNSON: Let me add that studies of this sort regarding sex may ensue simply because there is so much more sexual material, at least on the primary broadcast networks, than there is violence. It is not even close. In the 1960s there was considerably more violence than sex on television. Now the scales are well in favor of sex in terms of prevalence. So those studies may be in preparation as we speak.

MR. HAWTHORNE: May I make a quick point on the studies? I am aware of one case in which the studies of television violence are being considered by a court.¹⁰⁵ There is a recent case involving "True Crime" playing cards.¹⁰⁶ Those cards were found to

105. *See Eclipse Enters. v. Gulotta*, 134 F.3d 63 (2d Cir. 1997).

106. *See id.* at 64. According to the Second Circuit:

Eclipse Enterprises, Inc. has published several sets of trading cards that include pictures or drawings of famous criminals as well as information about their lives and the crimes they committed. These cards have been sold by set in book stores and trading card shops throughout the country since 1988. Among these card sets are "Coup D'etat," which presents theories pertaining to the assassination of President John F. Kennedy; "Friendly Dictators," which details U.S. support of authoritarian regimes and murderous dictators; "Drug Wars,"

be such a problem in the local community that an ordinance was passed barring these grisly things, which depicted murderers, like the Son of Sam, and described their activities. A law was passed barring them because of the dangers posed to minors.¹⁰⁷ This was challenged in court.¹⁰⁸

The television studies were included as evidence to establish the kinds of psychological harms involved in exposure to violence. The trial court found that this type of evidence was too unreliable and unclear to serve as the basis for restricting speech based on a purported link to violence.¹⁰⁹ That decision, *Eclipse Enterprises v. Mulatto*,¹¹⁰ was just affirmed by the Second Circuit.¹¹¹

MR. ZIPURSKY: Are there questions from the audience?

MR. ZARIN: I am Heath Zarin, editor-in-chief of the *Fordham Intellectual Property, Media & Entertainment Law Journal*, and I have a question for any of the panelists. What is the legal distinction made when trying to decide whether a broadcast is news or entertainment, and what would you propose as a standard?

MR. MOULTON: In the V-chip law, we gave very little guidance in this regard because we considered the decision ultimately to be one for the broadcasters.¹¹² We made it very clear that our goal was a voluntary rating system that would allow parents the ability to block on the basis of violence and sexual material that the parent considered detrimental to children. In a sense, we put the

which discusses crimes associated with Prohibition and drug trafficking; "Crime and Punishment," which depicts scenes from trials of heinous criminals; and "True Crime," which presents information about serial killers and gangsters.

Id.

107. *See id.* (noting that Local Law 11-1992 was enacted by the Board of Supervisors of Nassau County to protect children from these trading cards).

108. *Id.*

109. *Eclipse Enters. v. Gulotta*, 942 F. Supp. 801, 811 (E.D.N.Y. 1996) (holding that "Local Law 11-1992 is unconstitutional because the County has failed to establish that trading cards depicting heinous crimes are harmful to minors, and that the ordinance is not narrowly tailored to meet a compelling state interest").

110. 134 F.3d 63 (2d Cir. 1997)

111. *Id.* at 68 ("[W]e affirm the judgment of the district court to the extent that it determined that the Law is a content-based restriction on speech that does not survive strict scrutiny.").

112. *See S. REP. NO. 104-230* (1996).

broadcasters in the odd position of having to make the decision about what to rate based on their perception of what a parent might feel about the material.

But that is a decision-making process that is engaged in every day. Every standards and practices division makes decisions with sponsors and advertisers about whether they want their product associated with specific material. Our view is that the V-chip is a proxy for the parents; it kind of puts them in the room as part of that discussion. It is a discussion that occurs every day.

The industry has refused to rate news from the very beginning, and no one has disagreed with that refusal. But it was not legislated. The industry announced that they would not rate news. That leads to the line-drawing question. But, in the end, it is almost not a legal decision; it is a decision for their standards and practices divisions to make, about how to make this rating system operational.

They will have a monitoring board that includes some parents but will be controlled by the industry. They will look at how various networks are rating things. Presumably they will find differences between the networks and will have discussions on resolving those differences. They may not resolve it at all. The application of the rating system may be completely different between networks, and the monitoring board may be unable to do anything about it. We will see. But all of that will be worked out in the operational phase.

MR. PETERS: Just a quick comment. I am not an advocate of having the news serve as little more than a platform for the stories of the infinite number of crimes taking place in New York City, but there is a difference between reporting about a crime and depicting it. Thinking back to the television show *Perry Mason*. I do not recall ever seeing a murder. Was *Perry Mason* a violent program? Did the program show violence? It was a murder mystery that had the good taste to avoid giving all the close-up details.

Admittedly, it gets tough when you start making these distinctions, but on the whole the news does not depict the violent act. It is reporting. At this point, there is not an awful lot of concern or evidence that reporting is going to prompt some child to go out and

commit a crime. Could it happen? Yes. But that certainly is not the primary concern that prompted this law. It was the graphic, sensationalistic, exploitative depictions of violence that prompted this law.

Arguably, news discussion really does not come into play, looking at the purpose of the statute. Of course, this statute does not require anything.

MR. MOULTON: Representatives of parents generally take the view that local news in particular is real objectionable and they hate the “if it bleeds, it leads” concept, which seems to be pretty standard practice now on most local news. And parents with young children do not view the violence that they see at six o’clock, during a news broadcast, all that differently from violence they see on entertainment shows. They are just sick and tired of the volume of violence that comes at them. They will not try to insist that news be rated, but, from the practical point of view, they hate that stuff too.

MR. ZIPURSKY: Is there pressure from those parents groups on the media to reduce the news leads approach?

MR. MOULTON: There are people here in the pressure business that can help answer that. It seems to me that there are advocacy organizations that have spent much time and much money trying to work out boycotts and other forms of pressure on the media, in attempts at some enduring effect. The evidence is pretty spotty. You can get a particular sponsor to pull back from a particular show every once in a while, but the ocean of material keeps flowing in. Most local television station managers concede, if you talk to them in private, that they hear a lot from people about what gets on the news and they make an effort to try to balance it.

MR. ZIPURSKY: Regarding the question asked earlier by Mr. Zarin of the *Fordham Intellectual Property, Media & Entertainment Law Journal*, would one of our panelists like to address the further issue concerning the media’s ability to hold the line with entertainment and not creep over into softening the news or rating the news?

MR. PETERS: One point would be for the statute to be more specific about the types of depictions that trigger ratings. For ex-

ample, if a news magazine wants to re-enact a violent sexual crime and use their creative imagination to make it as titillating and sensationalistic as possible, that program should be rated. If the types of behavior that this hypothetical statute were aimed at were clear enough, there might still be an exception for news, but hopefully it would require something other than a program calling itself a news program.

What is the concern? There is great concern that young children, even teenagers, would imitate the behavior that they see. I can imagine some of those news magazines doing things like that.

QUESTION: I guess this question is directed toward one of Mr. Moulton's last comments. This is a two-part question. Seeing that the networks are fairly competitive, can a voluntary rating system survive without NBC's participation, and if it does not, then what, looking ahead to the congressional future?

MR. MOULTON: Right now our position is that we will not sanction NBC. Ninety-five percent of the complaints point out that every network, except NBC, and every major cable company, except BET, has agreed to follow this system.¹¹³ They are setting up a monitoring system negotiation to try to deal with the NBC problem.

NBC has decided that it would be confusing to use the system that most of the country will use and it would be clearer if they used a different system. That is an absolutely preposterous position to take, having no regard for helping parents. In the end, NBC is providing the age-based part of the system but not the content part of the system.¹¹⁴

As a practical matter, if you have an activated V-chip, a grid will come up on the screen of your television. The age-based system is down the left side, going from "M" for the bad stuff down to "PG." Across on each of these lines is a "V," an "S," an "L," and a "D." I do not know whether you all know about the "D." The industry decided to add "D" to indicate suggestive dialogue that is not a sex act or swearing.

113. See Don Aucoin, *NBC, BET Resist Content Ratings*, BOSTON GLOBE, Nov. 15, 1997, at A12.

114. See *id.*

But anyhow, all of these letters come up green, which means you have not activated it yet and nothing is blocked out. You can turn these letters red and block out that type of programming. If you turn the “PG” red and do nothing else, you are telling the system to block every show that carries the “PG” rating, whether it’s a “V,” an “S,” an “L,” or a “D.”

If you turn the “PG” red and then turn the “V” red, the “L,” the “D,” and the “S” will all stay green. At this point, you are starting to make distinctions between content.

My point is that many people with young children will just block out “PG” because they do not like what the industry has decided is “PG.” They will turn “PG” red and block everything. Those people will end up blocking out NBC shows because NBC shows will be rated “PG.” Depending on how many people start to make distinctions between violence, sex, and language, there could be big or imperceptible differences between how NBC gets handled. We do not really know yet whether from the public’s perspective, that is, the point of view of a parent using this, whether NBC’s failure to include the content will be a big deal operationally or a little one. Thus we do not know whether the public reaction will be significant or not.

BET is not rating at all, so none of BET’s programming will be blocked.¹¹⁵ As MTV, a cable channel in competition with BET, will work within the rating system, BET will see a difference pretty quickly. While the MTV stuff will be blocked, nothing on BET will be blocked. So BET is likely to quickly become more of a topic of conversation than NBC.

It is inevitable, once NBC gets over its pique, that they will come on-board. Possibly, if there is no reaction to NBC, the other networks might question why they are participating in the present system. Then, the whole thing might start to unravel and people might go after NBC. But we just do not know yet.

MR. ZIPURSKY: Thanks very much.

MR. MOULTON: I did not tell you what would happen, though. I have no idea what would happen.

115. See Flynn, *supra* note 74 (“BET does not rate shows at all.”).

MR. ZIPURSKY: Unfortunately, our time is up. Thank you very much to all our panelists for a very lively discussion.