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Self-Censorship by Media Industries

by Lewis Grossman

What jailer so inexorable as one's self!
- Nathaniel Hawthorne

INTRODUCTION

When liberal American legal scholars ponder the dangers of censorship, they tend to concentrate on the kind of censorship that is perpetrated by the government. Like good disciples of Locke and Jefferson, they believe that there is a public realm of coercion and a private realm of freedom, and that defenders of liberty should focus on keeping the former from intruding on the latter. So long as federal, state and local government officials do not abridge the First Amendment, many champions of free speech are inclined to relax and assume that the system is in good working order.

An exclusive focus on governmental censorship is inappropriate, however, for as we shall see, in the course of recent American history, institutions and individuals within the private realm have suppressed far more speech than the government has. The many types of private censorship range from the self-restraint exercised by an author who is afraid of offending his readers to the organized nationwide boycott of a film by a religious group. This article will not attempt to discuss all the forms of private censorship that inhibit free expression in this country, for an adequate treatment of the entire subject would fill a large book. Instead, this article will focus on a particularly virulent type of private censorship -- cooperative self-censorship by media industries. Many media industries have practiced this type of censorship. Although their self-policing arrangements have sometimes had only a limited effect on the content of their products, at other times they have thoroughly prevented certain subjects and ideas from reaching the public.


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Section I will examine the efforts of four different industries to regulate their own expression -- the Production Code and the ratings system of the Motion Picture Association of America, the Comics Code of the Comics Magazine Association of America, the Television Code of the National Association of Broadcasters, and the labeling agreement of the Recording Industry Association of America. By describing the development of these voluntary agreements, this article will show that they were not "voluntary" at all but rather were imposed on the media by the government and by pressure groups. Section II, using the self-regulatory mechanisms described in Section I as models, will further describe the components of the different kinds of self-censorship schemes and will examine the degree to which the particular structure of a self-censorship mechanism determines its repressive effect.

A detailed analysis of the specific provisions of the codes and of the precise effects that they have had on the content of the media are beyond the scope of this article. It can simply be noted they have all restricted the portrayal of crime, violence, sex and drug abuse, among other topics, and have discouraged racial, ethnic and religious bigotry. In addition, they have tended to be profoundly conservative and pro-authoritarian. Consider, for example, this passage from the current Comics Code:

In general, recognizable national, social, political, cultural, ethnic and racial groups, religious institutions, and law enforcement authorities will be portrayed in a positive light. These include the government on the national, state, and municipal levels, including all of its numerous departments, agencies, and services; law enforcement agencies such as the state and municipal police, and other actual law enforcement agencies such as the FBI, the Secret Service, the CIA, etc.; [and] the military, both United States and foreign.2

Self-censorship agreements have often reduced media content into simplistic and vacuous pro-establishment fables. Although many creators have worked ingeniously within the constraints of the codes and have produced excellent material despite them (the golden age of the movies occurred at the height of the Production Code's power), media self-regulation has forced many inventive and important ideas to remain unexpressed. This fact is no less troubling because private corporations, not government officials, have been the censors.

I. CYCLES OF CENSORSHIP: FOUR CASE STUDIES

Media businesses, like most others, are motivated primarily by the desire for profit. It follows that they rarely regulate themselves in a manner that would limit sales or advertising revenues unless external pressure compels them to do so.

In the United States, the state is usually the source of the external pressure that induces the media to perform self-censorship. As the following examples demonstrate, the process is a cyclical one. Pressure groups persuade a local or state government or the federal government to act to "purify" a medium. The government exposes the industry's excesses and threatens punitive measures unless it "cleans up its act." The leaders of the industry are intimidated into cooperatively forming a mechanism for self-regulation. The industry, being in the business of communications, is usually well equipped to publicize its efforts and thus to appease its critics. Then comes a period of relative calm, during which the industry disseminates increasing amounts of offensive material, until protest groups mobilize against it, and the process starts again.3

One curious aspect of this process is the manner in which the state sometimes is able to intimidate an industry into adopting a system of self-regulation more strict than the state could impose itself, given the limitations of the First Amendment. It is clear why the media took government threats seriously in the early part of this century. Prior to 1925, the Supreme Court refused to apply the First Amendment to state regulation of speech.4 More recently, however, the Supreme Court has used the First Amendment strictly to limit government regulation of speech.5 Many government threats against media industries thus seem to be empty blustering. Yet the media still cower. Perhaps the prospect of prolonged and expensive lawsuits frightens them. Or perhaps when the government scolds and threatens a media industry, the industry becomes a target of such public opprobrium that it feels compelled to take action. It is encouraging to note, however, that as the state's power to suppress expression has diminished, so too has the severity of the self-regulation adopted by the media in response. The most important lesson one can draw from the following examples is that the mere potential for government censorship can be as dangerous as the actual exercise of that power.

3. For another description of this cyclical process, see OTTO N. LARSON, VIOLENCE AND THE MASS MEDIA 237-38 (1968).
A. MOTION PICTURES

1. The Dawn of Self-Regulation

People began to cry for the government to censor motion pictures almost from the moment that movies began to tell stories in dramatic form with *The Great Train Robbery* in 1903. Like most advocates of media censorship, early movie "bashers" were primarily concerned with motion pictures' detrimental effects on children. By 1907, a Chicago judge, in a letter to a Chicago newspaper, asserted that nickelodeons "cause, indirectly or directly, more juvenile crime coming into my court than all other causes combined."6

In response to the increasingly indignant flood of complaints, George B. McClellan, the mayor of New York, revoked the license of every movie house in the city in December 1908.7 Although film exhibitors successfully petitioned the courts for injunctions permitting the theaters to reopen, industry leaders feared similar censorship efforts would succeed in other cities. The nine principal producing companies decided to avert government interference by jointly creating a body that would regulate the content of their movies. In 1909, they agreed to submit all of their films prior to release to a private motion picture censorship board in New York composed of prominent civic and religious leaders.8 They promised to cut any footage the board deemed objectionable, or even to scrap a film entirely if the board so ordered. Motion pictures endorsed by the board would display a seal of approval—a pair of scissors superimposed on a star. The age of media self-censorship was born.9

Although the board worked to control the content of motion pictures,10 demands for government censorship continued. In 1911, Pennsylvania passed the first state law regulating film content prior to exhibition, followed shortly thereafter by Ohio and Kansas in 1913.11 In 1915, in *Mutual Film Co. v. Industrial Comm'n of Ohio*,12 the United States Supreme Court upheld the Ohio and Kansas statutes. Justice McKenna noted that "the exhibition of moving pictures is a business pure and simple, originated and conducted for profit."13 From this observation, he

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8. Id. at 31.
9. For a more detailed account of these events, see id. at 30-32.
10. The board refused to approve about 20% of the films it reviewed and often required the producers to make cuts in movies that it passed. Id. at 32.
13. Id. at 244.
illogically concluded that the free speech and free press provisions of the state constitutions did not protect the movies against government censorship.\(^{14}\)

The *Mutual Film* decision did not immediately lead to a spate of governmental censorship. Maryland was the only state that established a movie censorship board during the next several years.\(^{15}\) Many states and municipalities were, however, prepared to regulate the film industry if it did not adequately regulate itself; by the end of 1921, 36 states were considering censorship legislation.\(^{16}\) Calls for federal censorship also increased after Congress held hearings in the mid 1910s that examined the depravity of motion pictures.\(^{17}\)

The specter of hundreds of censorship boards enforcing hundreds of different versions of morality frightened industry leaders. To discourage government interference, they attempted a series of self-regulatory measures. First, they established a short-lived organization called the National Board of Review. Subsequently, in 1919, they formed the National Association of the Motion Picture Industry. As Murray Schumach observed, however, the movie barons' "suspicions of one another led them to violate the rules of their young association so flagrantly that the association became a mockery."\(^{18}\)

In 1922, with the scandalous lives of movie stars causing as much public consternation (and titillation) as the content of their films, the movie moguls made their boldest attempt yet to stave off government censorship. They hired President Harding’s Postmaster General, Will H. Hays, to head a new association called the Motion Picture Producers and Distributors Association of America (MPPDA).\(^{19}\) Although filmmakers submitted synopses of their screenplays to the "Hays Office" for advice about what they should cut, Hays spent much more time lobbying his

\(^{14}\) *Id.* The Court considered only the state constitutions’ free expression provisions because it had not yet applied the First Amendment of the United States Constitution to the states through the Fourteenth Amendment. It would not do so until 1925, in *Gitlow v. New York*, 268 U.S. 652 (1925). After 1925, however, the Court’s decision in *Mutual Film* was extended to deny motion pictures federal constitutional protection as well. For four decades, *Mutual Film* upheld the power of prior restraint of movies by the government. The Court finally granted films First Amendment protection in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

\(^{15}\) SKLAR, *supra* note 7, at 31.

\(^{16}\) SCHUMACH, *supra* note 6, at 19.

\(^{17}\) See *Hearings on the [Establishment of the] Motion Picture Commission Before the House Committee on Education*, 63rd Cong., 2nd Sess. (1914); *Hearings on Trust Legislation Before the House Committee on the Judiciary*, 63rd Cong., 2nd Sess. (1914); *Hearings on Prohibiting Shipment of Certain Motion-Picture Films Before the House Committee on the Judiciary*, 64th Cong., 1st Sess. (1916).

The congressional hearing became the legislative branch’s favorite tool for pressuring the media into self-censorship. It was used repeatedly throughout the century.

\(^{18}\) SCHUMACH, *supra* note 6, at 18.

\(^{19}\) SKLAR, *supra* note 7, at 82-83.
political friends and nursing the industry's image than he did expurgating movies.

2. The Age of the Production Code

While Hays extolled the purity of motion pictures, filmmakers continued to add sex and violence to their creations. During the Great Depression, the struggling studios, desperate to attract audiences, released increasingly provocative films. The introduction of sound to movies meant that risqué motion pictures offended two senses instead of just one. Once again, the film industry came under attack, particularly from the Catholic Church. In 1930, to discourage the formation of state and local movie censorship boards, the studios invited Martin Quigley, a Catholic publisher, and Daniel Lord, a Jesuit priest, to draft the Motion Picture Production Code.

Robert Sklar has observed that the Production Code "went about as far as it could toward expressing the Catholic bishops' viewpoint without converting the movies from entertainment to popular theology." The Production Code strictly regulated the depiction of many subjects, including crime, sex and religion. Although it permitted the depiction of "crime, wrong-doing, evil, and sin" if they were essential to the plot, it did so within a system of compensating moral values. In other words, every film had to make clear that "evil is wrong and good is right."

Once again, however, the studios had formulated a scheme which was designed to appease their critics without actually censoring films. During its first four years, the Production Code had virtually no impact on the content of motion pictures. A "studio relations committee" applied the code, but it had no power to enforce its judgments. It could appeal for enforcement to an appellate group composed of officials of the top movie companies, but this group, known as the "Hollywood Jury," always favored the producers.

20. Id. at 174.
21. SCHUMACH, supra note 6, at 20.
22. SKLAR, supra note 7, at 173.
23. MOTION PICTURE PRODUCTION CODE, reprinted in SCHUMACH, supra note 6, at 279-80.
24. Id. at 279. The three "General Principles" of the code were:
   1. No picture shall be produced which will lower the moral standards of those who see it. Hence the sympathy of the audience shall never be thrown to the side of crime, wrong-doing, evil or sin.
   2. Correct standards of life, subject only to the requirements of drama and entertainment, shall be presented.
   3. Law -- divine, natural, or human -- shall not be ridiculed, nor shall sympathy be created for its violation.

   Id. at 288.
25. SCHUMACH, supra note 6, at 21.
As illustrated, each round of public and governmental pressure drove the motion picture industry to adopt a more elaborate, yet always impotent, self-regulation mechanism. The failure of the 1930 arrangement to improve the moral tone of movies provoked an outraged response that finally forced the producers to adopt a genuine system of self-censorship. In 1933, probably with impetus from the Vatican, a committee of Catholic bishops announced the formation of the Legion of Decency, which planned a nationwide boycott of indecent films. Within ten weeks, eleven million Americans, including many Protestants and Jews, signed the agreement to observe the boycott. In addition, the Federal Council of Churches warned the movie moguls that it would seek federal censorship unless they strictly policed themselves.

The movie industry, already financially unhealthy, finally capitulated in order to avoid economic disaster as well as governmental intervention. The MPPDA put teeth into the Production Code by creating a rigorous enforcement mechanism. It established a new body called the Production Code Administration. With the approval of the bishops, it installed Joseph Breen, a Catholic, as its head. The MPPDA empowered Breen to withhold the Code Seal of Approval from any film that violated the Production Code. The studios pledged not to distribute or exhibit movies that did not bear the seal. The Hays Office assumed the power to impose a $25,000 fine on any member of the MPPDA who released or displayed a movie without the seal. This new method of self-regulation was so successful that the provision for fines proved to be unnecessary. For nineteen years after 1934, not one theater in the United States showed a movie produced by a major studio that did not bear the seal.

There were a number of reasons for the system's effectiveness. First of all, in the years before television, the lack of competition from other forms of entertainment ensured the success of even the blandest films. Second, and perhaps most important, the film industry was a quintessential vertically integrated oligopoly. The major studios owned controlling interests in most of the important first run theaters in the United States. They saw to it that these theaters would not exhibit movies without the seal. This arrangement permitted the MPPDA to prevent

26. SKLAR, supra note 7, at 173.
27. Id.
28. SCHUMACH, supra note 6, at 21.
29. SKLAR, supra note 7, at 173.
31. In any case, as Robert Sklar observed, audiences in the depressed 1930s and war-torn 1940s wanted movies to provide them with an escape from tension and insecurity and thus did not mind the absence of violence and social criticism. SKLAR, supra note 7, at 174.
32. In 1948, at least 70% of first run theaters in cities with populations over 100,000 were affiliated with the five largest studios, all members of the MPPDA. United States v. Paramount Pictures, 334 U.S. 131, 167 (1948).
even non-members from circumventing the Production Code. Third, because *Mutual Film* was still the law, the motion picture industry was extremely wary of the numerous state and local censorship boards throughout the nation. The Legion of Decency, which supported and monitored the Production Code, was clearly prepared to pressure these boards into censoring films if the industry did not observe the Production Code's constraints. These three factors -- the absence of alternative forms of mass entertainment, the industry's monopolistic structure, and the fear of government censorship -- allowed the Production Code to reign for two decades as a system of self-regulation no less effective than government censorship at controlling the content of motion pictures. In the late 1940s and 1950s, however, some changes occurred that caused this fragile voluntary structure to crumble.

First, television emerged as a powerful competitor to the movies. As many Americans acquired televisions, movie attendance plummeted. Many people saw no reason to go to the movies when they could view similarly inoffensive family fare at home on television. Moviemakers thus felt pressured to present themes and images unavailable on television in order to keep their audience.

Second, in 1948, the federal courts stripped the major studios of their monopolistic domination over the movie industry. In *United States v. Paramount Pictures*, the United States District Court for the Southern District of New York, on remand from the United States Supreme Court, compelled the studios to divest themselves of their theaters on antitrust grounds. The courts thus separated the production and distribution of movies from their exhibition. Such separation allowed independent and foreign producers who were not members of the Association (now known as the Motion Picture Association of America, or MPAA) to show films without the Code Seal of Approval in first-run theaters, which the studios no longer controlled. Exhibitors were free to display whatever films they felt their audiences wanted to see. The Hays Office no longer had the final say over the content of almost every film shown in America.


34. In 1948, almost a million television sets were sold. GIRAUD CHESTER ET AL., *TELEVISION AND RADIO* 41 (5th ed. 1978).

35. SCHUMACH, supra note 6, at 89.


37. The Court in *Paramount* failed to discern the impact that the structure of the movie industry had on the content of motion pictures. It asserted, the question here is not what the public will see or if the public will be permitted to see certain features. It is clear that under the existing system the public will be denied access to none. If the public cannot see the features on the first-run, it may do so on the second, third, fourth, or later run.
A third development that contributed to the end of the Production Code's dominance was a series of decisions in which the Supreme Court finally recognized movies as a form of expression entitled to constitutional protection. In 1952, the Court at last declared, in *Joseph Burstyn, Inc. v. Wilson*, that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments." Twelve years later, *Jacobellis v. Ohio* conclusively established that only obscene movies were outside the protection of the First Amendment. Further, in *Freedman v. Maryland*, the Court held that prior censorship arrangements by state and local governments must include strict procedural safeguards to satisfy the Due Process Clause of the Fourteenth Amendment.

The rise of Constitutional protection for movies eased the industry's fears of government censorship. It became apparent that the government did not have nearly as much power as it once did to regulate the content of films. Court rulings dramatically reduced the number of local censorship boards. The primary motive for self-censorship -- to stave off government interference -- largely vanished. The emboldened studios pushed through looser Production Code standards and called for tolerant interpretations of its provisions. Some ignored the Production Code altogether.

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334 U.S. at 166-67. The Court failed to comprehend that films that were denied the opportunity to be exhibited in first-run theaters would so likely be unprofitable that they would rarely be made at all.

38. 343 U.S. 495, 502 (1952). The Court refreshingly exposed the absurdity of the reasoning in *Mutual Film*:

> It is urged that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.

*Id.*


41. By 1969, just four years after *Freedman*, only one state and a handful of cities had motion picture licensing systems. Bates, *supra* note 33, at 621 n.18.

42. There still existed incentives not to dissolve the Code Administration completely. The possibility for boycotts still existed, although the increasingly liberal mores of the American public made attempts at such concerted actions less likely to be successful. Furthermore, local censors could make life very difficult for filmmakers, even if the courts would eventually block them. In 1964, one motion picture expert noted that local censors often realize that they are on shaky legal ground, "[b]ut they bludgeon distributors into doing what they wish with veiled threats. The distributor, rather than engage in what may be a long and costly lawsuit, goes along with them." *Quoted in Schumach, supra* note 6, at 201.
The Hays office became an impotent shadow of its former self.

3. The Emergence of Classification

By the 1960s, with the deterioration of the Production Code and the dissemination of more explicit movies, it was time for the next cycle in the history of self-regulation to commence. The demand grew for some form of government regulation. Public officials began to respond to this pressure. In 1963, Iowa Congressman John Henry Kyl introduced a resolution that called for the industry to "put its house in order" or face federal censorship. State and local governments searched for constitutional ways to control movie content. In 1964, the Supreme Court seemed to hold open a door. In *Jacobellis*, Justice Brennan suggested that laws that otherwise violated the First Amendment might be constitutional if they were "aimed specifically at children."

In 1965, the Dallas city council passed a film classification ordinance designed only to protect children. According to the ordinance, if the Dallas Motion Picture Classification Board deemed a picture "not suitable for young persons," children under sixteen years old would not be permitted to attend. New York State had a similar statute which made it unlawful to sell to a minor a ticket to a movie that portrayed "nudity, sexual conduct or sadomasochistic abuse which is harmful to minors."

The Supreme Court heard challenges to these statutes and announced both decisions on the same day in 1968. The holdings made the movie industry shudder. In *Ginsberg v. New York*, the Court found the New York statute to be constitutional, based on a theory of "variable obscenity." The Court held that a state could regulate the dissemination of material to minors that is obscene as to them, even if it is not obscene as to adults. In *Interstate Circuit v. Dallas*, the Court found the Dallas movie classification ordinance to be unconstitutionally vague, but it made clear that, in light of *Ginsberg*, the only impermissible aspect of the law was the "absence of narrowly drawn, reasonable and definite..."

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43. In 1953, United Artists released Otto Preminger's *The Moon is Blue* without approval. The studio defied the Production Code again three years later by releasing Preminger's *Man with the Golden Arm* without a seal. The studio made healthy profits on both.
45. 378 U.S. at 195.
46. DALLAS, TEX., REV. CODE Of CIV. & CRIM. ORDINANCES ch. 46A (1965).
47. Id.
49. 390 U.S. 629 (1968).
standards for the officials to follow. . ."50 The Court thus implied that a properly drawn classification statute could be constitutional.

Jack Valenti, a former White House adviser to Lyndon Johnson who was now the president of the MPAA, felt that the Court’s pronouncements constituted an open invitation to establish state and local review boards. If hundreds of jurisdictions formed their own classification systems, the result would be chaos. He determined that the industry must make a conciliatory move to quiet public demands for government regulation.

The MPAA’s resulting strategy strikingly demonstrates how the nature of media self-censorship largely depends on the extent of the state’s censorship power. In 1968, the MPAA, in conjunction with the National Association of Theater Owners (NATO) and the International Film Importers and Distributors of America (IFIDA), established a new ratings system. It was the type of scheme that *Interstate Circuit* had suggested a government could constitutionally enforce if it were properly drawn.

The classification scheme that the industry agreed to in 1968 is still in effect today, with some minor changes. MPAA and IFIDA members submit films that they produce or distribute to an organization called the Code and Rating Administration (CARA). Nonmembers are also invited to submit their films. CARA is composed of a chairman appointed by the president of the MPAA and ten "average" American parents otherwise unconnected to the motion picture industry.

CARA evaluates each film based on the categories of violence, drugs, sensuality, language and theme and assigns it one of five ratings. The MPAA defines the ratings in the following manner:

"G" General audiences -- all ages admitted.
"PG" Parental guidance suggested; some material may be unsuitable for children.
"PG-13" Parents strongly cautioned. Some material may be inappropriate for children under 13.
"R" Restricted. Under 17 requires accompanying parent or adult guardian.
"NC-17" No children under 17 admitted.51

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51. Glenn Collins, *Guidance or Censorship? New Debate on Rating Films*, N.Y. TIMES, Apr. 9, 1990, at C11, C17. "NC-17" was known as "X" until September 1990, when the MPAA changed the name of the rating in response to criticism of the stigma associated with the "X" rating. *See infra* part II.A. Early in the history of the ratings system, "PG" was called "M" ("Suggested for mature audiences") and the age of maturity for the purposes of "R" and "X" was 16 instead of 17. The "PG-13" rating did not exist until 1984, when director Steven Spielberg led a successful campaign for a new rating to address the concerns raised by pictures which might be too intense or frightening for pre-teens.
Producers can either accept the rating, resubmit the film after making cuts, or appeal the classification to the Code and Ratings Appeals Board, composed of the MPAA president and twenty-two representatives of MPAA, NATO and IFIDA companies. A producer who does not submit his film to CARA may either give it an NC-17 himself or distribute it without a rating, in which case cooperating theaters that exhibit it must designate it NC-17, regardless of its content. Since many theaters refuse to show unrated films, moviemakers adhere to the agreement most of the time.

Although the ratings system has been subject to some criticism for the lack of specific information it provides, it is for the most part popular. Polls show that 70% to 73% of parents find it useful. As for the system's primary goal, Valenti insists that "the ratings helped defuse movements by the federal government and individual states to censor movies." He points out that before he took over the MPAA, there were more than 100 legislative bills pending to control movie content, and that after he implemented the ratings system, these bills were all withdrawn. Valenti's defense of the classification system epitomizes the motivating force behind the entire history of motion picture self-censorship. "If there were no voluntary system, something would fill that vacuum. Moral Majority would get city councils and state legislatures to do so. I think a dark curtain would descend on creativity in the cinema."

B. COMIC BOOKS

Today, when Americans spend so much time watching television that many seem to read nothing at all, it is easy to forget what an important pastime comic books were forty years ago. In 1949, Americans bought about 720 million comic books, compared to 130 million in 1987. A poll taken in 1947 (before the peak in circulation) showed that 87% of adolescent boys, 81% of adolescent girls and 41% of adult males between eighteen and thirty years old read comic books regularly.

52. Bates, supra note 33, at 623.
53. In September 1990, in response to such criticism, the MPAA announced that each time a film received an R rating, it would issue an explanation of why the movie was placed in that category to film reviewers and theater owners.
58. Marya Mannes, Junior Has a Craving, NEW REPUBLIc, Feb. 17, 1947, at 20, 22.
During the 1940s and 1950s, the popularity of comic books was accompanied by an almost hysterical concern about their effects on youngsters. In 1945, a *Time* article titled "Are Comics Fascist?" cited an expert who declared, "Superman is a Nazi." Critic John Mason Brown dubbed comic books "the marijuana of the nursery." Psychiatrist Fredric Wertham, the leading foe of comic books, wrote a widely-read treatise titled *Seduction of the Innocent*, which blamed the comics for undermining the morality of America’s youth and causing juvenile delinquency. Even so prominent a figure as newspaper columnist Walter Lippmann asserted that "comic books are purveying violence and lust to a vicious and intolerable degree."

Although all types of comic books alarmed some parents, educators, journalists and government officials, the genre that spurred the censorship forces into action was crime comic books. These extraordinarily popular magazines specialized in explicit and violent portrayals of gruesome and shocking crimes. In the late 1940s, they generated a few highly publicized copycat incidents, in which children reenacted episodes that they had read about.

Occurrences like these intensified the anti-comic movement. Although some local government authorities moved to regulate offensive comic books, private individuals and groups worked most actively to control the magazines’ contents before 1948. Nonetheless, comic book publishers knew all too well from the history of motion pictures how private pressure could lead to government censorship. Like the movie moguls, they undertook to implement a self-policing system that would calm their critics.

The comic book industry’s first attempt at cooperative self-regulation was, however, as feeble as the motion picture industry’s early efforts. In

63. See, e.g., *Comic Book Inspires Boys’ Torture of Pal*, N.Y. TIMES, Aug. 19, 1948, at 17. This story reports, "Three small boys strung up a playmate by his neck and tortured him, police said today, adding that they were re-enacting the plot of a comic book." *Id.* The year before, in another widely reported incident, a young Pittsburgh boy hanged himself, apparently inspired by a comic book. *Comics Blamed in Death*, N.Y. TIMES, Sept. 15, 1947, at 12.
64. For instance, after the torturing incident mentioned in note 63, authorities in the county where it took place asked for a ban on the sale of comic books dealing with crime and torture. *Comic Book Inspires Boys’ Torture of Pal*, supra note 63.
July 1948, fourteen major publishers announced the formation of an organization called the Association of Comics Magazine Publishers and the adoption of a six-point code of ethics.\textsuperscript{65} The Comics Code prohibited, among other things, presentations of crime that "throw sympathy against law and justice or . . . inspire others with the desire for imitation," "scenes of sadistic torture," and "sexy, wanton comics."\textsuperscript{67}

Participating publishers submitted their manuscripts to Harry Schultz, the executive director of the Association, who inspected them and awarded a seal of approval to comics that conformed to the code.\textsuperscript{68} The system clearly paralleled the movie industry's highly successful and popular self-censorship methods.\textsuperscript{69} In operation, however, the 1948 Comics Code proved to be as ineffectual as the Motion Picture Production Code was between 1930 and 1934, before an adequate enforcement mechanism (the Breen Office) was established.

There were several explanations for the system's lack of success. First of all, the publishers who agreed to participate represented less than one-third of the comic books sold.\textsuperscript{70} Second, the Comic Code itself was brief, broadly worded and full of loopholes. Third, Schultz conducted the evaluation program informally, and, by his own admission, he made unjustified approvals.\textsuperscript{71} Consequently, the Comic Code did little to eliminate crime comic books.\textsuperscript{72}

Nor did it placate those calling for outside control, at least initially. If anything, the industry's action seemed temporarily to worsen matters by drawing further attention to the crime comics' outrageous plots and lurid pictures. Private groups raged against the corruption of America's children by these publications. In December 1948, just three years after the fall of Nazi Germany, students at a Catholic boys' school in Binghamton, New York, held a comic book burning, where they destroyed a thousand "indecent" comic books.

The National Council of Parents and Teachers and other private organizations demanded governmental action on the state and local level.\textsuperscript{73} By the end of 1948, fifty American cities had taken steps to

\textsuperscript{66} Id. at 23.
\textsuperscript{67} Id.
\textsuperscript{68} The seal read, "Authorized ACMP. Conforms to Comics Code."
\textsuperscript{69} The similarities between the two systems were noted at the time by the press. See, e.g., Code for the Comics, supra note 60.
\textsuperscript{70} The publishers who enrolled in the association released 15 million of the 50 million comics sold monthly. See Clean-Up Started by Comics Books As Editors Adopt Self-Policing Plan, supra note 65.
\textsuperscript{71} Note, Regulation of Comic Books, 68 HARV. L. REV. 489, 505 (1955).
\textsuperscript{72} Fredric Wertham, bemoaning the inadequacy of the code, observed that while in 1947, one-tenth of all comics dealt exclusively with crime, in 1948, despite the introduction of the code, that figure rose to one-third. Dorothy Barclay, Army to Limit Sale of Comics, N.Y. TIMES, Jan. 18, 1949, at 26.
\textsuperscript{73} Seek Comic Book Censor, N.Y. TIMES, Sept. 17, 1948, at 30.
regulate or ban objectionable comic books.\textsuperscript{74} Some cities established censorship committees to pass on books before sale.\textsuperscript{75} Los Angeles passed an ordinance making it a misdemeanor to sell or give a minor a comic book "in which there is prominently featured an account of crime."\textsuperscript{76} In early 1949, the New York State Legislature overwhelmingly passed a bill that made it a crime to print or sell books or magazines devoted principally to accounts of "bloodshed, lust, or heinous acts."\textsuperscript{77} Sheriffs and district attorneys around the country threatened to take action against sellers of offensive comic books.

This anti-comics passion soon burned itself out, however. It is difficult to ascertain the degree to which the self-regulation and public relations efforts of the Association were responsible for dousing it. During 1949, there was a drop in the number of crime comic books, which may have appeased some critics.\textsuperscript{78} A few sensible government officials also helped temporarily to calm the censorship frenzy. Governor Thomas Dewey declared the New York bill unconstitutional and vetoed it, and a California court struck down the Los Angeles ordinance on constitutional grounds. At the beginning of 1950, Schultz declared that the hysteria was over.\textsuperscript{79}

The industry's reprieve did not last long, however. The history of comic book censorship proved to have a cyclical nature strikingly similar to the history of motion picture censorship. As the first wave of opposition receded, publishers increasingly disregarded the ineffectual code and tested the limits of the public's tolerance. In order to reverse a marked drop in circulation, they released many crime comic books.\textsuperscript{80} Furthermore, in 1950, publisher William Gaines introduced a new genre, the horror comic. These curious and popular magazines presented gruesome, violent, supernatural tales. One horror comic, for example, depicted the story of a grave digger who fell in love with a beautiful woman, killed her in a fit of passion, made love to her corpse, and was strangled to death when rigor mortis set in.\textsuperscript{81}

\textsuperscript{74} Modern Comics Hit By Mayor's Report: Code of Standards Is Accepted by Minority of Publishers and Controls Stressed, N.Y. TIMES, Nov. 25, 1948, at 50.
\textsuperscript{75} Oneida, New York and East Hartford, Connecticut were among the cities that took such measures. \textit{Id.}
\textsuperscript{77} Douglas Dailes, State Senate Acts to Control Comics, Passes Feinberg Bill Calling for Review of Books By Unit of Education Department, N.Y. TIMES, Feb. 24, 1949, at 17.
\textsuperscript{78} Madeleine Loeb, Anti-Comics Drive Reported Waning, N.Y. TIMES, Jan. 21, 1950, at 9.
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} The only concession that many publishers made was to drop the word "Crime" from their titles. In fact, for many publishers this policy was a transparent attempt to disguise the fact that the content of their magazines had changed very little.
\textsuperscript{81} Horror on the Newsstands, \textit{Time}, Sept. 27, 1954, at 77.
In reaction to such publications, the anti-comic book movement, which had never completely disappeared, began to simmer again. A special New York State joint legislative committee that had been established in 1949 held new hearings and pestered the industry. In 1951, the committee issued a report recommending that the publishers set up a more effective self-policing organization patterned after the Hays Office. It warned ominously, "They can do it for themselves or the State will be compelled to do it for them."82

The industry did not heed the committee's threat, so the next year the committee offered six bills regulating the sale of objectionable comic books, one of which easily sailed through both houses of the legislature.83 Once again, however, Governor Dewey vetoed the bill because he deemed it unconstitutionally vague.

Despite such episodes, comic book foes worked in relative obscurity during the early 1950s. The press, which had covered the comic book wars intensively in the late 1940s, hardly mentioned comic books from 1950 through 1953.84 In 1954, however, the issue exploded onto the front page when the United States Senate subjected the comic book industry to a public hearing in order to expose it to widespread scrutiny and opprobrium. Congress had previously made the motion picture industry the target of such hearings and would later do the same to the television and record industries.

The comic book hearings were held in New York City in the spring of 1954.85 The Senate Judiciary Committee's Subcommittee to Investigate Juvenile Delinquency, under the chairmanship of Senator Estes Kefauver, conducted the hearings. The televised sessions were replete with impassioned condemnations of comic books by mental health experts and equally vehement defenses by representatives of the industry.86 In its report, the subcommittee rejected federal legislation. It

82. Trade Told to Police Offensive Comic Books or Face Regulation by State Legislature, N.Y. TIMES, Mar. 16, 1951, at 33.
83. This bill made it unlawful "to publish or sell to minors comic books dealing with fictional crime, bloodshed, or lust, that might incite minors to violence or immorality." Comic Book Curbs Voted In Assembly, N.Y. TIMES, Mar. 13, 1952, at 42. The Assembly approved this bill by a vote of 141-4. Id.
84. In indices such as the New York Times Index and the Reader's Guide to Periodical Literature, the number of entries under the heading "Comics" drops dramatically after 1949.
86. The hearings produced some entertaining exchanges. For instance, the following dialogue occurred between Senator Kefauver and William Gaines, a comic book publisher and the inventor of horror comics:

Senator Kefauver: Here is your May 22 issue. This seems to be a man with a bloody ax holding a woman's head up which has been severed from her body. Do you think that is in good taste?
encouraged state and local action but hoped that "public pressure, resulting from the hearings, may do as much good as anything else [by leading the comic book industry to] dust off, and enforce, a code of good taste that has been lying dormant for several years." 87

The subcommittee's strategy worked. In the autumn of 1954, as galvanized pressure groups pushed local governments around the country to act against crime and horror comics, the comic book industry finally took strong concerted action to protect itself from outside interference. It attempted to still the cries for censorship by promising to censor itself. The publishers formed a new association called the Comics Magazine Association of America (CMAA) and wrote a new comics code that all CMAA members had to obey. Of the thirty-one major publishers, twenty eight joined, representing 75% of the industry's output. 88 The publishers named Charles F. Murphy, a former New York City magistrate, as their "czar" and official censor. 89

The member publishers agreed to submit all comic books to the Comics Code Authority, composed of Murphy and his staff, prior to publication. As the Code Administrator, he would grant comic books that conformed with the code a seal that stated "Approved by the Comics Code Authority." He would order revisions in magazines that failed to satisfy the Comics Code's provisions. Publishers could appeal his decisions to a permanent committee. The penalty for failure to abide by this arrange-

Mr. Gaines: Yes, sir; I do, for the cover of a horror comic. A cover in bad taste, for example, might be defined as holding the head a little higher so that the neck could be seen dripping blood from it ....

Senator Kefauver: You have blood coming out of her mouth.

Mr. Gaines: A little.


88. Dorothy Barclay, 'New' Comic Books To Be Out In Week, N.Y. TIMES, Dec. 29, 1954, at 8. These statistics are somewhat misleading. One of the publishers that refused to join the CMAA was Dell, the nation's largest publisher of comic books. Dell, a purveyor of totally inoffensive juvenile comics, refused to submit to the Comics Code because it believed that its own standards were more stringent than those of the code. The other major publisher that stayed out of the CMAA was the Gilberton Company, which specialized in comics based on famous works of literature. It refused to tamper with classic stories. So, in fact, extremely few comic books in America violated the code in a meaningful way.

89. Like Hays, the original president of the MPAA, Murphy was a respected citizen, unconnected to the industry, who had governmental connections. It should be noted, however, that despite the easy comparisons drawn between Murphy, on the one hand, and Hays and his successor Eric Johnston, on the other, Murphy's true counterpart in the motion picture industry was Joseph Breen, the Production Code Administrator. The president of the CMAA was not Murphy, but John Goldwater, co-publisher of Archie Comics.
ment was expulsion from the CMAA and notification of newsdealers, many of whom presumably would refuse to sell the offending publisher's products.

The Comics Code was a detailed document noteworthy for its conservative and puritanical tone. It banned "profanity, obscenity, smut, [and] vulgarity," as well as "scenes of horror, excessive bloodshed, gory or gruesome crimes, depravity, lust, sadism [and] masochism." It required that "all characters shall be depicted in dress reasonably acceptable to society, [with] females drawn realistically without exaggeration of any physical qualities." The code created a fantasy world in which "[i]n every instance good shall triumph over evil." It was a world with no "walking dead, torture, vampires and vampirism, ghouls, cannibalism, and werewolfism," with no "disrespect for established authority." The Comics Code was likely, as Murphy promised, "the strongest code of ethics ever adopted by a mass media industry."

Although the enforcement mechanism was not immediately successful, individuals, private organizations and governments continued to attack indecent comic books, and they soon pressured the Comics Code Authority into diligently applying the code. Crime and horror comic books disappeared, as did most of the smaller publishers, many of whom depended on these genres.

In order to comply with the code, the remaining publishers turned to a bland assortment of amusing anthropomorphized animals and righteous superheroes who inevitably (and bloodlessly) apprehended evil villains. The authority's work was so successful that by 1960, the National Office for Decent Literature declared it could find no comics that were objectionable for youth.

The Comics Code is still in force today, but the majority of comic books no longer present a sanitized and simplistic vision of the world. In the

90. CODE OF THE COMICS MAGAZINE ASSOCIATION OF AMERICA, supra note 2.
91. Id.
92. Id.
93. Id.
95. In 1955, 13 states enacted laws to curb comic books depicting horror, sex or violent crime and two others formed committees to study the problem. Comic Book Curb Grows, N.Y. TIMES, July 11, 1955, § 8, at 24. National and local organizations continued to monitor critically comic book content. Wertham, who had recently published a widely read condemnation of comic books titled Seduction of the Innocents, refused to acknowledge improvement and continued his crusade against bad comic books. See Wertham, supra note 62.
96. Although the rise of television contributed to their demise, the introduction of the Comics Code may have been the most important factor.
97. John Tebbel, Who Says the Comics are Dead?, SATURDAY REV., Dec. 10, 1960, at 44.
early 1960s, artists and writers began to produce less formalized and more socially conscious comic books populated by characters with realistic human qualities. Comic book publishers grew increasingly daring over the following two decades. By the late 1980s, comic books offered shocking violence and explicit sex as well as stinging social commentary. Some current comic books make the horror and crime comics seem quaint by comparison.

There are a number of reasons why such comic books are sold today despite the Comics Code's regulations. Although the code remains thorough and quite rigid, the CMAA has liberalized it somewhat. More importantly, the code administrator simply has failed to enforce it rigorously. He awards the seal of approval to comic books that publishers twenty years ago would not even have bothered to submit to him. He clearly understands that racier publications allowed the previously ailing industry to more than double in size in the 1980s. Michael Silberkleit, the publisher of Archie Comics and current president of the CMAA, acknowledges that the Comics Code Authority certifies extremely lurid and violent material. He remarks, "You wouldn't want to see what doesn't get approved."

In fact, many comic books are now sold without the CMAA seal of approval. Magazine distributors and many newsstands have abandoned the comic book business. Instead, direct distributors sell comic books to a network of between 3,500 and 5,000 specialized comic stores around the country. These specialty shops, most of which emerged in the 1980s, now sell at least two-thirds of the comic books sold in the United States. They carry many publications that have not been submitted to the Comics Code Authority.

Some of the comic books that lack the seal of approval are published by small independent presses who are not CMAA members. These independent publishers produce intensely violent and graphically pornographic comic books, as well as a few creative and intelligent

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98. Television was largely responsible for this development; not only did it help create the financial woes which drove the desperate publishers to improve their product, but it also drew a great deal of critical attention - attention which otherwise might have been directed at comic books. See infra part I.C.


100. The CMAA revised the code for the first time in 1971, to allow comic books to deal more easily with criminal acts, sex, the occult and contemporary language. Later that year, the members of the CMAA agreed to give themselves permission to treat responsibly the subject of drugs.

101. Queenan, supra note 99.

102. Id. at 32, 79.
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ones. Other unapproved comic books, however, are published by CMAA members such as Marvel and DC. There is a major loophole in the current Comics Code that permits CMAA members to publish comics without the Code Seal so long as they "refrain from distributing these publications through those distribution channels that, like the traditional newsstand, are serviced by individuals who are unaware of the content of specific publications before placing them on display." The specialty store business this provision permits is so profitable that even the wholesome Archie Comics Group planned to release new adult titles without the seal, until conservative pressure groups persuaded it not to do so.

The increasing activity of such groups suggests that the next cycle of comic book self-censorship may begin sometime soon. Although conservative organizations have recently been directing most of their rancor at rock lyrics, comic books have drawn some criticism. A few comic stores have been successfully prosecuted for selling obscene material. As comic books become increasingly outrageous, and the weakened Code Administrator stands by watching helplessly, many in the industry anticipate a renewal of the anti-comics furor. This inevitably would lead to a revival or reform of the self-censorship mechanism. "I'm always afraid that someone's going to come down hard on this industry," Silberkleit acknowledges. "Back in the fifties, Kefauver and McCarthy nearly put us out of business."

C. TELEVISION

As the "Golden Age" of both the movies and comic books came to an end in the early 1950s, that of television was just starting. Before long,

103. One pornographic comic book series titled Cherry, which follows the sexual exploits of a young woman and is drawn to resemble familiar juvenile comic books like Archie, uses a parody of the CMAA seal that reads "Condemned by the Comics Clone Conspiracy."

104. CODE OF THE COMICS MAGAZINE ASSOCIATION OF AMERICA, supra note 2.

105. See infra part I.D.

106. For example, in February 1991, the Lafayette Citizens for Decency called a news conference in Lafayette, Indiana, to focus attention on stores selling "pornographic" materials. Among their targets was the local branch of a national chain book store that they alleged had sold them a graphic comic book with a plot about prostitution. UPI, BC cycle, Feb. 16, 1991. John Fulce, a former comic book salesman, has recently been conducting a vigorous campaign against the immorality of contemporary comics. In addition to writing a book, published by a Christian publishing house and condemning indecent and sacrilegious comic books, he has appeared on Christian talk shows to warn of their danger. Michael Flagg, Wrong Kind of Funny Business?, L.A. TIMES, Mar. 21, 1991, at E1.


108. Queenan, supra note 99.
television was the most influential and pervasive form of mass communication in this country. In view of television's ascendancy, it is not surprising that the same forces that pushed the other media to fashion self-policing arrangements impelled the television industry to do the same. From 1954 until 1984, when it dissolved the system in response to an antitrust suit, the National Association of Broadcasters (NAB) administered the Television Code.

Twenty radio stations formed the NAB in 1923 to resist demands for royalties from the American Society of Composers, Authors, and Publishers (ASCAP). During its first years, the association performed various functions to support and promote radio. It then started to lobby for industry interests before Congress and the FCC and to encourage self-regulation in order to deter government censorship.

In 1929, the NAB convention approved a brief and general Code of Ethics to prevent the airing of programs and advertisements that might offend listeners. In 1935, in response to the hostile attitude expressed by many Congressmen toward the industry at the Communications Act Hearings of 1934, the NAB adopted a more specific ten-point code. Finally, in 1939, the NAB implemented an enlarged Radio Code, which remained in force, in various editions, until 1982. Therefore, in 1952, when public pressure and repeated threats of specific legislation intimidated the National Association of Radio and Television Broadcasters (as the NAB was called from 1951 to 1958) into establishing the Television Code, it not only had the motion picture Production Code as a model but also had experience in writing and implementing a code itself.

Like the motion picture and comic book codes, the Television Code included restrictions on the depiction of crime, violence, sex, obscenity, drugs and material potentially offensive to racial and religious groups. Like the Radio Code, on the other hand, the Television Code avoided the other codes' moralistic tone. The Television Code also regulated the broadcast of quiz shows and exhorted certain practices in the treatment of news. In addition, it included detailed advertising standards that regulated the products that could be advertised, the content of commercials, and the time and frequency with which they could be shown.

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109. See infra pp. 469-70.
110. In 1933, the National Recovery Administration (NRA) made the 1929 NAB Code the official law for all stations, but the Supreme Court found the NRA to be unconstitutional in 1935. A.L.A. Schechter Poultry v. United States, 295 U.S. 495 (1935).
Except for during a one-year period in the mid-1970s, NAB members were not required to subscribe to the Television Code. On the other hand, any television station, whether or not a member of the NAB, could elect to subscribe. Overall, about two-thirds of stations did so. This figure is deceptively low. The signatory stations accounted for a disproportionately high percentage of television viewing in the United States. Furthermore, all three networks abided by the code, and the networks provided the majority of programming to affiliates around the nation.

The enforcement mechanism was strikingly weak, at least on paper. A Code Authority conducted the program. It was composed of a director, appointed by the NAB president and board of directors, and his executive staff. Although the Code Authority received synopses of scripts shortly in advance of shooting time and suggested revisions, for the most part its role was to monitor the material stations actually put on the air. When it found what it perceived to be a violation of the Television Code, it asked the station for an explanation. If the Code Authority was not satisfied with the explanation, it reported the breach to a TV Code Review Board, a body composed of representatives of code subscribers. If the Review Board concluded that the station had indeed committed a violation, it sent the matter to the NAB Television Board of Directors for possible disciplinary action.

The only sanction available to the board of directors was to suspend or withdraw the right to use the NAB Seal of Good Practice from a station found guilty after a formal hearing. Unlike the motion picture and comic book code authorities, which awarded a seal to each acceptable item, the NAB Code Authority granted a seal to complying stations, and those stations kept the seal unless they committed a "continuing, willful or gross violation" of the Television Code.

Since most stations displayed the seal only twice a day -- early in the morning right before the Star Spangled Banner and late at night immediately after it -- the loss of the right to use it did not seem like a very harsh penalty. Indeed, television had the least imposing enforcement method of the three media that have been examined thus far. Nonetheless, television's system of collaborative self-regulation prevented

113. From April 1976 until February 1977, all members of the NAB who operated stations in the top 100 markets were required to observe the code as a condition of membership. CHESTER ET AL., supra note 34, at 99.
114. In 1978, the more than 65% of stations that subscribed to the code represented approximately 85% of all television viewing. United States v. National Assoc. of Broadcasters, 536 F. Supp. 149, 153 (D.D.C. 1982).
115. TELEVISION CODE, quoted in id. at 164 n.60. The NAB exercised its power to revoke the seal only one time, when it expelled 30 stations from the code for showing commercials for hemorrhoid products. All 30 were readmitted when they agreed not to show the advertisements again.
the dissemination of controversial material even more successfully than
the others. This apparent paradox can be explained by certain character-
istics peculiar to the medium of television.

First, television and radio enjoy less First Amendment protection than
other media. They are subject to control by the government because they
use airwaves deemed to be owned by the people. Broadcasters must
receive licenses from the Federal Communications Commission (FCC).
Each license lasts for only three years, and to retain its license, a
broadcaster must operate its station in the "public interest." Furthermore,
the Supreme Court held in 1978 that the FCC may prohibit the
broadcast of offensive material in certain circumstances, even if the
material is not legally obscene. Therefore, when the FCC, the President (who nominates FCC
members) and Congress (which confirms FCC nominees and writes
legislation regulating broadcasting) threatened, as they often did, to take
action unless television "cleaned up its act," television executives were
even more inclined to adhere to their code than were the heads of other
media businesses. Broadcasters feared that if they did not adequately
censor themselves, the government would step in and enforce the
Television Code for them, and that the courts would not stop the
government from doing so. Furthermore, if a station were to lose its
right to display the seal, a clear signal would have been sent to the FCC
when the station applied for license renewal that the station might not
be serving the "public interest."

A second explanation for why television stations obeyed the Television
Code's strict programming standards is that most television is supported
exclusively by advertising. Advertisers like to present their products
in a noncontroversial milieu. An NAB survey showed that some
advertisers preferred to advertise on stations that displayed the seal. Private groups could have cut off a non-approved station's advertising
revenue simply by threatening to organize boycotts against the products

117. FCC v. Pacifica Found., 438 U.S. 726 (Stevens, J., plurality); reh'g denied, 439 U.S.
883 (1978) (TV and radio receive less First Amendment protection because they confront
the citizen in the privacy of his home and are uniquely accessible to children).
118. SCHUMACH, supra note 6, at 233-34.
119. GEORGE ERIC ROSDEN & PETER ERIC ROSDEN, LAW OF ADVERTISING § 41.03[1]
(1973).
120. The motion picture industry has never relied on advertising revenue. Comic books
used to sell a fair amount of advertising space (indeed, the Comics Code was intended to
control the content of advertisements as well as comics themselves), but the publishers also
made a substantial proportion of their profit from circulation. Today, comic books contain
few advertisements.
121. United States v. National Assoc. of Broadcasters, 536 F. Supp. 149, 164 n.61
(D.D.C. 1982).
of its sponsors. Broadcasters thus had an additional reason to observe the code.

As one NAB official observed, "[T]he mere fact that we have that power to threaten to drop people from the Code has its own inhibiting value . . . . [A station] would rather not be known as someone bucking what appears to be a good system." A member of the Code Review Board concurred. "The moral sanctions of the Code authority are criticized by some as being too weak, but I think there are none in this room who would care -- or dare -- to disregard them."

There are clear similarities between the history of television self-regulation and the history of movie and comic book self-regulation. All three industries adopted their codes of ethics primarily to discourage government interference. The degree to which these three industries have complied with their respective codes has varied with the amount of pressure imposed on them by private and governmental entities.

Because of television's special status as a highly-regulated communications industry, the pressure on television broadcasters has been particularly intense. Congress has always been willing to assume the politically popular task of purifying the people's airwaves. Although Congress occasionally has used hearings to expose the moral danger of motion pictures and comic books, these industries have been fortunate compared to television broadcasters, whom Congress has subjected to highly publicized hearings every few years.

In 1952, 1954 and 1955, Senator Kefauver's Subcommittee to Investigate Juvenile Delinquency, the same body that held the comic book hearings, hosted hearings to examine the effects of televised violence on youth. From 1961 through 1964, the subcommittee, then under Senator Thomas Dodd, held additional hearings on the subject. In 1964, in its interim report, the subcommittee recommended adding sanctions to the NAB Code and impliedly threatened Congressional action if the industry did not regulate its violent programming more diligently. The limited distribution of the interim report and the subcommittee's failure to issue a final report, however, limited the impact of these hearings.

Senator John Pastore succeeded Dodd as the chief political enemy of television violence. He was chairman of the Communications Subcommittee of the Senate Commerce Committee. Beginning in 1969, he held

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122. Id. at 164.
124. Id. at 1095 n.35.
125. The experts who testified at these hearings expressed widely varying opinions on the contributions of television violence to juvenile delinquency. STERLING & KITTROS, supra note 112, at 419.
126. Id. at 420.
hearings on the link between television violence and crime at least once a year. He also opposed much of the religious and political satire and the sexually suggestive material that appeared on television. In 1969, his disappointment with the industry's failure to police itself adequately led him to propose that the NAB's Code Authority begin to censor entertainment programs before they were released. In exchange, he would promote legislation to assure the security of broadcast licenses.

NBC and ABC agreed to cooperate, but CBS refused, asserting that it could not "accede to a proposal which would [make the NAB Television Code Authority] the single final arbiter of network television entertainment that the American people would be permitted to see." The agreement fell through.

Nevertheless, Pastore's pressure influenced television programming. The NAB was not the sole censor in the television industry. Each network had its own department of standards and practices. In the same letter in which he turned down Pastore's proposal, CBS's president also promised to "intensify our efforts to improve the program standards of the CBS television network." Indeed, less than two weeks later, CBS's Program Practices Department rejected several segments in the controversial Smothers Brothers Comedy Hour, and the network subsequently canceled the show and fired the Smothers for their failure to deliver an acceptable tape on time.

On other occasions, the government was able to pressure the NAB into revising its code. In 1974, a group called Action for Children's Television (ACT) persuaded the FCC to take steps to limit the amount of advertising on children's television programs. FCC Chairman Richard Wiley warned broadcasters that if they did not take action, the FCC would. The next month, the NAB Code adopted a rule limiting advertisements targeted at children. Soon thereafter, the FCC announced that it would not pass a rule on the matter because "the standards adopted by the [NAB] are comparable to the standards which we would have considered adopting by rule in absence of industry reform."

127. Among the broadcasts he disfavored were Laugh-In, The Smothers Brothers Comedy Hour, and a Noxema shaving cream commercial where a woman begs a man who is shaving to "take it all off." GEOFFREY COWAN, SEE NO EVIL 54 (1979).
128. Id. at 55.
129. Letter from Frank Stanton, President of CBS, to Senator Pastore (Mar. 22, 1969), quoted in id. at 55-56.
130. Id. at 57.
131. Id. at 51-53.
132. The NAB had good reason to take such government threats seriously; when the NAB had resisted pressure to regulate cigarette advertising in the late 1960s, Congress responded with legislation completely banning such advertisements from television and radio. Id. at 105.
133. Id. at 91-92.
The same year, Wiley and the FCC strong-armed the NAB into adding a "family viewing policy" to its code. This new rule, better known as the "family hour," enjoined the airing of "entertainment programming inappropriate for children" between 7:00 P.M. and 9:00 P.M. (between 6:00 P.M. and 8:00 P.M. in the Central Time Zone). Wiley's efforts were motivated by the opposition of many private groups and government officials to the broadcast of programs with adult themes, such as All in the Family, during the early evening hours, when youngsters were likely to watch them. For months, in speeches, interviews, and meetings with network officials, Wiley warned that if the NAB did not do something constructive about this issue, the FCC would be compelled to take action. In April 1975, the NAB capitulated and added the family viewing policy to the Television Code by amendment.

In 1976, a group of creators, writers and producers of network TV programs challenged the policy in federal district court in California. They based their claims on the First Amendment and the Administrative Procedure Act (APA). Because neither the First Amendment nor the APA governs purely private activity, the plaintiffs had to persuade the court that the pressure exerted by Wiley and the FCC converted the NAB's adoption of the policy into state action.

The court accepted this position in Writers Guild of America, West v. FCC. The court found that the networks, the NAB and the FCC had participated in an "unprecedented joint venture" and that the "threat of regulatory action was . . . a crucial, necessary, and indispensable cause" of the NAB's implementation of the policy. It thus held that the establishment of the family hour constituted state action violative of the First Amendment and the APA. Relying on Bantam Books v. Sullivan, a Supreme Court decision, Judge Warren Ferguson wrote, "If the First Amendment means anything, . . . the Commission has no right to accompany its suggestions with vague or explicit threats of regulatory

134. The amendment read:

[E]ntertainment programming inappropriate for viewing by a general family audience should not be broadcast during the first hour of network entertainment programming in prime time and in the immediately preceding hour. In the occasional case when an entertainment program in this time period is deemed to be inappropriate for such an audience, advisories should be used to alert viewers.

Writers Guild of America, West v. American Broadcasting Co., 609 F.2d 355, 357 n.2 (9th Cir. 1979).

135. Id.


138. Id. at 1094.

action should broadcasters consider and reject [its suggestions]." The decision compelled the NAB to stop enforcing the family viewing policy. Although the Court of Appeals vacated the judgment on jurisdictional grounds in 1979, the NAB never reintroduced the policy. The principle of Bantam Books and Writers Guild remains an important potential weapon for opponents of censorship by "voluntary" industry codes. Although the government rarely coerces self-regulation so actively and so clearly as the FCC did in this case, if a plaintiff can establish that a media industry would not have instituted a self-censorship system but for government pressure, he may be able to persuade a court to strike down the system if it does not satisfy First Amendment requirements. Every self-censorship arrangement we have examined so far would almost certainly violate the First Amendment because of vagueness, overbreadth and lack of procedural due process.

The legal arrow that finally felled the Television Code was aimed not at its suppression of speech, but at its other Achilles' heel, its anticompetitive effects. In 1979, the Justice Department brought an action against the NAB, charging that several of the Television Code's commercial time restrictions violated antitrust laws. Specifically, the Government asserted that code provisions that limited the minutes per hour that could be devoted to commercials, the number of commercials

140. 432 F. Supp. at 1150. In Bantam Books, the Rhode Island Legislature created a Commission to Encourage Morality in Youth. The Commission reviewed books and magazines and composed lists of those that were inappropriate for minors. The commission then sent the lists to booksellers, accompanied by notices which asked for "cooperation" and advised the booksellers that the lists were circulated to local police departments and that the commission would "recommend prosecution of purveyors of obscenity." 372 U.S. at 58.

The Supreme Court held that this arrangement violated the First Amendment. It noted that "compliance with the Commission's directives was not voluntary. People do not lightly regard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around." Id. at 68. The Court further observed that though the Commission is limited to informal sanctions - the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation - the Commission deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim. We are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief. Id. at 67. Since the FCC itself has formal power to control broadcasting, its actions in the Writers Guild case were, if anything, a clearer First Amendment violation than the Rhode Island commission's pressure in Bantam Books.

141. Writers Guild of America, West v. American Broadcasting Co., 609 F.2d 355 (9th Cir. 1979).

142. After years of litigation complicated by jurisdictional issues, all of the parties in the case agreed to a settlement in 1984.

143. A number of articles have convincingly demonstrated that the MPAA rating system would contravene the First Amendment if it were state action. See Bates, supra note 33; Friedman, supra note 30.
per each program interruption, and the number of products that could be advertised in a single commercial violated the Sherman Act.\textsuperscript{144} Both parties moved for summary judgment. In United States v. National Association of Broadcasters, the federal district court held:

The NAB Code is an agreement among competing television networks and stations, and it restricts the availability of one of the principal services these competitors offer -- the broadcasting of commercial announcements. As such, it is the classical agreement which the Sherman Act was designated to reach.\textsuperscript{146}

The court decided that the "Rule of Reason"\textsuperscript{146} applied to the provisions that limited the time and number of advertisements, and that a trial was therefore necessary to settle the dispositive questions of fact.\textsuperscript{147} On the other hand, the court found the multiple product limitation to be a per se violation of the Sherman Act and granted summary judgment for the government.\textsuperscript{148}

In November 1982, while an appeal was pending, the Justice Department and the NAB negotiated a consent decree ending the litigation. In the decree, the NAB agreed to stop enforcing all rules respecting the quantity, placement or format of advertising. Soon afterward the NAB, worried that the remainder of the Television Code might also be vulnerable to antitrust attacks, dissolved the Code Board of Directors and officially terminated the remaining functions of the Code and Code Authority. The Television Code was dead.\textsuperscript{149}

The Supreme Court has never decided an antitrust case involving a media code. It thus remains unclear whether an antitrust suit challenging a self-censorship arrangement could ultimately succeed, particularly

\textsuperscript{144} 15 U.S.C. § 1 (Supp. 1991). The Act states, "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal."

\textsuperscript{145} 536 F. Supp. 149, 163 (D.D.C. 1982).

\textsuperscript{146} The Rule of Reason derives from Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911), which supported the proposition that the Sherman Act applies to agreements which are "unreasonably restrictive of competitive conditions." As the doctrine is applied now, cases are evaluated under the Rule of Reason if their "competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978).

\textsuperscript{147} National Assoc. of Broadcasters, 536 F. Supp. at 152.

\textsuperscript{148} Id. Per se violations are "agreements whose nature and necessary effects are so plainly anti-competitive that no elaborate study of the industry is needed to establish their illegality." National Soc'y of Professional Eng'rs, 435 U.S. at 692.

\textsuperscript{149} The NAB dropped the Radio Code, as well.
if the arrangement regulated only noncommercial content. For now, the Sherman Act survives as a potential weapon against collaborative self-regulation by the media.

The dissolution of the Television Code did not quickly result in dramatic changes in American television. The networks' departments of standards and practices and individual station managers were still worried enough about government interference to keep much potentially offensive material off the screen. Still, as the 1980s progressed, the combination of the lack of a code and the rise of cable television did lead to some subtle changes, such as a generally more relaxed attitude about the presentation of sexual themes, as well as some very concrete changes, such as the introduction of advertisements for contraceptives.

Many Americans, and hence many politicians, are concerned about this state of affairs. Consequently, it appears that television's next round of self-censorship may be about to begin. FCC chairman Alfred Sikes is urging the introduction of a new code, as are many members of Congress. In December 1990, Congress passed the "Television Program Improvement Act," which eliminates the antitrust obstacle potentially raised by United States v. NAB by granting an antitrust exemption to organizations in the television industry, so they might develop "voluntary guidelines designed to alleviate the negative impact of violence in telecast material."

The opportunity thus exists for the NAB to implement a new television code regulating violent broadcasts. Nonetheless, the NAB insists that it has no plans to do so. The association cites First Amendment concerns, but it is also likely troubled by the networks' declining market share.

Government pressure may well eventually compel the industry to adopt a new television code. The FCC is attempting to expand its current 16-hour (6:00 a.m - 10:00 p.m.) ban on "indecent" radio and television broad-

150. At least one other federal district court has considered the issue. In 1970, the producer of the film Tropic of Cancer filed an antitrust suit for a preliminary injunction against the MPAA, alleging that the rating system, which had designated his movie as X-rated, was a conspiracy in constraint of trade in violation of the Sherman Act. The district court turned down the plaintiff's request for an injunction because he did not adequately establish that he would succeed on the merits or be irreparably damaged by his failure to secure an injunction. The court did not reach the merits themselves. Tropic Film v. Paramount Pictures, 319 F. Supp. 1247 (S.D.N.Y. 1970).


154. Telephone Interview with Walter Wurfel, Senior Vice President of Public Affairs at NAB (July 1, 1991).
casts to 24 hours. Although the U.S. Court of Appeals for the District of Columbia struck down the 24-hour ban as violative of the First Amendment in May 1991, the FCC is attempting to have that holding reversed. If it succeeds, broadcasters may attempt to ward off such government censorship by reestablishing a code. Television may well be stuck in a repeating cycle of self-censorship for as long as it remains a highly regulated industry.

D. ROCK MUSIC

The history of the collaborative self-censorship of rock lyrics by the record industry is brief, because it began only within the last decade. Rock music is probably the most controversial modern art form. The phrase "rock and roll" itself is a sexual euphemism. Rock is full of sexual language, violent images, anti-authoritarian themes and stinging political commentary. Songs occasionally contain vicious bigotry, satanic references and mysterious backwards messages. Until fairly recently, rock was a phenomenon experienced almost exclusively by youth and was thus inaccessible and threatening to the older generations who held power. Furthermore, the fact that African-Americans were largely responsible for inventing rock and roll and continue to be among its most prominent composers and performers has disturbed many Americans with racist tendencies.

It is therefore not surprising that rock and roll has been the target of censorship efforts almost from the time it emerged in the 1950s.

155. Enforcement of Prohibitions Against Broadcast Obscenity and Indecency, 47 C.F.R. § 73.3999 (1990). The FCC defines indecent programming as material that "describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." Pacifica Found., 56 F.C.C.2d 94, 98 (1975).


157. The Television Program Improvement Act would not erase antitrust problems with a code regulating "indecent" programming, for the act pertains only to agreements about violent broadcasts, whereas the FCC's notion of "indecent" material concerns "sexual or excretory activities or organs." 47 U.S.C. § 303(c) (Supp. 1991).


160. There are many well-known examples of private and governmental censorship of rock music. In 1956, Asa Carter, the executive secretary of the North Alabama White Citizen's Council, initiated a purge of rock from jukeboxes because the NAACP had "infiltrated" white teens with rock and roll. In order for his group, the Rolling Stones, to
Nevertheless, anti-rock forces did not attempt to force a self-policing system on the music industry until the 1980s. Why was this so, given the ready examples provided by the movie, comic book and television codes? Perhaps it was because such an arrangement did not seem particularly appropriate for this medium. Whereas the number of motion pictures, comic books and television programs released each year is fairly limited, there are literally tens of thousands of songs. The size of the task of a record industry code authority would dwarf that of the other industries’ self-policing organizations. Furthermore, music is divided into more diverse genres than the other media. Few people were interested in censoring Verdi or Cole Porter, but, given the blurry distinctions between different types of music, it would be difficult to design a code that would clean up Sergeant Pepper without disturbing Lieutenant Kijé.

Despite these difficulties, in the early 1980s several organizations started to campaign for a formal system of self-regulation in the record industry. In 1983, the National Parent Teacher Association (PTA) called on the Recording Industry Association of America (RIAA) to rate records and to require its members to display lyrics on album covers. The RIAA completely ignored these demands.

In spring of 1985, an organization called the Parents’ Music Resource Center (PMRC) took up the battle. Although the PMRC was composed entirely of private citizens, it would be somewhat misleading to call it a private organization. It was widely known as "The Washington Wives" because seventeen of its original twenty members were married to some of Washington’s most powerful politicians. One writer wryly observed that "half of them are married to ten percent of the Senate." The co-chairwomen of the PMRC were Susan Baker, the wife of Treasury Secretary James Baker, and Tipper Gore, the wife of Senator Albert Gore.

Because of the familial connections of its members, the PMRC received an inordinate amount of attention from the press. They used their free air time and newspaper space to lambaste rock for promoting free love, sadomasochism, rebellion, the occult and drugs to America’s children. Their principal targets were black artists, such as Prince, and heavy

appear on the Ed Sullivan Show, Mick Jagger had to change the words "Let's Spend the Night Together" to "Let's Spend Some Time Together." (What he in fact sang was an incomprehensible mumble.) The FCC held an investigation to determine the lyrics of the Kingsmen’s unintelligible song "Louie, Louie." In the late 1960s and early 1970s, Vice President Spiro Agnew conducted a spirited campaign against rock lyrics about drugs. He warned that the FCC might take away radio stations’ licenses if they played songs containing such lyrics. See LINDA MARTIN & KERRY SEGRAVE, ANTI-ROCK, THE OPPOSITION TO ROCK ‘N’ ROLL (1988).

162. MARTIN & SEGRAVE, supra note 160, at 292.
metal groups, such as Judas Priest. They also accused Madonna, a white pop singer, of teaching young girls "how to be a porn queen in heat."163

In May 1985, the PMRC sent a letter to the RIAA that suggested, among other things, that the latter organization establish a ratings board composed of producers, songwriters, disc jockeys and community representatives to classify records. Objectionable records would receive one of four ratings: "X" for sexual explicitness, "O" for occultism, "D/A" for drugs and alcohol and "V" for violence.164 Record companies would be required to label their albums with the ratings, and the PMRC would pressure radio stations not to play X, D/A, O or V songs.

Stanley Gortikov, the president of the RIAA, sent the PMRC a response in which he firmly rejected the proposal on behalf of his organization.165 He did, however, inform the Washington Wives that nineteen of the RIAA's forty-four member companies had agreed to put warning stickers on albums of a violent or sexual nature at their own discretion.166 The labels would read something like "Parental Guidance - Explicit Lyrics."167

It was a very limited concession. Still, some artists and civil libertarians were upset that the industry had "caved in." The fact that it took the PMRC only three months to win a concession that the national PTA had been unable to win after two years of pressure demonstrated how the PMRC's governmental connections had intimidated the industry. Susan Baker acknowledged, "Our connections certainly helped, no doubt about it."168

There are a number of reasons why the record industry was susceptible to such quasi-governmental pressure, despite the protection afforded it by the First Amendment. First, the Ginsberg169 and Interstate Circuit170 cases still held open the possibility of a government-enforced classification system to protect children. If the RIAA had ignored the PMRC's proposal that it rate its own records, the Washington Wives might have persuaded their husbands to do the rating.

163. Id. at 293.
164. The proposed system, with its descriptive classifications, was much like ones that many people have suggested the MPAA adopt for films. See, e.g., Hal Hinson, The 20-Year Rating Game: MPAA's Film Review System Still Spurs Debate Over Artistic Freedom, WASH. POST, Nov. 6, 1988, at G1 (President of California PTA favors subheadings such as PG-V for violence or PG-S for sex); Jack Mathews, Change in Film Ratings Favored, Parents Want More Details; Producers Want Status Quo, L.A. TIMES, Dec. 23, 1987, § 6, at 1 (Poll shows that 73% of American adults would favor adding additional codes -- V for violence, S for sex and L for language -- to the ratings to reflect movies' contents).
165. MARTIN & SEGRAVE, supra note 160, at 296.
166. Id.
167. Id.
168. Morthland, supra note 159, at 75.
Second, the financial success of the recording industry depended on its ability to have its product broadcast on the radio airwaves, and those airwaves were regulated by Congress and the FCC. Nat Hentoff, a civil libertarian journalist, observed:

[I]f the record industry doesn't do what the Washington wives want it to, the Senate Commerce Committee is likely to be asked to save the children of the nation by setting up regulations and statutes as to the kinds of rock language that can no longer be permitted, especially on the air.¹⁷¹

Finally, the music industry did not want to displease the federal government, because it often needed the government's help. For example, the RIAA frequently asked the FBI and other federal agencies for assistance in enforcing copyright and counterfeit laws. Furthermore, in 1985, Congress was considering an anti-piracy bill that the RIAA had drafted. This "Home Audio Recording Bill"¹⁷² would have assessed a surtax on the sale of tape recorders and blank cassette tapes to reimburse record companies and music publishers for the money they lost to unauthorized duplication of their products. The RIAA was consequently wary of spurning the PMRC. Gortikov informed the RIAA member companies that he could not "escape continuing dialogue with this group," because ignoring the Washington Wives might "jeopardize[]" the anti-piracy bill.¹⁷³

The PMRC was dissatisfied with the RIAA's concession and with the record companies' spotty compliance with it.¹⁷⁴ Some warning labels appeared, but not many, and a few RIAA companies publicly denounced the use of the labels and joined the Musical Majority, an anti-censorship organization. The PMRC formed a coalition with the National PTA and announced a modified set of demands. It no longer required a permanent ratings board and four descriptive classifications. Instead, it wanted the record companies to put an all-purpose "R" rating, similar to the corresponding MPAA classification, on explicit records, according to guidelines established by a one-time panel. The PMRC also demanded that the industry make printed lyrics available to customers before purchase.¹⁷⁵

The Washington Wives then proceeded to justify all the fears Gortikov and the RIAA had about their governmental connections. On September 19, 1985, the Senate Commerce, Technology, and Transportation

¹⁷³ Morthland, supra note 159, at 75.
¹⁷⁴ Id. at 88.
¹⁷⁵ See MARTIN & SEGRAVE, supra note 160, at 298.
Committee held a highly publicized hearing on rock lyrics. Senator Albert Gore, Tipper's husband, was a member of the Committee, and Senator John Danforth, whose wife was connected with the PMRC, was the chairman. Tipper Gore claimed that her organization did not request the hearings. However, when asked if Senator Gore had anything to do with setting up the hearing, a staff member of the Commerce Committee responded, "You must know that the Senator's wife is a leader of the Parents' Music Resource Center." The goal of the rock music hearings was the same as that of the movie, comic book and television hearings before it -- to expose the medium's corrupting influence to the nation and browbeat the industry into policing itself. Probably to guarantee publicity, the Committee invited pop culture heroes John Denver, Frank Zappa and Dee Snyder to testify. Their presence transformed the session into the event of the year on Capitol Hill. Photographs of Snyder, a member of the heavy-metal group Twisted Sister, testifying before the Committee in his outrageous stage regalia appeared in newspapers and magazines around the country.

Much of the hearing was devoted to debate over the PMRC proposal. Susan Baker testified on behalf of the PMRC. All three musicians spoke out against rating records. Zappa, an avant-garde rock musician and composer, asserted that "the complete list of PMRC demands reads like an instruction manual for some sinister kind of toilet-training program to housebreak all composers and performers." As in past hearings concerning other media, senators attempted through threats of government intervention to intimidate the record industry into censoring itself. Danforth stated that the government was not contemplating legislation. On the other hand, Senator James Exon warned, "unless the music industry cleans up their [sic] act . . . there is likely to be legislation." Senator Ernest Hollings announced, "I will be looking from the Senator's standpoint . . . to try to see if there is . . . an approach that can be used by the Congress to limit this outrageous filth, suggestive violence, suicide, and everything else in the Lord's world that you would not think of." He added, "If I could find some way constitutionally to do away with it, I would."

The hearing was not an unqualified success for the PMRC. The singers' comments were arguably more eloquent and persuasive and unques

177. Hentoff, supra note 171.
179. Hearing, supra note 176, at 53.
180. Id. at 60.
181. Id. at 2.
182. Id.
ably more publicized than those of Baker and the senators sympathetic to her cause. Nevertheless, the hearing did focus a great deal of unfavorable public attention on the controversial lyrics of some rock songs. The industry decided to sue for peace.

On November 1, 1985, the RIAA, PMRC and PTA announced a new accord. Under this agreement, whenever a company distributed a record with explicit references to sex, violence or substance abuse, it would have two options. It could attach a warning sticker to the album stating "Explicit Lyrics - Parental Advisory." Alternatively, it could print the lyrics on the back of the album or on a lyric sheet inserted under the plastic wrap. Of the RIAA's forty-four companies, twenty-two, representing more than 80% of American music sales, agreed to the plan.

It was undoubtedly one of the weakest collaborative self-censorship arrangements in the history of American media. There was no code and no industry-wide ratings board. Each company established its own criteria about what constituted explicit lyrics. In fact, it was not until May 1986 that a record company finally labelled a record. After that, only the most brutally violent and crudely sexual albums received labels.

Like other ineffective self-policing systems, such as the 1930 Motion Picture Production Code (administered by a "studio relations committee") and the 1948 Comics Code (administered by the Association of Comics Magazine Publishers), the 1985 record labeling agreement quieted the controversy only until people became aware that it was not accomplishing much. Compliance increased somewhat over time, but the wording of the warning stickers varied, and they were often coordinated with the cover designs of the albums, limiting their visibility. Furthermore, although some major record chains refused to carry albums with warning stickers, or refused to sell them to minors, a sticker did not seem substantially to reduce an album's profitability or deter its production.

183. Since the lyrics to all of the songs on an album could not fit on the small container of a cassette tape, the agreement provided that cassettes with explicit songs could be tagged with a sticker advising "See LP for lyrics." MARTIN & SEGRAVE, supra note 160, at 306.
184. Id.
185. The first album to receive a warning label was Love on the Beat, by a French artist named Serge Gainsbourg. The label read, "Explicit French Lyrics: Parental Advisory."
186. See supra part I.A.2.
187. See supra part I.B.
188. The general manager of Tower Records in Boston said in April 1990 that 35-40% of rap albums are labeled with warnings. Kevin Cullen, When Public Enemy Raps, Many Hub Youths Get the Message, B. GLOBE, Apr. 11, 1990, at 30.
189. Among the chains that discontinued selling records with warning labels to anyone under 18 were Trans World Corp., Wax Works/Disk Jockey and Musicland. Chuck Philips, Record Industry Unveils Warning Label; Advisory: Logo Warns Consumers, Parents of Potentially Offensive Lyrics, L.A. TIMES, May 10, 1990, at F1.
In 1989 and 1990, articles about violent pornographic and satanic rock began appearing frequently in major publications again. The main targets were rap and heavy metal music. By early 1990, legislators in almost twenty states were trying to restrict the sale of explicitly sexual or graphically violent records.

To discourage states from imposing their own warning label requirements, the RIAA announced, in March 1990, that all of its companies would apply uniform, highly visible stickers, each with the same size, design, wording and placement, on explicit albums. In May 1990, the RIAA unveiled the new logo, a black and white label reading "Parental Advisory -- Explicit Lyrics." According to the agreement, individual record companies would continue to decide for themselves which albums would receive warning stickers. There were no guidelines, and no outside panel would review the companies' decisions.

The RIAA's promise to institute a uniform labeling system placated many lawmakers. By the time the RIAA unveiled the new sticker in May, sixteen of the nineteen state legislatures considering statutes requiring warning labels had already ceased their efforts to pass them. Moreover, the PMRC supported the new logo. Nonetheless, a series of events over the next two months demonstrated that critics of explicit rock lyrics would continue to pressure the industry. On June 6, a federal district judge in Florida found As Nasty as They Wanna Be, an album by the rap group 2 Live Crew, to be obscene.

According to USA Today, "Record store labeling has had no effect on sales." Jefferson Graham, Stores Limit Sales of Some Rap LP's, USA TODAY, June 23, 1989, at 1D. Some guessed that the stickers actually increased sales. Holly Cass, the executive director of the National Association of Independent Record Distributors and Manufacturers, noted, "The stickers could make these albums forbidden fruit, very desirable." Jon Pareles, Record Companies to Put Warnings on the Raw, N.Y. TIMES, Mar. 29, 1990, at C17. Indeed, 2 Live Crew's stickered song, Nasty as They Wanna Be, sold nine times more than their cleaned-up version of the song, Clean as They Want to Be. Amy Duncan, Will Voluntary Labeling Work?, CHRISTIAN SCI. MONITOR, Apr. 24, 1990, at Arts 15.


192. See id.

193. Id.

194. Id.

195. Philips, supra note 189.

for selling the album.\textsuperscript{197} Two days after Freeman's arrest, three members of 2 Live Crew were arrested after an adults-only concert in Hollywood, Florida. In addition, on July 7, the Louisiana Legislature passed the nation’s first bill mandating that record manufacturers place warning labels on albums with potentially offensive lyrics.\textsuperscript{198}

By the end of 1990, the record industry had some reason to be optimistic. In October, a jury acquitted the members of 2 Live Crew.\textsuperscript{199} Freeman was convicted,\textsuperscript{200} but Texas judges dismissed similar obscenity charges against a San Antonio record-store owner and the Dallas-based Sound Warehouse chain.\textsuperscript{201} And Governor Buddy Roemer of Louisiana vetoed the state record labeling bill, asserting that it was unconstitutional.\textsuperscript{202}

Nonetheless, the story of self-regulation by the record industry is almost certainly not finished. In the spring of 1991, Jay Berman, the head of the RIAA, asserted, "[A]nycor who thinks the pop music obscenity battle is over ought to think again."\textsuperscript{203} The Freeman conviction, if ultimately upheld, will probably have a chilling effect on the entire music industry.\textsuperscript{204} Moreover, by June 1991, thirteen state legislatures were once again considering bills requiring warning labels on album covers.\textsuperscript{205} Pressure groups and government officials striving to mandate warning stickers will gain support if rock music continues to become increasingly vulgar, violent, misogynistic, homophobic and racist.\textsuperscript{206} If the threat of government censorship builds, the record industry likely will be coerced into formulating a more effective self-policing mechanism.

\textsuperscript{197} In addition to Charles Freeman, at least four other record-store employees around the country were arrested for selling the album. Jon Pareles, \textit{Store Owner Convicted of Obscenity in Album Sale}, \textit{N.Y. Times}, Oct. 4, 1990, at A18.


\textsuperscript{200} Pareles, \textit{supra} note 197.


\textsuperscript{202} Frances F. Marcus, \textit{Label Bill is Vetoed in Louisiana}, \textit{N.Y. Times}, July 26, 1990, at C17.


\textsuperscript{206} \textit{See} Adler & Foote, \textit{supra} note 190.
The degree to which that system will curb expression will depend largely on the amount of potential and actual power that government wields over the industry.\textsuperscript{207} The case histories this article has examined clearly demonstrate this fact. But the specific characteristics of the self-censorship arrangement will also help determine its potency. The next section will examine the various structural choices an industry makes when it constructs a self-regulatory system and the effects those choices have on the tendency of that system to suppress artistic expression.

II. SYSTEMS OF CENSORSHIP: THE CRITICAL COMPONENTS

As the four case studies illustrate, the extent to which an industry's self-censorship system curbs expression depends largely on the amount of pressure that the government exerts to coerce compliance. On the other hand, the specific features of such a system also help to determine its effectiveness. Indeed, pressure groups and government officials often browbeat a media industry not only into policing itself but also into policing itself in a certain way that they believe will most efficiently prevent the dissemination of offensive material.

This section will discuss three sets of alternative features of media self-censorship arrangements. The effectiveness of a given arrangement hinges to a large degree on the particular features it possesses. First, a self-censorship mechanism may employ a mandatory seal of approval, it may classify material in a way that limits juvenile access, or it may use purely advisory ratings. Second, the producers or distributors of the medium may be the only parties to the self-censorship agreement, or the purveyors of that medium may participate as well. Third, the material may be evaluated by the individual companies who produce or distribute it, by a body composed of industry representatives, or by a group of outsiders.

A. SEAL OF APPROVAL VS. RESTRICTIVE CLASSIFICATION VS. ADVISORY RATINGS

Almost all groups that campaign for media self-regulation say that their primary goal is to protect children. Parents have the right, as well as the responsibility, to control what their children read, listen to and watch. Any arrangement that limits parents' discretion to perform this

\textsuperscript{207} Because of its dependence on radio, which is highly regulated, the record industry is quite vulnerable to indirect government pressure. The federal government, through the FCC, should be able to coerce the RIAA into adopting a much stricter self-censorship mechanism than the one it has now.
task is troubling. Even more troubling, however, is a system that, in the process of sheltering youth, violates the free speech rights of adults as well. Unfortunately, those who are concerned with saving other people's children from contamination usually do not mind if adults also happen to be denied access to controversial images, words and ideas.

There is no major medium in this country that caters only to youth, or even primarily to youth. Adults twenty years old or older purchase more than two-thirds of the rock records sold in this country. Even comic books, seemingly the most juvenile of all media, have a readership composed largely of adults. It is therefore imperative, from a free speech perspective, that a system of self-regulation not protect children by preventing the release of all material that is not suitable for them. As Justice Brennan said in *Jacobellis*:

> We recognize the legitimate and indeed exigent interest ... in preventing the dissemination of material deemed harmful to children. But that interest does not justify a total suppression of such material, the effect of which would be to "reduce the adult population ... to reading only what is fit for children."

All self-regulation by the media limits the expression available to adults to some degree. But the three basic forms of self-regulation -- seals-of-approval, restrictive classification and advisory ratings -- do not all infringe on the free speech rights of adults the same amount.

The seal of approval is the least precise method for protecting the welfare of children. The Motion Picture Production Code and the Comics Code prohibited the distribution of any item that had not received a seal from the code authority. In other words, these systems were designed to check completely the dissemination of objectionable material, even if the material was objectionable only to children. A creator or distributor whose product failed to receive the seal had to expurgate his product to satisfy the industry censors. If he did not, the film or comic book would never reach an audience.

208. According to RIAA statistics, in 1984, children between the ages of 10 and 14 bought only 9% of rock records, children 15 to 19 bought 22%, and people over 20 purchased the rest. Berry & Wolin, *supra* note 161, at 606.

209. In 1955, just as the Comics Code was taking effect, the *New York Times* reported that 25 million children and 75 million adults read some comics every day. *Inflation Barred as Aid to Jobless*, *N.Y. Times*, Apr. 24, 1955, at 83. The ratio today is likely even more heavily skewed towards adults because of the recent proliferation of comic books designed specifically for older readers.

The NAB used its Seal of Good Practice differently, but not in a way that protected the interests of adults. The Television Code was not, like the comic book and motion picture codes, a form of prior censorship. The NAB review board did not pre-approve material. Instead, it continuously monitored each network's and each station's programming. TV stations had the right to display the seal so long as they were not in "continuing, willful or gross violation" of the Television Code.\textsuperscript{211} Stations endeavored not to lose the seal because such a loss would send a negative message to both the FCC and advertisers. Therefore, TV stations and networks often refused to accept controversial shows from producers. Furthermore, writers and producers often censored themselves in order to ensure that stations would televise their products. The NAB's use of its Seal of Good Practice thus kept virtually all programming and advertisements with adult themes off the air.\textsuperscript{212}

Unlike self-regulation systems that use a seal of approval, restrictive classification systems, while preventing children from having access to certain materials, also attempt to protect the rights of adults. The MPAA ratings program is such a system. The PG-13, R and NC-17 ratings inform parents about the suitability of films for minors and restrict children's access to films containing mature language and themes, but they are not intended in any way to interfere with adults' ability to see motion pictures.\textsuperscript{213} Some civil libertarians feel that the NC-17 rating (formerly X) abridges the rights of parents by denying them the unlimited discretion to decide what movies their children can see and the rights of children by preventing them from seeing movies that their parents might otherwise allow them to see.\textsuperscript{214} But for the most part, Americans view the ratings as helpful and harmless.\textsuperscript{215}

Before the MPAA replaced the X rating with NC-17 in 1990, however, it became clear that the MPAA ratings program did more than prevent youngsters from seeing adult films. In fact, it forced the creators of many films to alter their product and prevented some films from ever being made at all.

\textsuperscript{211} \textit{TELEVISION CODE, supra} note 115.
\textsuperscript{212} Geoffrey Cowan noted that prior to the end of the 1960s, television "seldom contained material that was explosive or controversial. Political issues, religion, sex, indeed the real world, rarely appeared." \textit{COWAN, supra} note 127, at 50.
\textsuperscript{213} The PG-13 rating means that a child under 13 must be accompanied by a parent or guardian to attend the film. An R rating signifies that a child under 17 must be so accompanied. An NC-17 rating means that no person under 17 may be admitted under any circumstances.
\textsuperscript{214} This is the ACLU's official position. In its policy guide, it asserts, "the X rating, by placing upon the theater owner the responsibility for barring children under [17], deprives parents of the right to determine for themselves what pictures their children may see." \textit{POLICY GUIDE OF THE AMERICAN CIVIL LIBERTIES UNION 40} (1986).
\textsuperscript{215} According to MPAA polls, 70% to 73% of parents find the rating system to be useful. \textit{Collins, supra} note 51.
The reason that the former system intruded on the creative decisions of writers and directors was that serious movies were rarely financially viable if the Code and Rating Administration (CARA) slapped them with an X. The MPAA did not trademark the X rating, as it did the others. Pornographers were thus able to coopt the symbol and use it to promote their films. Many people therefore assumed that all X movies were pornographic. As the ACLU noted, "Particularly with regard to X-rated films, the administration of classification based on content will tend to act... as an invitation to boycotters and censorship drives by local pressure groups against theater owners, especially in small communities." The big theater chains eschewed controversy and would not show X movies, nor would many smaller chains and independent theaters. Furthermore, many movie houses had rental contracts that forbade them to exhibit films that were rated X. Most television stations, even pay cable stations, would not show them. Many newspapers and all television stations refused advertising for X films.

To ensure that their films would be exhibited and publicized, most distributors, when threatened with an X, forced the directors to cut the films to eliminate the offending material. In 1981, Jack Valenti estimated that fully one third of the films that CARA viewed were edited to change the rating. Filmmakers resubmitted motion pictures again and again until CARA awarded them the rating that they wanted.

This occurred for the first time just three months after the classification program began in 1969. Warner Brothers responded to the financial-
ly disastrous performance of *The Girl on a Motorcycle* by purging it of its erotic scenes in order to get an R.\(^{222}\) Subsequently, distributors bowdlerized many serious-minded films to avoid an X rating. These included *Taxi Driver, Cruising, Scarface, Angel Heart* and *9½ Weeks*. Writers, directors and producers censored uncounted other motion pictures to satisfy the common contractual requirement that they not deliver an X film.\(^{223}\)

Distributors who refused to cut a film, yet did not want the toxic X, had the unattractive option of bypassing the classification system altogether. Filmmakers rarely chose this path, for NATO theaters, which comprise 85% of motion picture exhibitors in the United States, will not show an unrated film.\(^{224}\) Nevertheless, some filmmakers calculated that the stigma of an X rating was worse than no rating at all. *I Am Curious Yellow, Caligula* and *Dawn of the Dead* all had moderate success without a rating. Even if unrated films occasionally made money, however, they almost certainly reached a much smaller audience than they would have if the ratings system did not exist at all.

In the late 1980s, there was growing dissatisfaction within the film business about the manner in which the X rating could unfairly stigmatize nonpornographic movies intended for adults. Adrian Lyne, the director of *9½ Weeks*, considered the form of self-censorship represented by the MPAA classification system to be as insidious as the government variety. He protested, "People are avoiding making certain types of movies, and that's real unhealthy."\(^{225}\) Irwin Winkler, a successful producer, agreed: "I'd like to see the system abolished. I think we should have the freedom to tell the story as we, the filmmakers, feel it should be told, without interference and with all the freedom of our imagination."\(^{226}\)

In 1990, the disgruntlement within the film industry over the system became more vociferous and widespread when CARA assigned the X rating to a spate of independently-distributed nonpornographic films, including *Tie Me Up, Tie Me Down, Henry: Portrait of a Serial Killer, The Cook, the Thief, His Wife and Her Lover, and Life is Cheap . . . But Toilet Paper is Expensive*. The producers of these movies chose to release

\(^{222}\) Ronald Duncan, the writer of the screenplay, complained, "If they remove the sex, it's like removing the yolk from an egg." *X Marks the Spot*, NEWSWEEK, Feb. 24, 1969, at 101.

\(^{223}\) The MPAA ratings system also led (and still leads) to an odd sort of anti-purification phenomenon. The G rating is equated with kiddie movies and is thus felt to spell disaster at the box office for many motion pictures. Consequently, many filmmakers are thought to slip a dirty word or two into their movies in order to avoid receiving a G. Hodgson, *supra* note 56.

\(^{224}\) Friedman, *supra* note 30, at 216.

\(^{225}\) Corliss, *supra* note 190, at 72.

\(^{226}\) Hinson, *supra* note 164.
them unrated. Miramax Films sued the MPAA to have the X rating given Tie Me Up changed to an R, but it lost the case. In July 1990, more than thirty leading directors argued in an open letter to Jack Valenti that "the artistic freedom and integrity of American film makers are being compromised by an outdated and unfair rating system." When a major studio, Universal, found its film Henry and June classified X, the pressure on the MPAA to change the ratings system increased.

Finally, in September 1990, the MPAA eliminated the X rating and replaced it with a new NC-17 category ("No Children Under 17 Admitted"). The criteria that the MPAA uses to confer the new rating are precisely the same as those previously used to confer an X. Whereas the MPAA did not trademark the X rating, however, it has trademarked NC-17, thus denying pornographers the privilege of using it for films that they do not submit to the rating system. Although pornographers are permitted to apply for an NC-17, Jack Valenti doubts they will. He notes, "I think it would be hard to attract the raincoat crowd with a rating called NC-17." The MPAA thus intends to designate adult films in a manner that does not lump nonpornographic movies together with smut.

It is still too early to determine whether NC-17 is actually more protective of expression or is, as one critic observed, "little more than a new way to spell X." There is some indication that studios will find it easier to promote and exhibit NC-17 movies than X movies. Most major newspapers have decided to publish advertisements for NC-17 films, so long as the advertisements and the films themselves are not prurient or offensive. Moreover, all three television networks, none of which accepted advertisements for X movies, have suggested that they might be willing to accept commercials for some NC-17 films, although they will run them only during late-night hours. Finally, some

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228. Rohter, supra note 217, at C18.
229. Id.
231. Rohter, supra note 217, at C18.
233. Larry Rohter, Resistance to NC-17 Rating Develops, N.Y. TIMES, Oct. 13, 1990, at A13. The Birmingham (Alabama) News is one of the few papers that has adopted a general policy of rejecting advertisements for NC-17 movies, thus treating them the same way that it previously treated X films. Id.
234. Id.
theaters that refused to show X films have agreed to exhibit movies rated NC-17.235

On the other hand, certain negative responses to the NC-17 rating indicate that it may eventually be viewed no differently from X. Just one week after the introduction of the rating, town officials in Dedham, Massachusetts, pressured a local theater to cancel its showing of Henry and June, which, after being reclassified, had become the first film to be rated NC-17. The National Council of Churches and the United States Catholic Conference quickly condemned the new rating as an attempt "to get sexually exploitative material into general theatrical release" and encouraged theaters not to exhibit NC-17 movies.236 Donald Wildmon, the leader of the American Family Association, accused the MPAA of trying to "mainstream pornography."237 In January 1991, Blockbuster Video, the country's largest video retailer, announced, perhaps in response to Wildmon's pressure, that it would not stock any film rated NC-17.238

Some distributors of sexually explicit movies are submitting their films to the ratings board in order to receive NC-17 labels.239 This trend may thwart the MPAA's intention to distinguish quality adult films from pornography. If this blurring continues, the NC-17 rating may eventually lead to as much repression of free expression in the cinema as its progenitor did.240

The third basic method of self-regulation, in addition to seals of approval and restrictive classification, is the use of advisory ratings. Advisory ratings serve only to inform parents; they do not formally restrict the ability of children to receive a medium.241 For example, the

235. Mason, supra note 230.
236. Rohter, supra note 233.
238. Id.
240. By 1992, there was evidence that NC-17 was acquiring the same stigmatic effect that X had. Many movie theaters, especially in malls, would not show NC-17 films, some newspapers, magazines and television stations refused to carry advertisements for them, and several major video outlets did not carry them. It thus appeared that NC-17 would diminish the profits of movies in the same way X did (Henry and June, the last major studio film to carry an NC-17 rating, grossed a disappointing $11.6 million.). As a result, when Basic Instinct received a preliminary NC-17 rating from the MPAA, the movie's director, Paul Verhoeven, faced pressure from his producer and distributor to edit the film in order to get an R rating. Bernard Weinraub, Violent Melodrama of a Sizzling Movie Brings Rating Battle, N.Y. TIMES, Jan. 30, 1992, at C15; Richard Corliss, Whatever Became of NC-17?, TIME, Jan. 27, 1992, at 64.
241. It should be noted that, so long as ratings do not inhibit availability, they can actually be counterproductive by informing children (and adults) which items are least acceptable, and thus most seductive. Nat Hentoff predicts that "[k]ids will go zipping
warning label used by record companies is an advisory rating; it alerts parents to the presence of "explicit lyrics" but it does not stop youngsters from buying the album.\textsuperscript{242} Susan Baker defended this system by pointing out, "We're not telling kids they can't buy these records. We just want the rating out there so parents can see it and say to their children, 'We need to talk about this.' Or they can say 'Go right ahead, kids.' That's their right, too."\textsuperscript{243}

However, even purely advisory ratings can stifle expression by serving as warning beacons to censorship groups, as the MPAA's X rating did. A number of major record store chains refuse to stock albums with warning stickers in order to avoid conflicts with pressure groups.\textsuperscript{244} Many stores, while not adopting a general policy of rejecting all labeled albums, have decided to drop potentially offensive records,\textsuperscript{245} and the stickers surely indicate to them which records are most problematic. There are also reports that mall leases will start to prohibit tenants from selling stickered albums.\textsuperscript{246} Moreover, radio stations might start to decline to play songs from such albums in order to avoid arousing the ire of the FCC.\textsuperscript{247}

Clearly, the seal of approval approach suppresses expression more completely than the classification methods. It is important to recognize, however, that rating systems are not merely harmless efforts to protect children. Restrictive classification programs, such as the MPAA ratings system, abridge the rights of parents to control their children's access to information and expression. Furthermore, all ratings systems violate the rights of both artists and their audiences by impeding the dissemination of much controversial material.

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\textsuperscript{242} Hentoff, \textit{supra} note 171, at 31. When asked how he would feel about being required to package all sexually explicit albums in plain paper packaging, one record company executive exclaimed, "God, how I wish that would happen. I've got some real dogs, but if I'm ordered to put a plain wrapper on them, they'll begin to \textit{move}!" Id.

\textsuperscript{243} Morthland, \textit{supra} note 159, at 87.

\textsuperscript{244} Among the chains that have adopted this policy are Sears, J.C. Penney and Disc Jockey. See Adler & Foote, \textit{supra} note 190, at 57; \textsc{Martin} & \textsc{Segrave}, \textit{supra} note 160, at 305.

\textsuperscript{245} Philips, \textit{supra} note 189.

\textsuperscript{246} Chuck Philips, \textit{A War on Many Fronts; Censorship: 1990 Was the Year That 'Free Expression' Ran Head-On Into 'Moral Concern'. But the Conflict May Only Be Beginning}, \textsc{L.A. Times}, Dec. 26, 1990, at F1.

\textsuperscript{247} See \textit{supra} part I.C.
B. ARRANGEMENTS THAT BIND THE PURVEYORS VS. ARRANGEMENTS THAT DO NOT

The self-censorship systems this article has examined are all based on agreements among companies that are primarily responsible for distributing a medium -- the movie studios, the comic book publishers, the television networks and the record companies. These "distributors," through their trade associations, agree to regulate content. If there are no non-complying distributors, such an accord will suffice to suppress or classify all unacceptable material. On the other hand, if there are alternative distribution channels, and there usually are, the creators of controversial material can successfully disseminate their product so long as there are purveyors -- that is exhibitors or sellers -- who are willing to handle it. Therefore, the overall effectiveness of a self-censorship mechanism depends largely on whether the purveyors of a given medium are also bound to follow the agreement.

The cooperation of the purveyors may be guaranteed by the very structure of an industry. For example, the motion picture industry under the old studio system was a vertically integrated oligopoly; in 1945, the five major studios possessed controlling interests in at least 70% of the critical first run theaters in cities with populations exceeding 100,000. Consequently, these theaters would not under any circumstances exhibit a motion picture that did not bear a seal of approval from the Hays Office. The distributors' direct control over the most important purveyors was a major reason for the extraordinary success of the motion picture code. As discussed earlier, when, in United States v. Paramount Pictures, the federal courts stripped the studios of their top-to-bottom control of the industry on antitrust grounds, exhibitors were free to bargain for and choose the pictures that they believed audiences wanted to see, with or without the seal. The new competition in exhibition greatly diminished the MPAA's power over motion picture content through the Production Code.

Because of the antitrust laws, it is unlikely that such a vertical monopoly could ever exist again. Even if the purveyors of a medium are independent from the distributors, however, they can still be counted on to comply with a self-regulation procedure if they themselves are parties to the agreement. This is the way that the MPAA ensured that exhibitors would comply with its ratings program; it persuaded the National Association of Theater Owners (NATO) to agree to sign on to the system.

248. In this section, the word "distributor" is not used in any trade-specific sense but rather generally to signify the companies that stand atop the industry and market the creative product under their own aegis.
249. See supra note 32.
250. 334 U.S. 131 (1948).
About 85% of American theaters are members of this association. Therefore, most theaters in the country refuse to show unrated movies.

Until its demise, the success of the Television Code also rested on the fact that so many purveyors -- television stations -- were signatories to the code. Although networks dominated the NAB and distributed much of the nation's programming, FCC rules allowed them to own and operate only a few stations each. Most TV stations were network affiliates or independents. If just the networks themselves had subscribed to the Television Code, all of these other stations could have aired programs that did not conform to the Television Code with impunity. This was not the case, however -- in 1978, over 65% of all commercial TV stations subscribed to the Television Code, and they accounted for approximately 85% of all television viewing. As a result, adherence to the Television Code was extremely widespread.

There are some self-censorship arrangements in which the purveyors are neither voluntarily nor involuntarily bound to comply with the agreement. These self-policing systems are the least likely to suppress expression, for they do not impede non-complying distributors' ability to market their goods. The record companies' current warning-sticker program is an example of this type of arrangement. Record stores have not joined the agreement. Therefore, they still stock the albums of companies who refuse to label their explicit records.

When the Comics Code was adopted in 1954, the primary purveyors of comic books were newsstands, drug stores, variety stores and supermarkets. While the publishers of comic books bound themselves to the code, those who sold them did not. The CMAA nevertheless expected newsstands and stores to refuse to stock comic books without a seal. Indeed, William Gaines' company initially stayed out of the association but joined

251. Hodgson, supra note 56.
253. The current relationship between networks and TV stations is loosely parallel to the current relationship between movie studios and theaters. In its early years, however, the structure of the broadcasting industry more closely resembled that of the pre-Paramount film industry than that of the modern film industry. CBS and NBC owned or controlled many of the most important stations and, according to a 1941 FCC report on chain broadcasting, they maintained contracts with their affiliates that "resulted in a grossly inequitable relation." CHESTER ET AL., supra note 34, at 84. Some of these contracts contained "exclusive affiliation" clauses which forbade affiliates from airing any other network's programs and forced stations to dedicate most of their schedule to network programming. In other words, the networks controlled stations in much the same way that the studios controlled theaters. If this situation had persisted, the Television Code could have governed most programming even if the networks were the only signatories to it.

The television industry, however, experienced its own Paramount-type ruling. In 1941, the FCC issued eight specific regulations designed to loosen the networks' monopolistic control over their outlets. These regulations are still in effect today. See CHESTER ET AL., supra note 34, at 84-85; STERLING & KITTRIOS, supra note 112, at 189-92.
when Gaines learned from dealers that they would not handle his comics without a seal.\textsuperscript{254} The merchandisers were probably worried that pressure groups would target them for harassment if they sold unapproved comic books.

Although newsstands and stores generally cooperated on an informal basis, they were not quite so compliant as the association believed that they would be. The two large publishers whose magazines did not carry the Comics Code symbol -- Dell, which published mainly children's cartoons and Gilberton, which specialized in "classic comics" -- did not suffer a perceptible drop in sales.\textsuperscript{255} Furthermore, a new adult satirical comic magazine, \textit{Mad}, ignored the Comics Code completely and still achieved a high circulation through the traditional outlets. In the early sixties, a publisher successfully marketed a new line of horror comics. And in 1971, Marvel, a member of the CMAA, breached the code by releasing a series of \textit{Spiderman} stories about drugs without the seal. Newsstands did not hesitate to sell the magazines. In fact, the success of the series impelled the CMAA to issue a guideline the same year permitting the responsible treatment of substance abuse.\textsuperscript{256}

As mentioned previously, the current Comics Code contains a huge loophole. It not only fails to bind newsstands and stores to the agreement but also explicitly permits the distribution of comics without the seal through specialty shops. The Comics Code has thus become one of the most ineffective media codes that ever existed.

\section*{C. Internal Censors vs. Industry Censors vs. Outside Censors}

As we have seen, pressure groups and the government force self-censorship systems on industries. Without outside pressure, people in the media business would infrequently choose not to disseminate material for moral reasons. They are for the most part motivated by profit. They want to sell what customers want to hear, read or see -- to buy.

Companies that distribute films, comic books, TV programs or rock albums are reluctant to expurgate items that more people would want to receive in their uncensored form. Therefore, a self-regulation system that gives the companies themselves the right to make the regulatory decisions is the least dangerous to free expression. The current RIAA agreement is such a system. Each record company is allowed to make its own judgment about which albums should receive warning stickers.

If a company concludes that labeling an album will limit its availability, it is likely to leave the sticker off in order to boost sales.

From the point of view of enemies of the media, this sort of arrangement is akin to letting inmates serve as their own prison guards. An intermediate, and more effective, enforcement mechanism is to have a body made up of industry representatives apply the code or ratings system. Its judgments will not be based on the financial interests of the specific company at issue. On the other hand, because of its concern for the general health of the industry and its likely bias in favor of free speech, such a body will tend not to censor material too zealously.

The MPAA and CMAA both take such an approach, as did the NAB when the Television Code was still in operation. Each of these associations recruits people from outside the industry to perform the first review of the material but then allows a body composed of industry representatives to overrule the initial decision.

In the motion picture ratings system, the chairman of the Code and Ratings Administration (CARA) and the eleven "average" parents who serve as its members render the initial decision. If a filmmaker disputes CARA's determination, he may appeal it to the Code and Ratings Appeals Board, which is made up of the MPAA president, twelve representatives from member studios, eight exhibitors from the NATO Board of Directors, two producers from the Producers' Guild of America, and two representative from International Film Importers and Distributors of America. From 1968 to 1988, 216 ratings were appealed, and about 45% were overturned.

In the comic book industry, the Comics Code administrator (who is not a publisher) and his staff determine whether a publication should receive the seal of approval. If a publisher disputes the administrator's decision, he may appeal it to the permanent committee, composed of representatives from CMAA member companies.

In the NAB's self-policing arrangement, the Code Authority Director and his executive staff had the primary responsibility for monitoring stations and identifying breaches of the Television Code. They reported alleged violations to the Television Review Board, a body of broadcasters who subscribed to the Television Code. If the review board decided that

257. As noted earlier, from 1930 to 1934, the MPAA left conformance with the new Production Code to the individual studio's discretion. As a result, moviemakers virtually ignored the Production Code. Similarly, record companies under the current arrangement are allowed to decide for themselves when to apply a warning label to an album. They seldom do.

258. The president of the MPAA, currently Jack Valenti, has the power to appoint and dismiss the chairman of CARA. The chairman, currently Richard Heffner, in turn has the power to appoint the members of CARA. The president of the MPAA cannot fire a CARA member. This arrangement shields them from industry pressure. Hodgson, supra note 56.

259. Hinson, supra note 164.
a breach had occurred, it sent the matter to the Television Board of Directors for final disposition.

In each of these systems, although people theoretically independent of industry pressure render the initial decision, bodies composed of people from the industry render the final resolution. Consequently, the codes are not ultimately enforced with excessive moral fervor by individuals unconcerned with free speech rights and media profits.

The most suppressive type of self-censorship arrangement is one where an industry voluntarily surrenders the entire review process to industry outsiders. One example of this type of system was the TV blacklist of the early 1950s. In 1950, at the height of the Red Scare, the American Business Consultants, a firm composed of three former FBI agents, issued a pamphlet titled Red Channels: The Report of Communist Influence in Radio and Television. This booklet provided background information on 151 broadcasting personalities whom it accused of being Communists or Communist sympathizers. Soon afterward, another organization printed lists of allegedly communist writers and actors in a publication called Aware.

Advertisers pressured broadcasters not to hire men and women who appeared on these lists. The profit motive, which often motivates the media to oppose censorship, in this case led the television industry to accept it. Broadcasters refused to give jobs to blacklisted individuals. They did not even perform independent evaluations of the accuracy of the charges made against these performers and writers. The motion picture industry also used blacklists during this paranoid era, but Murray Schumach notes that there was a difference:

> The movie industry, though greatly influenced by the same groups that imposed a blacklist on television, retained final control of the use of the blacklist. Television abdicated even this limited authority . . . the actual decisions were dictated to them by outside groups . . . . They grumbled against these outsiders . . . but they never failed to try to placate them.

By handing their hiring decisions over to zealots wholly unconcerned with the welfare or artistic integrity of their medium, TV broadcasters committed a particularly virulent kind of self-regulation.

The four case studies suggest that the repressive nature of a self-censorship arrangement depends primarily on the repressive potential of the government. It is apparent, however, that the particular structure of a self-censorship system also helps to determine its potency. If the

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261. Id. at 364.
262. Id. at 307.
263. Schumach, supra note 6, at 235-36.
record industry, as is likely, is coerced into forming a stricter and more elaborate self-regulation mechanism in the future, it should carefully consider the details of that mechanism. The freedom of expression of both performers and listeners will depend on its decisions.