

TELEVISION VIOLENCE AND INDUSTRY SELF-REGULATION: THE V-CHIP, TELEVISION PROGRAM RATINGS, AND THE TV PARENTAL GUIDELINES OVERSIGHT MONITORING BOARD

JOEL TIMMER*

In 1997, the television industry created the TV Parental Guidelines, the program rating system that works in conjunction with the V-chip. To help gain the Federal Communications Commission's approval of the system, the industry also created the Oversight Monitoring Board, which it pledged would engage in a range of activities to ensure the accuracy and consistency of television program ratings. This article examines the operation and effectiveness of the board and the television program rating system as a form of industry self-regulation and provides suggestions for increasing the effectiveness of both the board and the rating system.

Congress has long been concerned about television violence and its effect on viewers, particularly children.¹ Despite this concern, however, Congress has passed few laws to regulate television violence.² This is

*Associate Professor, Department of Film, Television and Digital Media, Texas Christian University.

¹One of the most comprehensive discussions of congressional activity in regards to television violence from the 1950s to the early 1980s is WILLARD D. ROWLAND JR., *THE POLITICS OF TV VIOLENCE: POLICY USES OF COMMUNICATIONS RESEARCH* (1983). See also DOUGLASS CATER & STEPHEN STRICKLAND, *TV VIOLENCE AND THE CHILD: THE EVOLUTION AND FATE OF THE SURGEON GENERAL'S REPORT* (1975); CYNTHIA A. COOPER, *VIOLENCE ON TELEVISION: CONGRESSIONAL INQUIRY, PUBLIC CRITICISM AND INDUSTRY RESPONSE: A POLICY ANALYSIS* (1996); James F. Short Jr., *The National Commission on the Causes and Prevention of Violence*, in *SOCIOLOGY AND PUBLIC POLICY: THE CASE OF PRESIDENTIAL COMMISSIONS 66* (Mirra Komarovsky ed., 1975); Joel Timmer, *Incrementalism and Policymaking on Television Violence*, 9 COMM. L. & POL'Y 351 (2004).

²See, e.g., Timmer, *supra* note 1, at 352–53.

due, in large part, to the First Amendment, which protects both the television industry and the presentation of television violence.³ With its options to deal with television violence constrained by the First Amendment, Congress has often relied on industry self-regulation to address its concerns about television violence.⁴ In fact, the laws Congress has passed addressing television violence — giving the industry an antitrust exemption to allow it to develop standards on violence in television programming and requiring the development of a program rating system to work in conjunction with the V-chip — have attempted to get the industry to regulate itself in this area.⁵

An aspect of one such law — the program rating system required by the V-chip law⁶ — is the focus of this article. The article examines the creation, implementation and operation of the rating system, known as the “TV Parental Guidelines.” Its focus is on the self-regulatory organization created by the industry to oversee the system, the TV Parental Guidelines Oversight Monitoring Board.⁷ Little is publicly known about the organization; few periodical articles mention it, much less discuss it in depth. Further, it does not appear any academic articles have been published that focus on the board. One purpose of this article, then, is to provide information on an organization about which little has been written.

In examining the board and its functioning as a self-regulatory organization, the history of congressional action on television violence is covered, as is the academic literature on self-regulation generally. What is known about the board’s activities is then discussed, followed by a consideration of the conditions that have been identified as being conducive to effective industry self-regulation. The article concludes with suggestions about what the board might do to increase its effectiveness in promoting accuracy and consistency in the application of the TV Parental Guidelines.

³For a discussion of First Amendment limitations on the regulation of violent entertainment, see Joel Timmer, *When a Commercial Is Not a Commercial: Advertising of Violent Entertainment and the First Amendment*, 7 COMM. LAW & POLY 157, 173–81 (2002).

⁴See, e.g., Timmer, *supra* note 1, at 358–62.

⁵See *infra* notes 12–24 and accompanying text.

⁶Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56, § 551 (1996) [hereinafter V-Chip Law]. The Parental Choice in Television Programming Act was passed by Congress as part of the Telecommunications Act of 1996.

⁷See *infra* notes 43–44 and accompanying text.

HISTORY OF CONGRESSIONAL CONCERN ABOUT TELEVISION VIOLENCE

Since the early days of television, violence has been a regular concern of Congress. Congress held hearings on television violence as early as 1952 and in every decade since.⁸ Despite that, no legislation to deal with television violence was introduced until 1986.⁹ Instead, Congress' approach typically involved making the television industry aware of its concerns and calling on the industry to address those concerns. In other words, Congress has long followed a strategy of encouraging or pressuring the industry to self-regulate.¹⁰ Such a strategy consists of the government pressuring industry to change its behaviors without taking legislative or other formal action to actually require changes. Such pressure, however, is typically accompanied by an implied or explicit threat for the government to take action should the industry fail to do so.¹¹ Since Congress regularly returned to the issue of television violence, however, one can conclude that earlier efforts to promote industry self-regulation of television violence were not viewed as being entirely successful.

Beginning in 1986, legislation was introduced in Congress to address television violence.¹² This led to the passage of the first law to deal with television violence: the Television Program Improvement Act of 1990.¹³ The law provided the television industry with a three-year exemption from antitrust laws to allow industry members to collaborate and develop standards on the presentation of television violence.¹⁴ However, no action by the industry was mandated; rather, any action by the industry to develop such standards was entirely voluntary.¹⁵ Little was done by the industry until near the expiration of the antitrust exemption, when the four broadcast networks and many cable networks pledged to air parental advisories before programs with violent content.¹⁶ This

⁸See *supra* note 1.

⁹See, e.g., Timmer, *supra* note 1, at 363.

¹⁰See *id.* at 358–62.

¹¹See MICHAEL HOWLETT & M. RAMESH, *STUDYING PUBLIC POLICY: POLICY CYCLES AND POLICY SUBSYSTEMS* 91 (1995).

¹²For some explanations as to why legislation on television violence was introduced during this time period see Timmer, *supra* note 1, at 363–65.

¹³47 U.S.C. § 303c (2012).

¹⁴*Id.* at § 303c(c).

¹⁵The law was likely written this way to avoid raising the First Amendment concerns that mandated action might have raised.

¹⁶See, e.g., Ellen Edwards, *Cable to Air Violence Warnings*, WASH. POST, July 30, 1993, at G1; Megan Rosenfeld, *Warning: TV Violence Is Harmful, Networks Concede*, WASH. POST, July 1, 1993, at A1.

apparently failed to satisfy Congress, however, and many hearings were held on television violence over the next few years, with several bills on the topic being introduced.¹⁷

All of this congressional activity on television violence in the mid-1990s culminated with the 1996 passage of another law attempting to address television violence. That law, the Parental Choice in Television Programming Act,¹⁸ was passed, in part, because Congress found that children are negatively affected by the sex and violence on television to which they are exposed. Accordingly, Congress sought “to limit the negative influences of video programming that is harmful to children.”¹⁹ To achieve this, Congress required that most new television sets sold in the United States be equipped with technology that parents could use to block programs with sexual, violent or other content to which they did not want their children exposed.²⁰ In order for this technology, known as the “V-chip,” to recognize what to block, programs needed to be rated. Distributors of video programming would then include ratings on programs to allow parents to block programming they determined to be inappropriate for their children.²¹

The V-chip law left it to the industry to develop a television program rating system that would allow the technology to determine what programming to block, with one important caveat: If the industry should fail to devise a system found acceptable by the Federal Communications Commission, then the FCC would itself appoint an advisory committee to devise such a system.²² This advisory committee, which would be composed of representatives of the television industry, parents and appropriate public interest groups, would develop a system for the “rating of video programming that contains sexual, violent, or other indecent material about which parents should be informed before it is displayed to children.”²³ The television industry, however, worked to develop an

¹⁷*See, e.g.*, Timmer, *supra* note 1, at 366–69.

¹⁸V-Chip Law, *supra* note 6.

¹⁹47 U.S.C. 303 note (2013); V-Chip Law, *supra* note 6, at § 551(a)(8) (1996).

²⁰47 U.S.C. § 303(x) (2013).

²¹47 U.S.C. 303 note (2013); V-Chip Law, *supra* note 6, at § 551(b) (1996).

²²47 U.S.C. 303 note (2013); V-Chip Law, *supra* note 6, at § 551(b) & (e) (1996). The provision of the law requiring the FCC to appoint an advisory committee to develop a rating system would “take effect 1 year after the date of enactment of [the V-chip law], but only if the Commission determines, in consultation with appropriate public interest groups and interested individuals from the private sector, that distributors of video programming have not, by such date (a) established voluntary rules for rating video programming that contains sexual, violent or other indecent material about which parents should be informed before it is displayed to children, and such rules are acceptable to the Commission. . . .” *Id.* at § 551(e).

²³*Id.* at § 551(b).

acceptable rating system on its own rather than rely on an FCC-appointed advisory committee.

The two laws passed by Congress to deal with television violence, then, were essentially attempts to get the industry to regulate itself in this area, with Congress encouraging, facilitating and even mandating industry self-regulation of television violence. The antitrust exemption provided by the Television Program Improvement Act of 1990, which gave the industry the ability to take collective action on the issue but did not require such action, was unsuccessful in achieving what Congress had hoped to achieve.²⁴ The V-chip law had more of an impact than the antitrust exemption did.

SELF-REGULATION

Industry actions taken to address governmental concerns can be labeled “self-regulation.” A key characteristic of self-regulation is “that the industry or profession rather than the government is doing the regulation.”²⁵ A few features may distinguish self-regulation from government regulation, although all of these features may not be present in all instances of self-regulation. One feature is “the purely voluntary nature of regulation.”²⁶ As discussed below, the self-regulatory system adopted in response to the V-chip law was not “purely voluntary,” meaning this characteristic of self-regulation does not completely apply here. A second feature is that “nongovernmental actors [are] the sole rule-making authority.”²⁷ In terms of this characteristic, nongovernmental actors were not the sole rulemaking authorities, as the development of a rating system to work in conjunction with the V-chip was required by legislation, and the rating system adopted by the industry was required to be approved by the FCC.²⁸ After that determination, however, the FCC had no further role to play, leaving nongovernmental actors as the sole authority in the implementation and operation of the rating system after its approval. A third feature of self-regulation is “the non-binding or nonlegal nature of the rules.”²⁹ This characteristic is present, as the rating system is nonbinding and nonlegal, in that its use by those providing television programming is not mandated by law.

²⁴See *supra* notes 13–17 and accompanying discussion.

²⁵Angela J. Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L.J. 711, 715 (1999).

²⁶Saule T. Omarova, *Wall Street as Community of Fate: Toward Financial Industry Self-Regulation*, 159 U. PA. L. REV. 411, 423–24 (2011).

²⁷*Id.*

²⁸V-Chip Law, *supra* note 6, at § 551(e).

²⁹Omarova, *supra* note 26, at 423–24.

Saule T. Omarova notes that “there are many different forms of self-regulatory arrangements and institutions, depending on the specific context in which they evolve.”³⁰ Nevertheless, three general types of self-regulation have been identified. One is “‘voluntary’ self-regulation, characterized by the absence of direct government intervention.”³¹ In the context of television violence, voluntary self-regulation was the primary approach utilized from the 1950s through the 1980s, during which time Congress pressured the industry to address the issue of television violence without taking any other formal government action. The antitrust exemption provided to the industry in the early 1990s might be considered voluntary as well, as no industry action was required by the law. The second type is “‘sanctioned’ self-regulation, in which private actors formulate rules subject to government approval.”³² The V-chip law and its associated rating system might be considered sanctioned self-regulation, since the law directed the industry to develop a television program rating system which was subject to approval by the FCC. The third type is “‘mandated’ self-regulation, in which private actors are required by the government to establish a self-regulatory framework.”³³ It might be argued that the V-chip law contained an element of mandated self-regulation, since the FCC was directed to develop a rating system if the industry failed to devise one acceptable to the FCC. Technically, however, the law did not mandate a self-regulatory rating system be developed and adopted by the industry. The fact that the FCC was directed to do so if the industry failed to do so provided strong incentive, however, for the industry to develop its own rating system that would be approved by the FCC.

As the foregoing discussion should make clear, the fact that industry is taking action to self-regulate does not necessarily mean “that government involvement is entirely lacking.”³⁴ Indeed, industry may often adopt self-regulation in an effort “to stave off government regulation.”³⁵ Industry may also undertake self-regulation to implement or supplement legislation.³⁶ As the foregoing discussion shows, both of these reasons motivated the television industry to develop and adopt its own rating system to work in conjunction with the V-chip.

³⁰Saule T. Omarova, *Rethinking the Future of Self-Regulation in the Financial Industry*, 35 BROOKLYN J. INT’L L. 665, 675 (2010).

³¹*Id.* at 677.

³²*Id.*

³³*Id.*

³⁴Campbell, *supra* note 25, at 715.

³⁵*Id.*

³⁶*Id.*

DEVELOPMENT OF TV PARENTAL GUIDELINES RATING SYSTEM AND CREATION OF OVERSIGHT MONITORING BOARD

The V-chip law provided the industry with the opportunity to develop its own rating system before the FCC was directed to appoint an advisory committee to do so. Industry efforts to develop the rating system were led by the National Association of Broadcasters, the National Cable Television Association, and the Motion Picture Association of America. In early 1997, these industry trade organizations submitted an age-based rating system proposal to the FCC. Under the proposal, programs would be rated based on the age groups for which they were deemed appropriate: TV-Y would designate a program designed for children, TV-Y7 for programs appropriate for children 7 and older, TV-G for programs appropriate for all ages, TV-PG for programs that may not be suitable for younger children, TV-14 for programs that may not be suitable for children younger than 14, and TV-M (later TV-MA) for programs designed for adults.³⁷ Under the plan, ratings would be assigned to programs by program producers or by the networks or stations that aired the programs.³⁸

This age-based rating system was widely criticized by legislators, advocacy groups, and researchers as failing to indicate the specific types of content in particular programs.³⁹ According to Jeff McIntyre, who was involved in the development of the rating system as a representative of the American Psychological Association, the industry was directed by the FCC to meet with advocacy groups to develop revisions to the initial rating system.⁴⁰ In response to this criticism and pressure, the industry met with “representatives of ten advocacy groups to work out a compromise,” during which time “lawmakers continued their threats to legislate, forcing industry representatives to remain at the table.”⁴¹ This process led the industry to modify the rating system to include content-based ratings in addition to the original age-based ratings: FV

³⁷Federal Communications Commission, Public Notice, *Commission Seeks Comment on Industry Proposal for Rating Video Programming* 1 (Feb. 7, 1997) (CS Docket No. 97–55, FCC 97–34), available at <http://transition.fcc.gov/Bureaus/Cable/Public.Notices/1997/fcc97034.pdf> (last visited Feb. 24, 2013) [hereinafter FCC 1997 Public Notice].

³⁸*Id.* at 2.

³⁹See, e.g., Heather Fleming, *Senate Pressuring for Content Ratings*, BROADCASTING & CABLE, May 5, 1997, at 10; Jane Hall, *Senators Push Content-Based TV Ratings*, L.A. TIMES, Feb. 28, 1997, at A4; Sheryl Stolberg, *TV Ratings Code Said Highly Flawed*, L.A. TIMES, Mar. 27, 1997, at A23.

⁴⁰Telephone Interview with Jeff McIntyre, Member, TV Parental Guidelines Oversight Monitoring Board (Nov. 29, 2012) [hereinafter McIntyre Nov. 2012 interview].

⁴¹KATHRYN C. MONTGOMERY, *GENERATION DIGITAL: POLITICS, COMMERCE, AND CHILDHOOD IN THE AGE OF THE INTERNET* 47–48, 56 (2007).

for fantasy violence, V for violence, S for sexual situations, L for language, and D for dialogue.⁴² This rating system is known as the “TV Parental Guidelines.”

Part of the initial rating system proposal submitted by the industry as represented by the NAB, NCTA and MPAA included the creation of a TV Parental Guidelines Oversight Monitoring Board. According to the industry, this Oversight Monitoring Board was being established “to ensure that the Guidelines are applied accurately and consistently to television programming.” In regards to the duties and activities of the board, the industry pledged the following:

The Oversight Monitoring Board will provide information to producers and other program distributors concerning the Guidelines, as well as address complaints and requests from the public about the Guidelines and their implementation. The Oversight Monitoring Board will regularly hear the views of parents through an ongoing effort that will explore attitudes about the TV Parental Guidelines and the way in which they are being applied to programming. The Board will also regularly conduct focus groups and commission quantitative studies to determine whether the Guidelines are in fact providing useful information to parents, and will consider any needed changes to them.⁴³

The industry also stated that the Oversight Monitoring Board would “review the guidelines on a regular basis and make sure that the uniformity and consistency of the guidelines [are] maintained to the greatest extent that is possible.”⁴⁴

A number of people interviewed for this article remember the idea for the board as coming from the industry.⁴⁵ Arthur Seidelman, a

⁴²Letter from Jack Valenti, President and CEO, Motion Picture Association of America; Decker Anstrom, President and CEO, National Cable Television Association; and Eddie Fritts, President and CEO, National Association of Broadcasters, to William F. Caton, Secretary, Federal Communications Commission (Sept. 10, 1997), *available at* <http://transition.fcc.gov/vchip/revprop.html> (last visited Feb. 24, 2013) [hereinafter Revised Industry Proposal].

⁴³Letter from Jack Valenti, President and CEO, Motion Picture Association of America; Decker Anstrom, President and CEO, National Cable Television Association; and Eddie Fritts, President and CEO, National Association of Broadcasters, to William F. Caton, Secretary, Federal Communications Commission 4 (Jan. 17, 1997), *available at* <http://transition.fcc.gov/Bureaus/Cable/Public.Notices/1997/fc97034a.pdf> (last visited Feb. 24, 2013) [hereinafter Initial Industry Proposal].

⁴⁴*Id.* at Attachment: Parental Guidelines for America’s Television Programming: A Background Paper 7.

⁴⁵McIntyre Nov. 2012 interview, *supra* note 40; Telephone Interview with Kathryn Montgomery, Former TV Parental Guidelines Oversight Monitoring Board Representative for the Center for Media Education (Nov. 28, 2012) [hereinafter Montgomery interview].

representative of the Directors Guild of America involved in developing the rating system who went on to serve on the board, recalls that the idea for the board came up early in the process of developing the ratings.⁴⁶ In fact, the board was part of the industry's original age-based rating system proposal.⁴⁷ According to Kathryn Montgomery, who led advocacy group efforts to add content descriptors to the rating system and served on the board herself, the industry saw a need for a centralized board to oversee the rating system because the system itself was so decentralized, with many program producers, networks and stations involved in rating programs.⁴⁸ Seidelman recalls the industry also saw the board as serving functions such as coordinating educational campaigns and dealing with complaints about the system.⁴⁹ Jeff McIntyre, an advocacy group representative who served on the board for many years, said he believes that the industry likely saw the board as serving multiple functions, such as helping to gain acceptance of the rating system proposal by advocacy groups and the government as well as providing political cover and serving a public relations function when the industry came under fire for program content.⁵⁰

The original industry proposal called for the Oversight Monitoring Board to consist of nineteen members: a chair with the three television industry segments — the broadcast television industry, the cable industry, and the program production community — represented by six members each.⁵¹ Public interest groups raised concerns that a board composed solely of industry representatives was too unbalanced. To address these concerns, five members from the advocacy community, to be selected by the chair, were added to the board.⁵² According to an industry representative to the board, the three industry trade organizations — the NAB, NCTA and MPAA — each selects the six board members that will represent its industry.⁵³ MPAA President and CEO Jack Valenti

⁴⁶Telephone Interview with Arthur Seidelman, Former TV Parental Guidelines Oversight Monitoring Board Representative for the Directors Guild of America (Dec. 3, 2012) [hereinafter Seidelman interview].

⁴⁷Initial Industry Proposal, *supra* note 43, at 4.

⁴⁸Montgomery interview, *supra* note 45.

⁴⁹Seidelman interview, *supra* note 46.

⁵⁰*Id.*

⁵¹Initial Industry Proposal, *supra* note 43, at 4.

⁵²Federal Communications Commission, Report & Order, *Implementation of Section 551 of the Telecommunications Act of 1996, Video Programming Ratings* ¶ 23 (1998) (CS Docket No. 97–55) available at <http://transition.fcc.gov/Bureaus/Cable/Orders/1998/fcc98035.html> (last visited Feb. 24, 2013) [hereinafter FCC 1998 R&O].

⁵³Telephone Interview with Industry Representative to TV Parental Guidelines Oversight Monitoring Board who spoke on condition of anonymity (Dec. 11, 2012) [hereinafter Industry Board Representative interview].

served as the initial chair of the board. Since his death, the chair position has rotated among the three trade organizations approximately every two years. While the industry provides funding for the board, board members themselves are not paid, nor are they reimbursed for expenses, such as those incurred to attend board meetings.⁵⁴

Under the V-chip law, the FCC was assigned the task of deciding whether the industry had developed an acceptable rating system to work in conjunction with the V-chip.⁵⁵ In its acceptance of the industry's proposed rating system, the FCC noted the activities to which the board had committed itself: ensuring ratings are applied accurately and consistently, addressing complaints by the public, exploring attitudes about the system and its application, conducting and commissioning research on the system, and considering any needed changes to the system.⁵⁶ Emphasizing the industry's commitment to "independent, scientific research and evaluation of the rating system once the v-chip is in place," the FCC expressed its belief that:

[T]his independent research and evaluation is important to determine whether the rating system is working and providing parents with the information needed to make viewing choices for their children. We view this research and evaluation effort as an important opportunity for parents to assess the usefulness of the rating system and provide input on the consistency and accuracy of the ratings. We expect that the research and evaluation of the rating system, once the system has been in use, will allow for adjustments and improvements to the system. We view this commitment as an important element in the proposal.⁵⁷

In sum, then, the formation of the Oversight Monitoring Board and its stated activities, particularly the research it would conduct to evaluate and improve the rating system, were significant in the FCC's finding the industry's proposed rating system acceptable.

ADVANTAGES AND DISADVANTAGES OF SELF-REGULATION

A number of advantages of industry self-regulation over government regulation have been identified. Perhaps the biggest in terms of industry self-regulation of television violence in particular is that it does not

⁵⁴*Id.*

⁵⁵V-Chip Law, *supra* note 6, at § 551(e)(1).

⁵⁶FCC 1998 R&O, *supra* note 52, at ¶22.

⁵⁷*Id.*

raise the First Amendment constitutional issues that might be implicated by direct government regulation. The First Amendment protection afforded television violence limits government regulation.⁵⁸ First Amendment issues are not implicated, however, if the industry itself acts to restrict television violence. One benefit, then, of self-regulation can be “avoidance of constitutional issues.”⁵⁹

While the FCC played a role in approving the rating system proposed by the industry, the FCC’s duties in regards to the system were limited solely to determining whether it was acceptable.⁶⁰ Given the First Amendment protection accorded television violence, it is likely Congress chose to keep the FCC’s role in regard to the rating system limited to minimize the potential for successful First Amendment challenges to the V-chip law. Had the FCC been more directly involved in rating or regulating television program content, the likelihood of the law being struck down by courts on First Amendment grounds would have been significantly higher. Addressing the limited role to be played by the government and the FCC in regards to the V-chip and its associated rating system, Senator Kent Conrad, arguing in favor of the V-chip proposal during congressional debate, explained:

[The law] does not mandate a government rating system, or that a program be rated if a broadcaster refuses to rate programming. Nor does this legislation establish a government entity to rate television programming. . . . No penalties are established by this provision if a television broadcaster’s cable operator refuses to develop ratings, or apply whatever ratings or identification system is established voluntarily, or by the advisory committee under the FCC. The development of any rating or other television program identification is entirely voluntary — the effectiveness of the V-chip technology as an aid for parents rests with television broadcasters and cable operators, not the Federal Government.⁶¹

In addition to an avoidance of constitutional issues, self-regulation may provide other advantages. One advantage might be efficiency, as the industry may have knowledge of the subject matter to be regulated that is superior to the government’s knowledge of the subject.⁶² To put it another way, industry actors may have “a greater degree of expertise

⁵⁸See, e.g., Timmer, *supra* note 3, at 173–81.

⁵⁹Maria Matasar-Padilla, Note and Recent Development: *Music Lessons: What Adam Lambert Can Teach Us About Media Self-Regulation*, 29 CARDOZO ARTS & ENT. L.J. 113, 140 (2011).

⁶⁰V-Chip Law, *supra* note 6, at § 551(e)(1).

⁶¹142 CONG. REC. S702 (Feb. 1, 1996) (statement of Sen. Kent Conrad).

⁶²See Campbell, *supra* note 25, at 715–16.

and technical knowledge”⁶³ than government regulators do, or at least “better access to expertise in the area they are regulating.”⁶⁴ The television industry can be expected to have greater knowledge of television program content than the government. As a practical matter, the television industry also has a great advantage over the government in the rating of program content in that the industry has the ability to review programming before it is aired on television. A major problem with having the government or another third-party rate television programming is that — without significant changes to industry practices — parties outside the industry do not have access to programming in advance, which makes it difficult to ensure accurate rating of programs.⁶⁵ If the industry is rating programs, then this problem does not exist.

Self-regulation can also be less costly for the government, because the cost of developing and enforcing rules is borne by the industry. While the government may be involved in a supervisory capacity, this is still typically less costly than direct regulation.⁶⁶ After the approval of the rating system, there was no further direct formal government involvement with the system and thus no direct costs to the government associated with the implementation and operation of the system.

Self-regulation can also be more flexible than government regulation, since it is easier for an industry organization to modify its rules and policies in response to changed conditions than it is for a government agency such as the FCC, which must go through a notice and comment process to alter its rules, as well as gain the necessary consensus and political support for doing so.⁶⁷ In other words, self-regulation may consist of “less bureaucracy resulting in quick adaptation of rules.”⁶⁸ As will be discussed below, it does not appear that there have been many changes to the rating system since its implementation. However, if changes were to be made to the system, it would be easier for the industry to make such changes than it would for the government for the reasons just discussed.

Another potential benefit of self-regulation is that it may “foster voluntary compliance.”⁶⁹ Self-regulation may provide industry participants

⁶³Matthew J. Feeley, Note: *EU Internet Regulation Policy: The Rise of Self-Regulation*, 22 B.C. INT'L & COMP. L. REV. 159, 172 (1999).

⁶⁴Emily R. Caron, *Blood, Guts & the First Amendment: Regulating Violence in the Entertainment Media*, 11 KAN. J.L. & PUB. POL'Y 89, 94 (2001).

⁶⁵Telephone Interview with FCC Staff Member who spoke on condition of anonymity. [hereinafter FCC Staff Member interview].

⁶⁶See Campbell, *supra* note 25, at 716.

⁶⁷See *id.*

⁶⁸Feeley, *supra* note 63, at 172.

⁶⁹John Lunstroth, *Voluntary Self-Regulation of Complementary and Alternative Medicine Practitioners*, 70 ALB. L. REV. 209, 272 (2006) (notes omitted).

with greater incentives for compliance in that they “may be more willing to comply with rules developed by their peers rather than those acting from the outside.”⁷⁰ The industry was extremely reluctant to rate its programs and resisted the development of a program rating system.⁷¹ In the end, however, it was likely more palatable for the industry to implement and utilize a rating system which it had developed, rather than one developed by the government or other third parties. Further, the system that was instituted was similar to one with which the industry was already familiar, in that it was modeled on the MPAA motion picture rating system that has been used for decades.⁷²

While some of these benefits may be present in the self-regulatory system adopted by the television industry in response to the requirements of the V-chip law, it would seem that the biggest advantage of self-regulation over government regulation is that it avoids constitutional issues. While there may be other advantages to self-regulation in this context, it is likely that Congress’ reason for choosing an industry-developed and administered system over a government-run system had far more to do with an avoidance of First Amendment issues. This seems more likely to be the case when one considers the disadvantages of self-regulation.

There are criticisms associated with self-regulation as well. As one author observed, “Self-regulation has always presented the proverbial problem of the ‘fox guarding the henhouse.’”⁷³ To put it another way, critics of self-regulation argue that companies in business to make a profit cannot be trusted to regulate themselves to achieve goals intended to benefit the public rather than the companies themselves. According to Mark M. MacCarthy, broadcast industry self-regulation is seen by many as little more than “public relations instruments used to protect the interests of broadcasters and to prevent outside regulation.”⁷⁴ MacCarthy writes that the “conventional wisdom regarding broadcast self-regulation . . . is that ‘the broadcasting industry agrees to meaningful self-regulation only when its leaders are convinced that

⁷⁰Campbell, *supra* note 25, at 716.

⁷¹See, e.g., MONTGOMERY, *supra* note 41, at 47–48, 52–53. Arthur Seidelman, who represented the Directors Guild of American in the development of the program rating system, says that the industry was initially opposed to using a rating system due to fears of self-censorship and a chilling effect. Seidelman interview, *supra* note 46.

⁷²See, e.g., Graeme Browning, *No Oscar for Jack*, NAT’L J., Aug. 23, 1997, at 1688, 1689. See also *infra* notes 188–90 and accompanying discussion.

⁷³Steven Irwin, Scott Lane, Carolyn Mendelson & Tara Tighe, *Self Regulation of the American Retail Securities Market — An Oxymoron for What Is Best for Investors?*, 14 U. PA. J. BUS. L. 1055, 1067 (2012).

⁷⁴Mark M. MacCarthy, *Broadcast Self-Regulation: The NAB Codes, Family Viewing Hour, and Television Violence*, 13 CARDOZO ARTS & ENT. L.J. 667, 696 (1995).

the government will act if they don't.”⁷⁵ It does appear that the threat of government action was a factor motivating the industry. Had the industry failed to devise an acceptable rating system, the FCC would have been directed by law to appoint an advisory committee to develop one instead.⁷⁶ Further, there was considerable criticism of the industry's original age-based system for failing to provide information about program content.⁷⁷ Government pressure and the threat of further legislation appear to have helped motivate the industry to modify that system to include content-based ratings.⁷⁸ Since that time, however, government attention to the issue has waned, as has public action by the board.⁷⁹

One advantage of self-regulation was that the industry may have greater expertise over the subject matter to be regulated. Some critics of self-regulation, however, question whether that expertise will be used to benefit the public or instead will be used “to maximize the industry's profits.”⁸⁰ They argue that companies “will put their own profits ahead of the public interest,” resulting in self-regulatory standards that “will inevitably prove too lenient.”⁸¹ Emily R. Caron concurs, suggesting that “the industry will likely focus on tailoring the regulations to their business advantage, rather than working to enhance the ability of parents to prevent their children from being exposed to entertainment that the parents feel is inappropriate.”⁸² There is some reason to believe the industry may have put its own interests first in developing the rating system. As discussed previously, the industry was reluctant to add content descriptors to the system.⁸³ Further, some have suggested that the lack of detailed definitions for the ratings categories was an attempt by the industry to minimize the potential for complaints about the incorrect application of program ratings.⁸⁴

Angela J. Campbell writes that under self-regulation, industry “may be unwilling to commit the resources needed for vigorous self-enforcement” and that the industry may not have “the power to enforce

⁷⁵*Id.*

⁷⁶V-Chip Law, *supra* note 6, at § 551(e).

⁷⁷*See, e.g.,* Hall, *supra* note 39; Fleming, *supra* note 39; Stolberg, *supra* note 39.

⁷⁸*See supra* notes 39–42 and accompanying text; *infra* notes 167–70 and accompanying text.

⁷⁹Telephone Interview with Arnold Fege, President, Public Advocacy for Kids (Dec. 4, 2012) [hereinafter Fege interview]; McIntyre Nov. 2012 interview, *supra* note 40.

⁸⁰Campbell, *supra* note 25, at 717.

⁸¹Dennis D. Hirsch, *The Law and Policy of Online Privacy: Regulation, Self-Regulation, or Co-Regulation*, 34 SEATTLE UNIV. L. R. 439, 458 (2011).

⁸²Caron, *supra* note 64, at 94.

⁸³*See supra* notes 39–42 and accompanying text. *See also infra* notes 180–82 and accompanying text.

⁸⁴*See infra* notes 144 & 188 and accompanying text.

adequate sanctions.”⁸⁵ Dennis D. Hirsch writes that even if industry representatives do have the power to enforce sanctions, they may not possess the “incentive to enforce industry standards against their peers.”⁸⁶ All this may lead to lax enforcement of self-regulatory standards,⁸⁷ as industry self-regulators may be unwilling “to draw attention to non-compliance by their industry compatriots.”⁸⁸ The system designed by the industry contains no serious sanctions for those found to be in violation. It has been pointed out that “even if the Board did find that a broadcaster incorrectly rated a program, the Board has no authority to alter the rating or sanction the broadcaster.”⁸⁹ It also appears that the board has been reluctant to find violations in the application of the system,⁹⁰ and several advocacy group representatives to the board state that they are “unaware of any situation in which the Board has taken action against an incorrectly rated program.”⁹¹

Another potential problem with self-regulation is that the processes to develop, implement and enforce the regulations may lack “transparency compared to traditional rulemaking, meaning the public interest will not be adequately represented.”⁹² Accordingly, “[T]he private nature of self-regulation may fail to give adequate attention to the needs of the public or the views of affected parties outside the industry.”⁹³ It has been suggested that the industry was not sincere about considering input from advocacy groups, who were representing the interests of parents and children, in the development of the rating system.⁹⁴ It has also been observed that the board’s “membership and proceedings are secret, so there are no guarantees for transparency or effectiveness.”⁹⁵ In addition, advocacy group representatives to the board say they have little power to make changes to the board’s functioning or to the rating system itself

⁸⁵Campbell, *supra* note 25, at 718.

⁸⁶Hirsch, *supra* note 81, at 458.

⁸⁷See Lunstroth, *supra* note 69, at 272 (notes omitted).

⁸⁸Feeley, *supra* note 63, at 173.

⁸⁹Angela J. Campbell & Blake E. Reid, Brief of Amici Curiae American Academy of Pediatrics, American Academy of Child and Adolescent Psychiatry, Benton Foundation, Children Now, and United Church of Christ Office of Communication, Inc. in Support of Affirmance, *Federal Communications Commission v. Fox Television Stations*, On Writ of Certiorari to the United States Court of Appeals for the Second Circuit, No. 10-1293 (Supreme Court), at 27 (Nov. 9, 2011), available at <http://www.fcc.gov/document/fcc-usa-v-fox-et-al-no-10-1293-sup-ct-11> (last visited Feb. 24, 2013) [hereinafter 2011 Brief].

⁹⁰See *infra* note 125 and accompanying text.

⁹¹2011 Brief, *supra* note 89, at 27.

⁹²Hirsch, *supra* note 81, at 458.

⁹³Campbell, *supra* note 25, at 717–18.

⁹⁴See *infra* notes 176–79 and accompanying text.

⁹⁵*Barely Legal; TV Peddles Teen Sex to Girls; The V-Chip Doesn’t Help Because Ratings Aren’t Accurate*, WASH. TIMES, Dec. 21, 2010, at B2.

as they are substantially outnumbered by industry representatives. As a result, they feel they have little power.⁹⁶

Just as many of the advantages of self-regulation appear to be present in the context of the development and oversight of the TV Parental Guidelines program rating system, so are many of the disadvantages or problems of self-regulation. Thus, self-regulatory activities by the industry may be minimal without government attention or the threat of government action, the self-regulatory scheme might be said to put the industry's interests ahead of those of parents and children, enforcement of the system may be lax with no penalties for violation of the system, and the concerns of the public may not be adequately considered when the board's actions and decisions are not subject to scrutiny from the public or the government.

ACTIVITIES OF THE BOARD SINCE ITS FORMATION

Over the years, there have been many complaints that the board has failed to follow through on the commitments it made to the FCC. A number of advocacy groups asserted that while the FCC's approval of the rating system was based in part "on the creation of a Monitoring Board to hear complaints over potentially incorrectly rated programs . . . the Board has not effectively served this function."⁹⁷ In 2009, the Parents Television Council noted that while the NAB, NCTA and MPAA claimed that the "Board's efforts have resulted in meaningful improvements in the application of TV ratings and are ongoing," those industry organizations failed "to cite any examples of where public input into the process have resulted in any improvement in an individual rating or with the system itself."⁹⁸ Another criticism leveled against the board is that board proceedings and the identities of board members are not made public, preventing the public from gauging the board's effectiveness.⁹⁹ Further, the Children's Media Policy Coalition holds that "most parents are not aware that the Oversight Monitoring Board exists, much less that they can file complaints with it regarding the program rating system."¹⁰⁰

⁹⁶Fege interview, *supra* note 79.

⁹⁷2011 Brief, *supra* note 89, at 27.

⁹⁸Parents Television Council, Reply Comments, *Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming*, at 4 (May 18, 2009) (MB Docket No. 09-26), available at <http://apps.fcc.gov/ecfs/document/view?id=6520216869> [hereinafter PTC Reply Comments].

⁹⁹*See Barely Legal*, *supra* note 95, at B2.

¹⁰⁰Children's Media Policy Coalition, Comments, *Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video and Audio Programming* 9 (Apr. 16, 2009) (MB Docket No. 09-26), available at <http://apps.fcc.gov/ecfs/>

Thus, despite the board's promised activities to promote accuracy and consistency in the application of the TV Parental Guidelines, many advocacy groups charge that the board has actually done very little of what it promised.¹⁰¹ The FCC has exhibited similar concern. In 2011, the FCC contacted the board to learn what it was doing to meet "its public commitments," including the research the board had promised to conduct. The FCC noted that this research and other promised board activities were viewed as "an important element" in its acceptance of the industry's rating system proposal.¹⁰²

If the board has followed through on what it pledged to do, it has not made those activities or that information public. In fact, there is very little public information about the existence of the board or what it does. There do not appear to be any periodical or academic articles that cover the board and its activities in any depth.¹⁰³

Arnold Fege, who worked as an advocacy group representative in negotiating for changes to the television program rating system and served briefly as a board member, says that it is intentional that little is known about the board.¹⁰⁴ Dale Kunkel, who has conducted and published research on the television program ratings,¹⁰⁵ expresses the opinion that the industry has done all it can to keep the board and its activities as

document/view?id=6520213672 (last visited Feb. 24, 2013) [hereinafter CMPC Comments].

¹⁰¹See, e.g., *id.*; PTC Reply Comments, *supra* note 98.

¹⁰²Letter from William Lake, Chief, Media Bureau, Federal Communications Commission, to Gordon H. Smith, President and CEO, National Association of Broadcasters 2 (Dec. 9, 2011) (on file with author) [hereinafter 2011 Letter].

¹⁰³Google searches and searches of Academic Search Complete, Academic OneFile, Factiva, JSTOR, Lexis Nexis Academic, and other academic databases with the term "TV Parental Guidelines Oversight Monitoring Board" return few results. Sources that are identified through these searches typically only mention the board and do not discuss it in any detail. Many sources only identify the board as the source of ratings definitions. See, e.g., Eric Degans, *Teach Your Child What Makes TV Tick*, ST. PETERBERG TIMES, Apr. 6, 1997, at 3F; Tom Walter, *Rating the Ratings*, THE COMMERCIAL APPEAL, Feb. 27, 1997, at C1. Some other results mention the board in stories about cable network BET declining to use ratings. See, e.g., Esther Iverem, *BET Shuns Program Ratings System*, WASH. POST, Feb. 20, 1997, at B1. Other results are for comments filed in FCC proceedings, which were used as a source of substantive information on the board. See, e.g., The National Association of Broadcasters, the National Cable & Telecommunications Association, and the Motion Picture Association of America, Inc., Joint Reply Comments, *Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming* (May 18, 2009) (MB Docket 09-26), available at <http://apps.fcc.gov/ecfs/document/view?id=6520216897> (last visited March 22, 2013) [hereinafter Industry 2009 Reply Comments].

¹⁰⁴Fege interview, *supra* note 79.

¹⁰⁵See, e.g., Dale Kunkel, Wendy Jo M. Farinola, Kirstie Farrar, Edward Donnstein, Erica Biely & Lara Zwarun, *Deciphering the V-Chip: An Examination of the Television Industry's Program Rating Judgments*, 52 J. OF COMM. 112 (2002).

low-profile as possible.¹⁰⁶ If this has in fact been an objective of the board, then the board has been largely successful. In fact, one former board member said she hadn't heard anything about the board for years and had assumed that it no longer existed.¹⁰⁷ However, the board has not always been so low-profile. Fege said the board was public about its activities for a time, then went off the radar.¹⁰⁸ Kunkel concurred, stating that after its first few years, the board did little.¹⁰⁹

The board was more active in its early years, however, and began meeting shortly after the implementation of the rating system.¹¹⁰ One of the major initial concerns for the board was how to make information about the V-chip and program rating system public. To address that goal, public service announcements were screened by the board.¹¹¹ One former board member credits the cable industry with being particularly responsive to the board's efforts in this area, stating that cable companies did the most to try to educate the public about the system with its own campaigns.¹¹² In addition, Fege remembers discussions about the process the board should follow, such as whether decisions should be made by consensus or by majority vote.¹¹³ Other issues initially dealt with by the board involved the actual display of the ratings, such as how big the ratings would be, how long they should appear on the screen, and whether they would be transparent or overlaid on programs.¹¹⁴

Thus, it appears that the board was fairly active in the early years of the TV program rating system dealing with issues about the implementation of the system and how to educate the public about the system. Once the system had been implemented, however, it seems that the board became less active, raising complaints by several advocacy groups. If the board was active, it did little to make information about its activities or accomplishments public.

¹⁰⁶Telephone Interview with Dr. Dale Kunkel, Professor Emeritus, Department of Communication, University of Arizona (Dec. 4, 2012) [hereinafter Kunkel interview].

¹⁰⁷Telephone Interview with Brooke Johnson, Former Representative for A&E Television Networks to the TV Parental Guidelines Oversight Monitoring Board (Dec. 13, 2012) [hereinafter Johnson interview]. Even though Johnson was one of the initial representatives to the board, she never played a particularly active role. She participated in one or two board meetings *via* teleconference and never attended a meeting in person. Further, in her current position at Food Network, ratings issues rarely arise as the network's programming is generally appropriate for a family audience.

¹⁰⁸Fege interview, *supra* note 79.

¹⁰⁹Kunkel interview, *supra* note 106.

¹¹⁰Montgomery interview, *supra* note 45.

¹¹¹Seidelman interview, *supra* note 46.

¹¹²Fege interview, *supra* note 79.

¹¹³*Id.*

¹¹⁴Johnson interview, *supra* note 107.

Receiving and Responding to Consumer Complaints

In its 1997 proposal to the FCC, the industry stated that one of the board's duties would be to "address complaints and requests from the public about the guidelines and their implementation."¹¹⁵ More recently, the TV Parental Guidelines Web site states that the board "reviews complaints about specific program ratings to help ensure accuracy."¹¹⁶ A primary duty of the board, then, is to deal with complaints from the public about the accuracy of program ratings. Educational campaigns about the V-chip and the TV Parental Guidelines do discuss complaints about ratings.¹¹⁷ The board's Web site about the TV Parental Guidelines provides information on where to address complaints.¹¹⁸ The board also sends a representative to the annual Parent Teacher Association conference, who provides literature that can be distributed in schools with information for parents about making complaints.¹¹⁹

In 2009, the industry asserted that the board "meets regularly to review complaints and, when there are widespread and verifiable complaints about a particular show's rating, may decide whether that rating is appropriate."¹²⁰ This suggests that the board only reviews the accuracy of a program's rating when there are "widespread and verifiable complaints" about the rating. Indeed, as one former board member described it, "[T]he industry wants to wait until there are hundreds of thousands of letters complaining about a specific show."¹²¹ According to the industry, there have been "widespread and verifiable complaints about only a handful of programs since the creation of the Guidelines."¹²² Formal action by the board to investigate the accuracy of a complained-about rating, then, seems to be a relatively rare occurrence. In other situations, when fewer complaints are received, it does not appear that the board takes formal action. In fact, according to the Children's Media

¹¹⁵Initial Industry Proposal, *supra* note 43, at 4.

¹¹⁶The TV Parental Guidelines, TV Ratings Oversight, <http://tvguidelines.org/> (last visited Feb. 24, 2013) [hereinafter TV Parental Guidelines Website].

¹¹⁷Industry Board Representative interview, *supra* note 53.

¹¹⁸TV Parental Guidelines Website, *supra* note 116.

¹¹⁹Industry Board Representative interview, *supra* note 53.

¹²⁰National Association of Broadcasters, National Cable & Telecommunications Association, & Motion Picture Association of America, Inc., Joint Comments, *Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming*, at 9 (Apr. 16, 2009) (MB Docket No. 09-26), available at <http://apps.fcc.gov/ecfs/document/view.action?id=6520213659> (last visited Feb. 24, 2013) [hereinafter Industry 2009 Comments].

¹²¹Don Aucoin, *Despite Vow, Many TV Shows Lack Rating Labels, Study Says*, BOSTON GLOBE, Sept. 25, 1998, at A1.

¹²²Industry 2009 Comments, *supra* note 120, at note 21.

Policy Coalition, in such situations the board simply refers complaints to the particular network that aired the offending programs.¹²³

The board's description of its complaint adjudication process states that when the board receives multiple complaints about a program's rating, the chair decides whether to bring those complaints to the board. If, however, the complaints are widespread, the chair calls a meeting for the board to review the rating. During such a meeting, the network that aired the program can "present its case for the program's rating." If a majority of the board members present vote that the program was inaccurately rated, the chair will notify the program's producer or network of that determination. If the producer or network agrees with the board's conclusion "and agrees to change the rating on future airings, this issue is concluded. However, if the distributor or network argues that the Board's decision is in error and decides not to change the rating, the Board will make its views public."¹²⁴

It appears the board has reviewed the accuracy of the rating of only one program in the past several years, in which case the board upheld the accuracy of the assigned rating. According to Jeff McIntyre, who has served on the board as an advocacy group representative for many years and who is one of very few board members to publicly acknowledge his or her role and speak about the board's operation, the board voted on the accuracy of a complained-of program rating only once during his tenure. At issue were episodes of the TV series *Damages*. Episodes of the series had been edited for syndication, with those episodes airing earlier at night than and within a few days of unedited versions of the same episodes. The edits made in the syndicated versions trimmed some audio and just seconds of video from some more explicit scenes, and less stringent ratings were assigned to the syndicated versions. While McIntyre acknowledged that making these judgments about the accuracy of the assigned ratings was somewhat subjective, he observed that the board's vote was largely split on industry/advocacy group lines, with the industry generally voting to approve the ratings assigned to the complained-of episodes.¹²⁵

According to one industry representative to the board, in the early years, the board expected ensuring rating accuracy and consistency to be a complaint-driven process, with the board getting many complaints about program ratings. In fact, it was expected that reviewing and

¹²³CMPC Comments, *supra* note 100, at 6–7.

¹²⁴Memorandum from the TV Parental Guidelines Oversight Monitoring Board to the Author (June 2012) (on file with the author) [hereinafter 2012 Board Memo].

¹²⁵Telephone Interview with Jeff McIntyre, Member, TV Parental Guidelines Oversight Monitoring Board (July 17, 2012) [hereinafter McIntyre July 2012 interview].

adjudicating complaints would be the primary means of helping to ensure accurate and consistent application of the ratings. As it turned out, however, the board does not get that many complaints.¹²⁶ The board itself reports that it receives, on average, 300 questions or messages per year, but only “a relatively small number” of those are complaints. The remaining communications cover “a broad range of topics including general research questions by students or viewers, requests for a show to be put back on the air, questions regarding commercials, and questions about the location of certain channels.”¹²⁷ The Children’s Media Policy Coalition confirms this, observing that some of the complaints directed to the board deal with “billing, satellite function, and political or religious views.”¹²⁸ According to one industry source, viewers are more likely to complain about the cancellation or preemption of programs, such as a program starting late because of a football game overrun, for example, than they are about the accuracy of a program’s rating.¹²⁹

This does not mean there are no complaints about program ratings. According to an industry board member, one common complaint involves the same show or episodes of a show getting different ratings. However, as the industry explains it, the different ratings can reflect edits made to the same episode of a show to air at different times or on different channels. For example, an episode of *Sex and the City* may air on HBO unedited and be assigned a TV-MA rating. That same episode may be edited to air on TNT, where it might be assigned a TV-14 rating. Further edits may be made for that episode to air on a broadcast television station, where it could be assigned a TV-PG rating. Each rating can be appropriate since different amounts of objectionable content are edited for the show to air in the different venues.¹³⁰

Based on this, it appears the board does little with complaints other than refer them to the network that aired the offending program. Complaints are only required to be considered by the board when complaints about a particular program’s rating are widespread and verifiable, a standard which seems to be rarely met. The lack of board action in this area may be somewhat attributable to the fact that the board does not receive many complaints that actually deal with the accuracy of the ratings applied to particular programs.

¹²⁶Industry Board Representative interview, *supra* note 53.

¹²⁷2012 Board Memo, *supra* note 124.

¹²⁸CMPC Comments, *supra* note 100, at 9.

¹²⁹Industry Board Representative interview, *supra* note 53.

¹³⁰*Id.*

Ensuring Accuracy and Consistency in Application of the Ratings

Another of the board's primary duties is to ensure accuracy and consistency in the application of the TV Parental Guidelines.¹³¹ Little information about how the board does so has been made public, however. The first public discussion of the board's efforts in this area appears to have occurred in 1999, two years after the board's formation. At that time, board chairman Jack Valenti stated that the board had considered ratings for children's programs, particularly whether the "Y-7 rating for fantasy violence on children's shows was being applied properly." To implement what the board had discussed, Valenti said that the results of the board's discussions would "be shared directly with the distributor/producer of the programs reviewed."¹³² No other information about these discussions or their results seems to have been made public, so it is unclear what the board specifically did to ensure accuracy in the rating of children's programs.

The board's discussion on the Y-7 rating was based on research conducted by Dr. Dale Kunkel with funding from the Kaiser Family Foundation on the use of content descriptors in rating programs.¹³³ The research concluded that content descriptors were not being applied to many programs that merited them. Further, the programs that lacked content descriptors for violence, for example, did not just contain isolated acts of violence. Rather, these were programs containing high levels of violence. The implication of this for Kunkel was that the rating system as it was operating at the time was worse for parents that relied on it than no rating system whatsoever because of the large amount of objectionable content that was not rated under the system and thus not blocked by the V-chip.¹³⁴

Kunkel recalls presenting this research to some eight to ten board members who were present for a meeting, along with some staff, and other board members participating *via* conference call. Kunkel summarized the findings of the study for the board and showed some scenes of children's programs with high levels of violence and yet no rating for violence. One of these scenes from a children's program involved the use of computer graphics to put the viewer in a helicopter with robots that

¹³¹Initial Industry Proposal, *supra* note 43, at 4.

¹³²Warren's Cable Regulation Monitor, Jan 25, 1999, LexisNexis Academic.

¹³³This research was later published: Kunkel et al., *supra* note 105.

¹³⁴Kunkel interview, *supra* note 106. Some of the findings are covered in DALE KUNKEL ET AL., RATING THE TV RATINGS: ONE YEAR OUT, EXECUTIVE SUMMARY (1998), available at <http://www.kff.org/entmedia/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=14647> (last visited Feb. 24, 2013).

were hunting and shooting wild game on another planet. While hunting, one of the robots turned to the camera, laughed and said he loved shooting prey that couldn't shoot back. Another scene Kunkel screened for the board was from *Power Rangers* and depicted a character in a Godzilla-like outfit marching through a town shooting flames out of his hands and setting buildings on fire. Neither of these shows featured a rating for violence. Kunkel was not present for board discussion of actions that should be taken in response to the findings of his research,¹³⁵ but Valenti's comments to the press suggest the board came to some conclusions that were shared with program producers and distributors.¹³⁶

Other than the brief statement by Valenti to the press, little information about the board's activities in this area appears to have been made public until ten years later. In 2009, the NAB, NCTA and MPAA told the FCC, "In recent years, the Board has redoubled its efforts to ensure ratings are applied consistently across channels."¹³⁷ These efforts, according to the industry, had "resulted in meaningful improvements in the application of TV ratings and are ongoing."¹³⁸ The industry described one of these efforts as involving ongoing discussions with standards and practices executives at various channels which resulted "in a more common and consistent understanding of how ratings should be applied." The industry provided an example:

The Board's ongoing conversations revealed that companies had been applying the content descriptor portion of the TV ratings differently. Some companies were applying the descriptors to explain why a program was assigned a particular age-based rating. For example, if a program was rated TV-PG because it contained moderate levels of violence, those companies added a "V" content descriptor to the base rating. Other companies were applying the descriptors only to identify *the most intense* levels of content included in the age-based rating. These companies rated a program TV-PG, with no descriptor, if it contained moderate violence, language, sexual dialogue, and/or sexual activity, and added a content descriptor to the age-based rating only when the specific content was at the high end of the moderate range.

The Monitoring Board worked with the cable and broadcast industries to address this inconsistency, and the industries agreed to apply the content descriptors in a consistent manner to explain the age-based rating. This approach has resulted in the use of many more descriptors in

¹³⁵Kunkel interview, *supra* note 106.

¹³⁶See Warren's Cable Regulation Monitor, *supra* note 132.

¹³⁷Industry 2009 Comments, *supra* note 120, at 9.

¹³⁸*Id.* at 3.

programming today, and provides viewers with more information about the kind of content they should expect to see in a show because the reason for the rating is provided.¹³⁹

In addition to this example of how the board's efforts promoted consistency in the application of program ratings, the industry provided the FCC with an explanation as to why some programs may appear to be inconsistently rated when in fact they are not. The situation, discussed earlier,¹⁴⁰ involves the application of different ratings to different versions of the same program. As the industry explains, "[M]ovies and television series may be edited differently depending on whether they are carried on a premium cable, basic cable, or broadcast service. In addition, different versions of the same program may be created to address differences in target audiences or day parts."¹⁴¹ The industry explains that in these circumstances, the different ratings are appropriate "given the specific content in each version."¹⁴²

From the examples provided by the industry to the FCC, the board seems to have taken some action over the years to promote more accurate and consistent application of program ratings. For example, the board took action to promote more consistent application of content descriptors of programming after learning that they were being applied inconsistently. This action would help make program ratings more informative for parents. However, the board does not publicly point to any other actions to promote consistent or accurate application of ratings. Nevertheless, it appears that the board may take actions behind the scenes to promote accuracy and consistency through discussions with standards and practices personnel about applications of the ratings in different circumstances.

Provide Information to Producers and Other Program Distributors Concerning the Guidelines

The board initially promised the FCC it would provide information to producers and program distributors about the rating system.¹⁴³ It appears that the board has taken some action in this area over the years, but has, for the most part, declined to make the information public. In the early years of the rating system, the board discussed and fleshed

¹³⁹*Id.* at 9–10.

¹⁴⁰*Supra* note 130 and accompanying text.

¹⁴¹Industry 2009 Reply Comments, *supra* note 103, at note 16.

¹⁴²*Id.* at 7.

¹⁴³Initial Industry Proposal, *supra* note 43, at 4.

out the meanings of the various ratings categories. According to Arthur Seidelman, former DGA representative to the board, the results of these discussions were communicated to the standards and practices departments of broadcast and cable networks, but were not communicated to the public. Seidelman says that the reason for not communicating the information to the public is that the board wanted to provide the networks some flexibility in the application of the ratings. Making detailed standards for the application of the various ratings would limit that flexibility. In addition, Seidelman said some of the board's reluctance to provide detailed definitions for the ratings categories is that doing so could give groups that want to protest program ratings ammunition to use if the ratings were not applied according to detailed rules made known to the public.¹⁴⁴

As previously demonstrated, the board has provided information to producers and program distributors about the guidelines, which may have helped promote accuracy and consistency in ratings application. For example, the research presented by Kunkel to the board on the use of the violence content descriptor in TV-Y7-rated programs appears to have led to the board communicating with program producers and distributors to help ensure that ratings were properly applied. Also, the example provided by the industry to the FCC about the action the board took after learning content descriptors were being applied inconsistently would seem to have promoted more consistent application of the ratings.

An industry representative serving on the board provided other examples of similar activity. The board member stated that the board regularly facilitates discussions between standards and practices personnel at various networks about questions and issues that have arisen as they attempt to apply ratings to programs. There is not a great deal of involvement by board members in these discussions. Rather, the board's role is more to help facilitate the discussions among the industry personnel applying the ratings.¹⁴⁵ Some of the issues that have been considered in this manner involve where the boundaries are between the different age-based rating categories, what language is appropriate in the different age-based categories, and what effect bleeping language or covering the lips of someone using foul language should have on the ratings assigned to a program.¹⁴⁶ The results of these discussions, however, are generally not made public. One reason offered for this by the industry representative to the board is that providing detailed definitions of the various ratings categories is difficult due to the importance

¹⁴⁴Seidelman interview, *supra* note 46.

¹⁴⁵Industry Board Representative interview, *supra* note 53.

¹⁴⁶*Id.*

of context and the inherent subjectivity in making some of these decisions. Also, the industry board member expressed the view that too much information on ratings category definitions could confuse parents about the meanings of the ratings rather than help them understand them better.¹⁴⁷

Another situation in which the board might take a more active role involves a network hiring a new standards and practices person without much training. In such a case, the board might help provide training to that person on the rating system and how to apply the ratings.¹⁴⁸ Thus, it seems that the board has taken action over the years to work with program producers, program distributors, and standards and practices personnel to facilitate discussions about issues related to the application of the ratings. In at least some of these cases, it appears that these actions have helped the board achieve another objective: promoting the accurate and consistent application of the ratings.

Conducting Research

In 1997, the industry pledged that the board would “regularly hear the views of parents” to learn about their attitudes toward the rating system and its operation. In addition, the board promised it would “regularly conduct focus groups and commission quantitative studies to determine whether the Guidelines are in fact providing useful information to parents, and will consider any needed changes to them.”¹⁴⁹ If the board has conducted or sponsored much of this type of research, however, it has done little to make such efforts known.

Until 2012, the only public discussion before Congress or the FCC of research conducted by the board occurred in a 2004 congressional hearing. There, Anthony Podesta, identifying himself as “Executive Secretariat” of the board, testified, “We know from our own polling and from surveys done by organizations like the Kaiser Family Foundation, that parents find the system helpful.”¹⁵⁰ However, nothing more about this polling was released to the public, nor was any other board-sponsored

¹⁴⁷*Id.*

¹⁴⁸*Id.*

¹⁴⁹Initial Industry Proposal, *supra* note 43, at 4.

¹⁵⁰*Effectiveness of Media Rating Systems: Hearing Before the Senate Comm. On Commerce, Science & Transportation*, 108th Cong. (2004) (statement of Anthony Podesta, Executive Secretariat, TV Parental Guidelines Oversight Monitoring Board), available at http://commerce.senate.gov/public/index.cfm?p=Hearings&ContentRecord_id=ee74fa34-86fa-4db8-8a13-f31b9d8e3196&Statement_id=6c45c10b-1017-4212-ad1c-86f32adf168&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=b06c39afe033-4cba-9221-de668ca1978a&MonthDisplay=9&YearDisplay=2004 (last visited Feb. 24, 2013).

research released for the next several years. According to one industry board member, the board conducted research at the beginning of the rating system's implementation, but did not conduct or sponsor any other research until 2011, the results of which were made public in 2012.¹⁵¹

In 2012, the board, for the first time, publicly announced the results of research it had sponsored, the key findings of which it delivered to the FCC. This research consisted of two Internet-based surveys conducted in late 2011 by Public Opinion Strategies and Hart Research Associates. One survey was of 1,001 parents of children aged 2 through 17, and the other was of 500 teens, aged 13 to 17. The research focused on the respondents' awareness of, usage of, and views on the TV rating system. Generally, the results were quite favorable for the board and the system. Among some key findings were that "93 percent of parents and 82 percent of teens said they are aware of the TV ratings system, . . . 69 percent of parents view the TV ratings system favorably, [and] 68 percent of parents say they use the TV ratings system."¹⁵²

It appears then that the quantity of research sponsored or conducted by the board, at least in terms of what has been released to the public, has been very limited, with the results of only one study being made publicly available in the first fifteen years of the board's existence. Further, that research focused only on the public's views toward and usage of the system. It did not examine whether ratings were being applied accurately, consistently or uniformly, which was to be one of the primary concerns of the board.

While the board's research efforts appear quite limited, other parties have conducted such research and made the findings known. Some of these studies also focused on awareness, understanding and usage of the V-chip and rating system. For example, a 2007 Kaiser Family Foundation Study found that while most parents are aware of the V-chip and TV ratings, many them didn't understand the meaning of the various ratings.¹⁵³ On the other hand, a 2010 Rasmussen Reports survey found

¹⁵¹Industry Board Representative interview, *supra* note 53.

¹⁵²Media Release, TV Parental Guidelines Monitoring Board, New Study Reveals Americans Believe TV Parental Guidelines Are Effective (Apr. 6, 2012), *available at* <http://www.ncta.com/ReleaseType/MediaRelease/New-Study-Reveals-Americans-Believe-TV-Parental-Guidelines-Are-Effective.aspx> (last visited Feb. 24, 2013) [hereinafter 2012 Research Release].

¹⁵³VICTORIA RIDEOUT, PARENTS, CHILDREN & MEDIA: A KAISER FAMILY FOUNDATION SURVEY 8 (2007), *available at* <http://www.kff.org/entmedia/upload/7638.pdf> (last visited Feb. 24, 2013).

that 60% of those surveyed with children at home said the “the current TV rating system is an effective way to warn users.”¹⁵⁴

Many other studies on the accuracy of the ratings applied to programs found that ratings are often applied inaccurately. One 2002 study found that while age-based ratings were generally applied accurately, content descriptors were lacking in a large majority of programs with content calling for the application of such descriptors.¹⁵⁵ A 2004 study found the presence of more objectionable language in programs rated TV-PG than those rated TV-14, “[J]ust the opposite of what these age-based ratings would lead a viewer to believe.”¹⁵⁶ A study by the Parents Television Council in 2005 found “that every network had problems with the accurate and consistent application of content descriptors.”¹⁵⁷ A similar study by the PTC in 2007 found that the broadcast networks were inconsistently using content descriptors in prime time programming, with “[t]wo-thirds (67%) of the shows reviewed . . . containing potentially offensive content lack[ing] one or more of the appropriate content descriptors.”¹⁵⁸ Publicly available studies exist then that suggest there could be problems with the accuracy of TV ratings. If the board has ever conducted such studies, it has not made the results publicly available.

According to board member Jeff McIntyre, the industry has pointed to the existence of third-party research on the rating system as negating or reducing the need for the board to conduct its own research.¹⁵⁹ The board itself observes that “[n]umerous research studies” on the TV rating system have been conducted. The board reports that it “was briefed on a number of these studies . . . and considered this information during its ongoing deliberations.”¹⁶⁰ As was discussed above, Kunkel reported the findings of his research on the use of the violence content descriptor in children’s programming to the board.¹⁶¹ In addition, an industry

¹⁵⁴Press Release, TV Watch, Poll Shows Parents Use Tools and Believe They Are Effective (Aug. 4, 2010), *available at* <http://www.televisionwatch.org/151/poll-parents-use-tools> (last visited Feb. 24, 2013).

¹⁵⁵Kunkel et al., *supra* note 105, at 136.

¹⁵⁶Barbara K. Kaye & Barry S. Sapolsky, *Offensive Language in Prime-Time Television: Four Years After Television Age and Content Ratings*, 48 J. OF BROADCASTING & ELECTRONIC MEDIA 554, 563–64 (2004).

¹⁵⁷Parents Television Council, The Ratings Sham 1 (2005), *available at* <http://www.parentstv.org/PTC/publications/reports/tvratings2005/study.pdf> (last visited Feb. 24, 2013).

¹⁵⁸Parents Television Council, The Ratings Sham II 2 (2007), *available at* <http://www.parentstv.org/PTC/publications/reports/ratingsstudy/RatingsShamII.pdf> (last visited Feb. 24, 2013).

¹⁵⁹McIntyre July 2012 interview, *supra* note 125.

¹⁶⁰2012 Board Memo, *supra* note 124.

¹⁶¹*Supra* notes 133–35 and accompanying text.

representative to the board states that the board considered and made use of research sponsored by the Kaiser Family Foundation. That research showed that while the level of awareness of the existence of the V-chip and rating system was relatively high, there was a lack of understanding about some aspects of the V-chip and of the rating system's content descriptors. This information was used by the board to help devise and focus educational campaigns on the system.¹⁶²

In sum, then, it appears that the board has made some use of third-party research on the TV Parental Guidelines, although it seems to have been done mainly in the early years of the system. As far as sponsoring or conducting its own research, the board did little, if anything, until 2011, when it sponsored the survey research on the public's usage and satisfaction with the rating system. In its pledge to the FCC, however, the board promised that it would regularly conduct research on the rating system, and in that regard, the board's actions seem lacking.

CONDITIONS PROMOTING EFFECTIVE SELF-REGULATION

Several factors can help foster successful industry self-regulation. As one scholar has observed, "[S]elf-regulation is most effective when accompanied by 'a huge threat of legislation' as well as by marketplace incentives."¹⁶³ Other researchers concur, concluding that self-regulation is most effective when "the threat of external regulation" is present.¹⁶⁴ Angela Campbell has observed that in many cases of media industry self-regulation, "[A] major motivating factor was fear that if the industry failed to act on its own, the government would regulate. Where the threat of government regulation receded . . . self-regulation failed."¹⁶⁵ Thus, the threat of government regulation can be a major motivating factor for the industry. There was a very concrete threat of government regulation should the industry fail to develop a rating system to work in conjunction with the V-chip. If the industry had failed to come up with an acceptable rating system within a year of the implementation of the V-chip law, the FCC would have been directed by law to appoint an advisory committee to develop such a system.¹⁶⁶ Such a threat was likely a major force motivating the industry to develop an acceptable rating system.

¹⁶²Industry Board Representative interview, *supra* note 53.

¹⁶³Catherine Louisa Glenn, Note, *Protecting Health Information Privacy: The Case for Self-Regulation of Electronically Held Medical Records*, 53 VAND. L. REV. 1605, 1629 (2000).

¹⁶⁴*Id.* at 1632–33.

¹⁶⁵Campbell, *supra* note 25, at 758.

¹⁶⁶V-Chip Law, *supra* note 6, at § 551(e).

After the original age-based rating system was unveiled, it again is likely that the threat of additional government action motivated the industry to amend it.¹⁶⁷ The threat of the FCC being required to appoint an advisory committee to develop a rating system remained, since the FCC did not make findings on the acceptability of the age-based rating system. Further, there was action in Congress at the time likely intended to put pressure on the industry to revise the rating system. While the negotiations that led to the addition of content-based ratings were taking place, Kunkel worked with Senator Ernest Hollings' staff on a "rate right or late night" legislative proposal, which would require programs with violent content not rated for violence to be aired during the late night hours. Kunkel said the purpose of the proposal was to pressure the industry to add content descriptors to the rating system.¹⁶⁸ Kunkel also recalls that the Senate Commerce Committee held a hearing in March 1997 on how well ratings were working, also with the purpose of pressuring the industry.¹⁶⁹ Furthermore, it appears that part of the motivation for the industry's agreeing to add content descriptors to the rating system is that by doing so it could remove the threat of future legislation, at least for a time. According to one source, "As part and parcel of the ratings agreement, the television industry asked for, and got, letters of 'assurance' from several congressional leaders that Congress won't take up the ratings issue for three years."¹⁷⁰

One potential explanation for the board's seeming lack of activity in the last several years, then, may have to do with the fact that there's been little serious threat of legislation or other significant government action to regulate television violence. While the possibility of the FCC appointing an advisory committee to develop a rating system likely helped motivate the industry to itself devise an acceptable rating system, the threat of FCC action subsided once the FCC found the industry rating system acceptable. That is because the FCC's authority over the rating system was limited to a determination of its acceptability.¹⁷¹ Once the FCC determined the industry system acceptable, it had no further formal role to play in regards to the accurate or consistent application of the rating system, and thus provided less of a motivating force than it had.

Nevertheless, even informal action by the FCC may be enough to motivate the industry to act. While the board sponsored research in

¹⁶⁷See *supra* notes 39–42 and accompanying text.

¹⁶⁸Kunkel interview, *supra* note 106.

¹⁶⁹*Id.*

¹⁷⁰Browning, *supra* note 72, at 1691.

¹⁷¹FCC Staff Member interview, *supra* note 65.

late 2011, the results of which it released in 2012,¹⁷² it is possible this research was conducted in response to FCC attention to the issue. In May 2011, FCC staff met with the board to learn what the board had done to follow through on its commitment to conduct research on the rating system.¹⁷³ Based on the timing of the two events and the fact that the board had apparently not conducted or sponsored any research since it was created in 1997, it seems possible that the research may have been conducted as a response to the FCC's showing interest in the issue, suggesting that government attention may provide the impetus for self-regulators to take action. However, it appears that both knowledge of the board and interest in its activities has waned at both the FCC and in Congress since the implementation of the rating system, removing some of the motivation for the board to be more active.¹⁷⁴

Another condition that can facilitate effective industry self-regulation is transparency, specifically that:

[T]he self-regulatory organization should engage in its rulemaking on the record, with notice and opportunity for comment given to all affected groups to the extent possible, with particular emphasis on notice to non-members who might be adversely affected by the proposed rule, and responses to all significant comments required in the rulemaking record.¹⁷⁵

This was not done in the development of the rating system, or in the oversight of the system since its implementation. However, the industry consulted with advocacy group representatives in developing the system, though it may be that at least some of these consultations were for appearances' sake rather than to sincerely seek and consider those groups' input.

Kathryn Montgomery, who was involved in the development of the rating system as a representative for the advocacy group Center for Media Education, wrote, "As part of the legislative agreement on TV ratings, the industry was to hold a series of meetings with industry groups, academic experts, and health professionals as it developed the new system for labeling programs."¹⁷⁶ While such meetings were held, Montgomery doubts that the industry was always sincere about soliciting those groups' input. In December 1996, for example, MPAA head

¹⁷²*Supra* note 152 and accompanying text.

¹⁷³2011 Letter, *supra* note 102, at 1.

¹⁷⁴Fege interview, *supra* note 79; McIntyre Nov. 2012 interview, *supra* note 40.

¹⁷⁵Campbell, *supra* note 25, at 761 (discussing Douglas C. Michael, *Federal Agency Use of Audited Self-Regulation as a Regulatory Technique*, 47 ADMIN. L. REV. 171, 245 (1995)).

¹⁷⁶MONTGOMERY, *supra* note 41, at 52.

Jack Valenti held a meeting with “representatives from more than a dozen educational institutions and nonprofit advocacy groups.”¹⁷⁷ While the purpose of the meeting was supposed to be to “solicit ‘input’ from the groups, a story leaked to the *Washington Post* ran that same morning, revealing that the industry already had come up with its final plan for the new, age-based system.”¹⁷⁸ While Valenti, who led the meeting, denied this was the case, Montgomery wrote, “[I]t was obvious that the industry had no intention of changing its plans” for an age-based rating system.¹⁷⁹

With the age-based rating system being labeled as insufficient by regulators and advocacy groups, the industry was forced to work with advocacy groups to revise its proposal. In fact, the FCC told the industry to meet with advocacy groups in making such revisions.¹⁸⁰ While the industry may have been reluctant to do this, it appears that advocacy groups were able to secure some changes to the rating system. In terms of the original age-based rating system, it appears the TV-Y7 rating was added “to appease family advocacy groups’ concerns.”¹⁸¹ Advocacy groups also helped secure the addition of content-based ratings to the system, and they influenced what those content descriptors would be. For example, Kunkel says that Valenti took the position that the industry would not apply a rating for violence to children’s programming, the reason being that violence in children’s programming was only make-believe. Pressure from advocacy groups led the industry to compromise on this issue, however, by agreeing to the use of the “FV” rating for “fantasy violence” in children’s programming.¹⁸² So it appears that interested parties were able to have some impact on the ultimate form of the rating system, though not in the manner thought to best facilitate effective self-regulation: on the record, with notice and opportunity to comment, and responses on the record to all significant comments.

In addition to consultation with interested parties, another desirable characteristic for a system of self-regulation is that there be “a series of clearly written codes.”¹⁸³ Moreover, successful self-regulation has been found to be more likely where the rules to be promulgated consisted

¹⁷⁷*Id.* at 54.

¹⁷⁸*Id.*

¹⁷⁹*Id.*

¹⁸⁰McIntyre Nov. 2012 interview, *supra* note 40.

¹⁸¹Browning, *supra* note 72, at 1689.

¹⁸²Kunkel interview, *supra* note 106.

¹⁸³Janet Hoek & Ninya Maubach, Symposium, *Self-Regulation, Marketing Communications and Childhood Obesity: A Critical Review from New Zealand*, 39 LOY. L.A. L. REV. 139, 143 (2006).

of “relatively narrow rules related to output-based standards.”¹⁸⁴ Conversely, self-regulatory programs “with the most subjective standards experienced the most difficulty in implementation.”¹⁸⁵ In other words, self-regulation is more likely to be successful when standards are “concrete and measurable” than when they are “vague and subjective.”¹⁸⁶

One may argue that the rating system is clearly written, in that it states, for example, that programs rated TV-PG may contain moderate violence, ones rated TV-14 may have intense violence, and ones rated TV-MA may have graphic violence.¹⁸⁷ However, the system is not very detailed, as it provides no guidance on how to distinguish moderate violence from intense violence from graphic violence. Kunkel says that Valenti wanted a system like the MPAA motion picture rating system, in which it wasn’t necessarily clear why a particular rating was assigned. Such a system provides advocacy groups with less reason to target or boycott programming than a system that provided very specific ratings for shows with high levels of sex or violence.¹⁸⁸

In defense of a television rating system based on the movie rating system, Valenti was quoted as saying, “[T]he more complex a ratings system is, the fewer parents there will be who can decipher it and use it. And if most people can’t use it, what good will it be?”¹⁸⁹ According to Tony Podesta, co-founder and chairman of the Podesta Group, a lobbying organization which represents the board, the industry held that the movie ratings were the best model for television ratings, “in part because everybody understands them and in part because they’re so easy to use.”¹⁹⁰ Thus, while there may be some reasons in favor of the system that was ultimately developed, it appears to be lacking some of the characteristics that make successful self-regulation more likely. First, the rating system is not clearly written, in that the definitions of the ratings categories provide little detailed guidance on how to interpret those definitions and apply the ratings to different types of content. Further, there is a certain degree of subjectivity in making rating determinations, a fact recognized by both advocacy group and industry representatives to the board.¹⁹¹ However, having a system that is not clearly written, at least not in the sense of providing clear guidance

¹⁸⁴Campbell, *supra* note 25, at 761 (quoting Michael, *supra* note 175, at 192).

¹⁸⁵*Id.*

¹⁸⁶*Id.*

¹⁸⁷TV Parental Guidelines Website, *supra* note 116.

¹⁸⁸Kunkel interview, *supra* note 106.

¹⁸⁹Browning, *supra* note 72, at 1689.

¹⁹⁰*Id.*

¹⁹¹McIntyre July 2012 interview, *supra* note 40; Industry Board Representative interview, *supra* note 53.

on what ratings should apply in what situations, and having a system that requires some subjective determinations to be made, can hinder a system of self-regulation from being as effective as it might be.

With the existence of clearly written codes to guide industry behavior, effective self-regulation then “depends on interested parties, including consumers . . . industry representatives, and other regulators, being aware of the codes’ existence and encouraged to submit complaints.”¹⁹² Along with the existence of clearly written codes, members of the public and other interested parties should be made aware of the complaint process for supposed violations of the codes. Having a clearly written code can assist “potential complainants with framing their concerns.”¹⁹³ The entity hearing complaints, then, should be “comprised of equal representation from industry and the public.”¹⁹⁴ It should also “follow the principles of natural justice in its deliberations and allow [all] interested parties an opportunity to respond to the complaint.”¹⁹⁵

The board has been criticized for failing to take action on many complaints and for formally reviewing complaints only “after a significant number of complaints have been lodged against a specific program episode.”¹⁹⁶ If fewer complaints are received, says the Children’s Media Policy Coalition, they “are simply passed on to the network.”¹⁹⁷ As discussed above, in the past several years, the board has voted on the accuracy of the rating of only one program. Furthermore, several advocacy group representatives who served on the board claim to be “unaware of any situation in which the Board has taken action against an incorrectly rated program.”¹⁹⁸ In addition, the composition of the board is heavily weighted in favor of the industry,¹⁹⁹ and complaints are adjudicated without input from the public. The complaints process used by the board, then, lacks several qualities identified as being more conducive to effective self-regulation. It should be noted, however, that making self-regulatory codes public and soliciting complaints from the public

¹⁹²Hoek & Maubach, *supra* note 183, at 143.

¹⁹³*Id.*

¹⁹⁴*Id.* at 144.

¹⁹⁵*Id.*

¹⁹⁶Federal Communications Commission, Report, *Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming* ¶ 28 (2009) (MB Docket No. 09-26, Report), available at <http://www.independentratings.org/attachments/128.CSVA%20Report%20FCC-09-69A1.pdf> (last visited Feb. 24, 2013) [hereinafter FCC 2009 Report].

¹⁹⁷CMPC Comments, *supra* note 100, at 6–7.

¹⁹⁸*Id.*

¹⁹⁹See *supra* notes 51–53 and accompanying text.

may not be in self-regulators' interests, since this could "increase their workload and the expense of maintaining the system itself."²⁰⁰

Another condition that promotes effective self-regulation involves complaints that are upheld, in which case "a penalty should be imposed."²⁰¹ Such a penalty, however, should have some material effect on the entity penalized in order to provide an incentive for compliance with the self-regulatory code.²⁰² According to a number of interested advocacy groups, however, "[E]ven if the Board did find that a broadcaster incorrectly rated a program, the Board has no authority to alter the rating or sanction the broadcaster."²⁰³ As a number of advocacy groups observe:

Because the power to rate programs rests exclusively with each individual industry member, how each programmer assigns ratings is left entirely to its discretion. The Board plays no role in this ratings process and is merely available as a secondary resort to address after-the-fact consumer complaints about the rating of a specific program. Even if the Board were to decide that a program had been incorrectly rated, however, the network or distributor, *not* the Board, would have the final say on whether to change or maintain the challenged rating.²⁰⁴

Another condition related to complaints that can facilitate effective self-regulation is that once complaints have been decided, the results of those decisions must be communicated to industry participants "to help establish precedents that can guide" their actions in the future and to the public to help maintain public awareness of the complaints process and the range of issues addressed in that process.²⁰⁵ The board, however, has not made the results of its deliberations on complaints public, although it is possible this information might be shared with industry members. Thus, the benefits that might result from sharing the outcomes of complaint adjudication with the public — helping maintain awareness of the complaints process and showing the types of issues addressed in the that process — are not achieved. Further, it is not clear if the board's decisions on complaints are shared with all industry

²⁰⁰Hoek & Maubach, *supra* note 183, at 143–44.

²⁰¹*Id.* at 144.

²⁰²*See id.*

²⁰³2011 Brief, *supra* note 89, at 27.

²⁰⁴Brief of Amici Curiae American Academy of Pediatrics et al. at 25, Federal Communications Commission v. Fox Television Stations, 556 U.S. 502 (2009) (No. 07-582), *available at* <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1045&context=sch> (last visited Feb. 24, 2013) [hereinafter 2008 Brief].

²⁰⁵Hoek & Maubach, *supra* note 183, at 145.

members or with just the producer or distributor of the program that is the subject of the complaint. If the results are shared only with the latter, then the board's decisions on complaints do not serve a precedential purpose that can help guide future decisions of the industry overall.

Industry size and structure may also affect the likelihood of success of self-regulation. As Campbell observes, "Logic suggests that the fewer industry participants, the easier it would be to self-regulate."²⁰⁶ In addition, the chances for the success of self-regulation may be better when "there are dominant [industry] players that can use their market power to enforce self-regulatory provisions."²⁰⁷ Efforts to develop, implement and oversee the rating system are led through the three major industry trade organizations: the NAB, NCTA and MPAA. Having three trade organizations, which represent the major industry segments, oversee the development of the system may have made it easier to develop and implement. However, there are many players involved in applying ratings to television programs. Under the rating system, program producers, television networks, or television stations may apply ratings to programs, meaning there are a large number of individuals or organizations involved in determining and applying program ratings, which would seem to make it more difficult for the system to work as effectively as it could, particularly given that there is some degree of subjectivity in making such decisions.

Cynthia Estlund identifies another condition for effective self-regulation, that being that the self-regulatory system "be open to observation and criticism from without." This includes having a means of gathering information about the activities of the self-regulatory organization and conveying that information to regulators and other interested parties. This, however, may be contrary to the desires of the industry. As Estlund observes, while the industry's "interest in self-regulation may often be driven by a desire to insulate [itself] from outside scrutiny, the key to making self-regulation effective is to resist that insulation."²⁰⁸ A related characteristic of an effective self-regulatory system involves undertaking "periodic and independent audits" of the self-regulatory system, which should then be made public.²⁰⁹

As discussed previously, the board releases very little information about itself or its activities. A criticism of the board for many years, at least until its 2012 release of research it sponsored, was that it had failed to conduct promised research to evaluate the system once it was

²⁰⁶Campbell, *supra* note 25, at 763.

²⁰⁷*Id.*

²⁰⁸Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 378 (2005).

²⁰⁹Hoek & Maubach, *supra* note 183, at 145.

in place. Such research might have been used to fulfill some of the same functions that an audit of the system would fulfill. Indeed, for those complaining about the board's failure to conduct research, the issue is not simply that the board failed to follow through on its promise, but that the research was important to "allow for adjustments and improvements to the system."²¹⁰

The only publicly-released research by the board in its first fifteen years of existence, it should be noted, suggested relatively high levels of public awareness and satisfaction with the system. Because the research was sponsored by the board, one might doubt its objectivity or findings, which is likely a reason why independent audits of the self-regulatory system are recommended. As Arnold Fege sees it, one problem is that no one is watching over the board. He said he believes there needs to be oversight of the board by an independent agency or group, which could be funded by the Kaiser Family Foundation or some similar organization.²¹¹ Eileen Espejo, an advocacy group representative, recommends that the board prepare and make public an annual report of its activities, which would at least provide some information to the government and the public.²¹²

In sum, then, it seems that many of the characteristics most likely to be conducive to a system of effective industry self-regulation are not present in the context of the Oversight Monitoring Board and the TV Parental Guidelines. Once the rating system had been accepted and implemented, there appears to have been little sustained attention or pressure from the government to motivate the industry to ensure the system operates effectively. While there was some consultation of advocacy groups in the development of the system, and advocacy groups are represented on the board, it appears their influence is limited, with the industry sometimes appearing reluctant to respond to their concerns. The TV ratings code is not clearly written, in that the definitions of the various ratings categories are not well defined, and making decisions about ratings application involves a degree of subjectivity. Further, rating decisions are made by a large number of industry participants, rather than just a few. Finally, the board is not open to public scrutiny of its activities, and there has been no periodic independent assessment of the functioning of the system.

Nevertheless, there is reason to believe the system has been at least somewhat effective. The board's own research found a high level

²¹⁰FCC 1998 R&O, *supra* note 52, at ¶ 22.

²¹¹Fege interview, *supra* note 79.

²¹²Telephone Interview with Eileen Espejo, Director, Media Health and Policy, Children Now (July 5, 2012) [hereinafter Espejo interview].

of awareness and satisfaction with the system.²¹³ Montgomery, who worked on behalf of advocacy groups on the TV Parental Guidelines, believes that the policies that resulted from her working with the industry were not always the best policies, but they did help hold the industry accountable for its content. For example, the system did force the industry to admit that there was violent content in its programming, and she believes the system to be somewhat useful.²¹⁴ An industry representative to the board concedes that the rating system is not perfect, and that people can disagree about how it works and how it is applied but still thinks that the system works.²¹⁵ While there is reason to believe that the rating system has some utility and is somewhat effective, independent research suggests there are some problems with the system.²¹⁶ Thus, there are steps that might be taken to increase the usefulness and effectiveness of both the board and the rating system it was created to oversee.

SUGGESTIONS TO IMPROVE THE SYSTEM

It should be noted that the board is not the only entity that could take beneficial action to improve the operation of the TV Parental Guidelines program rating system. The industry itself might take action, with or without the board's involvement. For example, in the past, industry organizations have undertaken educational campaigns about the system on their own, not under the auspices of the board.²¹⁷ Another such situation involves the decision to apply ratings to online versions of television shows, which the industry did on its own without the board's involvement.²¹⁸ Nevertheless, the industry made a number of commitments about the activities and responsibilities of the board when it created the board along with the TV Parental Guidelines, and one FCC source

²¹³See *supra* note 151 and accompanying text.

²¹⁴Montgomery interview, *supra* note 45.

²¹⁵Industry Board Representative interview, *supra* note 53.

²¹⁶See *supra* notes 153–58 and accompanying text.

²¹⁷Industry Board Representative interview, *supra* note 53. In a 2006 congressional hearing, Jack Valenti outlined an educational campaign that the industry planned to undertake, of which board member Jeff McIntyre was unaware. *Decency in Broadcasting, Cable, and Other Media, Hearing before the Senate Commerce Committee*, 109th Cong. 7–8 (2006) (statement of Jack Valenti, Former Chairman/CEO, Motion Picture Association of America); *id.* at 53 (statement of Jeff McIntyre, Legislative and Federal Affairs Officer, American Psychological Association).

²¹⁸See, e.g., Brian Stelter, *TV Content Ratings System Set to Expand to Web*, THE NEW YORK TIMES MEDIA DECODER, June 12, 2012, available at <http://mediadecoder.blogs.nytimes.com/2012/06/10/tv-content-ratings-system-set-to-expand-to-web/> (last visited Feb. 24, 2013); Espejo interview, *supra* note 212.

believes it is important that the board comply with the commitments it made in 1997.²¹⁹

There is little formal action that the FCC can take in this area, however. The FCC's authority over the rating system does not extend beyond its initial judgment on the system's acceptability. The FCC might inquire about the board's efforts to fulfill its commitments, but it cannot require the board to do anything, nor can the FCC sanction the board for failure to do something. However, FCC or congressional attention on the board and television program rating system might have some beneficial results, as it might provide motivation to get the board to take some particular action. For example, as discussed earlier, the FCC took informal action when it inquired in 2011 about the board's efforts to fulfill its research obligation.²²⁰ This was followed not long afterwards by the board sponsoring research on the rating system and releasing the findings of that research to the public.²²¹ Thus, government attention to the board and its activities might help spur the board to action. Nevertheless, while government attention may help prompt the board to act, it will be up to the board itself to take any action or make any changes in its structure or function.

The composition of the board might be changed with beneficial results. Nineteen of the twenty-four board members are from the industry, allowing for the perception that the board may be biased in favor of the industry.²²² According to one former advocacy group representative to the board, if any changes were going to be made to the system, the industry representatives on board would need to make them. That is because of the strong majority the industry has on the board, and advocacy group members have no power to make changes without industry support.²²³ One suggestion, then, involves a more balanced board composition, with increased representation by "child development and public health professionals, social scientists and parents."²²⁴ As the Parents Television Council sees it, a better balanced board would contain more members "who might offer a different viewpoint than an industry member, or who might offer specific expertise in the area."²²⁵

²¹⁹FCC Staff Member interview, *supra* note 65.

²²⁰See *supra* note 173 and accompanying text.

²²¹See *supra* note 152 and accompanying text.

²²²See *supra* notes 51–53 and accompanying text.

²²³Fege interview, *supra* note 79.

²²⁴*Rating Entertainment Ratings: How Well Are They Working for Parents and What Can Be Done to Improve Them?*; Hearing Before the Senate Comm. On Governmental Affairs, 107th Cong. 20–21 (2001) (statement of Michael Rich, M.D., M.P.H.), available at <http://www.gpo.gov/fdsys/pkg/CHRG-107shrg75480/pdf/CHRG-107shrg75480.pdf> (last visited Feb. 24, 2013) [hereinafter Ratings Hearing].

²²⁵PTC Reply Comments, *supra* note 98, at 8.

The board might also improve its effectiveness by increasing its public profile. As outlined earlier, from the information that is publicly available, it does not appear that the board has done as much as it might to promote accuracy and consistency in the application of ratings, nor does it appear to have done much to follow through on other activities it was supposed to perform. While previous discussions suggest that the board is somewhat more active than it might seem to the public, it would be to the board's benefit to publicize its activities more than it has. Doing so could help give the public, the government and advocacy groups a more favorable opinion of the board and the system it was created to oversee. Further, making its proceedings public and allowing for more public input are conditions that can increase the effectiveness of self-regulation.

And, of course, it appears that there is room for the board to take a far more active role than in recent years. According to some sources, the board has not even met regularly for several years. One former advocacy group representative to the board says the board went three or four years without meeting.²²⁶ Another advocacy group member of the board, however, says that there does not seem like there has been much pressure to meet, stemming from the fact that the board seems fairly satisfied with the educational campaigns it has conducted, and that the board does not get many legitimate complaints about program ratings.²²⁷ Thus, one step that should be taken is for the board to meet more often to discuss the role it might play and the actions it could take to increase the rating system's effectiveness.

There is a role for a strong, active oversight and monitoring board to play in improving the functioning of the rating system. The decentralized nature of the system, with television networks or program producers rating their own programs, leaves a great deal of room for inconsistent application of ratings. Compounding this problem is the fact that the definitions of the types of content in different categories are very brief. For example, violence in a TV-PG-rated program would be "moderate," "intense" in a TV-14 program, and "graphic" in TV-MA program.²²⁸ These brief definitions require somewhat subjective judgments, and reasonable people could differ on whether the violence in a program is moderate or intense, for example, particularly on the fringes. These issues with the system could be ameliorated by an active, centralized board that provided more guidance to those making these judgments in

²²⁶In late 2012, Arnold Fege said the board had not met since 2008 or 2009. Fege interview, *supra* note 79. In late 2010, Dan Isett of the PTC reported that the board had not met since the summer of 2009. *Barely Legal*, *supra* note 95, at B2.

²²⁷McIntyre Nov. 2012 interview, *supra* note 40.

²²⁸TV Parental Guidelines Website, *supra* note 116.

the assignment of ratings. As discussed previously, it appears that the board does this to some degree in behind-the-scenes conversations with standards and practices personnel.²²⁹ However, research on the accuracy of program ratings could reveal areas where further such action by the board might prove beneficial.

The board, then, should conduct or sponsor research that could be used to improve the functioning of the system.²³⁰ One industry representative to the board expressed the expectation that the board will do more research, but was not sure what the focus of the research might be.²³¹ One type of research that would seem to hold significant potential for improving the operation of the system would be an analysis of the accuracy and consistency with which ratings are applied to programs. If common errors are identified, the board could step in to provide guidance to those who rate programs, much like it did with the inconsistent application of content ratings discussed earlier. There have been such studies conducted by third parties in the past, which largely suggest there are problems with consistency and accuracy. Those studies could be used by the board, along with updated studies on more recent applications of program ratings. Such studies might either use a random sample, to allow for some confidence in generalizing the results of the study, or they might focus on programs with complaints. Whether complaints about those programs are about the ratings or simply the content of those programs, using complaints as a basis for the study could help make up for the fact that the board's activities did not turn out to be as driven by the consideration of complaints as originally supposed.

The board should also change the manner in which it handles complaints, but it must first work to make the public more aware of its role in collecting complaints. One problem in terms of complaints may be that the public is largely unaware of the board and its role related to complaints. TV program ratings are not accompanied by information about where to address complaints about the inaccuracy of the ratings. One would need to go to the TV Parental Guidelines Web site to learn that.²³² Further, as discussed previously, many of the complaints the board receives may not deal directly with rating accuracy or consistency. While viewers do not seem to be making many complaints about program ratings accuracy, they do make complaints about programming.

²²⁹See *supra* notes 145–46 and accompanying text.

²³⁰There is precedent for the television industry sponsoring major independent research with the National Television Violence Studies of the 1990s. Ratings Hearing, *supra* note 224, at 14 (statement of Dale Kunkel, University of California, Santa Barbara).

²³¹Industry Board Representative interview, *supra* note 53.

²³²TV Parental Guidelines Website, *supra* note 116.

Board member Jeff McIntyre expressed the view that, partly due to public ignorance of the board, complaints are more likely to be filed with TV stations, networks, the FCC or the PTC.²³³ Many people interviewed for this article stated that complaints were much more likely to be filed about program content rather than program ratings. For example, former board member Brooke Johnson, who worked for cable network A&E while serving on the board, agreed that complaints were far more often about program content, such as the language to which a viewer's child was exposed on A&E, rather than on whether that program had been accurately rated for language.²³⁴ Thus, there appears to be a need for the board to do more to inform the public that it deals with complaints about the rating system, and that the complaints it deals with involve the accuracy or consistency of program ratings. Further, complaints about program content might be used in research on the accuracy of ratings, as one concern of the board would be to ensure that programs with content that some find objectionable be accurately rated to enable viewers to block such content should they wish to do so.

The board should also change how it deals with complaints. It appears that the primary action taken on complaints, if any, is to simply pass them on to the networks that aired the offending shows. While it is certainly appropriate to let a network know there were complaints about the rating of a show it aired, this should not be all there is to the process. Tracking and cataloging complaints, including those about program content and not just ratings accuracy, might reveal some inconsistencies or other issues with the system or how it is applied by those responsible for rating programs. Particularly in the absence of other types of research on these points, the analysis of complaints may reveal useful information for improving the system. The board could also lower its threshold for the consideration of complaints from the "widespread" requirement used today.²³⁵ This standard appears to have been met only once in the past several years, so it too severely limits the board's review of complaints and what might be learned from such review. Further, it appears from the one vote the board has held on the accuracy of a program's rating that industry board representatives are reluctant to find a program's rating inaccurate,²³⁶ even though there are no formal penalties under the system for programs with

²³³McIntyre July 2012 interview, *supra* note 125.

²³⁴Johnson interview, *supra* note 107.

²³⁵2012 Board Memo, *supra* note 124.

²³⁶*See supra* note 125 and accompanying text.

inaccurate ratings.²³⁷ This may be an additional argument for altering the composition of the board to reduce the industry's dominance.

Based on what little is known about the board, it appears that the industry is reluctant to make the board as effective as it could be in promoting the accuracy and consistency of TV program ratings. Advocacy group representative Jeff McIntyre offers some potential explanations for this. He suggests that the industry views the V-chip and rating system as already imposing burdensome duties on the industry, and the industry might be afraid that any changes to the system would increase those burdens. In addition, the industry may have some fear of change generally and the uncertainty that accompanies it, and any actions by the board to improve the system might require changes the industry is reluctant to implement. Further, the industry might be worried that any problems in the rating system identified by the board might be used politically against the industry, so is reluctant to identify and investigate potential problems.²³⁸

In creating the V-chip rating system, the industry devised a mechanism — the TV Parental Guidelines Oversight Monitoring Board — that has much potential for improving the accuracy and operation of the system. However, the promise for the effective functioning of the system that the board represents has yet to be fully realized. This problem need not persist. The board could take a number of steps to become more effective in achieving its purposes as well as promoting a more positive image of the board to the government, advocacy groups and the public. The board can make its activities more public, solicit more input from the public, change the way it deals with complaints, alter the composition of the board, provide more detailed definitions of the ratings categories, and sponsor or conduct more research on the accuracy and consistency of program ratings. Government and public attention to the board and the rating system could help motivate the board to make some of these changes. Each of these steps holds the potential to promote a more accurate and consistent television program rating system, which could help parents make better decisions about the programs they allow their children to watch.

²³⁷2011 Brief, *supra* note 89, at 27.

²³⁸McIntyre July 2012 interview, *supra* note 125.