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Comparing Regulatory Models - Self-Regulation vs. Government Regulation: The Contrast between the Regulation of Motion Pictures and Broadcasting May Have Implications for Internet Regulation

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Comparing Regulatory Models -- Self-Regulation vs. Government Regulation:

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PART I. Introduction

{1} As the Internet grows into an identifiable, unique medium for mass communication, the question of regulation will continue to arise with voices both pro and con. While there is an increasing collection of literature on different aspects of communication and regulation on the Internet, there is another important source for information that should be considered when evaluating regulation of the new medium: history. History is a valuable guide for our actions today and in the future. This is no less true in the communications industry.

{2} The premise behind this article is that the history of regulation of other media in this country can be a valuable resource for evaluating our approach to regulating the Internet as a communications medium. Two media in particular provide an interesting contrast of regulatory models: motion pictures and broadcasting. Motion pictures gained widespread recognition, use, and popularity in the early years of this century. The history of the motion picture industry includes an early period of governmental regulation, followed by industry self-regulation and voluntary ratings. In contrast, the broadcast industry, which emerged some 30 years after film, started out relatively self-regulated, but quickly required governmental intervention, which continues to this day.

{3} Since continued regulation of the internet appears inevitable, the question remains as to which of these paths the Internet will follow. The Internet is much like early broadcasting, with a large number of professional and amateur "broadcasters" traveling over the net, setting up "home pages" and exchanging data. Like the early movie industry, the commercial service providers and companies on the Internet are scrambling to fill the increasing user demand for new and exciting information and entertainment gratifications. And like broadcasting, amateur users abound, each trying to "shout" louder than everyone else to get their voices heard. All of these "growing pains" are creating pressures on the Internet similar to the pressures this paper will discuss that led to the differing regulatory models applied to broadcasting and motion pictures. In addition, much like broadcasting and film, many concerns about the new medium's affect on children are being raised by both parents and legislators.

{4} A model of regulation is being developed in response to the passage of the Telecommunications Act of 1996. That model could be based on the motion picture industry's system of self-regulation, which may at first seem to be less threatening to the First Amendment rights of the Internet users. On the other hand, the Internet regulatory model could be modeled on the broadcast industry's system of federal regulation through an administrative agency like the FCC--a choice many people immediately associate with censorship and government interference in private conversations and transactions. The purpose of this article is to examine the development of two contrasting regulatory models and some of the common assumptions about the greater protection of First Amendment and individual rights in a self-regulatory model. Hopefully this comparison will enlighten our development of a new regulatory model for the Internet through recognition of the pitfalls inherent in both of these models.

{5} Following this introduction, Part II of this paper recounts the birth and development of the motion picture industry, discusses the fears expressed about the effects of the medium, examines the methods of control applied to the industry to address those fears, and considers the criticisms and problems with self-regulation by the industry. In Part III, the same issues in regards to the broadcasting medium are discussed. Part IV concludes the paper by comparing the successes and failures of the regulation of the two media, and considers what the history of these media tell us about regulation of the Internet.

PART II. Motion Pictures & Self-Regulation by the Industry

A. Development of Motion Pictures as a Mass Communication Medium

{6} The beginnings of the motion picture industry can be traced back to Thomas A. Edison. [1] Edison was the inventor of the kinetoscope, a machine which allowed a single person to look through a viewfinder at short film clips. [2] On April 14, 1894, the first commercial "debut" of the machine was made in a New York parlor on Broadway. [3] With the establishment of the screen and projector just two years later, the kinetoscope was transformed into a form suitable for mass viewing. [4] These early kinetoscopes and projectors were commonly used in traveling circuses and vaudeville shows as side

attractions. [5] Most of the early movies were made by one of three companies--Biograph, Edison, or Vitagraph. [6] The content of these early films primarily featured motion, of people or objects, rather than intricate plots. [7] Improvisation and staged episodes with simple plots increased movie popularity to the point they grew to be featured entertainment by themselves. [8] Five cent theaters called nickelodeons opened in most major U.S. cities by 1902. [9]

{7} Mass audiences were attending the movies regularly by 1903. [10] As the audience size grew it became clear that the crowds were comprised largely of the working and lower classes. [11] As the popularity of the movies increased, the production companies extended the length of the features and included more topics and more complex plots. [12] The increased demand for new movies lead to greater competition between the production companies, resulting in improved quality and greater length. [13] However, the increased competition also lead to more questionable, even illegal, industry practices including unauthorized copying, stealing, price fixing, and block distribution. [14] As for the improving message of movies, pre-World War I movies tended to be opinionated, espousing late-Victorian societal values and prosocial moral attitudes. [15] As the medium grew, however, topics and viewpoints changed, leading to the inevitable sensational or provocative film. [16]

B. Fears of the Power of Motion Pictures on Mass Audiences

{8} New communication technologies historically have been met with concerns about its unbridled power to influence the mass audience, and the movies were no exception. Early concerns about motion pictures were based on the idea that films were a medium of mass influence, reaching large populations at one time, and therefore required greater control than more individualized art forms such as literature, painting, and theater. [17] Interestingly, the earliest protest against a film occurred just two weeks after Edison placed a kinetoscope on the Boardwalk in Atlantic City. [18]

{9} The medium's popularity grew in the post-WWI era, with claims of 40 million admissions a week. [19] Naturally, with the increasing audience came increasing concern over the influence of the movies on the public, particularly considering the most popular topics for many films of the day. [20] " [T]he industry as a whole showed little sense of public responsibility. . . . Anything that made money was permissible, and the surefire hits in the twenties were erotica and crime." [21] These films contributed to the increasing complaints about the "false sex standards, incitements to sexual emotion, glorification of crime and criminal, and debasing brutality." [22]

{10} The nature of movie going may have contributed to the perception that movies have a significant influence over the audience. The visual nature of film gives it a communicative power unlike that of print. [23] Movies often pretend to or seem to present a real world, represented through motion involving people, scenery, and imagery. [24] Consider, too, the context of movie viewing--a dark theater, a reclined chair, and a surrounding audience of like mind. [25] The viewer is receptive and passive at the movies. [26] Reality fades out with the lights as the individuals in the audience are drawn together into another reality. [27] Indeed, " [t]he capacity of a medium to simulate reality, and the amount of intellectual effort required to comprehend the representation," [28] likely helped fuel the perception of film's pervasive effect on viewer.

{11} One of the best records of the fears surrounding film is found in case law. In one of the earliest United States Supreme Court cases involving the motion picture industry, *Mutual Film Corporation v. Industrial Commission of Ohio*, [29] Justice McKenna recited some of the justifications for the Court's upholding pre-censorship of films. " [T]hey may be used for evil, and against that possibility the statute was enacted." [30] Justice McKenna added that film's "power of amusement . . . make them the more insidious in corruption by a pretense of worthy purpose or if they should degenerate from worthy

purpose." [31] The Court stressed the potential for excitement and appeal to prurient interests. [32] Of particular concern to the Court was the presence of children, who generally attended most feature films with other adults regardless of the content or unaware of the true content. [33]

{12} Early concerns about the motion picture medium ranged from the sexual to the political. [34] One area of protest involved the way different groups were portrayed on the screen. [35] Minority groups, foreign interests, occupational groups, and animal activists all lobbied for, and often procured, better representation of their members in film. [36] Others kept a sharp eye on the use of film for propaganda and other political purposes. [37] Again, much of the concern about these issues along with the traditional religious, sexual, and moral issues, reflect the popular opinion that "the movies share in the function of furnishing the diet of information, opinion, and imagery on which citizens build their attitudes and convictions." [38]

{13} More recent expressions of concern about the influence of film show similar fears still exist today. Indeed, the Motion Picture Association of America's own Jack Valenti recognizes on the MPAA World Wide Web Homepage that much of the driving force behind the establishment of the MPAA and the modern ratings system was the changing content of films and the changing mores of society since the 1960s. [39] Other recent authors have noted the growing disillusionment of the public with Hollywood. [40] " [T]ens of millions of Americans now see the entertainment industry as an all-powerful enemy, an alien force that assaults our most cherished values and corrupts our children." [41] Critics still speak about "the destructive messages so frequently featured in today's movies." [42] A 1989 survey revealed that 67 percent of those surveyed thought that movie's violent images are mainly to blame for the epidemic of teenage violence in this nation. [43] In addition, 68 percent of those surveyed in a 1991 poll by Gallup said that movies have a considerable or very great causal effect on violence in society. [44] Clearly, these studies suggest that not much has changed in the mind of the public since the medium emerged at the turn of the century, despite the changing regulatory forms.

C. Changing Industry Regulation

{14} In response to the fears outlined above, the motion picture industry has been subjected to several different forms of regulation over the years. The earliest regulations came from local and state government licensing. [45] Using local business licensing laws, city and state governments regulated the nickelodeons with fees and codes. [46] In 1907, when licensing alone failed to quell protests, Chicago instituted police pre-censorship through review of all movies prior to release. [47] In 1909, a New York city citizens group founded the National Board of Censorship, intending to ward off impending government regulation while liberally reviewing films prior to release. [48] In the mean time, government licensing schemes and prior review grew in popularity with statutes being enacted in Pennsylvania (1911), Ohio (1913), Kentucky (1913), and Maryland (1916). [49]

{15} Such regulations were upheld by the Supreme Court in *Mutual Film*. [50] Mutual Film Corporation, a movie distributor in Ohio, [51] argued that the Ohio censorship board statute imposed an unlawful restraint on interstate commerce, violated the freedom of speech protected by the state constitution, and delegated legislative power to censor boards. [52] The Court held that the censorship statutes did not impede the social value of the movies, and prevented possible abuses of the medium. [53] In addition, the Court held that "the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio Constitution, we think, as part of the press of the country, or as organs of public opinion." [54] The Court concluded that such prescreening regulation was within government power, and that there were sufficient safeguards against censor abuse built into the statute. [55] With this clear support from the Supreme Court, state and local governments were free to institute similar pre-screening censorship

boards.

{16} In 1921, New York rejected the self-regulatory scheme proposed by the National Board of Review and instituted its own state censorship board. [56] The motion picture industry responded by creating the Motion Picture Producers and Distributors of America, the industry organization that was eventually to become the Motion Picture Association of America. [57] Postmaster General Will H. Hays was named the head of the new MPPDA and assigned the task of improving public relations and convincing producers to tone down content for the benefit of the industry. [58] After limited success in the 1920s, Hays joined Martin Quigley and Reverend Daniel Lord in drafting the Motion Picture Production Code. [59] In 1934 the Roman Catholic church formed the Legion of Decency to review and rate movies. [60] From that time until well into the 1960s, a "condemned" rating by the Legion of Decency virtually ensured that no catholic would attend the movie, dooming it to financial failure. [61]

{17} As the abuses of the powers of most state censorship boards became obvious, [62] two Supreme Court cases signaled the end of permissive state censorship, and encouraged the industry to move toward self-regulation and a ratings system. In 1948, the Supreme Court in *United States v. Paramount Pictures, Inc.*, [63] said that " [w]e have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment." [64] Perhaps the most important case, however, was "The Miracle" case, *Burstyn v. Wilson*, [65] in 1952. In *Burstyn*, the Court held that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments." [66] The Court held that prescreening and censorship by government "is a form of infringement upon freedom of expression to be especially condemned." [67] The result was that by 1972 there remained only one state censorship board and a handful of local boards. [68]

{18} Relieved of official censorship power, the state and local governments in the mid-1960s began seeking ways to better inform movie consumers through formal rating systems. [69] While early attempts at such rating systems were rejected by the courts, [70] the industry moved quickly to introduce a formal rating system in 1968. [71] The new ratings scheme was approved by the MPAA members, the National Association of Theater Owners, and the International Film Importers and Distributors of America. [72] The idea was for parents to have control over the viewing habits of their children. [73] Jack Valenti, who helped develop the ratings system, abolished the old Hays Production Code and announced the new ratings system November 1, 1968. [74] According to Valenti, " [t]he movie industry would no longer `approve or disapprove' the content of a film, but we would now see our primary task as giving advance cautionary warnings to parents so that parents could make the decision about the movie going of their young children." [75]

{19} That early ratings system was similar, but not identical to what exists in 1995. The system started out with four categories: G - meaning General Audiences, where all ages were admitted; M - meaning Mature Audiences, where all ages were allowed in but parental guidance was suggested; R - meaning Restricted, where individuals under 16 could not be admitted without a parent or other adult accompanying them into the movie; and X - where no one under 17 may be admitted. [76] Later, the M rating was changed to GP (General audiences, Parental guidance suggested), then to PG (Parental Guidance Suggested), to correct the misconception that M was a sterner rating than R. [77] In 1984, PG was divided into PG and PG-13, with the later indicating an intensity level higher than may be suitable for some younger children. [78] In September of 1990, the MPAA started providing explanations for its PG-13 and R ratings in order for parents to be able to make educated decisions before taking children to movies so rated. [79] In addition, X, which had been co-opted by the pornography industry, was changed to NC-17 due to the "surly meaning [indicated by an X rating] in the minds of many people, a meaning that was never intended." [80] It is this industry-imposed rating system which is the self-regulatory system governing the motion picture industry today. As the next section will discuss, however, not

everyone feels this is the least restrictive or most effective system of regulation possible.

D. Criticisms of and Problems with Self-Regulation & Ratings

{20} While the industry and the MPAA present the current self-regulatory rating system as the best possible protection of the creative and communicative qualities of motion pictures, critics point out that self-regulation may not be all it is cracked up to be. In 1972, Stephen Farber wrote a book about the movie rating system after having served for six months on the board that assigns the ratings. While the system has changed in answer to some of his criticisms, many still have validity today. In particular, one of Farber's biggest concerns was that the people assigning the ratings were working for the MPAA, which meant they were working for the major studios whose dues and fees support the MPAA. [81] Based on his observations, Farber suggested that the MPAA also practiced a balancing game of inside politics, with the primary goal being to avoid studio revolt from the system. [82] Naturally since all movies are rated voluntarily, any studio who felt too many of its movies had been rated unfairly several times in a row could withdraw from the MPAA and release its movies with some other rating system or unrated. [83]

{21} Another criticism was directed at the notion that a single letter rating provides enough information about the content of any film for viewers to make educated decisions about what to view or allow their children to view. [84] Other critics point out that studios may see particular ratings as financially advantageous. [85] While many studios "grind out" large numbers of R-rated movies based on the believe that such a rating brings higher profits, the statistics show that G and PG films consistently gross more money and make up a larger portion of the top movies at the end of year than R films. [86] According to film critic Michael Medved, "In 1990, Hollywood produced more than four times as many 'R' films as 'G' and 'PG' films combined, . . . nevertheless, the annual Top 20 included the same number (seven) of 'PG' and 'R' titles." [87]

{22} However, the problems go beyond industry manipulation and misuse of the ratings system. Farber noted in 1972 that the MPAA had an alarming amount of pre-release control over movie production. [88] In fact, Farber recounted instances when the ratings board made "suggestions" to a studio based on the reading of script, before any shooting had even taken place. [89] Indeed, Faber and other critics assert that meddling by the MPAA may start as early as script reading and continues into on-site shoot visits and final editing sessions. [90] In its effort to avoid government censorship, the industry may have inadvertently imposed another equally threatening form of censorship.

{23} It is the dodging of government censorship that makes up the final major criticism of many who have evaluated the self-regulatory system. These critics point out that the primary motivational factor behind self-regulation is the threat of government or outside censorship and regulation. [91] When the threat of such censorship is looming, the industry works hard at providing satisfactory self-regulation. But when outside pressures are finally reduced and the public demand for regulation subsides, the self-regulatory system weakens its guard and becomes more permissive. [92] Author Richard S. Randall notes, "Self-regulation depends for its very life on the presence of governmental threats or very strong private pressures. Without such threats or pressures, it is likely to resolve itself into a minor part of a public relations program." [93] These criticisms, along with the more common complaints about the over reaction to sex and lack of reaction to violence in decisions about ratings, suggest that while the industry may feel that the current self-regulatory system of ratings is preferable to official government censorship, self-regulation in fact may have equal or greater censorship implications than government-imposed regulation.

PART III. Broadcasting & Federal Regulation

A. Development of Broadcasting as a Mass Communication Medium

{24} Prior to the turn of the century, electronic communication had to be conducted through the wired system of telegraphy. [94] In 1895, Italian inventor Guglielmo Marconi developed wireless communication. [95] He sent a transmission across the English Channel in 1899, and then across the Atlantic Ocean in 1901. [96] After the ability to transmit voice messages was demonstrated by Reginald Fessenden in 1906, [97] radio was developed primarily for naval use. [98] One of the most famous early naval uses of radio was during the 1912 sinking of the Titanic, when the captain transmitted an S-O-S from the ship [99] and enterprising "wireless operators" like David Sarnoff reported the disaster. [100] During World War I, the government gave almost exclusive control over the radio to the Navy for use in war time. [101] By the time the war ended in 1917, not only had the Navy significantly advanced the use of radio, but amateur operators were growing in number as well. [102]

{25} One of these operators was Frank Conrad, who had developed his transmitter in the Pittsburgh while working for Westinghouse Electric and Manufacturing Co. on various Navy contracts. [103] Conrad operated an experimental community station during the war, and continued its daily broadcast of music and speeches after the war ended. [104] Conrad's experiment developed into KDKA which debuted with a broadcast on November 2, 1920 of the Harding-Cox election results, the first scheduled radio broadcast. [105] Westinghouse was joined by companies such as General Electric, AT&T, and United Fruit to further develop radio broadcasting and dominate the market. [106]

{26} The exponential growth of the industry was left relatively unregulated in its early stages, resulting in a flooding of the airways. [107] Interference problems caused by stations increasing the power of its signals to drown out competing signals threatened to make the medium almost useless. [108] At first the industry rejected any type of governmental regulation and resisted legislation to impose more control over the airwaves. [109] But by the mid-1920s, notes authors John Witherspoon and Roselle Kovitz, " [t]he industry was now hopelessly out of control and begged for legislation to relieve the chaos that threatened to destroy this young but potentially powerful medium." [110] It was the legislation that followed this plea for help which led to the government regulatory structure that continues to oversee the industry today. [111]

{27} Television followed radio by about 30 years. [112] In 1923, Vladimir Zworykin applied for the first patent for an "all-electronic" TV system. [113] Just four years later, a patent on "an image dissector camera tube" was granted to Philo T. Farnsworth. [114] Several years of laboratory work and experimentation, with supervision by the FCC, resulted in the May 1, 1939 broadcast of New York World's Fair opening ceremonies--marking the beginning of daily television broadcasting by what was then RCA-NBC. [115] By this time, however, a federal regulatory system was already in place and watching over the development of television in addition to the radio industry.

B. The Quick Leap from Self to Federal Regulation

{28} Clearly the radio industry had proven unable or unwilling to regulate itself, leaving the medium in danger of becoming useless for communications due to interference. The first attempt at legislation was the Radio Act of 1912 But it was mostly ineffective because it merely gave the secretary of commerce power to grant licenses and assign frequencies. [116] The courts would not allow then Secretary of Commerce Herbert Hoover to use the Act to regulate the industry in order to solve the ever increasing interference problems. [117] Without legislation authorizing more control over the growth of the industry, abuses of the airwaves continued to escalate. Finally, in 1927, Congress passed legislation

granting significant regulatory control over broadcasting to the federal government. [118]]

{29} The Radio Act of 1927 created the five member Federal Radio Commission to solve the interference problem. [119] The legislation also included terms requiring the FRC to ensure stations were operating in the public interest, convenience, and necessity. [120] The FRC had the much needed power to review new and existing station licenses by evaluating the performance and operation of the stations to date. [121] In addition, the 1927 act expressly gave radio First Amendment protection from censorship. [122] Indeed, in challenges over the FRC's power to deny license renewals, the courts upheld the FRC's review of past programming in making renewal decisions, thereby validating the public interest, convenience, and necessity standard. [123]

{30} However, the 1927 act was insufficient in some areas to keep up with the changing demands of the growing communications industry. Because the Interstate Commerce Commission was unable to keep up with both the communications industry and the growing needs of the national transportation system, Congress wished to unify communications authority. [124] In 1934, Congress passed the Communications Act of 1934 to accomplish this goal. [125] The Act replaced the FRC with the Federal Communications Commission. [126] Not only did the new FCC have the responsibility of regulating the radio industry, but wired technologies were now included in the legislation. [127] The new act included most of the 1927 provisions, including the public interest, convenience, and necessity standard, but also included oversight of common carriers like the telephone and telegraph companies. [128] In later years, provisions providing for public broadcasting licensing and funding, cable and satellite were added. [129]

{31} Since the Communications Act of 1934 and the creation of the FCC, both Congress and the FCC ha had to defend the continuing validity of the federal regulatory system. In their textbook about the regulation of the telecommunications industry, Leslie Smith, Milan Meeske, and John Wright II identify five traditional rationales for broadcast regulation. [130] First is the idea of public ownership of the airways. [131] Because the public owns the airwaves used by the broadcasters, the public has the right to demand certain standards for their use. [132] Second, the licensee only has permission to use the frequency assigned to it, but the public retains ownership and, therefore, some say in its use. [133] Third, because there is a scarcity of frequencies such that not everyone who wants one can have one, the public has the right to demand that those who are using the scarce resource are using it in the public interest. [134] Fourth, federal regulation has been justified due to the nature broadcasting as being a more intrusive medium than print. [135] A broadcasting consumer is consider more of a captive viewer than a print consumer since once the receiver is turned on there is no control over what comes in through the radio or TV. [136] Fifth, the potential impact of the broadcasting medium is much greater than any other since it is so pervasive in our society. [137] Because of its pervasiveness, some people argue that it is more likely to have an impact of some kind on an individual and society as a whole. [138]

C. Criticisms of and Problems with Federal Regulation

{32} Despite these rationales, the federal regulatory system created by the Communications Act of 1934 is not without its critics. Some people argue that the federal government and the FCC have not proven to be the most effective regulators for insuring the public interest standard. [139] Critics assert that most governmental regulation dealing with content is of questionable constitutional validity, and involves too much quasi-judicial activity by an executive agency. [140] Some critics assert that allowing the marketplace to work by itself will produce the desired "public interest." [141] In her note published in the Federal Communications Law Journal, Julia Schlegel asserts that " [w]hile the marketplace is not universally effective in inducing social change, it is far better than allowing the government to impose its values upon society by regulating the content of speech." [142] This argument assumes that the public will express through its viewing habits and advertising support the content it finds acceptable. [143]

{33} Other critics hold that the FCC may not be assertive enough. In response to an FCC report stating that self-regulation to reduce violence on TV is preferable to governmental action, [144] some authors argue that self-regulation has proven to be ineffective. [145] One author states, " [s]elf regulation by television on the violence problem is about as likely as self regulation by the tobacco industry on the cigarette problem." [146] These critics assert that the industry has broken past promises to regulate itself in the public interest. [147] The solution, they assert, is to encourage the FCC to exercise its licensing and regulatory authority "to ensure that the public interest, convenience and necessity are served." [148] This position advocates the implementation of legislation mandating a ratings system, on-screen warnings, and use of V-Chip technology, which allows for the blocking of programs with undesired levels of violent content. [149]

{34} There are, however, some critics who argue that the current FCC regulatory system no longer has validity in modern times. [150] A report by the Progress & Freedom Foundation points out that the current system is a product of 1934, when the state of the nation and technology was significantly different. [151] The report argues that intrusive regulation by the FCC has denied the economy of tens of billions of dollars in annual growth. [152] One way the current federal regulation has had this effect is through administrative delay and high costs. [153] First, the report claims that understaffing at the FCC has slowed to a near crawl the process of getting any new technology or license approved. [154] Second, the report demonstrates how the FCC has vacillated when making rulings on the development of new technologies for communication, eventually resulting in approval, but only after considerable delay in technology development and denial of considerable revenue for the economy. [155] Such complicated issues and technological decisions are more efficiently made by market forces, according to the report. [156]

{35} The report also points out several areas were the duties of the FCC duplicate those already or better performed by other authorities like the Justice Department through anti-trust litigation. [157] Contending that the current system lends itself to abuse by existing companies and special interests who are resistant to competition, the report points to the FCC's refusal to allow phone companies to compete with cable operators, resulting in a cost of $3 - 7 billion annually to bale customers. [158] When one considers that the current system was created in 1934, when the telegraph was still the dominant mode of communication, [159] it is not difficult to understand why the old assumptions behind federal regulation no longer apply. The report points to the fact that there is now more competition than ever in the communications industry, and that in fact the FCC has prevented competition in several areas which resulted in considerable cost to consumers. [160] In addition, the "bandwidth" of new technology has virtually eliminated the scarcity problem, which justified regulation in the public interest in the past. [161] Furthermore, in many instances the cost of transmission is negligible due to new, less expensive technologies. [162] Finally, the report points out that since digital technology has replaced the analog technology of 1934, the limits of the old technology have disappeared as well. [163]

PART IV. Conclusion

{36} Clearly the motion picture and broadcasting media are significantly different. Yet public concern over their influence on society and behavior have lead to common calls for regulation and oversight. Both industries have striven to avoid censorship, but continue to struggle against public demand for greater responsibility. Perhaps most interesting is that in the comparison of the regulatory forms applied to both industries--self-regulation in the case of motion pictures and government regulation in the case of broadcasting--we see common complaints of censorship. Some people look at the current system and say there is not enough control. Others accuse the regulators of having too much control over the freedom of

the respective media and call for increasing market control.

{37} Perhaps most revealing in the comparison is that while we may think that self-regulation is the best possible solution to avoiding censorship and restrictions on a medium, the truth appears to be that self-regulation imposes many of the same restrictions as governmental regulation. What does this suggest for the regulation of the Internet? Opponents of government regulation of the Internet view the Internet as an extremely promising medium for free expression and public debate, demanding that government be prevented from placing controls on the medium through anticipatory industry self-regulation. But as the review of the motion picture industry suggests, self-regulation can lead to the same restrictions that are so feared from government control.

{38} The question of whether the Internet can be controlled by either regulatory model still remains. Considering its massive and amorphous structure, and it's global presence, stretching between continents and countries and cultures, the Internet may be impossible to formally regulate. In that case, is the Internet a just a medium in the traditional sense, or is it something else requiring a new approach altogether? This is a question for future consideration.

ENDNOTES

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[1] RUTH A. INGLIS, FREEDOM OF THE MOVIES 25 (1947).

[2] *Id.*

[3] RICHARD S. RANDALL, CENSORSHIP OF THE MOVIES 10 (1968).

[4] *Id.*

[5] INGLIS, *supra* note 1, at 25; RANDALL, *supra* note 3, at 10.

[6] INGLIS, *supra* note 1, at 25.

[7] RANDALL, *supra* note 3, at 10.

[8] *Id.*

[9] *Id.* These early films were often referred to as "flickers," reflecting the quality of the films at that time. INGLIS, *supra* note 1, at 25.

[10] INGLIS, *supra* note 1, at 26.

[11] *Id.*; RANDALL, *supra* note 3, at 10.

[12] INGLIS, *supra* note 1, at 27; RANDALL, *supra* note 3, at 10.

[13] INGLIS, *supra* note 1, at 27; RANDALL, *supra* note 3, at 10-11.

[14] INGLIS, *supra* note 1, at 27; RANDALL, *supra* note 3, at 10-11. Eventually the federal government brought much of the illegal under control, particularly price fixing and block distribution, through anti-trust actions against the major producers and distributors. INGLIS, *supra* note 1, at 27.

[15] INGLIS, *supra* note 1, at 28.

[16] INGLIS, *supra* note 1, at 28-29, 62-63; RANDALL, *supra* note 3, at 10. For example, while early films tended to present anti-labor union points of view through the characterization of the labor organizer in the movie, subsequent films also presented the pro-labor view. INGLIS, *supra* note 1, at 28-29. Some later films also portrayed minorities in a more positive light. *Id.*

[17] STEPHEN FARBER, THE MOVIE RATING GAME 2 (1972). Farber points out that today television has eclipsed film as the most influential mass medium. *Id.* at 3. His book states that "about fifty per cent of moviegoers are between the ages of sixteen and twenty-four and at least two-thirds are under thirty--most of them college-educated." *Id.*

[18] RANDALL, *supra* note 3, at 11.

[19] *Id.* at 14.

[20] *Id.*

[21] *Id.*

[22] *Id.* (*quoting* MARTIN QUIGLEY, SR., DECENCY IN MOTION PICTURES 31 (1937)).

[23] RANDALL, *supra* note 3, at 67.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at 67-68.

[28] *Id.* at 68.

[29] 236 U.S. 230 (1915).

[30] *Id.* at 242.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] For an excellent review of the perceived social role of film after the turn of the century, see INGLIS, *supra* note 1, at 1-24.

[35] *Id.* at 3.

[36] *Id.* at 3-6.

[37] *Id.* at 17-19.

[38] *Id.* at 23.

[39] Jack Valenti, Motion Picture Association of America, *The Voluntary Movie Rating System*, World Wide Web page located at: http://www.mpaa.org.

[40] *See, e.g.*, Richard P. Salgado, *Regulating a Video Revolution*, 7 YALE L. & POL'Y REV. 516 (1989) (discussing the need for better control over home video rentals due to the lack of control over children's access to adult material in many stores); MICHAEL MEDVED, HOLLYWOOD VS. AMERICA: POPULAR CULTURE AND THE WAR ON TRADITIONAL VALUES (1992) (arguing that the entertainment media industry is stubbornly ignoring increasing signals of public displeasure with content themes); TOM O'BRIEN, THE SCREENING OF AMERICA: MOVIES AND VALUES FROM ROCKY TO RAIN MAN (1990) (evaluating how films do or do not reflect American values and moral viewpoints).

[41] MEDVED, *supra* note 40, at 3.

[42] *Id.*

[43] *Id.* at 4.

[44] *Id.*

[45] While the federal government was authorized to review imported films, the United States never had ...tional censorship law for the movies, unlike most other countries. RANDALL, *supra* note 3, at 13.

[46] *Id.* at 11.

[47] *Id.*

[48] *Id.* at 12. The board was later renamed the National Board of Review. *Id.* The board was regularly criticized for its close ties to the industry, its dependence on the industry for funding, and its excessively permissive review of many films. *Id.*

[49] *Id.* at 12-13.

[50] 236 U.S. at 244-45.

[51] *Id.* at 232.

[52] *Id.* at 239.

[53] *Id.* at 242.

[54] *Id.* at 244.

[55] *Id.* at 245-46.

[56] RANDALL, *supra* note 3, at 16.

[57] *Id.*

[58] *Id.*

[59] FARBER, *supra* note 17, at 5. The original code included statements such as the following:

> No picture shall be produced which will lower the moral standards of those who see it. Hence the sympathy of the audience shall never be thrown to the side of crime, wrongdoing, evil or sin.
> The sanctity of the institution of marriage and the home shall be upheld. Pictures shall not infer that low forms of sex relationship are the accepted or common thing.
> In general, passion should be treated in such a manner as not to stimulate the lower and baser emotions.
> . . .
> Sex perversion or any inference of it is forbidden.
> Miscegenation (sex relationship between the white and black races) is forbidden.
> Theft, robbery, safe-cracking, and dynamiting of trains, mines, buildings, etc., should not be detailed in method.
> Children's sex organs are never to be exposed.
> There must be no scenes at any time, showing law-enforcing officers dying at the hands of criminals. This includes private detectives and guards for banks, motor trucks, etc.

Id. at 9 (quoting the Production Code of 1930).

[60] *Id.* at 6.

[61] *Id.*

[62] RANDALL, *supra* note 3, at 23-25. Censorship boards often went beyond the statutorily provided standards, evaluating movies based on social values and political viewpoints. Id.

[63] 334 U.S. 131 (1948).

[64] *Id.* at 166.

[65] 343 U.S. 495 (1952).

[66] *Id.* at 502. The Court reasoned that books, newspapers, and magazines are produced and sold for profit, which does not prevent them from falling under First Amendment protection. *Id.* at 501-02. The Court expressly rejected any language in Mutual Film Corp. that was contrary to its new holding. *Id.* at 502.

[67] *Id.* at 503 (citing Near v. Minnesota, 283 U.S. 697 (1931)).

[68] FARBER, *supra* note 17, at 12. In fact, most of the boards were gone by 1965. Id.

[69] *Id.* at 14.

[70] *See, e.g.*, Interstate Circuit v. Dallas, 247 F. Supp. 906 (1965) (invalidating classification ordinance due to excessive vagueness).

[71] FARBER, *supra* note 17, at 14.

[72] *Id.*

[73] *Id.* at 15; RANDALL, *supra* note 3, at 179.

[74] Valenti, *supra* note 39.

[75] *Id.*

[76] *Id.*, FARBER, *supra* note 17, at 14-15.

[77] Valenti, *supra* note 39.

[78] *Id.*

[79] *Id.*

[80] *Id.* The official, trademarked rating is: NC-17: NO CHILDREN UNDER 17 ADMITTED. *Id.* All of the rating categories except X are trademarked and can not be used by anyone but the MPAA; however, producers may distribute a movie without a rating. Id.

[81] FARBER, *supra* note 17, at 19-20.

[82] *Id.*

[83] *Id.*

[84] *Id.* at 104. To some extent the MPAA rating system has been extended to include PG-13 and explanations for ratings assigned to categories PG, PG-13, R, and NC-17. Valenti, *supra* note 39.

[85] MEDVED, *supra* note 40, at 287.

[86] *Id.*

[87] *Id.*

[88] FARBER, *supra* note 17, at 55.

[89] *Id.*

[90] *Id.* at 55-59. FARBER notes that in 1972 the board was taking some measures to reduce the amount of censorship effect the ratings system may have on film production. *Id.* at 58-59. On the MPAA World Wide Web page, Jack Valenti expressly denies any industry pressure on board decisions or vice versa.

Valenti, *supra* note 39.

[91] *See, e.g.*, INGLIS, *supra* note 1, at 174, 180; MEDVED, *supra* note 40, at 321; RANDALL, *supra* note 3, at 184 (all arguing that outside pressure helps keep the self-regulation of the industry on its toes).

[92] *See supra* note 91.

[93] RANDALL, *supra* note 3, at 184.

[94] F. LESLIE SMITH, ET AL., ELECTRONIC MEDIA AND GOVERNMENT 33 (1995).

[95] JOHN WITHERSPOON and ROSELLE KOVITZ, THE HISTORY OF PUBLIC BROADCASTING 4 (1989).

[96] Smith, *supra* note 94, at 34.

[97] WITHERSPOON, *supra* note 95, at 4.

[98] *Id.* at 5.

[99] *Id.*

[100] Gelman, Morrie, *75 Years of Pioneers: A Personalized History of the Fifth Estate from Frank Conrad to Rupert Murdoch*, BROADCASTING & CABLE, Nov. 6, 1995, at 80.

[101] WITHERSPOON, *supra* note 95, at 5.

[102] *Id.* at 4-5.

[103] Gelman, *supra* note 100, at 81.

[104] *Id.*

[105] *Id.* at 80-83.

[106] WITHERSPOON, *supra* note 95, at 5.

[107] *Id.* at 4-5.

[108] SMITH, *supra* note 94, at 36.

[109] WITHERSPOON, *supra* note 95, at 6.

[110] *Id.*

[111] *Id.*

[112] WITHERSPOON, *supra* note 95, at 9.

[113] Gelman, *supra* note 100, at 83. Zworykin was finally granted his patent in 1939. *Id.* at 84.

[114] *Id.* at 83.

[115] *Id.* at 83-84.

[116] Smith, *supra* note 94, at 35.

[117] *Id.* at 36.

[118] *Id.* at 37, WITHERSPOON, *supra* note 95, at 6.

[119] SMITH, *supra* note 94, at 37.

[120] *Id.* at 38.

[121] *Id.*

[122] *Id.*

[123] *See, e.g.*, Trinity Methodist Church v. FRC, 62 F.2d 850 (App. D.C. 1932); KFKB Broadcasting v. FRC, 47 F.2d 670 (App. D.C. 1931)(both cases upholding FRC review of past programming in decisions to deny license renewal as not amounting to an unconstitutional censorship of protected First Amendment speech).

[124] SMITH, *supra* note 94, at 41-42.

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.* at 44-45.

[129] *Id.*

[130] SMITH, *supra* note 94, at 46-47.

[131] *Id.* at 46.

[132] *Id.*

[133] *Id.* at 46-47.

[134] *Id.* at 47.

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *See, e.g.*, Julia W. Schlegel, Note: *The Television Violence Act of 1990: A New Program for Government Censorship?* 46 FED. COMM. L. J. 187 (1993)(asserting that the Communications Decency Act is potentially unenforceable or possibly unconstitutional and that allowing the market to control itself may be more effective).

[140] *Id.* at 203-11.

[141] *Id.* at 189-90, 212-17.

[142] *Id.* at 190.

[143] *Id.* at 189-90.

[144] 51 F.C.C.2d 418 (1975).

[145] William Abbott, *Television and Violence: A Symposium: What is the Constitutional Solution*, 22 HOFSTRA L. REV. 891 (1994). There are also many who argue in favor of self-regulation as an effective solution to violence in broadcasting. *See, e.g.*, Terry L. Etter, The Knock-Down, Drag-Out Battle Over Government Regulation of Television Violence, 3 COMMLAW CONSPECTUS 31, 41 (1995)(suggesting that self-regulation may be the most effective solution to the violence on TV problem); Edmund L. Andrews, *Cable Industry Endorses Ratings and Devices to Lock Out Violence*, N.Y. TIMES, Jan. 22, 1994, at A1 (suggesting that self-regulation could prevent such legislation); Ellen Edwards, "Reno: End TV Violence," WASH. POST, Oct. 21, 1993, at A1 (reporting that Attorney General Reno called on the television industry to clean up its own act); Kim McAvoy, *TV Industry to Senate: Self-Regulation, Not Legislation, the Answer to Violence*," BROADCASTING & CABLE, May 24, 1993, at 14 (relating story of agreement of three major broadcasters to reduce violent content).

[146] Abbott, *supra* note 145, at 892-93.

[147] *Id.* at 892.

[148] *Id.* at 893.

[149] *Id.* at 895.

[150] George A. Keyworth, et. al., The Progress & Freedom Foundation, *The Telecom Revolution--An American Opportunity* (1995). A copy of this report can be obtained by contacting The Progress & Freedom Foundation, 1250 H Street NW, Suite 550, Washington, D.C. 20005, or E-Mail: PFF@AOL.com.

[151] *Id.* at 2.

[152] *Id.* at 4.

[153] *Id.* at 9, 13-15.

[154] *See Id.* at 9.

[155] *Id.* at 9, 17-31.

[156] *Id.* at 9.

[157] *Id.* at 9, 47-51.

[158] *Id.* at 10.

[159] *Id.* at 11.

[160] *Id.* at 10, 12.

[161] *Id.* at 12.

[162] *Id.*

[163] *Id.* at 13.