

## Appendix D

### AN OVERVIEW OF THE ENTERTAINMENT MEDIA INDUSTRIES AND THE DEVELOPMENT OF THEIR RATING AND LABELING SYSTEMS

This Appendix provides an overview of the motion picture, music recording, and electronic game industries, including a brief look at the role they play in the United States economy, as well as information on industry revenue, major players and market share, sales of rated or labeled products, spending statistics, and future trends. The Appendix then summarizes the historical development of the motion picture, music recording, and electronic game rating and labeling systems.

#### I. A SNAPSHOT OF THE ENTERTAINMENT MEDIA INDUSTRIES

The entertainment media are playing an increasingly significant role in the American economy, and the motion picture, music recording, and electronic game industries are part of that trend. In 1997, the latest year for which figures are available, the entertainment industries contributed an estimated \$348 billion to the U.S. economy, accounting for approximately 4.3% of gross domestic product.<sup>1</sup> Over the last 20 years, the real annual rate of growth of the core copyright industries (adjusted for inflation) grew twice as fast as the economy as a whole.<sup>2</sup> And some industry analysts predict that revenues from film, music, and video entertainment may increase from \$58 billion in 1998 to nearly \$95 billion in 2008.<sup>3</sup> This long-term growth will depend heavily on the development of new technologies to deliver these products to consumers.<sup>4</sup>

Recent mergers have created large entertainment corporations that own diverse assets and are often involved in creating, distributing, and operating more than one category of entertainment media, including movies, records, television shows, broadcast and cable networks, and the Internet.<sup>5</sup> This convergence will transform the entertainment media as these large conglomerates develop new ways to “both shape popular culture and deliver it to audiences around the world.”<sup>6</sup>

##### A. *The Motion Picture Industry*

*Revenues:* The motion picture industry generates revenue from several sources, including box office sales, home video sales and rentals (including VHS videocassettes and digital video disks (“DVDs”)), and licensing for television distribution. In 1999, gross box office sales generated revenues of almost \$7.5 billion,<sup>7</sup> while video rentals and sales each generated approximately another \$9-10 billion in revenues, for a total of just under \$20 billion.<sup>8</sup> Although large screen movies continue to play an influential role in the industry by creating “future demand for films in

other mediums, such as home video and television,”<sup>9</sup> consumers are now spending nearly three times as much annually to watch films on their home video systems than in theaters.<sup>10</sup> With the advent of new technologies such as DVD, which offer enhanced quality, interactive capabilities, and extra features, the home video rentals and sales markets will likely continue to grow in importance to the motion picture industry.<sup>11</sup>

*Major Players and Market Share:* In the box office arena, six film distribution companies – the Walt Disney Co., Viacom, Inc. (Paramount), Sony Corp., Fox Entertainment Group, Time Warner Entertainment, Inc., and Universal Studios Group – dominate the industry.<sup>12</sup> Together, they account for 80% of box office revenues.<sup>13</sup> These film distribution companies share box office revenues with the operators of movie theaters. The largest movie theater chains in 1999 were Regal Cinemas, AMC Entertainment, Cinemark Cinemas, Carmike Cinemas, and Loews Cineplex.<sup>14</sup>

The top firms for sales of home VHS and DVD products in 1999, accounting for nearly 70% of sales revenues, were Warner Home Video,<sup>15</sup> Buena Vista Home Entertainment,<sup>16</sup> Universal Studios Home Video,<sup>17</sup> Paramount Home Video,<sup>18</sup> Columbia Tristar, and Twentieth Century Fox Home Entertainment.<sup>19</sup> The same six companies accounted for approximately 80% of the rental market for home video.<sup>20</sup> The two largest U.S. video retail chains were Blockbuster Video and Hollywood Video;<sup>21</sup> however, consumer electronic chain stores Best Buy and Circuit City surpassed Blockbuster and Hollywood Video to become the top sellers of DVD software in 1999.<sup>22</sup>

*Rated or Labeled Product:* In 1999, 70% of the 677 movies rated by the MPAA were rated R. Another 16% were rated PG-13, while 9% were rated PG, and 5% received a G rating.<sup>23</sup> None received the NC-17 rating.<sup>24</sup> Of the 25 top-grossing movies (in all ratings categories) at the box office in 1999, almost half received a descriptor for violence while more than half of the 20 top rental movies (in all ratings categories) received a similar violence descriptor.<sup>25</sup>

*Audience:* The average consumer spending per person on movies in theaters in 1997 was \$28.83 and is expected to rise to \$33.60 by 2002.<sup>26</sup> Overall, theatrical admissions have been rising during the last decade. In 1999, there were 37,185 movie screens in the U.S., an increase of 3,000 over 1998.<sup>27</sup> According to the 1999 Motion Picture Attendance survey conducted by the MPAA, 20% of annual admissions came from the 16-20 year age group – the largest of any

cohort. The 12-17 age cohort made up 17% of total annual admissions – the third largest segment in annual theater admissions.<sup>28</sup> Consumer spending on home video was \$76.25 on average in 1997 and is projected to grow to \$98.34 by 2002.<sup>29</sup>

*Future Trends:* Technological advances such as DVD and digital television broadcasting (DTV) will affect the future of the movie industry, particularly in the home entertainment arena. DVD players provide sharper pictures and clearer audio than those available from VHS videocassette recorders, can store much more information than VHS tapes, and can offer many features, such as interactive information about movie productions and movie celebrities.<sup>30</sup> DTV will provide consumers clearer and sharper, cinema-like pictures as well as multichannel, CD-quality sound.<sup>31</sup>

### ***B. The Music Recording Industry***

*Revenues:* The music recording industry generates nearly all of its revenues from sales of full-length CDs, but also generates revenues from the sale of full-length cassettes, vinyl LPs, single CDs, and music videos.<sup>32</sup> Although Internet sales currently account for only 1% of sales, in the future, the industry may also make significant sales through Internet music purchases.<sup>33</sup> In 1999, the market value of all recorded music sales, according to the RIAA, was \$14.6 billion.<sup>34</sup>

*Major Players and Market Share:* Five distributors – UMG Recordings, Inc., Sony Music Entertainment, Inc., Warner Music Group Inc., EMI Recorded Music, North America, and BMG Entertainment – dominated the recording industry in 1999 and accounted for roughly 80% of retail sales.<sup>35</sup> Each of these companies offers products under a number of different individual divisions known as labels. Despite some recent challenges to the major recording companies from Internet-based music providers, these companies have well-established, exclusive relationships with artists and have large resources to fund the promotion and marketing of new recordings.<sup>36</sup>

*Rated or Labeled Product:* The recording industry does not officially track sales of music recordings labeled with an explicit-content parental advisory label separately from those for non-labeled recordings. A review of the Billboard 200™ for the weeks of July 31, 1999 and July 29, 2000, however, shows that approximately one-third of the top 100 best-selling CDs for these weeks contained an explicit-content label.<sup>37</sup>

*Audience:* Consumer spending per person on recorded music (excluding music videos) was \$55.20 per person in 1997 and is expected to rise to \$68.89 by 2002.<sup>38</sup> Recent data released by the RIAA indicate that, although overall music sales in 1999 were up 6%, the percentage of consumers between 10 and 19 years of age dropped from 25.9% of buyers in 1990 to 21.1% in 1999 – making them the second largest group of music buyers after consumers 45+, who account for 24.7% of sales.<sup>39</sup> To some degree, this may reflect the general aging of the population and older consumers' greater ability to afford compact disks.<sup>40</sup> Nonetheless, the RIAA survey indicates that some of the most popular music genres, *e.g.*, rock and rap/hip hop, are those that appeal to teenagers or younger children.<sup>41</sup>

*Future Trends:* Almost more than any other industry, the music industry is feeling the effects of technological change.<sup>42</sup> Although the CD remains the most widely used format to deliver music, computers are increasingly being used to receive, store, create, and distribute music. Industry analysts predict that U.S. online sales of music in CD format could grow from \$150 million in 1998 to \$1 billion by 2003 and to \$2 billion by 2007.<sup>43</sup> In addition, downloaded music using digital technology such as MP3 – which allows listeners to download single songs – will become increasingly popular. The long-term implications of these new technologies on the profitability and growth of the recorded music industry are difficult to assess, and the predominant format for music sales in the future remains an open question.<sup>44</sup>

### ***C. The Electronic Game Industry***

*Revenues:* The electronic game industry, which includes personal computer games and console-based video games, is the fastest growing part of the entertainment industry. In 1999, the industry grossed more than \$6.1 billion in sales, a 19% increase over 1998 sales levels of \$5.5 billion.<sup>45</sup> Video games sales accounted for \$4.2 billion of this revenue, while computer games sales accounted for \$1.9 billion.<sup>46</sup>

*Major Players and Market Share:* In 1999, Sony's game console, the PlayStation, accounted for 54% of the gaming hardware market while Nintendo's console, the Nintendo 64, garnered 33% of the market (not including its hand-held Game Boy).<sup>47</sup> Sega's console, the Sega Dreamcast, first launched in September 1999, captured a 14% share of the market.<sup>48</sup> In 1999, Sony had obtained 68% of the software gaming market, while Nintendo accounted for 28%. The five largest console game publishers in 1999 were Nintendo, Electronic Arts, Sony, Midway, and

Acclaim,<sup>49</sup> while the top PC game publishers were Havas Interactive, Electronic Arts, Hasbro Interactive, Mattel Interactive, and Infogrames Entertainment.<sup>50</sup> The top five video game retailers in 1999 were Toys “R” Us, Wal-Mart, Best Buy, KB Toys, and Kmart.<sup>51</sup>

*Rated or Labeled Product:* The most popular game genres are strategy/role-playing, action, sports and racing, shooting, fighting, and simulation.<sup>52</sup> According to the IDSA, 7% of all video games have been given a mature or M rating.<sup>53</sup> Nearly all M- and T-rated games contain violent content. In fact, of the 352 M-rated games currently listed on the ESRB Web site, 312 or 89% have content descriptors for violence.<sup>54</sup> Of the 981 Teen or T-rated games, 942 or 96% have content descriptors for violence.<sup>55</sup>

*Audience:* Consumer spending per person on video games in 1997 was \$16.42 and is projected to rise to \$20.04 in 2002.<sup>56</sup> According to some industry analysts, children make up 60% of the video game audience, and males over the age of 18 who are heads of households account for the other 40%. Other surveys show that the market for interactive games is much broader, with 69% of personal computer gamers 18 years or older and 54% of video console gamers 18 years and older.<sup>57</sup>

*Future Trends:* The future of the electronic game industry will be affected by new technologies including advances in personal computers, 3-D acceleration technology, and Internet connectivity. The industry expects the next generation of Internet-connected video consoles – such as the soon-to-be released Sony PlayStation 2, the Nintendo Dolphin, and the Microsoft X-Box – to catapult it to the forefront of high-technology home computing and consumer electronics.<sup>58</sup> These consoles will be able to play DVD games, movies, and CDs; download music, movies, and games from the Internet; provide other Internet-based functions like email; and act as a cable TV set-up box.<sup>59</sup> In addition, observers expect that the industry will develop new approaches to game play – such as people simulations and music games – in addition to the traditional game genres such as action, strategy, sports, role-playing, adventure flight/combat simulators, and puzzles.<sup>60</sup>

## II. HISTORY OF THE MOTION PICTURE RATING SYSTEM

### A. *The Early Days and the Hays Production Code*

From its earliest days, the motion picture industry has been subject to either government regulation or self-regulation. Early concerns about film's potential to reach and influence large audiences led to public calls for greater controls on movies than on books, art, or theater.<sup>61</sup> By 1911, several city and state governments had established censorship boards.<sup>62</sup>

Despite such censorship, heated discussions about film content and local and state regulation continued. In an attempt to head off the threat of extensive government censorship, the motion picture industry in 1922 formed the Motion Picture Producers and Distributors Association, now known as the Motion Picture Association of America ("MPAA"). The Association named Will Hays, then U.S. Postmaster General, the head and tasked him with formulating controls for the moral content of movies.<sup>63</sup>

The resulting "Hays Production Code" regulated movie scenes containing sex, vulgarity, crime, brutality, profanity, obscenity, blasphemy, cruelty to animals, religion, "special subjects," and "national feelings."<sup>64</sup> Early compliance with the Code by the studios was voluntary, but by 1934, the Production Code Administration began to enforce it by granting or denying a "seal of approval" based on adherence to Code standards. The studios agreed not to distribute any movies that did not carry the seal. Movie theaters – at that time owned mostly by the major studios – did not exhibit unapproved films.<sup>65</sup>

Court-ordered divestiture of studio-owned movie theaters in the 1940s helped lead to the demise of the Hays Code.<sup>66</sup> Theaters not owned by the studios were free to exhibit foreign and other films not approved by the Production Code Administration. The Supreme Court explicitly extended constitutional protection to film content in *U.S. v. Paramount Pictures*,<sup>67</sup> emboldening the film industry and further eroding the power of the Code. But to some observers, the greatest impetus to the dismantling of the Code may have been the wider "avalanching revision of American mores and customs" in the 1960s.<sup>68</sup>

In response to social changes, the MPAA liberalized the Code by introducing the advisory "Suggested for Mature Audiences" rating. In 1968, however, the Production Code Administration refused to apply its seal of approval, even with the "mature audiences" advisory, to *Blow-Up*, the first mainstream American film to contain nudity. Metro-Goldwyn-Mayer nevertheless released the film through a subsidiary company, thereby flouting the MPAA voluntary agreement that no member studios would distribute a film without a Code seal.<sup>69</sup>

The U.S. Supreme Court dealt a final blow to the Hays Production Code in 1968 in *Interstate Circuit, Inc. v. City of Dallas*.<sup>70</sup> Although it struck down Dallas's Motion Picture Classification Board as unconstitutionally vague, the Court stated that "because of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults."<sup>71</sup> Faced with the prospect of continuing and conflicting regulation by numerous state and local ratings boards, the motion picture industry devised a new self-regulatory system.

### ***B. The Modern Motion Picture Rating System***

The new voluntary<sup>72</sup> self-regulatory rating system was developed by the MPAA in conjunction with the National Association of Theatre Owners ("NATO") and the International Film Importers & Distributors of America.<sup>73</sup> In its November 1968 announcement of the system, the MPAA stated that the purpose of the rating system was not to approve or disapprove the content of films, but rather to advise parents as to the suitability of a film for their young children<sup>74</sup> with respect to theme, violence, language, nudity, sensuality, drug abuse, and other elements.<sup>75</sup>

The first four rating categories were:

G for General Audiences – all ages admitted;

M for Mature Audiences – parental guidance suggested, but all ages admitted;

R for Restricted – children under 16<sup>76</sup> not admitted without an accompanying parent or guardian; and

X – no one under 17 admitted. (Age varied in some jurisdictions.)<sup>77</sup>

The MPAA had originally planned to use only the G, M, and R ratings, leaving it up to parents to decide whether they wished to accompany their child to adult-oriented films. However, theater owners feared possible lawsuits by parents under state or local law and wanted the right to exclude children from specific films. NATO urged the creation of an adults only category, and the "X" category was added to the rating categories. The MPAA trademarked the category symbols, except for the "X."<sup>78</sup>

The first change to the rating system occurred in 1969, when the MPAA changed the "M" category to "GP," meaning "General Audiences: Parental Guidance suggested."<sup>79</sup> A year later, the MPAA again renamed "GP" to its current label, "PG: Parental Guidance Suggested. Some Material May Not Be Suitable For Children."<sup>80</sup> In 1984, in response to controversy over violence in the PG-rated film *Indiana Jones and the Temple of Doom*, the MPAA introduced the PG-13

rating. The label means “Parents Strongly Cautioned. Some Material May Be Inappropriate for Children Under 13.”<sup>81</sup>

In 1990, the MPAA replaced the “X” rating with “NC-17: No Children Under 17 Admitted,” a copyrighted symbol.<sup>82</sup> The change was precipitated by some observers’ criticism of the “X” rating as tantamount to a “kiss of death” to a motion picture’s chance of financial success.<sup>83</sup> The change to NC-17 also followed a state court’s condemnation of the MPAA’s rating system, particularly the labeling of some films with the X rating.<sup>84</sup> The NC-17 rating, however, appears to have inherited some of the X stigma.<sup>85</sup> Only 65 films are listed in the MPAA/CARA database as rated NC-17 (ten of these had been rated X before the NC-17 rating took effect).<sup>86</sup> Few are recognizable as mainstream films.<sup>87</sup>

Also in 1990, the MPAA began providing brief explanations to theater owners and certain media as to why films had been rated R (*e.g.*, “rated R for violence and nudity”). In 1992, the Association introduced similar rating reasons for the PG and PG-13 ratings and, in 1994, for the NC-17 rating. These content descriptors do not appear in print or broadcast advertising, but are available at the MPAA Web sites, [www.mpa.org](http://www.mpa.org), [www.filmratings.com](http://www.filmratings.com), and [www.cara.org](http://www.cara.org).<sup>88</sup>

The final change to date in the original MPAA rating system occurred in 1996, when the MPAA changed the meaning of NC-17 from “no children under 17 admitted. Age may vary in certain areas” to “no one 17 and under admitted,” thereby effectively raising the age of admission from 17 to 18.

The MPAA has taken steps to increase public awareness of its rating system. The Web sites mentioned above, in addition to providing the reasons for the ratings, also provide an explanation of the rating system in general. The MPAA also has published a booklet detailing the history, purpose, and meaning of the system, as well as the rating decision-making process.<sup>89</sup>

### **III. HISTORY OF THE MUSIC RECORDING LABELING PROGRAM**

#### ***A. Parental Pressure for a Music Rating System***

In May 1985, the Parents’ Music Resource Center (“PMRC”),<sup>90</sup> along with the National Parent Teacher Association (“NPTA”), began a dialogue with the Recording Industry Association of America (“RIAA”)<sup>91</sup> to encourage the recording industry to develop a voluntary system “to protect our children” from graphic sexual and violent lyrics.<sup>92</sup> The PMRC initially proposed that the recording industry adopt a rating system for recordings similar to the rating system used for motion pictures.<sup>93</sup> Among other proposals, the PMRC suggested that the front of record album jackets and cassettes prominently display ratings – “X” for profane, sexually



explicit, or violent lyrics, “O” for lyrics with references to the occult, and “D/A” for lyrics that encourage or glorify the use of drugs or alcohol.<sup>94</sup>

In August 1985, the RIAA responded to the PMRC’s calls for self-regulation by acknowledging “the legitimate concerns” of parents who wished to limit their children’s exposure to recordings with explicit lyrics and offering to place “a printed inscription on packaging of future recording releases to identify blatant explicit lyric content in order to inform concerned parents and children, and to make possible parental discretion.”<sup>95</sup> Under the RIAA proposal, each record company would identify which of its recordings required an advisory. The RIAA, however, opposed the PMRC’s request for a more formalized rating system, characterizing this option as “totally impracticable” due to the large number of songs released each year.<sup>96</sup> The association also rejected the PMRC’s other, more extensive, proposals.<sup>97</sup>

In response to the RIAA’s proposal, the PMRC countered that while generic labeling may sometimes be acceptable, “it certainly is not in the instance that each record company would apply its own standard about what constitutes ‘blatant explicit lyric content.’”<sup>98</sup> The PMRC noted that “[d]ifferent standards by each company would create confusion among consumers rather than serving as a benefit to them in deciding what is appropriate.”<sup>99</sup> Accordingly, the PMRC recommended that the recording industry appoint a panel of industry and consumer representatives to develop guidelines that the individual companies could use when deciding which of their recordings to label.<sup>100</sup>

With no formal agreement reached between industry and consumer groups, the Senate Commerce Committee convened hearings in September 1985 to examine sexually explicit and violent rock music lyrics.<sup>101</sup> The Committee heard testimony from the PMRC and NPTA, as well as the RIAA and several musicians.<sup>102</sup> Faced with charges of censorship, Senator John Danforth, the Committee Chairman, stated that the purpose of the hearing was not to consider legislation, but rather to discuss the issues surrounding explicit lyrics in rock music.<sup>103</sup> Tipper Gore, who testified at the hearings on behalf of the PMRC, maintained that the essence of the PMRC proposal was a voluntary labeling system, without government action.<sup>104</sup>

### ***B. The Initial Industry Response***

As a result of this mounting pressure from both Congress and parents’ advocacy groups, the RIAA announced an agreement with the PMRC and the NPTA on November 1, 1985, whereby participating record companies would place an advisory on recordings containing lyrics with strong language or that explicitly referred to sex, violence, or substance abuse.<sup>105</sup> Under the

plan, each record company would decide independently which albums contained “explicit” lyrics, without using uniform guidelines. On the albums selected, the advisory “Parental Advisory – Explicit Lyrics” would appear boxed and lined on the lower corner of the back cover.<sup>106</sup> In addition, as an alternative to labeling recordings as “explicit,” the companies had the option of providing the lyrics on the back of the LP jacket or in a lyric sheet.<sup>107</sup> Twenty-two recording companies, including all the major companies, supported this proposed labeling system.<sup>108</sup>

The recording industry’s initial effort at implementing this labeling system, however, met with extensive criticism. In 1986, the PMRC identified numerous problems with the industry’s compliance with the voluntary labeling program,<sup>109</sup> including complaints that the notices were “hard to find, easily removed, incorrectly worded, displaced, or too small to read,”<sup>110</sup> and that 25 albums released between January 1986 and May 1987 contained explicit lyrics but bore neither an advisory nor printed lyrics.<sup>111</sup>

### *C. Concerns at the Retail Level*

By 1990, approximately one third of the states had grown dissatisfied with the recording industry’s self-regulatory efforts and considered bills requiring the labeling of music with explicit lyrics or prohibiting the sale of such music to minors.<sup>112</sup> Among the proposals considered by the states were provisions prohibiting retailers from selling “offensive” or labeled music to minors; requiring retailers to separate “obscene” materials and to provide a full refund to parents who objected to a purchased album; and prohibiting minors from attending performances of music with explicit lyrics.<sup>113</sup> A Pennsylvania bill, for example, called for a label that would read, “WARNING: May contain explicit lyrics descriptive of or advocating one or more of the following: suicide, sodomy, incest, bestiality, sadomasochism, adultery, sexual activity in a violent context, murder, morbid violence, use of illegal drugs or alcohol. PARENTAL ADVISORY.”<sup>114</sup> The PMRC opposed these legislative proposals, continuing to support industry self-regulation over government involvement.<sup>115</sup>

Much of the proposed legislation sought to penalize retailers who sold explicit-content labeled recordings.<sup>116</sup> At the same time, these retailers also were facing mounting pressure from local communities, advocacy groups, and public figures regarding the sale of explicit music.<sup>117</sup> For example, Wal-Mart stopped carrying rock-and-roll records and magazines in response to complaints made by the Reverend Jimmy Swaggert, and Sears and J.C. Penney announced that they would not sell any records with warning labels.<sup>118</sup> In addition, many shopping mall retailers feared violating long-term leases that prohibited them from carrying “adult” material.<sup>119</sup>

For these reasons, music retailers<sup>120</sup> and their trade associations<sup>121</sup> encouraged the recording industry to establish an industry-wide standardized label, with uniform size and placement requirements.<sup>122</sup> The NARM asserted that adopting a visible, standardized label would make explicit recordings easily identifiable, would help in training employees to distinguish stickered products,<sup>123</sup> and would demonstrate to legislators that government intervention was unnecessary.<sup>124</sup>

#### ***D. The Current Parental Advisory Explicit Content Label***

Amidst these pressures, the recording companies and the retailers developed a uniform advisory label and, in May 1990, the recording industry unveiled a new label “standard in size, color, and placement.”<sup>125</sup> This black and white logo read “Parental Advisory – Explicit Lyrics.” The logo was to appear in the right-hand corner of the permanent packaging under the cellophane shrink wrap (instead of as a peel-off sticker), and was to measure 1 inch by ½ inch on cassettes or CD jewel boxes, and 1½ inches by 1 inch on albums and CD long boxes.<sup>126</sup> Nearly all of the RIAA’s 92 member companies agreed to use the new system.<sup>127</sup> One aspect of the industry approach that did not change, however, was that each record company continued to determine which recordings would display the logo, using its own definition of “explicit” lyrics.<sup>128</sup>

#### ***E. Continued Calls for Reform and the Industry’s Response***

Despite the new standardized label, Congress conducted hearings in February and May 1994 to discuss violent lyrics in music recordings and to examine the sufficiency of the industry’s labeling system.<sup>129</sup> As with the 1985 proceedings, these hearings did not contemplate legislation, and featured testimony by concerned citizens and record industry artists and executives.<sup>130</sup> Critics of the voluntary labeling system stated that “the parental guidance sticker system presently being used in the recording industry is simply not enough,” and advocated a rating system similar to the one used for motion pictures.<sup>131</sup> The recording industry responded that such a rating system would be unworkable because the recording companies “would not be equipped to make those decisions,” as it is nearly impossible to evaluate the meaning of offensive words in the context of particular songs.<sup>132</sup>

These congressional hearings, accompanied by the ongoing efforts of consumer groups to call attention to the violent and sexually graphic lyrics in many rock and rap CDs, motivated the major recording companies to coordinate with the RIAA and to re-evaluate the labeling program.<sup>133</sup> In mid-1995, the RIAA indicated that it would make the review “a top priority” and

would consider a number of proposed changes, including developing “ratings” for music recordings similar to movie ratings or adding descriptive commentary to the advisory label.<sup>134</sup> As part of the review process, the RIAA and the NARM conducted a series of focus groups, in which parents stated that they wanted a “visible and credible” voluntary labeling program to help them monitor the music their children purchased.<sup>135</sup>

Upon concluding its review, the industry retained its uniform logo and the process by which recordings were labeled, changing only the wording of the logo from “explicit lyrics” to “explicit content” to cover graphic music videos.<sup>136</sup> The RIAA also issued Usage Guidelines, still in effect today, which provided that the logo should be 1 inch by 5/8 inch on cassettes, CDs, vinyl records, and music videos, and should be placed on the permanent packaging under the cellophane shrink wrap.<sup>137</sup>

Instead of changing its parental advisory program, the recording industry focused on increasing public awareness of its existing advisory label. In August 1996, the RIAA and the NARM provided retailers with posters that displayed the label and described its purpose.<sup>138</sup> This point-of-purchase material, printed in deep yellow, explained to consumers that “The Parental Advisory is a notice to parents that recordings identified by this logo may contain strong language or depictions of violence, sex, or substance abuse.”<sup>139</sup> In addition, the RIAA distributed guidelines to recording companies, encouraging them to use the voluntary system and instructing them on “proper” usage of the advisory logo.<sup>140</sup>

In 1997 and 1998, the Senate held additional hearings on violence in music.<sup>141</sup> In the 1997 hearings, one senator called upon the recording industry to improve “its one-size-fits-all labeling system . . . to give parents more of the basic information they need to make informed judgments.”<sup>142</sup> In addition, individual states have continued to consider legislation concerning the sale of music with explicit lyrics to minors.<sup>143</sup> The recording industry, however, has maintained that the parental advisory logo provides parents with valuable information.<sup>144</sup>

Defending its self-regulatory labeling system, the recording industry stated that:

By voluntarily creating and administering the Parental Advisory Program, U.S. record companies have acknowledged their responsibility in the collaborative effort to help parents set and enforce standards for their children, without imposing those standards on others.<sup>145</sup>

Although the industry initially did not change its labeling system, the RIAA revised its Web site, [www.riaa.com](http://www.riaa.com), in May 2000 to highlight the Parental Advisory Labeling Program and to include additional information about the reasoning behind and mechanics of this program. On June 8, 2000, the RIAA joined with the MPAA and the ESRB in announcing a Web site,

www.parentalguide.org, that provides links to the different industry associations involved with entertainment rating or labeling systems.

In late August 2000, the RIAA recommended revisions to the parental advisory label program, to be effective October 1, 2000. According to the recommendation, the RIAA now asks that industry members: 1) use general guidelines, included in an RIAA memorandum, to determine whether a recording warrants a parental advisory label; 2) adopt a policy that the parental advisory label or other prominent notice of explicit content should appear in print advertising for explicit-labeled recordings and that advertising for explicit-content labeled recordings should not appear in publications, Web sites, or other commercial outlets whose primary (*i.e.*, 50% or more) market demographic is 16 years of age or younger; and 3) adopt a policy that the parental advisory label should appear prominently in online retail sites in all stages of the transaction and that online retail sites should link to the entertainment industry's Web site, www.parentalguide.org. Further, the RIAA committed to conduct an annual inquiry of its policies and their implementation.

#### **IV. HISTORY OF THE ELECTRONIC GAME INDUSTRY RATING SYSTEMS**

##### ***A. Background***

The electronic game industry initiated rating systems largely in response to threatened federal intervention in the early 1990's. On December 9, 1993, the Senate Subcommittee on Juvenile Justice and the Government Affairs Subcommittee on Regulation and Government Information convened the first of a series of three joint hearings entitled *Rating Video Games: A Parent's Guide to Games*.<sup>146</sup> The impetus for the hearing was a bill proposed by Senators Joseph Lieberman and Herbert Kohl that would have "establish[ed] the National Independent Council for Entertainment in Video Devices as an independent agency of the federal government to oversee the development of 'voluntary' standards to warn parents of the content of video games."<sup>147</sup>

In response to this proposed federal action, two major game developers – Sega of America and Nintendo of America – agreed to work together as part of a coalition of game developers to establish a rating system for video games.<sup>148</sup> The Software Publishers Association ("SPA") – an industry trade group for developers, publishers, and online distributors of software for personal computers – and the Video Software Dealers Association ("VSDA") – an industry trade group representing retail sellers of software – announced the formation of an industry coalition at a press conference shortly before the December 9, 1993 Senate hearing.<sup>149</sup>

In January 1994, the SPA (now the Software & Information Industry Association), along with other trade associations,<sup>150</sup> set up the Game Ratings Working Group, which brought together representatives from both the video game and computer game industries.<sup>151</sup> The companies and organizations participating in the Working Group “represent[ed] nearly 3,000 software developers, publishers, and distributors – virtually the entire personal computer software industry.”<sup>152</sup>

But a split soon emerged within the Working Group between the developers and publishers of personal computer software and the developers and publishers of video game software, the latter of which can be played only on a cartridge- or compact disc-based console system, such as those produced by Sega and Nintendo.<sup>153</sup> By April 1994, a group of video game companies had formed the Interactive Digital Software Association (“IDSA”) to advance the industry’s fledgling self-regulatory efforts.<sup>154</sup> The IDSA and the Working Group proceeded to develop separate rating systems for interactive software.<sup>155</sup> In the meantime, the American Amusement Machine Association, an industry trade group representing over 120 manufacturers, distributors, and parts suppliers of coin-operated amusement equipment, began creating yet a third rating system to provide public disclosure of the violent content of coin-operated video games.<sup>156</sup>

### ***B. The IDSA/ESRB System***

Congress held follow-up hearings on the video game industry’s self-regulatory efforts in March, June, and July 1994. In March, Jack Heistand, a representative of the Interactive Entertainment Industry Rating System Committee (a pre-cursor to the IDSA),<sup>157</sup> outlined five principles underlying the video game industry’s plans for a self-regulatory system: (1) the Committee would form a new industry trade association (the IDSA) and create, as an independent arm of the association, a ratings board made up of people from a variety of fields, including educators, parents, child development experts, business representatives, and others;<sup>158</sup> (2) the board would determine a final rating for games before they reach store shelves;<sup>159</sup> (3) the board would develop rating symbols, which would be accompanied by a description of the content of the game, such as “contains graphic depictions of animated violence”;<sup>160</sup> (4) all packaging, advertising (television, radio, online, and print), and consumer marketing material would display the rating symbol;<sup>161</sup> and (5) all members of the trade association would agree to adopt a voluntary advertising code of conduct that would include guidelines on “such things as properly targeting ads to users for whom the product is rated as appropriate.”<sup>162</sup>

Mr. Heistand also described several elements of the IDSA's rating process. The ratings board would have an executive director (chosen by the trade association's board of directors) who would be responsible for selecting "expert independent raters" whose identities would be unknown to the industry and the trade association staff.<sup>163</sup> The raters would be paid by the ratings board, not the trade association.<sup>164</sup> To obtain a rating, a publisher would submit a video tape of game play to the ratings board as late in the development process as possible. Publishers would be required to submit tapes that "show the boundaries of the game and include the most extreme portions that could affect the rating," along with an affidavit answering a series of questions about the game and certifying that the submission is representative of game play.<sup>165</sup> The system would result in "tough sanctions" against companies that withheld relevant information and, in effect, secured a rating fraudulently.<sup>166</sup>

In June and July 1994, Mr. Heistand and Douglas Lowenstein, president of the newly formed IDSA, reported to Congress on IDSA's progress in creating a rating system,<sup>167</sup> which was formally approved and implemented in September 1994, including the formation of "an independent, third-party entity" (eventually known as the Entertainment Software Rating Board ("ESRB")) to assign ratings to software.<sup>168</sup>

The IDSA rating system is now the industry's predominant rating system. It covers entertainment software for all platforms, including personal computers and video game consoles, that are intended for distribution through retail establishments, mail order, and online.<sup>169</sup> The ESRB's rating icon can be found on all console-based video games and on more than 80% of personal computer software games;<sup>170</sup> the remainder of personal computer games, which are unrated, are primarily educational titles for early childhood users.<sup>171</sup>

The IDSA and the ESRB have taken steps to inform the public of their rating systems. These associations published the ESRB Parent's Guide to Interactive Entertainment in 1998, which explains the rating symbols and content descriptors for video games, personal computer software, and Internet Web sites.<sup>172</sup> In November 1999, the ESRB launched a new initiative to make parents aware of the electronic game rating systems,<sup>173</sup> particularly in light of the ESRB's adoption of new standards in January 2000 to increase the size of ratings icons and to use descriptors in advertising, including a voice-over disclosure in television advertising.<sup>174</sup>

### ***C. The RSAC System***

In September 1994, the SPA-sponsored Working Group founded the Recreational Software Advisory Council ("RSAC"), with the mission of "providing parents and other

consumers with the information they need to make wise decisions about the recreational software they bring home.”<sup>175</sup> As explained to Congress by the SPA counsel, RSAC was incorporated as an organization outside of any industry trade association “[b]ecause independence from industry is essential for the credibility of a ratings program . . . .”<sup>176</sup>

Like the IDSA/ESRB system, the RSAC system assigns ratings to software titles before they are shipped to retailers, and authorizes the imposition of penalties, such as fines and product recalls, for companies that submit misleading information about game content during the rating process.<sup>177</sup> The assignment of an RSAC rating is largely based on a self-report of the game’s content by the developer or publisher after completing sworn responses to a detailed questionnaire. The developer or publisher is required to complete a highly specific, definition-intensive questionnaire concerning the game’s content, and a computer program automatically assigns a rating to the game based on these answers.<sup>178</sup>

Unlike the IDSA/ESRB system, the RSAC system does not rate games based on age appropriateness.<sup>179</sup> Rather, it rates content according to three criteria: violence, nudity/sex, and language. If there is no violence, nudity/sex, or offensive language in the game, the game receives an “All” rating, meaning that it is suitable for all audiences. If the game contains any degree of violence, nudity/sex, or language, however, a content icon(s) representing violence, nudity/sex, and/or language will appear on the game.

A four-degree thermometer icon also appears next to the RSAC content icon; a higher “temperature” on the thermometer indicates a more intense degree of violence, sexual content, or profanity. Thus, for example, a game depicting situations in which creatures are injured or killed might justify a violence icon (pictured as a bomb with a burning fuse) and a temperature level of one degree, whereas a violent game that depicts torture or rape would justify a violence icon and a temperature level of four degrees. Depending upon the violent content of the game, descriptors such as “creatures killed,” “humans killed,” “blood and gore,” or “wanton and gratuitous violence; rape” also may appear on the RSAC Advisory label.

The RSAC rating must be displayed in accordance with minimum size requirements on the front panel of all packaging and printed retail displays associated with the rated software. If the software is distributed in a purely electronic form without significant physical packaging, the ratings information must be displayed prominently on the boot-up display of the software title,<sup>180</sup> the IDSA/ESRB system, by contrast, requires only that the rating information appear on the page where game information (such as price) is provided, not within the game software itself. The RSAC system has not imposed any requirements for the display of rating information in



marketing materials or regarding the manner or media in which it is appropriate to advertise electronic games.<sup>181</sup>

As noted, the IDSA/ESRB rating system has become the industry's rating system of choice. By the end of 1999, only one software publisher was using the RSAC's rating system for its games,<sup>182</sup> and the last time any one of the eleven game publishers studied for this Report sought an RSAC rating was in February 1997.

#### ***D. The System for Coin-Operated Games***

The American Amusement Machine Association ("AAMA") and the Amusement and Music Operators' Association ("AMO") manage a separate industry rating system for coin-operated games. These two associations, with help from the International Association of Family Entertainment Centers and the International Association of Amusement Parks and Attractions, initiated the development of a Parental Advisory System, concurrent with the development of the ESRB and RSAC systems.<sup>183</sup> The Parental Advisory System was not implemented, however, until 1998.<sup>184</sup>

Unlike the ESRB system, the Parental Advisory System does not use a rating board. Similar to the RSAC system, the AAMA provides manufacturers and developers with a "System Guidelines" sheet to help them determine the appropriate rating through a series of questions about the game's content.<sup>185</sup> Like the RSAC system, the Parental Advisory System does not link the suitability of games with mild or strong descriptors to any age. However, a Code of Conduct developed by industry trade groups encourages the staff of coin-operated game establishments to discourage "children who are unaccompanied by a parent" from playing video games labeled with a red (strong) disclosure message.<sup>186</sup> The Code also states that the manufacturers and developers of video coin-operated games should strive to create fewer violent games and more games that are suitable for people of all ages.<sup>187</sup>

The Parental Advisory System uses four different content descriptors: animated violence, life-like violence, sexual content, and language. Warning labels include one of the above content descriptors on a green, yellow, or red sticker depending on the level of that behavior<sup>188</sup> exhibited in the game – green meaning "suitable for everyone," yellow meaning "mild," and red meaning "strong." Because each content descriptor warrants a separate disclosure message, it is possible for one coin-operated game to have four red ("strong") disclosure messages, one for each content descriptor. These disclosure messages must be of a minimum size, and must appear in the artwork of the front header portion of each game unit.<sup>189</sup> Beginning in the summer of 1999,

AAMA also has asked manufacturers to include in all advertising for coin-op video games a color-coded Parental Advisory Disclosure Message setting out the games' content descriptor (e.g., "Life Like Violence Mild").<sup>190</sup>

Although an industry study found that parents "offered praise for the industry's initiative in providing information regarding the content" of games, it also concluded that parents "explicitly permitted their children to play coin-op games that contained 'Strong'-rated content."<sup>191</sup> Believing that the Parental Advisory System is ineffective, some consumers have begun grassroots campaigns encouraging retailers voluntarily to remove violent games from their property.<sup>192</sup> Several companies, such as Wal-Mart, Disney, and Capcom, have removed violent games from their properties.<sup>193</sup> Most recently, the mayor of Indianapolis signed an ordinance prohibiting access by children under age 18 without parental accompaniment to coin-operated games that contain "graphic violence" or "strong sexual content," as well as requiring that such games be kept out of the view of minors.<sup>194</sup>

## ENDNOTES

1. International Intellectual Property Alliance, *Copyright Industries in the U.S. Economy: The 1999 Report* (released Dec. 1999), [www.iipa.com/execsummary.pdf](http://www.iipa.com/execsummary.pdf) (visited July 28, 2000). The figures cited are for the “core copyright industries,” which include the motion picture industry (television, theatrical, and home video); the recording industry (records, tapes, and CDs); the music publishing industry; the book, journal, and newspaper publishing industries; the computer software industry (including interactive software on all platforms); the legitimate theater; the advertising industry; and the radio, television, and cable broadcasting industries. IIPA’s member associations include the Motion Picture Association of America (“MPAA”), the Recording Industry Association of America (“RIAA”), and the Interactive Digital Software Association (“IDSA”).
2. *Id.*
3. Paul Kagan & Associates, Inc., *American Media and Entertainment Growing Three Times as Fast as the Nation’s Economy; Will Reach \$1.1 Trillion in Revenue by 2008*, [www.kagan.com/screen/kmarket/mc08.html](http://www.kagan.com/screen/kmarket/mc08.html) (visited July 27, 2000).
4. Standard & Poor’s, *Industry Surveys, Movies & Home Entertainment* [hereinafter *S&P Entertainment Industry Survey*] May 11, 2000, at 11.
5. *Id.* at 1-3, 12-13.
6. *Id.* at 16.
7. *Id.* at 9-10; see MPA Research Ass’n, *MPAA 1999 U.S. Economic Review*, at 29 (2000), [www.mpa.org/useconomicreview/1999Economic/sld002.htm](http://www.mpa.org/useconomicreview/1999Economic/sld002.htm) (visited July 28, 2000).
8. *Id.* See Thomas K. Arnold, *Electronic Chains Kings of DVD*, *The Hollywood Reporter*, Apr. 11, 2000 (citing 1999 VHS and DVD sales figures of \$8.9 billion and rental figures of roughly \$10 billion); *Home Video Will Remain Studio Breadwinner – Schroder*, *Video Week*, Jan. 10, 2000 (citing figures from investment bank Schroder & Co. showing home video as single largest source of income for motion picture distributors); see also U.S. Census Bureau, *Current Business Reports: 1998 Service Annual Survey*, at 33-34 (issued Dec. 1999) (Table 6.1: Motion Pictures (SIC 78) and Amusement and Recreation Services (SIC 79) – Estimated Receipts for Taxable Firms: 1989 Through 1998), [www.census.gov/svsd/sasann/view/tab6.pdf](http://www.census.gov/svsd/sasann/view/tab6.pdf) (visited July 27, 2000).
9. *S&P Entertainment Industry Survey*, *supra* note 4, at 9.
10. *Id.*
11. See, e.g., Dianne Garrett, *Company Town; Little Doubt About Future of DVD; Entertainment: Format Surged in Last 12 Months, Passing Several Milestones*, *L.A. Times*, Jan. 5, 2000, at C7; Christopher Parkes, *Hollywood Begins a Love-Affair with DVD Film Industry, After a Slow Start, US Studios Are Releasing a Flood of New and Old Films with Interactive Features*, *Fin. Times*, July 20, 2000 (USA Edition), at 4; Terry Pristin, *Making VCRs Obsolete: Hailed as the “Medium of the Millennium” DVDs Look Set to Become the Most Popular Item in*

*Home Entertainment, and Even Video Store Owners Are Happy*, Nat'l Post, Jan. 10, 2000, at C09 (citing predictions that DVDs “are on track to overtake video tape in a few years as the home entertainment format of choice”). While proclaiming the phenomenal growth of DVDs, most in the home video industry recognize that DVDs may eventually be overtaken by the development of video-on-demand films delivered through enhanced cable systems, satellite TV, and the Internet. *Id.*

12. *S&P Entertainment Industry Survey*, *supra* note 4, at 9.

13. *Id.*

14. **The Ten Largest North American Theater Chains (1999):**

<b>Chains</b>	<b>Screens</b>	<b>Number of Locations</b>	<b>Average Screens Per Location</b>
Regal Cinemas	4,474	438	10.2
Loews Cineplex Entertainment	2,916	400	7.3
AMC Entertainment	2,868	210	13.7
Carmike Cinemas	2,848	458	6.2
Cinemark USA	2,769	257	7.0
United Artists Theater Circuit	2,036	291	7.0
Hoyts Cinema	1,542	193	8.0
National Amusements	1,300	127	10.2
General Cinema Theatres	1,235	153	8.1
Famous Players	832	114	7.3
<b>Top Ten Total</b>	<b>22,820</b>	<b>2,641</b>	–
Others	3,111	472	–
<b>Total</b>	<b>25,931</b>	<b>3,113</b>	–

*See S&P Entertainment Survey*, *supra* note 4, at 12.

15. Warner Home Video includes New Line Cinema, HBO, Warner Vision, and Turner.

16. Buena Vista Home Video includes Disney labels, Miramax, and Dimension.

17. Universal Home Video includes Dreamworks.

18. Paramount Home Video includes Viacom-owned Nickelodeon.

19. The six largest companies' share of the sales market for 1999 was as follows:

<b>Company</b>	<b>Percentage of Total Market Share (reported as of 12/26/99)</b>
Warner Home Video	20.8
Buena Vista Home Entertainment (Disney)	16.0
Universal Studios Home Video	10.2
Paramount Home Video	8.4
Columbia TriStar Home Video	7.8
20 <sup>th</sup> Century Fox Home Entertainment	6.7

*VideoScan*, Video Week, Jan. 3, 2000. These figures are based on consumer purchases from point-of-sale data in 16,000 retail locations (not including rentals, supermarkets, direct response, and Internet sales).

20. The six largest companies' share of the rental market for 1999 was as follows:

<b>Company</b>	<b>Percentage of Total Market Share</b>
Warner Home Video	21.5
Buena Vista Home Entertainment (Disney)	19.2
Columbia TriStar Home Video	13
Universal Studios Home Video	9.5
20 <sup>th</sup> Century Fox Home Entertainment	9
Paramount Home Video	8.8

*1999 Video Rental Market Shares*, PRC News, Feb. 2000, at 1 (citing figures from the Video Software Dealers Association and VidTrac). Although some reports of the precise market shares of each of these six companies vary slightly, *see, e.g.*, Scott Hettrick, *Disney Is Tops in Video Revenue*, *Research Says*, Video Bus., Apr. 17, 2000, at 4, analysts agree that Warner Home Video and Buena Vista Home Entertainment are the market leaders for both sales and rentals of VHS and DVD products.

21. **Top Four Home Video Rental Chains (1998):**

Chain	Stores	1997 Units Rented (mill)	1998 Units Rented (mill)	1998 % of Revenue From Rentals
Blockbuster Inc.	6200*	814.5	918.6	81
Hollywood Entertainment Corp.	1350	147.0	203.0	79
Video Update	700	35.6	83.6	83
Movie Gallery	800	63.0	65.5	81
Totals	9050	1060.1	1270.7	—

\*Includes international units.

See *Hooray For Hollywood*, Chain Store Age, June 1999, at 46. Blockbuster and Hollywood Video remain the dominant retailers. As of year-end 1999, Blockbuster had about 4,795 domestic stores, while Hollywood Video had 1,615 stores. *S&P Entertainment Industry Survey*, *supra* note 4, at 10.

22. See Arnold, *supra* note 8.

23. MPAA 1999 U.S. Economic Review, *supra* note 7, at 14.

24. *Id.*

25. These figures were derived from the films and ratings available on [www.filmratings.com](http://www.filmratings.com) and were calculated using the content descriptors provided by the MPAA for several categories of violence including: “sci-fi violence,” “adventure violence,” “sexual violence,” “wacky violence,” and “strong violence.”

26. U.S. Census Bureau, *Statistical Abstract of the United States: 1999* [hereinafter *1999 Census Bureau Statistics*], at 580 (Table No. 920, *Media Usage and Consumer Spending: 1992 to 2002*) (released Dec. 13, 1999), [www.census.gov/prod/99pubs/99statab/sec18.pdf](http://www.census.gov/prod/99pubs/99statab/sec18.pdf) (visited July 28, 2000). This estimate includes only persons aged 12 years and older.

27. MPAA 1999 U.S. Economic Review, *supra* note 7, at 26.

28. MPA Research Ass’n, *1999 Motion Picture Attendance Study*, at 1 (March 7, 2000), [www.mpa.org/useconomicreview/1999Summary/index.htm](http://www.mpa.org/useconomicreview/1999Summary/index.htm) (visited July 28, 2000).

29. *1999 Census Bureau Statistics*, *supra* note 26.

30. See generally note 11 *supra*. See also *S&P Entertainment Industry Survey*, *supra* note 4, at 7.

31. *Id.*

32. See Recording Industry Association of America, *1999 Consumer Profile* [hereinafter *RIAA Profile*], [www.riaa.com/pdf/1999\\_Consumer\\_Profile.2.pdf](http://www.riaa.com/pdf/1999_Consumer_Profile.2.pdf) (visited July 28, 2000). The profile, conducted by Peter Hart Research, is based on a national telephone and Internet survey of past month music buyers (3,051 per year). The pollsters weighted the survey data by age and sex, and then projected the results to reflect the U.S. population age 10-and-over. See also Ed Christman, *Hit-Driven Album Sales Lead in '99 Report*, *Billboard*, Jan. 15, 2000, at 5 (reporting data from SoundScan, which collects point-of-sale information from approximately 85% of all music sellers for all formats and projects totals for the entire U.S. market).

33. *S&P Entertainment Industry Survey*, *supra* note 4, at 16.

34. *RIAA Profile*, *supra* note 32. These figures are based on manufacturers' shipments at suggested list prices. The National Association of Recording Merchandisers reports that the gross dollar volume for all music products in 1999 was \$10.49 billion. See National Association of Recording Merchandisers, *NARM 1999 Annual Survey Results* (released June 12, 2000), [www.narm.com./programs/research/surv99/99AnnualSurvey72.pdf](http://www.narm.com./programs/research/surv99/99AnnualSurvey72.pdf) (visited July 28, 2000). NARM's figures are lower than those reported by the RIAA because it reports what consumers actually paid for the music they purchased, as opposed to manufacturers' music shipments at list price.

35. See *S&P Entertainment Industry Survey*, *supra* note 4, at 10-11.

**Five Largest Music Distributors Total Album Market Share (January to June 2000):**

<b>Publisher</b>	<b>Percentage of Total Market Share</b>
Universal Music Group	26.8
BMG (Bertelsmann)	17.0
Warner Music Group	15.6
Sony Music	15.5
EMI Recorded Music	8.8
Independents/Other	16.3

See Ed Christman, *Universal No. 1 Album Distributor for Year's First Half*, *Billboard*, July 22, 2000, at 73 (reporting market share rankings from SoundScan for the period beginning Jan. 3, 2000 and ending July 2, 2000). These figures are roughly consistent with the overall 1999 statistics. See Ed Christman, *Universal Is '99's Top Distributor in Several Markets*, *Billboard*, Jan. 22, 2000, at 57. The proposed merger of Time Warner's and EMI's music operations would

catapult these companies to the No. 2 position, behind Universal. Don Jeffrey, *Warner EMI Deal Dramatizes Incredible Shrinking Biz – Firm’s Varying Strengths Likely to Make Smooth Fit*, *Billboard*, Feb. 5, 2000, at 5 (estimating combined market share of approximately 25.3%, about a percentage point behind Universal); Brian Garrity & Don Jeffrey, *Warner EMI Deal Dramatizes Incredible Shrinking Biz – Merger Raises Stakes for Remaining Majors*, *Billboard*, Feb. 5, 2000, at 5; see *S&P Entertainment Industry Survey*, *supra* note 4, at 2.

36. See Alex Berenson & Matt Richtel, *Heartbreakers, Dream Makers; Despite Digital Upstarts, Big Labels Still Rule the Music Industry*, *N.Y. Times*, June 25, 2000, § 3, at 1.

37. See [www.billboard.com/charts/bb200.asp](http://www.billboard.com/charts/bb200.asp) (visited July 24, 2000) and [www.billboard.com/charts/ago/lastyear.asp](http://www.billboard.com/charts/ago/lastyear.asp) (visited July 24, 2000).

38. *1999 Census Bureau Statistics*, *supra* note 26.

**39. Age Distribution of Record Buyers (1990 & 1999):**

Age Category	Percentage of Total (1990)	Percentage of Total (1999)
10-14	7.6	8.5
15-19	18.3	12.6
20-24	16.5	12.6
25-29	14.6	10.5
30-34	13.2	10.1
35-39	10.2	10.4
40-44	7.8	9.3
45+	11.1	24.7

See *RIAA Profile*, *supra* note 32; see also Anna Wilde Mathews & Martin Peers, *Marketing & Media: Teen Music Buying Dropped Last Year, According to Data*, *Wall St. J.*, June 26, 2000, at B14.

40. *S&P Entertainment Industry Survey*, *supra* note 4, at 15.



41. *Id.* **Music Industry Sales Profile (1990 & 1999):**

Category	Percentage of Sales and Revenue (1990)	Percentage of Sales and Revenue (1999)
Rock	36.1	25.2
Country	0.6	10.8
Rap/Hip Hop	8.5	10.8 (Rap 8.8 + Hip Hop 2.0)
R&B/Urban	11.6	10.5
Pop	13.7	10.3

*See RIAA Profile, supra note 32; see also Christman, supra note 32.*

42. Jane Irene Kelly, *New Commerce: Digital Branches Out – Sites + Sounds: Billboard Spotlights the Digital Music Revolution – Going Somewhere Fast – Emerging Technologies Continue to Help the Digital Market Grow*, Billboard, July 29, 2000.

43. National Association of Recording Merchandisers, *Online Music: A Strategic and Economic Analysis*, 1 NARM Research Briefs, Jan. 2000, at 7 (reporting projections of Paul Kagan Associates).

44. *See* Lee Gomes, *Entertainment World Has Flawed Crystal Ball: Conflicting Napster Predictions Evoke Errors in Foretelling Impact of VCR, Digital Tape*, Wall St. J., June 20, 2000, at B1; Anna Wilde Matthews, *Sampling Free Music over the Internet Often Leads to a Sale: Poll Adds to Conflicting Data as Recording Industry Sorts Out Web's Impact*, Wall St. J., June 15, 2000, at A3.

45. Interactive Digital Software Association, *1999 State of the Industry Report*, at 4, as supplemented by *Computer and Video Game Industry Data Updated for 2000* [hereinafter *IDSA 1999 Report*], [www.idsa.com/pressroom.html](http://www.idsa.com/pressroom.html) (visited July 28, 2000) (citing figures from the NPD Group); *see* IDSA, *Sixty Percent of All Americans Play Video Games*, Apr. 19, 2000 (press release), [www.idsa.com/releases/4\\_19\\_2000.html](http://www.idsa.com/releases/4_19_2000.html).

46. IDSA Press Release, *supra* note 45.

47. *See* Alex Pham, *Technology & Innovation: Game Wars*, Boston Globe, May 29, 2000, at C1 (citing figures from the NPD Group). With estimated retail sales topping more than \$1.2 billion in 1999, Nintendo's hand-held portable device has more than 99% of the market. *See* Joe Hutsko, *88 Million and Counting: Nintendo Remains King of the Handheld Game Players*, N.Y. Times, Mar. 25, 2000, at C1 (citing figures from Gerard Klauer Mattison).

48. *See* Steve Alexander, *Game Time: Sega's Stunningly Successful New Dreamcast Machine Moved It from Irrelevance into Strong Competition with Industry Rivals Sony and Nintendo*,

Minn. Star Trib., Dec. 20, 1999, at 12D.

49. **Top Entertainment Console Game Publishers' Market Share (1999):**

<b>Publisher</b>	<b>Percentage of Total Market (Unit) Share</b>	<b>Percentage of Total Market (Dollar) Share</b>
Nintendo	25.1	25.4
Electronic Arts	10.7	11.6
Sony	9.9	7.7
Midway	4.7	5.1
Acclaim	4.3	4.7

Information obtained from PC Data, Inc. (on file with the Commission). *See generally* [www.pcddata.com](http://www.pcddata.com).

50. **Top Entertainment PC Game Publishers' Market Share (1999):**

<b>Publisher</b>	<b>Percentage of Total Market (Unit) Share</b>	<b>Percentage of Total Market (Dollar) Share</b>
Havas Interactive	16.7	15.6
Electronic Arts	13.2	14.4
Hasbro Interactive	12.7	12.4
Mattel Interactive	7.1	9.9
Infogrames Entertainment	6.2	5.7

*Id.*

51. Toy Manufacturers Ass'n, *National Statistics Program* (data compiled by the NPD Group); *see generally* [www.toy-tma.org/industry/news/topselling/annual.html](http://www.toy-tma.org/industry/news/topselling/annual.html) (visited Aug. 25, 2000).

52. *IDSA 1999 Report*, *supra* note 45, at 8.

53. *Id.* at 3. The IDSA reported that sales of video and computer games with M ratings fell from 2.6 million units in 1998 to 1.2 million in 1999. Michael White, *Sales of Video, Computer Games Rise 20%, Violent Titles Decline*, Assoc. Press, Jan. 19, 2000 (citing figures compiled by the NPD Group). But many industry analysts said that the decline was due more to the phenomenal popularity of "Pokemon" than concern over events such as Columbine. *Id.*

54. See [www.esrb.com](http://www.esrb.com). The content descriptors listed under violence on the ESRB's Web site are as follows: mild animated violence, mild realistic violence, comic mischief, animated violence, realistic violence, animated blood and gore, realistic blood and gore, animated blood, and realistic blood.
55. *Id.*
56. 1999 Census Bureau Statistics, *supra* note 26.
57. IDSA 1999 Report, *supra* note 45, at 3, 5.
58. See Pham, *supra* note 47, at C1; see also Dean Takahashi, *Microsoft Joins the Game: Announces Plan to Take on Nintendo, Sony and Sega with the X-Box*, *The Gazette* (Montreal), March 11, 2000, at C4.
59. IDSA 1999 Report, *supra* note 45, at 3.
60. See Marc Saltzman, *Gaming Innovation*, *Toronto Star*, June 15, 2000.
61. Steven Farber, *The Movie Rating Game 2* (1972), quoted in Jeffrey A. Jacobs, *Comparing Regulatory Models – Self-Regulation vs. Government Regulation*, 1 *J. Tech. L. & Pol'y* 4 (1996). See also Jacobs, *supra*, at 4 (citing Richard S. Randall, *Censorship of the Movies* 67-68 (1968)) (visual nature of movies and their capacity to simulate reality give them a communicative power greater than print's; viewer is receptive and passive at the movies).
62. Richard M. Mosk, *Motion Picture Ratings in the United States*, 15 *Cardozo Arts & Ent. L.J.*, 135 (1997). The author was the co-chairman of the Motion Picture Classification and Rating Administration. Initially, the Supreme Court upheld this government censorship, see *Mutual Film Corp. v. Indus. Comm'n*, 236 U.S. 230, 244 (1915) (exhibition of films is a business not intended to be accorded the same rights as the press), but later struck down such censorship on First Amendment grounds. *United States v. Paramount Pictures*, 334 U.S. 131, 166 (1948) (First Amendment guarantees extended to motion pictures).
63. Farber, *supra* note 61, at 5.
64. Randall, *supra* note 61, at 201. See also Jacob Septimus, *The MPAA Ratings System: A Regime of Private Censorship and Cultural Manipulation*, 21 *Colum.-VLA J.L. & Arts* 69, 71 (1996) ("For example, open mouth kissing was prohibited; a man and woman in bed, whether married or not, had to keep one leg on the floor; verbal profanity was not allowed; bad guys did not escape justice.").
65. "Since seventy percent of the nation's first-run theaters were at that time owned by the five major studios, there was little problem in securing the cooperation of exhibitors." Farber, *supra* note 61, at 6.
66. In *Paramount Pictures*, 334 U.S. at 149, the Supreme Court found that defendants Loews, Paramount Pictures, Columbia Pictures, United Artists, Universal, and American Theatres Association conspired to restrain trade, thereby eliminating competition in the exhibition and

distribution of movies. Following the ruling, the Department of Justice oversaw the divestiture of many of the studio-owned theaters.

67. See also *Burstyn v. Wilson*, 343 U.S. 495, 502 (1952) (First and Fourteenth Amendments extended free speech guarantees to film).

68. Jack Valenti, *Motion Picture Association of America, the Voluntary Movie Rating System: How It Began, Its Purpose, the Public Reaction* 1 (1996) (available in booklet form from the MPAA or on the Internet at [www.mpa.org](http://www.mpa.org)).

69. *Id.* at 2.

70. 390 U.S. 676 (1968).

71. *Id.* at 690. In the years since the Supreme Court decided *Interstate Circuit*, the Court has decided many cases involving issues of speech and children. For a discussion of these cases and the constitutionality of governmental regulation in this area, see Appendix C (*First Amendment Issues in Public Debate over Governmental Regulation of Entertainment Media Products with Violent Content*).

72. Although the system is voluntary, all MPAA member companies – Walt Disney Company, Warner Brothers, Paramount Pictures Corporation, Universal Studios, Inc., Twentieth Century Fox Film Corporation, Sony Pictures Entertainment, and Metro-Goldwyn-Mayer, Inc. – have agreed not to distribute a film without a rating. *Rules and Regulations of the Classification and Rating Administration* Art. II § II (A), (1998). These companies have distributed approximately 80% of the major theatrical releases over the past five years. See *S&P Entertainment Industry Survey*, *supra* note 4, at 9.

The widespread adoption of MPAA's rating system and the refusal of most companies to distribute or exhibit unrated films was the subject of an unsuccessful 1970 antitrust lawsuit, *Tropic Film Corp. v. Paramount Pictures Corp.*, 319 F. Supp. 1247 (S.D.N.Y. 1970). Paramount Pictures had obtained distribution rights to the film *Tropic of Cancer* from the plaintiff, an independent producer. The film was submitted for MPAA rating and received an X. The plaintiff wished to distribute the film unrated, arguing that most theaters and newspapers would not show or advertise X-rated films, thereby severely disadvantaging such films. Paramount, an MPAA member, refused to distribute an unrated film. Tropic Film Corporation sued, alleging violations of Sections 1 and 2 of the Sherman Act and asking the court to enjoin Paramount and the MPAA from "carrying on an asserted industry-wide refusal to deal in and distribute, advertise and exhibit" *Tropic of Cancer* without an X rating. *Id.* at 1248. The court declined, stating that the rating system was "not designed to eliminate competition, but to advise motion picture exhibitors and, through them, the public, of the content of films which the Supreme Court has held that states have the constitutional right to prevent minors under seventeen from viewing." *Id.* at 1254.

73. Valenti, *supra* note 68, at 2.

74. “[W]e would now see our primary task as giving advance cautionary warnings to parents so that parents could make the decision about the moviegoing of their young children.” *Id.* at 3.

75. *Id.* at 5. For a discussion of the composition and workings of MPAA’s Classification and Rating Administration (CARA) see *id.* at 5-7.

76. Later raised to under 17 years of age.

77. Valenti, *supra* note 68, at 3, 9.

78. *Id.* at 3.

79. “We found early on that the M category was regarded by most parents as a sterner rating than the R category. To remedy this misconception, we changed the name from M to GP.” *Id.*

80. *Id.* at 3, 7.

81. *Id.* at 8.

82. *Id.* at 4.

83. *Id.* (“The X rating over the years appeared to have taken on a surly meaning in the minds of many people, a meaning that was never intended when we created the system.”).

84. *Miramax Films Corp. v. Motion Picture Ass’n*, 560 N.Y.S.2d 730 (N.Y. Sup. Ct. 1990). The court agreed that an X rating stigmatized a film:

At its inception, the rating system denoted the various levels by the use of symbols and registered those symbols as trademarks, with the notable exception of the ‘X’ rating. The effect of that exception . . . has been to permit those who characterize themselves as pornographers to appropriate the ‘X’ rating for their own purposes. ‘X rated’ is now synonymous with pornography. For a film not intended for the pornography market, the rating of ‘X’ is a stigma that relegates the film to limited advertising, distribution and income.

*Id.* at 734.

85. See, e.g., Amy Wallace, *Do Movie Ratings Need New Categories?*, L.A. Times, Aug. 10, 1999, at F1 (“[B]ecause an NC-17 rating is the kiss of death at the box office (movies with that rating are prohibited from advertising in many media outlets, screening in many theaters or renting in some video stores), movie studios usually contractually require directors to work with the MPAA to whittle films down to an R rating.”).

86. See *Movie Rating Search*, [www.cara.org/content.asp](http://www.cara.org/content.asp) (visited May 24, 2000).

87. See, e.g., Septimus, *supra* note 64, at 80 (“In 1995, the studios made a major effort to legitimize the NC-17 rating” with MGM/UA’s release of the sexually explicit “Showgirls.” However, the film was neither financially nor critically successful. “‘Henry & June,’ the only

other major-studio NC-17 release [in 1990], took in [only] \$11.5 million at the box office in 1990,” quoting Marc Caro, *The Heat Is On: Will NC-17 Go Legit?*, Chi. Trib., Sept. 10, 1995, at C1. No subsequent NC-17 film has been a mainstream financial and critical success.

88. A search feature available at the Web sites displays reasons (*e.g.*, language, violence, nudity, sex, and drug use) for a particular movie’s rating.

89. *See Valenti, supra* note 68.

90. A group of influential Washington women, including Pam Howar, Susan Baker, Tipper Gore, Sally Nevius, and Ethelynn Stuckey, founded the PMRC in 1985 to promote a consumer labeling plan for music recordings that contain explicit sexual and violent references. *See* William Raspberry, *Filth on the Air*, Wash. Post, June 19, 1985, at A21.

91. The RIAA is a Washington-based trade association whose members create, manufacture, and distribute more than 90% of all sound recordings produced and sold in the United States. *See* RIAA, *Who We Are: Mission Statement*, [www.riaa.com/About-Who.cfm](http://www.riaa.com/About-Who.cfm) (visited June 8, 2000).

92. Letter from PMRC to Stanley Gortikov, President, RIAA (May 31, 1985).

93. *See id.*

94. Michael Cieply, *Records May Soon Carry Warnings That Lyrics Are Morally Hazardous*, Wall St. J., July 31, 1985, at A21; Robert Hilburn, *Warnings on Labels Lauded*, L.A. Times, Aug. 10, 1985, Part 5, at 1. The PMRC further proposed that the companies: (1) print the lyrics of each song on the album cover in easy-to-read type, not obscured by design overlays; (2) regulate album covers depicting violence and explicit sexual themes by keeping such recordings behind the counter or covering them in a wrapper; (3) refrain from the use of hidden messages in songs; (4) reassess contracts with artists who glorify violence, substance abuse, or explicit sexual behavior in concerts where minors are admitted; (5) work with concert promoters to rate concerts based on an artist’s lyrics and on-stage performance; and (6) work with music video producers to rate music videos based on an artist’s lyrics and performance. *See* Cieply, *supra*; Ken Terry, *Diskeries to Label ‘Explicit’ Records*, Variety, Aug. 14, 1985, at 63, 68.

95. Letter from Stanley M. Gortikov, President, RIAA to Pam Howar, President, PMRC, Aug. 5, 1985, at 1 [hereinafter 8/5/85 Gortikov Letter]. *See also* Hilburn, *supra* note 94, Part 5, at 1; Terry, *supra* note 94, at 63.

96. 8/5/85 Gortikov Letter, *supra* note 95, at 8 (citing 25,000 songs released each year); *see also* Terry, *supra* note 94, at 63.

97. 8/5/85 Gortikov Letter, *supra* note 95, at 5-9. The industry maintained that space constraints and the competing rights of the music publisher copyright owner precluded printing lyrics on the back of albums. In addition, the RIAA stated that several of the other PMRC demands would not be possible because the recording companies do not have control over retailing practices, the production of music videos, or the promotion of concerts. *Id.*; *see also* Terry, *supra* note 94, at 63.

98. Letter from PMRC to Stanley W. Gortikov, President, RIAA, Aug. 7, 1985 at 1 [hereinafter 8/7/85 PMRC Letter]; see Stephen Holden, *Recordings Will Carry Advisory About Lyrics*, N.Y. Times, Aug. 9, 1985, at C16; see also Hilburn, *supra* note 94, Part 5, at 1; Terry, *supra* note 94, at 63.

99. 8/7/85 PMRC Letter, *supra* note 98, at 1.

100. *Id.*

101. See *Contents of Music and the Lyrics of Records: Hearings Before the Senate Comm. on Commerce, Science, and Transp.* [hereinafter *1985 Music and Lyrics Hearings*], 99th Cong. (Sept. 19, 1985); Michael Dolan, “*Porn Rock*” *Hearing Hot Ticket in D.C.*, Variety, Sept. 18, 1985, at 73; Dennis McDougal, *Zapping the Threat of Censorship*, L.A. Times, Sept. 20, 1985, Part 6, at 1.

102. See *1985 Music and Lyrics Hearings*, *supra* note 101, at III; McDougal, *supra* note 101, at 1. The artists who testified were: John Denver, Frank Zappa, and Dee Snider of Twisted Sister.

103. See *1985 Music and Lyrics Hearings*, *supra* note 101, at 1 (statement of Chairman John Danforth); McDougal, *supra* note 101, at 1.

104. See *1985 Music and Lyrics Hearings*, *supra* note 101, at 12-13 (statement of Tipper Gore, on behalf of the PMRC); Judy Mann, *Rock and a Hard Place*, Wash. Post, Sept. 25, 1985, at C3.

105. See PMRC, *PMRC, PTA and RIAA Agree on Recorded Lyrics Identification*, Nov. 1, 1985 (press release) [hereinafter 11/1/85 PMRC Press Release]; Fred Goodman, *Parents, RIAA in Lyrics Accord*, Billboard, Nov. 9, 1985, at 1; Dennis Wharton, *RIAA, PMRC Reach Accord on Record Lyrics; Labels Agree to Use Stickers or Print Words*, Variety, Nov. 6, 1985, at 85.

106. See Richard Harrington, *Accord on Lyric Labeling: Firms, Parents Agree to 2 Warning Options*, Wash. Post, Nov. 2, 1985, at H1; Wharton, *supra*, note 105.

107. See Goodman, *supra* note 105; Harrington, *supra* note 106. Cassettes containing explicit language would either display the label or the statement “See LP for Lyrics.” Wharton, *supra* note 105. The agreement also provided that musicians whose contracts gave them complete control over their product were not required to label or list lyrics. See Harrington, *supra*.

108. See Harrington, *supra* note 106.

109. See PMRC, *Results of Record Labeling Agreement*, Nov. 1, 1986, at 3-4 [hereinafter *11/1/86 PMRC Report*]; Henry Schipper, *PMRC Asks RIAA for Review of LP ‘Sticker’*, Variety, Nov. 11, 1986, at 1.

110. *11/1/86 PMRC Report*, *supra* note 109, at 4. See also Dennis Wharton, *Porn Rock Foes Charge Labels Have Ignored Pact on Racy Lyrics*, Variety, Dec. 17, 1986, at 85 (“Gore last week urged the diskeries to label the objectionable records ‘so you don’t need a microscope to find it.’”). The PMRC also stated that independent recording companies, admittedly not part of the agreement, were not identifying explicit recordings, in spite of the fact that “more and more

major record labels have begun to distribute and market these independent releases.” 11/1/86 *PMRC Report*, *supra* note 109, at 3; *see also* Wharton, *supra*.

111. Richard Harrington, *War on Lyrics, Part 2*, Wash. Post, June 24, 1987, at D7. Among the albums cited by the PMRC were the Beastie Boys’ *Licensed to Ill* and Mötley Crüe’s *Girls, Girls, Girls*, along with albums by Cinderella, Poison, and Ozzy Osbourne. *See id.* The PMRC noted that most of these albums were from small independent labels, which generally were not part of the labeling agreement. *See id.*

112. At various points in 1990, bills were pending in the following states: Alaska, Arizona, Delaware, Florida, Illinois, Iowa, Kansas, Maryland, Minnesota, Missouri, Nebraska, New Mexico, New York, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Virginia, and West Virginia. *See* Richard Harrington, *The New Wave of Lyrics Laws; Listening to Both Sides of the Record Labeling Debate*, Wash. Post, Jan. 28, 1990, at G1; Steve Hochman, *Record Industry Sees Tide Turning in Labeling Issue*, L.A. Times, Apr. 3, 1990, at F1; Jon Pareles, *States Drop Record-Labeling Bills*, N.Y. Times, Apr. 6, 1990, at C36; David Shribman, *State Lawmakers Tackle Issue of Song Lyrics in Debate over Rock and Role of Government*, Wall St. J., Apr. 2, 1990, at A14. Many of these bills were voluntarily withdrawn. *See* Hochman, *supra*; Pareles, *supra*; Shribman, *supra*.

113. *See* Hochman, *supra* note 112; Pareles, *supra* note 112.

114. *See* Harrington, *supra* note 112.

115. *See* Shribman, *supra* note 112.

116. *See* Jon Pareles, *Record Companies to Put Warnings on the Raw* [hereinafter *Record Companies*], N.Y. Times, Mar. 29, 1990, at C17; Jon Pareles, *As the Volume Rises in the Labeling Debate, Distortion Rules*, N.Y. Times, Apr. 1, 1990, § 2, at 1. In addition, communities in Florida and Alabama prosecuted record-store employees under city and county anti-obscenity laws for selling a stickered album – *As Nasty as They Wanna Be* by 2 Live Crew – to minors. *See* Pareles, *Record Companies*, *supra*.

117. *See* Pareles, *Record Companies*, *supra*; *see also* Ed Christman, *It’s a Stick(er)y Situation at NARM*, Billboard, March 17, 1990, at 1.

118. *See* Anne L. Clark, *As Nasty as They Wanna Be*, 65 N.Y.U. L. Rev. 1481, 1490 (1990).

119. *See id.*

120. Ken Terry, *Retailers Press Labels to Adopt Uniform Sticker*, Billboard, Oct. 14, 1989, at 4.

121. *See* Christman, *supra* note 117. NARM, with over 1,100 members worldwide, is a New Jersey-based trade association for the merchandisers and distributors of music and other prerecorded entertainment software. *See Mission Statement*, [www.narm.com/about/mission.htm](http://www.narm.com/about/mission.htm) (visited July 27, 2000). In addition, the RIAA’s vice president of public relations described the RIAA’s rededication to the labeling system as “trying to make our retailers happy.” Pareles,



*Record Companies*, *supra* note 116.

122. *See* Terry, *supra* note 120. In addition, many retailers decided to go further than the recording industry in terms of restricting access to certain recordings. For example, some retailers adopted “18-to-purchase” policies, or refused to sell any labeled albums at all. *See* Susan Nunziata, *Record Bar Pulling 2 Live Crew Recordings from All Its Stores*, *Billboard*, Mar. 17, 1990, at 5; Chuck Philips, *Record Industry Unveils Warning Label*, *L.A. Times*, May 10, 1990, at F1. In spite of these initial efforts, many retailers dropped or modified these policies after only one year. *See* Dave DiMartino, *One Year Later, Stores Soften on ‘18-To-Buy’*, *Billboard*, Apr. 13, 1991, at 1. *See Report* Section V.C. for current retailer policies regarding the sale of stickered albums to children under 18.

123. *See* Terry, *supra* note 120.

124. Ken Terry, *Trade Unites on Self-Labeling*, *Billboard*, Mar. 24, 1990, at 1.

125. Richard Harrington, *Record Industry Unveils Lyrics Warning Label*, *Wash. Post*, May 10, 1990, at D1. *See also* RIAA, *Uniform Advisory Logo Unveiled by Recording Industry*, May 9, 1990 (press release) (on file with the Commission).

126. *See* Harrington, *supra*, note 125; Pareles, *Record Companies*, *supra* note 116, at C17; Chuck Philips, *Record Industry Unveils Warning Label*, *L.A. Times*, May 10, 1990, at F1; *Recording Industry Shows Its New Warning Label*, *N.Y. Times*, May 10, 1990, at C16.

127. Harrington, *supra* note 125.

128. *See* Harrington, *supra* note 125; Philips, *supra* note 126. Some have pointed out that individual labeling decisions may lead to inconsistent labeling results. *See* Jeffrey Ressler, *To Sticker or Not to Sticker*, *Rolling Stone*, Feb. 7, 1991, at 17. For example, while one record company may not sticker for certain profane language, another may sticker for just one use of a profane word. *See id.*

129. *See Music Lyrics and Commerce: Hearings Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce*, 103d Cong. (1994). *See also* Bill Holland, *House Panel to Examine Rap*, *Billboard*, Feb. 19, 1994, at 1 [hereinafter Holland, *House Panel*]; Bill Holland, *Senate Hearing Examines Gangsta Lyrics*, *Billboard*, Mar. 5, 1994, at 10 [hereinafter Holland, *Senate Hearing*]. These hearings paralleled Congressional hearings on violence in television and video games, and occurred at a time when bills aimed at television violence and the creation of a federal ratings system for games were pending. *See* Kevin Merida, *Pop Culture Takes the Rap as Congress Battles Violence*, *Wash. Post*, May 10, 1994, at A1.

130. *See, e.g.*, Holland, *House Panel*, *supra* note 129.

131. *‘Gangsta Rap’ Rating System Urged*, *Wash. Post*, Feb. 12, 1994, at G3 (quoting Don Cornelius, founder and producer of “Soul Train”). Senator Carol Moseley Braun, for example, suggested a rating system similar to that adopted by the MPAA “to prevent certain records from

getting into the hands of children.” Holland, *Senate Hearing*, *supra* note 129.

132. Holland, *Senate Hearing*, *supra* note 129.

133. Bill Holland, *Sticker Review an RIAA Priority*, *Billboard*, June 24, 1995. For example, Time Warner’s CEO and Chairman instructed Warner Music Group to coordinate with the other recording companies “to develop guidelines for placing more specific warning labels on [potentially offensive] music.” Melinda Newman, *Warner Music Seeks Input on Lyric-Labeling Standards*, *Billboard*, June 3, 1995.

134. Holland, *supra* note 133.

135. See RIAA, *RIAA Parent’s Page-Parental Advisory Label Usage Guidelines for Audio and Video Product* [hereinafter *Usage Guidelines*], [www.riaa.com/Parents-Advisory-6.cfm](http://www.riaa.com/Parents-Advisory-6.cfm) (visited July 31, 2000).

136. NARM and RIAA, *NARM, RIAA Update Retailers on Enhanced Parental Advisory Program at Industry Seminar* (March 22, 1996), [www.riaa.com/News\\_Story.cfm?id=110](http://www.riaa.com/News_Story.cfm?id=110) (visited July 31, 2000) (joint press release).

137. See *Usage Guidelines*, *supra* note 135.

138. See NARM and RIAA, *The RIAA Bolsters Awareness of Its Parental Advisory* (Aug. 13, 1996), [www.riaa.com/News\\_Story.cfm?id=106](http://www.riaa.com/News_Story.cfm?id=106) (visited July 31, 2000) (joint press release). The recording industry associations provided two types of posters. Both state, “The Parental Advisory is a notice to parents that recordings identified by this logo may contain strong language or depictions of violence, sex, or substance abuse. Parental discretion is advised.” *Id.* One poster contains additional text for retailers that wish to restrict sales of stickered recordings. See *id.*

139. NARM, *Programs & Services*, [www.narm.com/programs/merch/parent.htm](http://www.narm.com/programs/merch/parent.htm) (visited July 28, 2000); see also [www.riaa.com/News\\_Story.cfm?id=106](http://www.riaa.com/News_Story.cfm?id=106) (visited July 28, 2000).

140. See *Usage Guidelines*, *supra* note 135.

141. See *Music Lyrics and Advisory Labels: Hearings Before the Senate Comm. on Commerce, Science and Transp.*, 105th Cong. (1998); *Music Violence: How Does it Affect Our Children?: Hearings Before the Subcomm. on Oversight of Gov’t Management, Restructuring and the District of Columbia of the Senate Comm. on Gov’t Affairs*, 105th Cong. (1997).

142. Bill Holland, *Senators Suggest Stricter Music Biz Labeling Policy*, *Billboard*, Nov. 15, 1997 (quoting Sen. Joseph Lieberman).

143. See Bill Holland, *Industry Groups Fight State Bills Targeting Music*, *Billboard*, Apr. 10, 1999; Bill Holland, *Record-Content Bills Resisted*, *Billboard*, Mar. 20, 1999.

144. See RIAA, *Recording Industry Head Upholds Value of Parental Advisory Program*, June 16, 1998 (press release) (responding to 1998 Senate hearings),

www.riaa.com/News\_Story.cfm?id=90 (visited July 31, 2000).

145. *Id.*

146. *Rating Video Games: A Parent's Guide to Games: Hearings Before the Subcomm. on Juv. Just. and the Gov't Affairs Subcomm. on Reg. and Gov't Info. of the Senate Comm. on Gov't Affairs* [hereinafter *Rating Video Games*], 103d Cong. (1993), reprinted at 1993 WL 664394.

147. *Id.* at 11 (statement of Sen. Orrin G. Hatch), reprinted at 1993 WL 664409. It also would have provided an exemption from the antitrust laws for the industry to develop such standards.  
*Id.*

148. Jane Greenstein, *Game Makers Moving Toward Rating System*, 14 Video Bus. 1 (Jan. 7, 1994).

149. Senator Lieberman lauded the industry's intention to create a voluntary rating system, but articulated three concerns he wished to see addressed in any such system:

First, there are questions about the system itself: who will do the rating? Will all manufacturers participate? How many age-specific ratings will there be? Will the industry spend money to inform parents about the meaning of the ratings?

Second, a rating system must not be perverted into a cynical marketing ploy to attract children to more violent games. We must not allow industry to trumpet a violent rating as a selling point.

Third, the industry must work to enforce whatever rating system it creates. It must consider licensing agreements and contracts which specify that ratings will be clearly visible in any advertising and understandable by parents and consumers. Distributors such as video rental stores or toy stores should face some contractual penalties from manufacturers if they sell or rent to children below the minimum ages in the ratings.

*Rating Video Games*, *supra* note 146, at 3-4 (statement of Sen. Joseph I. Lieberman), reprinted at 1993 WL 664383.

150. The Working Group also encompassed the following trade and professional organizations: Association of Shareware Professionals, Educational Software Cooperative, Shareware Trade Association and Resources, the Software Entrepreneurs Forum, and the Computer Game Developers Association. See *Rating Video Games*, *supra* note 146, at 171-72 (testimony of Mark Traphagen, Counsel, Software Publishers Association), reprinted at 1994 WL 394778.

151. *Id.* at 171.

152. *Id.*

153. “[P]ersonal computer software is designed for an ‘open platform,’ which can run software developed and published by thousands of different companies without the need for restrictive license agreements” from the platform developer. *Id.* at 172. By contrast, games for console systems must be licensed by the console manufacturers.

154. *Violence in Video Games: Hearing Before the Subcomm. on Telecomm. and Fin. of the House Comm. on Energy and Commerce*, 103d Cong. 14 (1994) [hereinafter *Violence in Video Games*] (statement of Douglas Lowenstein, President, Interactive Digital Software Association). The founding members of IDSA were Acclaim, Atari, Capcom, Crystal Dynamics, Electronic Arts, Konami, Nintendo, Philips, Sega, Sony, Viacom, and Virgin Interactive. *Id.*

155. The Working Group and the IDSA had several sources of disagreement. First, IDSA had proposed creating a software ratings board as an arm of the IDSA, but the SPA was concerned that situating the ratings board within an industry trade association would be tantamount to an “insulated” ratings system lacking objectivity and creating the appearance of favoritism to the industry. *See Rating Video Games*, *supra* note 146, at 172. Second, the SPA was distrustful of a ratings system potentially controlled by the video game industry, fearing that the video game industry would exercise its influence to reduce the availability or competitiveness of personal computer software. *Id.* at 172–73. Third, the SPA and IDSA harbored differences over the ratings categories, the rating structure, and the ratings process itself. *Id.* at 176.

156. *Id.* at 177 (statement of Steve Koenigsberg, President, American Amusement Machine Association), *reprinted at* 1994 WL 223121.

157. The Committee members included Electronic Arts, Acclaim, Atari, Nintendo, Philips, Sega, and the 3DO Company. *Id.* at 88 (testimony of Jack Heistand, Senior Vice President, Electronic Arts, Chairman, IDSA), *reprinted at* 1994 WL 223061.

158. *Id.* at 89.

159. *Id.*

160. *Id.* at 89–90.

161. *Id.* at 90.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 91.

166. *Id.* at 90. These sanctions could include a trademark enforcement suit with the threat of a civil penalty or a demand that a company re-sticker a product already on the market. *Id.*

167. *Violence in Video Games*, *supra* note 154; *Rating Video Games*, *supra* note 146.

168. *Violence in Video Games*, *supra* note 154, at 15. In September 1994, the IDSA formed the ESRB as a separate division of the IDSA for the purpose of independently rating the content of interactive entertainment software for all platforms. Although IDSA developed the ESRB rating system (as well as the ESRB itself), it has strived to avoid any involvement in the issuance of ratings by the ESRB or in ESRB's interpretations of its rating guidelines.

Until late 1999, the IDSA was responsible for enforcing the Advertising Code of Conduct ("Adcode") and helping ESRB ensure that participating companies comply with ESRB rules and regulations. Effective January 31, 2000, the ESRB formed a separate division – the Advertising Review Council ("ARC") – to take over enforcement of the Adcode and a new set of Ad Principles. ARC Principles and Guidelines at 3.

169. *News & Info: About the Entertainment Software Rating Board*, [www.esrb.org/news.html](http://www.esrb.org/news.html) (visited July 5, 2000).

170. *Id.*

171. *See Marketing Violence to Children: Hearing Before the Senate Comm. on Commerce, Science, and Transp.* (written statement of Douglas Lowenstein, President, IDSA), 106th Cong. (1999), *reprinted at* 1999 WL 266745. The ESRB also rates "Finite Space Arenas," that is, Web sites that "allow no interaction between web site and user." Additionally, the ESRB rates "Free Space Arenas," which "provide opportunities for users to engage in an interactive experience" through "bulletin boards, chat rooms, [and play with] additional participants." *ESRBI – About the ESRBI Ratings System*, [www.esrb.org/esrbi/about.html](http://www.esrb.org/esrbi/about.html) (visited August 6, 2000).

172. The Guide is available at ESRB's Web site, [www.esrb.org/parent.html](http://www.esrb.org/parent.html). ESRB also offers a brochure in English, French, and Spanish. The ESRB has also established a consumer hotline to provide ratings information in all three languages at (800) 771-ESRB (3772). The IDSA has provided retailers with supplemental material explaining the rating system.

173. Faye Fiore, *Media Violence Gets No Action from Congress*, L.A. Times, Nov. 20, 1999, at A1.

174. In addition, the ARC, created by IDSA and ESRB, has issued guidelines to govern the content of advertising. *See IDSA, Entertainment Software Group Creates Independent Council to Oversee Video Game Advertising*, Oct. 13, 1999 (press release), [www.idsa.com/pressroom.html](http://www.idsa.com/pressroom.html). *See Report* Section VI.B.

175. *Rating Video Games*, *supra* note 146, at 173.

176. *Id.*

177. RSAC Ratings Application, at 2.

178. A questionnaire also is submitted when applying for an ESRB rating, but an ESRB rating is largely based on the review of videotaped gameplay by three raters who have no ties to the interactive software industry.

179. The founding members of RSAC decided not to develop an age-based rating system because “not all families are the same.” *Cyberporn and Children: The Scope of the Problem, The State of the Technology, and The Need for Congressional Action: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong. at 93 (1995) (testimony of Stephen Balkam, Executive Director, Recreational Software Advisory Council), *reprinted at* 1995 WL 435917. According to RSAC, “[t]he FDA food labeling system was used as a model, as it provides objective and quantifiable measures of various ingredients within a product without making a judgment as to who should or should not purchase it.” *Id.* at 95.

180. RSAC Ratings Specifications.

181. Both the RSAC Ratings Application and the RSAC Ratings Specifications describe how the ratings information should be displayed on software packaging and in associated retail displays. They do not set out requirements for other forms of advertising or marketing, although the company is permitted to use the rating in advertising. RSAC Ratings Application at 2, 3; RSAC Ratings Specifications.

182. Starting in April 1996, the RSAC system was redesigned for use on the Internet and launched as RSACi. The RSACi system is now part of and managed by the Internet Content Rating Association (“ICRA”). It has greatly expanded beyond rating electronic game sites and now provides consumers with information about the level of sex, nudity, violence, and offensive language (vulgar or hate-motivated) on a wide variety of Web sites. The RSACi system has been integrated into Microsoft's browser, Internet Explorer, and MicroSystem's Cyber Patrol Software. The system currently is used on thousands of Web sites. *See ICRA, Internet Content Rating Association Formed to Provide Global System for Protecting Children and Free Speech on the Internet*, May 12, 1999 (press release), [www.icra.org/index.htm](http://www.icra.org/index.htm) (visited Aug. 15, 2000).

183. *See AAMA, Overview of the Coin-Operated Video Game Parental Advisory System*, [www.coin-op.org/pas1.htm](http://www.coin-op.org/pas1.htm) (visited Aug. 23, 2000).

184. *See History Lesson a Look at the Past Through RePlay Headlines in the News, Coin-Op History -- 1975 to 1998, Replay Magazine*, [www.replaymag.com/history.htm](http://www.replaymag.com/history.htm) (visited Aug. 23, 2000).

185. *See AAMA, Frequently Asked Questions & Answers*, [www.coin-op.org/pas2.htm](http://www.coin-op.org/pas2.htm) (visited Aug. 15, 2000).

186. *See AAMA, Coin-Operated Video Game Code of Conduct*, [www.coin-op.org/pas3.htm](http://www.coin-op.org/pas3.htm) (visited Aug. 15, 2000).

187. *Id.*

188. The AAMA violence descriptors are defined as follows:

*Animated Violence – Mild:* Contains scenes of violence involving cartoon-like characters in fantasy or life-like settings engaged in combative activity such as martial arts or sports activities with violent elements that *do not* result in bloodshed, serious injury and/or

death to depicted character(s).

*Animated Violence – Strong:* Contains scenes of strong violence involving cartoon-like characters in fantasy or life-like settings which result in bloodshed, serious injury and/or death to the depicted character(s).

*Life-Like Violence – Mild:* Contains scenes of violence involving human-like characters engaged in combative activity such as martial arts or sports activities with violent elements that *do not* result in bloodshed, serious injury and/or death to the depicted character(s).

*Life-Like Violence – Strong:* Contains scenes of strong violence involving human-like characters which result in bloodshed, serious injury and/or death to the depicted character(s).

*Sexual Content – Mild:* Contains sexually suggestive references or material.

*Sexual Content – Strong:* Contains graphic depictions of sexual behavior and/or the human body.

*Language – Mild:* Contains commonly used four-letter words.

*Language – Strong:* Contains strong four-letter expletives.

See AMOA, *Guide to Coin-Operated Video Games*, [www.amoa.com/guide.htm](http://www.amoa.com/guide.htm) (visited Aug. 15, 2000).

189. The AAMA and AMOA have asked operators to obtain the necessary ratings stickers from the AAMA or AMOA, and apply them to older games. See AMOA, *Frequently Asked Questions*, [www.amoa.com/faq.html](http://www.amoa.com/faq.html) (visited Aug. 15, 2000). According to AAMA, compliance with the stickering requirements for new games has almost reached 100%. For older games, however, compliance is lower, and the operators of the coin-op or entertainment centers, rather than the manufacturers, are responsible for placing the ratings on existing game units at the centers. The AAMA has published an extensive list of games and their respective ratings in an effort to help smaller operators properly label older games. See AAMA, *AAMA Game Ratings*, [www.coin-op.org/aamagames.htm](http://www.coin-op.org/aamagames.htm) (visited Aug. 15, 2000). A survey conducted by a family advocacy group of 25 arcade locations in airports, hotels, malls, restaurants, and other locations in three states noted that most of the locations failed to display the Parental Advisory System label on all their games. David A. Walsh, National Institute on Media and the Family, *1999 Video and Computer Game Report Card* (released Nov. 23, 1999), [www.mediaandthefamily.org/research/vgrc/1999-1.shtml](http://www.mediaandthefamily.org/research/vgrc/1999-1.shtml) (visited Aug. 15, 2000). The AAMA and AMOA jointly issued a press release critical of some of the findings of that study, and pointed to steps these groups have taken to improve industry compliance. AAMA & AMOA, *Coin-operated Interactive Entertainment Industry Statement on National Institute on Media and the Family Video and Computer Game Report Card* (Nov. 23, 1999) (joint press release) (on file with the Commission). The failure to sticker older games, nonetheless, may be especially problematic in smaller theaters, restaurants, and motels that have a few games in their lobbies or entrances.

190. See AAMA *On the Record: We're Willing to Consider More Show Consolidation*, RePlay Magazine, Oct. 1999, at 160. Generally, advertising for coin-operated games occurs in trade publications that are not usually seen by the general public. For examples of trade ads with the required color-coded disclosure of the content descriptors, see RePlay Magazine, June 2000, at 5 and back cover.

191. AAMA, *AAMA Report to Congress: A Report on the Industry's Pilot Study on Implementation of Access-Limiting Measures Under the Coin-Operated Video Game Parental Advisory System 26* (1998) (submitted to Senators Herbert Kohl and Joseph Lieberman) (on file with the Commission).

192. *Hearing on Impact of Media Violence on Kids Before the Sen. Comm. on Commerce, Science, and Transp.*, 106th Cong. (2000) (testimony of Danielle Shimotakahara), *reprinted at* 2000 WL 350139. Ms. Shimotakahara is a 12-year-old student circulating a petition asking for the removal of violent coin-operated video games from retail locations where children “hang out,” such as pizza parlors, bowling alleys, and skating rinks. *Id.*

193. *See* Catherine Hinman, *Disney Decides to Toss Violent Video Games*, *Sun-Sentinel*, May 17, 1999, at B6; Clark, *supra* note 118.

194. *Peterson Signs Violent Video Games Ordinance into Law* (July 17, 2000) (press release), [www.indygov.org/mayor/press/2000/vvg\\_law.htm](http://www.indygov.org/mayor/press/2000/vvg_law.htm) (visited Aug. 9, 2000).