Appendix C

FIRST AMENDMENT ISSUES IN PUBLIC DEBATE OVER GOVERNMENTAL REGULATION OF ENTERTAINMENT MEDIA PRODUCTS WITH VIOLENT CONTENT

This Appendix addresses First Amendment concerns that have been raised in the public debate regarding the marketing of entertainment media products with violent content to children.[1] It discusses the relevance of the First Amendment to the Commission's role in undertaking its study and issuing this Report, and to private sector restrictions on advertising and marketing. It also discusses the First Amendment standards and considerations that would most likely be used to evaluate proposals for government restrictions on the advertising and marketing of entertainment media products with violent content.

I. BACKGROUND

The First Amendment to the United States Constitution limits the government from making any law or regulation that would ban or indirectly tend to suppress – that is, "chill" – speech or expression.[2] Historically, the First Amendment has been interpreted broadly to protect individuals from government attempts to suppress political, ideological, or scientific ideas or information, and to defend against government incursions on freedom of expression in art, literature, movies, and music.[3] By contrast, the First Amendment has been interpreted to provide more narrow protection for commercial expression such as advertising.[4] The Supreme Court also has placed outside the protections of the First Amendment certain limited classes of speech that are viewed as having little or no value at all because they do not promote democratic ideals: incitement,[5] fighting words,[6] and obscenity.[7]

II. THE FTC'S STUDY, THE FIRST AMENDMENT, AND SELF-REGULATION

In general, the First Amendment applies only to government's attempts to restrict speech and expression through legislation, regulation, and enforcement actions. Such restriction includes the passage of legislation by the United States Congress or state or local legislatures and the promulgation of implementing regulations by federal agencies such as the Federal Trade Commission and their state and local counterparts. It does not generally apply to a study or investigation by a governmental agency or commission "in the absence of some actual or threatened imposition of government power or sanction."[8] The FTC's objective in undertaking this Report was to study whether the entertainment industries are marketing media products with violent content to children, and to analyze the industries' advertising and promotional activities

in light of the existing self-regulatory systems. Its objective was not to recommend legislation or any government action.

Nor does the First Amendment generally apply to private activity such as industry self-regulation. The exception is when a private party's actions are attributable to the government, either when: (i) the private party exercises a public function that is traditionally exclusively reserved to the State,[9] or (ii) the government has exercised coercive power or provided such significant encouragement that the challenged action can fairly be attributed to the government.[10] Therefore, the Constitution would not preclude the entertainment media industries themselves from taking steps to restrict or limit advertising and marketing of media products with violent content to children, as such conduct is private activity beyond the reach of the First Amendment.

III. THE COMMERCIAL/NON-COMMERCIAL SPEECH DISTINCTION

A. General Principles

The First Amendment's protection of speech and expression is broad but not absolute.[11] In certain cases, the courts have upheld restrictions on speech when the government's justification for restricting the speech outweighs the First Amendment values at issue.[12] In analyzing governmental restrictions on speech, the Supreme Court traditionally has divided speech into two categories – commercial speech and "fully protected," non-commercial speech.[13] Although the Supreme Court has struggled to define the differences between these two categories, there are some clear general rules. Non-commercial speech is generally viewed as political, ideological, artistic, or scientific expression. Commercial speech has been defined broadly as speech "related solely to the economic interests of the speaker and its audience,"[14] and described more narrowly as speech that does "no more than propose a commercial transaction."[15]

Whether speech is categorized as commercial or non-commercial is critical because the degree of First Amendment protection varies depending on the category of speech. Traditionally, the Supreme Court has applied a "strict scrutiny" standard to non-commercial speech, while analyzing commercial speech under an "intermediate scrutiny" test.[16] In practice, to restrict non-commercial speech, the government must prove that the restriction promotes a compelling government interest and is narrowly tailored to promote that interest.[17] If a less restrictive alternative would serve the government's purpose, the government must use that alternative.[18] By contrast, to restrict commercial speech that concerns lawful activity and is not misleading, the government must prove that its interest is substantial, that the regulation directly

advances the governmental interest asserted, and that it is not more extensive than is necessary to serve that interest.[19]

B. Advertisements and Promotions for Entertainment Media Products

The Supreme Court generally has viewed advertising for particular specified commercial products or professional services as commercial speech. Under this approach, it has upheld limitations on speech such as restrictions on targeted direct mail solicitations by lawyers to families of accident or disaster victims[20] and bans on solicitations by commercial enterprises on public university premises.[21] The categorization of advertising for entertainment media products as commercial or non-commercial speech is not as settled. Although some observers argue that advertisements for movies, music recordings, and electronic games should be viewed as commercial speech because they are merely advertising products that have been placed in the stream of commerce for profit,[22] industry members and some First Amendment advocates assert that such advertisements should be analyzed as protected, non-commercial speech because: (i) they promote a product that itself is entitled to protection; and (ii) they often incorporate or summarize parts of the underlying non-commercial expression, and therefore are, in substance, nothing more than a particular subset of the content of the non-commercial expression.[23]

The Supreme Court has never specifically ruled on this issue, and the existing federal and state court opinions are not uniform.[24] At least one state court has held that an advertisement for a movie "goes beyond proposal of a commercial transaction and encompasses the ideas expressed in the motion picture which it promotes; thus it is afforded the same First Amendment protections as the motion picture . . . ."[25] State courts in New York and California have reached opposite conclusions regarding whether promotional statements on a book cover and flyleaf constitute commercial or non-commercial speech.[26] Given that the law in this area is still developing, this Appendix will set forth the applicable standards both for commercial and non-commercial speech and review current proposals under both paradigms.

IV. THE STANDARD FOR REGULATION OF COMMERCIAL SPEECH

Since 1980, the courts have analyzed regulations affecting advertising for commercial products or professional services under the four-part test set forth for assessing commercial speech restrictions by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[27] The *Central Hudson* test asks:

(1) whether the speech at issue concerns lawful activity and is not misleading;

(2) whether the asserted government interest is substantial; and, if so,
(3) whether the regulation directly advances the governmental interest asserted; and
(4) whether it is not more extensive than is necessary to serve that interest.[28]

In this analysis, the government bears the burden of identifying a substantial interest and justifying the challenged restriction: "The government is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest – a fit that is not necessarily perfect but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served."[29] Moreover, "the four parts of the *Central Hudson* test are not entirely discrete. All are important and, to a certain extent, interrelated: Each raises a relevant question that may not be dispositive to the First Amendment inquiry, but the answer to which may inform a judgment concerning the other three."[30]

V. STANDARDS FOR REGULATION OF NON-COMMERCIAL SPEECH

Non-commercial speech receives the highest degree of constitutional protection. But, the government may still regulate certain aspects of that speech provided it meets certain requirements. In evaluating non-commercial speech, the courts distinguish between content-based restrictions and content-neutral restrictions. As with the distinction between commercial and non-commercial speech, "[d]eciding whether a particular regulation is content-based or content-neutral is not always a simple task."[31]

A. Content-Neutral Restrictions

Content-neutral restrictions regulate speech without regard to its subject matter or the viewpoint conveyed.[32] The Supreme Court has held that the "government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information.'"[33] Such content-neutral regulations may be permissible even when they incidentally affect the content of speech to some degree because, in most cases, such regulations "pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue."[34] Examples of content-neutral restrictions that have been held to be constitutional include laws that restrict the distribution of printed materials to prevent litter in a public space[35] or laws that prohibit the use of loudspeakers in order to reduce noise.[36]

Facially neutral regulations, however, can be invalid if they have a disproportionate effect on a particular type of speech or expression.[37]

B. Content-Based Restrictions

Content-based regulations regulate speech based on its subject matter or viewpoint. They seek to "suppress, disadvantage, or impose differential burdens upon speech because of its content."[38] Such regulations are subject to the strictest constitutional scrutiny, meaning that the government must prove that: (i) the regulation serves a compelling governmental interest; (ii) the means chosen to achieve that interest are narrowly tailored; and (iii) it has chosen the "least restrictive means" of accomplishing the government's objective.[39] The operative distinctions between a court's review of a content-based regulation and a content-neutral regulation is that in the former case, the government must meet the "compelling interest" and "least restrictive means" standards, while in the latter situation the government need only prove a "significant interest" and the availability of "ample alternative channels for communication of the information."

Constitutional scholars generally agree that governmental regulation of media products with violent content, "whether in the form of banning, rating, or channeling of violent media content, necessarily requires the government to make a judgment as to what content lies within the ambit of the statute and what content does not," thereby triggering content-based strict scrutiny review.[40] Although content-based regulations are considered presumptively invalid, such a regulation may withstand First Amendment analysis if: (i) it falls within certain categories in which the Supreme Court has permitted a more liberal standard of review, as described below, or (ii) the government is able to establish that the regulation meets the strict scrutiny test.

1. Exceptions to strict scrutiny for content-based restrictions on non-commercial speech relevant to entertainment media context

a. Obscenity

The Supreme Court has carved out an exception to the First Amendment for obscenity of a sexual nature, holding that it is simply "not within the area of constitutionally protected speech or press."[41] In *Miller v. California,*[42] the Court held that speech is obscene and subject to full regulation when: "(a) 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable

state law; and (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[43] Under the *Miller* test, many courts have upheld state restrictions on obscene materials.[44]

b. Protection of minors

The Supreme Court has long recognized that the "well-being of its children is of course a subject within the State's constitutional power to regulate" and upheld content-based restrictions on speech – including complete bans on children's access to certain material – that would not survive constitutional scrutiny if applied to adults.[45] These content-based restrictions are primarily aimed at constitutionally protected "indecent" material.[46] In such cases, the courts have not required the government to demonstrate to a scientific certainty that the speech at issue causes harm to minors.[47]

Nonetheless, the government's interest in protecting children does not always outweigh the First Amendment considerations involved. The Supreme Court has struck down a regulation requiring cable operators either to scramble sexually explicit channels in full or to limit programming on such channels to certain hours, as well as a statute criminalizing the knowing transmission of obscene or indecent messages to minors over the Internet, on "overbreadth" grounds because they infringed on adults' First Amendment rights.[48] The Supreme Court has repeatedly emphasized that regardless of the government's interest in protecting children, it may not "reduce the adult population . . . to . . . only what is fit for children."[49] "'Regardless of the government's interest' in protecting children, 'the level of discourse reaching a mailbox cannot be limited simply to that which would be suitable for a sandbox.'"[50]

c. Television and radio broadcasting

To a large degree, the higher level of governmental regulation that the Supreme Court has permitted in the area of broadcast television and radio corresponds to that permitted for obscenity and the protection of minors.[51] The Supreme Court has declined to apply the strict scrutiny test to content-based regulations of these broadcast media for three reasons: (i) the "scarcity" of airwaves available to the broadcast media;[52] (ii) the "uniquely pervasive" presence of the broadcast media in the lives of all Americans coupled with an individual's right to be left alone in the privacy of the home;[53] and (iii) the fact that broadcasting is easily accessible to even very young children.[54] Essentially, the Court has been concerned that a child could simply turn on the television and, without more, be subjected to indecent material. Under this rationale, the Court

has upheld certain content-based restrictions on broadcasting.[55] To date, however, the Supreme Court has not addressed the constitutionality of content-based restrictions on *violent* content in broadcast television or radio.

VI. REGULATORY PROPOSALS AND FIRST AMENDMENT ANALYSIS

This section explores First Amendment issues likely to arise if laws were enacted to restrict the advertising and marketing of entertainment media products with violent content to children. As noted earlier,[56] this area of First Amendment law is still unsettled.

A. Mandatory Rating or Labeling Systems

Some advocates have proposed a government-imposed parental advisory system – either a separate rating or labeling system for each industry or one uniform system for all or most of the entertainment industries.[57] Most commentators agree that any law requiring the rating or labeling of entertainment media products would raise the issue of "compelled speech" (because such a law or regulation would require a private party to express or endorse a particular message), thereby subjecting such a system to First Amendment review.[58]

The First Amendment analysis of such a law would turn on whether the court viewed government-imposed mandatory ratings or labels as affecting non-commercial or commercial speech. If viewed as affecting non-commercial speech, the court would first determine whether the labeling scheme is content-based or content-neutral. Although there has been some debate on this issue, many First Amendment scholars have argued that, were the government to mandate that media producers identify or label particular programs on the basis of the violence that they contain, courts would view the regulation as content-based, and therefore subject to the highest form of strict scrutiny and not as a consumer education label subject to a more lenient standard of review.[59] If viewed as affecting only commercial speech, the court would apply the *Central Hudson* test set forth above. Thus, the constitutionality of the law or regulation would depend in large part on whether the government could establish a: (i) "compelling" (non-commercial speech) or "substantial" (commercial speech) interest in providing children and their parents with information necessary to make judgments about the appropriateness of particular entertainment products with violent content; (ii) whether the government could establish that such a rating/warning system either is "narrowly tailored" to achieve (non-commercial speech) or "directly advances" (commercial speech) that objective; and (iii) whether such a ratings/warning system is either the "least restrictive means" of accomplishing (non-commercial speech) or a

"reasonable fit" with (commercial speech) the government's objectives given that such a system might impinge on the creativity of media producers and artists.[60]

B. Restrictions on Advertising and Marketing Targeting and Placement

Some advocates have proposed regulating advertising for entertainment media products with violent content to children by limiting advertisements and promotions for these products to certain types of media or venues that are not likely to have a large number of children in the audience.[61] Such regulations might include restrictions limiting advertisements for R-rated films, M-rated electronic games, or explicit-content labeled recordings to television or radio programs with a high percentage of over-16 audience members and prohibitions against advertising these media products in school-based media or on school property, such as cafeteria bulletin boards and athletic scoreboards.

Again, the level of First Amendment scrutiny that would likely apply to government-imposed restrictions of this type would turn on whether the advertisements for these products are classified as commercial speech or non-commercial speech. If classified as commercial speech, the court would apply the four-part *Central Hudson* test. If viewed as non-commercial speech, the court would first determine whether the restriction is content-based or content-neutral and then apply the applicable constitutional tests. In this context, because the restriction is premised on protecting minors from advertising for violent content and not on merely providing consumers with information, it is likely to be viewed as content-based.

A court's approach to such restrictions would depend in large part on three issues relevant to judicial analysis in non-commercial and commercial speech cases: (i) whether the government could, on the basis of the scientific, psychological, and empirical research establish a "compelling" (non-commercial speech) or "substantial" (commercial speech) "reason to protect minors from advertisements for entertainment products with violent content by restricting advertisements for such products to media and venues without substantial numbers of children; (ii) whether the regulation is "narrowly tailored" to achieve (non-commercial speech) or "directly advances" (commercial speech) that interest; and (iii) whether the government could establish that such restrictions are either the "least restrictive means" of accomplishing (non-commercial speech) or a "reasonable fit" with (commercial speech) the government's objectives given that such restrictions might inevitably affect adults as well as children. Under either standard, a court would also need to consider whether the challenged regulation would meet the constitutional standards for vagueness (*i.e.*, whether the regulatory definition of what constitutes violence is

sufficiently precise "so that those who are governed by the law and those that administer it will understand its meaning and application"[62]) or overbroad (*i.e.*, whether it would affect adults as well as children and whether it would also affect socially valuable and educational media that contain violence).[63]

C. Regulation of Violent Content in Advertising for Movies, Music, and Electronic Games

Regulations aimed at limiting violent content in the advertising of media products would be subject to largely the same First Amendment analysis described above. Accordingly, if advertisements for media products were considered non-commercial speech, any regulation affecting the content of these advertisements clearly would be content-based and subject to strict scrutiny. Given the courts' general aversion to content-based restrictions, the government's burden of proof to establish the constitutionality of such restrictions would be quite high.

Some commentators have approached the issue of violent content by calling for courts to treat violence like obscenity – essentially taking it out of the realm of constitutionally protected speech, and thereby permitting increased regulation.[64] They assert that depictions of violence that go beyond acceptable limits, like obscenity, can be differentiated from depictions of violence that have artistic or literary merit.[65] To date, however, those courts that have considered the issue have held that violent speech or expression cannot be treated like obscenity unless the work also contains material that is (sexually) obscene.[66] Many of those courts – and First Amendment scholars – note that it would be difficult to create a workable definition of violence that would not be overbroad or vague.[67] They argue that definitions that attempt to define violence by describing it either in terms of the *Miller* test or in terms of specific violent crimes (*e.g.*, murder, rape, aggravated assault, mayhem, and torture) would be overbroad because they would apply to large categories of valuable speech protected by the First Amendment or they would be too vague to give sufficient notice to product developers as to what would be considered obscene violence.[68] Should federal or state legislatures adopt laws treating violence like obscenity, it may fall to the courts to interpret precisely what constitutes violence that is equivalent to obscenity.[69]

ENDNOTES

1. Trade associations representing members of the movie and music industries submitted "white papers" to the Commission arguing vigorously that advertisements for movies and music are entitled to full First Amendment protection. *See* Memorandum from the Recording Industry Association of America ("RIAA"), BMG, EMI, Sony Music, Universal, and Warner Music Group to Federal Trade Commission, *First Amendment Issues Relevant to Federal Trade Commission Study on Marketing Practices of Recording Industry* (Feb. 14, 2000) [hereinafter *Recording Industry Memorandum*]; Walter E. Dellinger & Charles Fried, A Paper Presented to the Federal Trade Commission on behalf of Sony Pictures Entertainment Inc., Metro-Goldwyn-Mayer Studios, Inc., Miramax Films, Paramount Pictures Corporation, Twentieth Century Fox Film Corporation, Universal City Studios, Inc., Warner Bros., and Walt Disney Pictures and Television, *First Amendment Implications of the Federal Trade Commission's Inquiry into the Marketing to Minors of Motion Pictures That Depict Violence* (Jan. 19, 2000) [hereinafter *Motion Pictures Industry Paper*].

2. U.S. Const. amend. I.

3. The Supreme Court has expressly stated that movies and music fall within the First Amendment. *See, e.g., Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981) (declaring, in case striking down municipal ordinance prohibiting nude dancing, that "[e]ntertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee."). Several federal courts have debated whether electronic games should receive the same First Amendment protections as the other entertainment media but have not yet decided the issue conclusively. *Compare Rothner v. City of Chicago*, 929 F.2d 297 (7th Cir. 1991) (indicating that First Amendment protection of electronic games may depend on creative content), *with Malden Amusement Co. v. City of Malden*, 582 F. Supp. 297 (D. Mass. 1983) (holding that video games are not entitled to First Amendment protection because they do not contain expressive or informational content), *and America's Best Family Showplace Corp. v. City of New York*, 536 F. Supp. 170 (E.D.N.Y. 1982) (same). In deciding an appeal of a motion to dismiss, the Seventh Circuit in *Rothner* developed an approach that considers the extent to which the electronic game at issue contains artistic content:

> On the basis of the complaint alone, we cannot tell whether the video games at issue here are simply modern day pinball machines or whether they are more sophisticated presentations involving storyline and plot that convey to the user a significant artistic message protected by the first amendment. Nor is it clear whether these games may be considered works of art. To hold on this record that all video games – no matter what their content – are completely devoid of artistic value would require us to make an assumption entirely unsupported by the record and perhaps totally at odds with reality. As the Supreme Court has confessed its inability to comprehend fully the technology of the cablevision industry on the basis of a complaint, so we must confess an inability to comprehend fully the video game of the 1990s.

Rothner, 929 F.2d at 303. Given the substantial innovations in the current generation of

electronic games, including their use of movie clips, music, animation, and the development of plot and character, however, some commentators predict that many courts will eventually accord the same protection to electronic games as to other types of entertainment media. *See* David B. Goroff, *The First Amendment Side Effects of Curing Pac-Man Fever*, 84 Colum. L. Rev. 744, 752–53, 764 (1984); Matthew Hamilton, *Graphic Violence in Computer and Video Games: Is Legislation the Answer?* 100 Dick. L. Rev. 181, 190 (1995).

4. *See, e.g., Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (Constitution affords "commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values . . . .").

5. *See Brandenburg v. Ohio*, 395 U.S. 444 (1969). The *Brandenburg* Court's "incitement" decision requires proof of incitement to *imminent* and *immediate* lawless action. *Id*. at 447. In a law review article discussing proposals to regulate violence on television, Judge Harry Edwards of the United States Court of Appeals for the District of Columbia Circuit explained that the incitement element would be difficult for the government to prove:

> It is apparent that the incitement element of the *Brandenburg* test, alone, fails to capture government regulation of television violence. Simply put, the violent fare on television does not explicitly urge viewers to commit the evils with which the legislature may be concerned. Nor can such intent reasonably be attributed to television executives and producers. Largely for this reason, courts and commentators have concluded with near unanimity that televised portrayals of violence are not "directed to inciting or producing imminent lawless action."

Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 Nw. U. L. Rev. 1487, 1526 (1995); *cf. Estate of Jessica James v. Meow Media, Inc.*, 90 F. Supp. 2d 798 (W.D. Ky. 2000) (granting defendant's motion to dismiss tort claims because plaintiff failed to prove that defendant's actions, creation and distribution of a movie, games, and Internet materials, caused death of plaintiff's daughter). Judge Edwards suggested, however, that if television producers aired material intended to incite or produce violent behavior, the "mere fact of its being telecast would not immunize the programming from regulation under *Brandenburg*." Edwards & Berman, *supra*, at 1526 n.186.

6. *See Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). *Chaplinsky's* "fighting words" doctrine has been used only rarely, and has been limited to personally directed insults or taunts that tend to provoke immediate violent reaction. *See Gooding v. Wilson*, 405 U.S. 518, 524 (1972) (limiting "fighting words" doctrine); *Cohen v. California*, 403 U.S. 15, 20 (1971) (same); Dawn Christine Egan, *"Fighting Words" Doctrine: Are Police Officers Held to a Higher Standard, or per Bailey v. State, Do We Expect No More from our Law Enforcement Officers than We Do from the Average Arkansan?*, 52 Ark. L. Rev. 591, 591–92 (1998) (noting that the Supreme Court has not upheld a conviction based on the "fighting words" doctrine since *Chaplinsky*). Because movies, music recordings, and electronic games are not explicitly directed at an individual person, most observers agree that the *Chaplinsky* doctrine is not relevant to the current public debate over violent entertainment media. *See* E. Barret Prettyman, Jr. & Lisa A. Hook, 38 Fed. Comm. L.J. 317, 372 n.228 (1987); *but see* Sanjiv N. Singh, *Cyberspace: A New*

Frontier for Fighting Words, 25 Rutgers Computer & Tech. L.J. 283 (1999) (arguing that the "fighting words" doctrine could find a new life in cyberspace).

7. *See Miller v. California*, 413 U.S. 15 (1973); *infra* Part V.B.1.a. for a discussion of the *Miller* test for obscenity.

8. *Penthouse Int'l Ltd. v. Meese*, 939 F.2d 1011, 1017 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 950 (1992). In *Penthouse*, the U.S. Attorney General established a commission to study the impact of pornography in the United States. The commission was instructed to make recommendations to the Attorney General concerning ways in which the spread of pornography could be contained. After holding several public hearings, the commission sent letters to 23 corporations including Penthouse, stating, among other things, that the commission had received testimony indicating "that your company is involved in the sale or distribution of pornography." *Id*. at 1013. The recipients of the letters were advised to inform the commission if they disagreed, and were further advised that failure to respond would be taken as an indication of no objection to the testimony. *Id*.

Penthouse sued for injunctive and declaratory relief, arguing that the commission was chilling the distribution of constitutionally protected speech. *Id*. at 1012. The court rejected Penthouse's argument and held that its First Amendment rights were not chilled because of the lack of government threat. The court noted that the commission had no tie to prosecutorial power nor authority to censor publications. *Id*. at 1015. The court noted that the letter to the 23 corporations did not threaten prosecution or intimate any intent to proscribe the distribution of the publications, and stated that it did not "believe that the Commission ever threatened to use the coercive power of the state against recipients of the letter." *Id. Compare with Bantam Books v. Sullivan*, 372 U.S. 58 (1963) (activities of Rhode Island Commission to Encourage Morality in Youth violated First Amendment's prohibition against "informal censorship" because Commission had power to investigate and recommend prosecution of booksellers who sold material that Commission determined was obscene or indecent).

9. This is known in constitutional law as the "public function" prong of the "state action" doctrine. *See Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1980).

10. This is known in constitutional law as the "nexus" prong of the "state action" doctrine. *See Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982); *Blum v. Yaretsky*, 457 U.S. 991 (1982); *cf.* Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 Vand. L. Rev. 427, 491–93 (2000) (noting that parental concern over objectionable media products has led some national retail stores to refuse to stock such products or to require an edited version).

11. As Judge Harry T. Edwards of the D.C. Circuit has explained:

> The age when courts and commentators could debate whether the First Amendment constituted an "absolute" barrier to government regulation of speech is long gone. In its place stands a complex set of rules that directs a reviewing court to consider such diverse factors as the form and effect of the regulation, the purposes of the regulators, the value of the speech regulated, and the type of

media involved.

Edwards & Mitchell, *supra*, 1490–91 (citation omitted).

12. *See Nixon v. Shrink Miss. Gov't PAC*, 120 S. Ct. 897, 906 (2000) (upholding contribution limits on state office seekers based on the state's interest in preventing corruption and the appearance of corruption in the political process).

13. *See generally* P. Cameron DeVore, *Advertising and Commercial Speech*, 582 Practising L. Inst. 715 (Nov. 1999).

14. *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 561 (1980).

15. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)).

16. *See Reno v. ACLU*, 117 S. Ct. 2329 (1997); *Central Hudson*, 447 U.S. 557.

17. *See United States v. Playboy Entertainment Group, Inc.*, No. 98-1682, 2000 WL 646196, at *7 (U.S. May 22, 2000).

18. *Id*.

19. *See supra* Part IV. The exact degree of protection accorded to commercial speech is in flux. Although the Supreme Court has adhered to the "intermediate scrutiny" standard, recently, several Justices have suggested that the distinction between the two types of speech should be narrowed, and that "truthful, noncoercive" commercial speech about lawful activities should receive the same degree of constitutional protection, *i.e.*, strict scrutiny, as non-commercial speech. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). In *44 Liquormart*, at least four Justices suggested that truthful, non-misleading commercial speech should receive the same First Amendment protection as non-commercial speech, *id*. at 500, 504 (Stevens, Kennedy, Souter, & Ginsburg, JJ., plurality opinion), while Justice Thomas advocated for the elimination of the distinction between commercial and non-commercial speech. *Id*. at 522 (Thomas, J., concurring in part, and concurring in the judgment). Although the Supreme Court has not yet taken the step of elevating commercial speech to the same status as non-commercial speech, many judges and academics have already begun to discuss the implications of such a doctrinal shift. *See* Martin H. Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. Ky. L. Rev. 553 (1997). The Supreme Court has emphasized, however, that even if truthful commercial speech is accorded a higher level of constitutional protection, false and deceptive commercial speech would remain subject to full regulation by the government. *See Ibanez v. Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 (1994); s*ee also* 15 U.S.C. §§ 45(a)(1), 45(n) (authorizing FTC to regulate misleading and deceptive speech and to proscribe "unfair" advertising and marketing – *i.e.*, an act or practice that "causes or is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to

consumers or to competition.")

20. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1995).

21. *See Board of Trustees of SUNY v. Fox*, 492 U.S. 469 (1989).

22. *Cf.* Robert Adler, *Here's Smoking at You Kid: Has Tobacco Product Placement in the Movies Really Stopped?*, 60 Mont. L. Rev. 243, 275 (1999).

23. Specifically, the *Recording Industry Memorandum* states that "[A]dvertisting and marketing materials for recordings virtually always incorporate CD titles that are themselves expressive, and may also incorporate song titles and selected lyrics as well. These materials also frequently reproduce or incorporate album (or now, CD) covers that, themselves, are clearly art – another form of protected expression." *Recording Industry Memorandum* at 36; *cf. Rogers v. Grimaldi*, 875 F.2d 994, 998 (2d Cir. 1989) (movie title deserves First Amendment protection so long as the title does not mislead as to authorship and content of movie).

24. Those who argue in favor of full constitutional protection for advertising and marketing activities for entertainment media products rely on the Supreme Court's dicta in a case involving advertising for contraceptives, which suggested that strict scrutiny "may be appropriate in a case where [a company] advertises an activity itself protected by the First Amendment." *Bolger v. Youngs Drug Product*, 463 U.S. 60, 67 n.14 (1983).

25. *See Lewis v. Columbia Pictures Indus., Inc.*, 23 Media L. Rep. 1052 (Cal. Ct. App. 4th Dist. Nov. 8, 1994); *see also Lane v. Random House, Inc.*, 985 F. Supp. 141, 152 (D.D.C. 1995).

26. *Compare Lacoff v. Buena Vista Publ'g, Inc.*, No. 20-091, 606005/98, 2000 WL 202625, at *6 (N.Y. Sup. Ct. Jan. 28, 2000) (book cover and flyleaf for *Beardstown Ladies' Common-Sense Investment Guide* is not "advertising material" evaluated under commercial speech doctrine, but non-commercial speech fully protected by First Amendment), *with Keimer v. Buena Vista Books, Inc.*, 89 Cal. Rptr. 2d 781 (Ct. App. 1st Dist. 1999) (book cover and flyleaf containing allegedly false statements about investment returns constituted commercial speech entitled only to "qualified" free speech protection).

27. 447 U.S. 557.

28. *Id.* at 566.

29. *Greater New Orleans Broad. Ass'n v. United State*s, 119 S. Ct. 1923, 1932 (1999) (internal quotation marks omitted).

30. *Id*. at 1930*; see also 44 Liquormart*, 517 U.S. 484, 499–500.

31. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994). A content-based restriction, for example, would be a restriction that prohibited the publication of all political advertisements. A viewpoint-based restriction, which is a subset of a content-based restriction, would be a restriction that prohibited the publication of a political advertisement advocating a certain political party or idea. By contrast, an example of a content-neutral restriction would be a

restriction that prohibited any advertising inside federal offices.

32. *Ladue v. Gilleo*, 512 U.S. 43, 54–59 (1994) (distinguishing between content-based and content-neutral regulations).

33. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

34. *Turner*, 512 U.S. at 642.

35. *See City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804–05 (1984) (finding that "[t]he text of the ordinance [prohibiting the posting of signs on public property] is neutral – indeed it is silent – concerning any speaker's point of view. . . . It is well settled that the state may legitimately exercise its police powers to advance esthetic values.").

36. *Ward*, 491 U.S. 781.

37. *Turner*, 512 U.S. at 645.

38. *Id.* at 642.

39. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987).

40. *See United States v. Playboy Entertainment Group, Inc.*, No. 98-1682, 2000 WL 646196; s*ee also* The [New York Bar Association] Committee on Comm. and Media L., *Violence in the Media: A Position Paper*, 52 The Record 310 (Apr. 1997).

41. *Miller*, 413 U.S. at 23.

42. *Id.*

43. *Id.* at 24.

44. *See Recreational Developments of Phoenix, Inc. v. City of Phoenix*, 83 F. Supp. 2d 1072, 1095 (D. Ariz. 1999) (denying plaintiff's motion to enjoin an obscenity ordinance because the state law mirrored the *Miller* test); *County of Kenosha v. C&S Management, Inc.*, 223 Wis. 2d 373 (1999) (upholding the constitutionality of a Wisconsin law prohibiting the sale of obscene material based on the *Miller* test).

45. *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

46. *Id.* (upholding statute prohibiting sale of obscene – as to minors – printed material to minors under seventeen years of age whether or not it would be obscene to adults); *see also FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (upholding FCC finding that broadcast of radio monologue containing references to excretory or sexual activities or organs was "patently offensive" because it was broadcast in the afternoon when children are in the audience); *Action for Children's Television III*, 58 F.3d 654, 664–65 (D.C. Cir. 1995) [hereinafter *ACT III*] (upholding a slightly modified version of the FCC's safe harbor rules for indecent broadcasts

based on government's compelling interest in helping parents exercise their responsibility for their children's well-being).

47. In *ACT III*, the D.C. Circuit reviewed the case law and concluded that the Supreme Court has never required a scientific showing of psychological harm to establish the constitutionality of measures to protect minors from indecent speech: "Congress does not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds that can result from persistent exposure to sexually explicit material just this side of legal obscenity." 58 F.3d at 662. It remains to be seen, however, whether the courts would require scientific evidence of harm caused by media violence in order to establish a compelling government interest.

48. *See, e.g.*, *Playboy*, No. 98-1682, 2000 WL 646196; *Reno*,117 S. Ct. at 2346 (holding that statute intended to protect minors from harmful communications over the Internet violated the First Amendment in part because the statute suppresses a large amount of speech that adults have a constitutional right to send and receive); *see also Sable Communications v. FCC*, 492 U.S. 115, 128 (1989); *Erzoznick v. Jacksonville*, 422 U.S. 205, 213–14 (1975) (striking down ordinance banning nudity in outdoor movie theaters because "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them").

49. *Reno*, 117 S. Ct. at 2346 (citations omitted); *see also Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968) (invalidating a municipal ordinance that established a local classification board to rate movies as either "suitable for young persons" or "not suitable for young persons" on vagueness grounds).

50. *Id.* (citations omitted).

51. *See* Kevin D. Minsky, *The Constitutionality and Policy Ramifications of the Violent Programming Rating Provision in the Telecommunications Act of 1996*, 47 Syracuse L. Rev. 1301, 1308–12 (1997).

52. *Red Lion Broad. v. FCC*, 395 U.S. 367 (1969). The Supreme Court has held, however, that the scarcity rationale does not apply to cable television and has analyzed regulations affecting speech on cable television under a heightened standard of scrutiny. *See Turner*, 512 U.S. at 639; *see generally* Amy Fitzgerald Ryan, *Don't Touch That V-Chip: A Constitutional Defense of the Television Program Rating Provisions of the Telecommunications Act of 1996*, 87 Geo. L.J. 823, 836-40 (1999). Recently, however, the Court acknowledged that, "Cable television, like broadcast media, presents unique problems, which inform our assessment of the interests at stake, and which may justify restrictions that would be unacceptable in other contexts." *Playboy*, No. 98-1682, 2000 WL 646196, at *7.

53. *Pacifica*, 438 U.S. at 748–49.

54. *Id.* (upholding FCC finding that broadcast of radio monologue containing references to excretory or sexual activities or organs was "patently offensive" because it was broadcast in the afternoon when children are in the audience).

55. *Id.* In *Reno*, the Supreme Court distinguished the Internet from the broadcast media on the ground that the "intrusion on the privacy of the home" rationale does not apply to the Internet. 117 U.S. 2329. Specifically, the Court held that the Internet is not as "invasive" as radio or television, relying on the district court's findings that "communications over the Internet do not 'invade' an individual's home or appear on one's computer unbidden. Users seldom encounter content 'by accident.'" *Id.* at 2343. But with the development of new technologies to deliver movies, music recordings, and electronic games into the home, the level of availability and intrusion of other entertainment media (and the level of volition required) may be converging with broadcast media.

56. *See supra* Part III.B.

57. *See* Appendix G.

58. *Riley v. National Federation of the Blind*, 487 U.S. 781, 791 (1988).

59. These scholars argue that the government's intent would not be relevant: If, in enacting a labeling scheme, the "government were to be motivated not to censor violence, but rather to notify parents and viewers, does not change the level of scrutiny. Because the regulation is content-based, it elicits most exacting scrutiny. The fact that the government might act with benign intentions is irrelevant." Edwards & Berman, *supra* note 5, at 1562 n.323.

60. In addition to these considerations, the recording industry has argued that requiring that the rating or label be used on entertainment media, or in advertising or marketing materials, would also fail to meet the constitutional standard because it amounts to a "prior restraint" on speech. *Recording Industry Memorandum* at 40–41.

61. *See* Letter from Ralph Nader and Gary Ruskin, Executive Director, Commercial Alert to Robert Pitofsky, Chairman, Federal Trade Commission (June 22, 1999), www.essential.org/alert/mediaviolence/ftclet.html (visited Aug. 8, 2000) (calling Commission's attention to European restrictions on advertising to children such as prohibitions against television advertising directly targeting children below 12 years of age in Norway and Sweden).

62. *Interstate Circuit v. City of Dallas*, 390 U.S. 676, 689 (1968) (internal quotations omitted).

63. *See Erznoznik v. City of Jacksonville,* 422 U.S. 205, 212-13 (1975).

64. *See, e.g.,* Jendi Reiter, *Serial Killer Trading Cards and First Amendment Values: A Defense of Content-Based Regulation of Violent Expression*, 62 Alb. L. Rev. 183 (1998); Kevin W. Saunders, *Media Violence and the Obscenity Exception to the First Amendment,* 3 Wm. & Mary Bill Rts. J. 107, 111 (1994). Both Reiter and Saunders advocate using the *Miller* obscenity test to assess violent material. Reiter states:

> Neither the text nor the purposes of the First Amendment prevent the Supreme Court from creating a new category of less-protected speech whose subject matter is violence rather than sex, and using the Miller test to define its boundaries. By analogy to 'obscenity,' this category would have a special name (perhaps

> 'depravity') which would be used as a legal term of art to describe the materials which were subject to regulation. State and municipalities could then define and regulate whichever types of violent entertainment seemed most harmful to them....

Reiter, *supra*, at 209. *But see Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 687 (8th Cir. 1992) (striking down statute that prohibited sale or rental to minors of videos containing violent content where statutory test for violence was patterned after *Miller*).

65. Reiter, *supra* note 64, at 211 ("Just as the vast majority of works with sexual content do not overstep the boundaries of the *Miller* test, most works with violent content would still receive full First Amendment protection.").

66. *See Winters v. New York*, 333 U.S. 507, 510 (1948) (refusing to treat violent "true crime" stories and detective magazines as obscene under statute banning obscenity: although the Court could see "nothing of possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature"); *see also Eclipse Enterprises, Inc. v. Gulotta*, 134 F.3d 63, 67–68 (2d Cir. 1997) (striking down statute prohibiting sale of trading cards depicting violent crimes to minors); *Video Software Dealers Ass'n*, 968 F.2d 84; *Sovereign News v. Falke*, 448 F. Supp. 306, 394 (N.D. Ohio 1977) (striking down obscenity statute applying to material containing violence, brutality, or cruelty), *remanded on other grounds*, 610 F.2d 428 (6th Cir. 1979).

67. *See, e.g.*, Edwards & Berman, *supra* note 5, at 1502–03 (asserting that it would be difficult to draw lines between "thematic" violence and "gratuitous" violence due to the "grave difficulty in drawing the appropriate lines [and that this problem] would turn any such inquiry into a jurisprudential quagmire").

68. [I]f 'violence' were defined as the depiction of physical force that causes injury or pain, the definition would sweep in representations of war, sports, accidents, natural disasters, medical and surgical procedures, and even the portrayal in nature films of the predatory behavior of animals. Passages from classic works of literature would also fit the definition.

See Motion Picture Industry Paper at 25.

> [M]usic coupled with lyrics has unique qualities that make interpretation especially subjective, and thus may aggravate vagueness issues . . . . A more specific approach, listing particular violent acts, would be no more successful in passing constitutional muster. Not only would the listed definitions of particular acts of violence themselves potentially suffer from vagueness problems, but such definitions would inevitably reach large categories of valuable speech protected by the First Amendment and would therefore be grossly overbroad.

See Recording Industry Memorandum at 25.

69. The problems of using the *Miller* test for obscenity in practice have been underscored by Justice Potter Stewart's infamous articulation of his "I know it when I see it" approach.

Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).