IN OPPOSITION TO THE PROPOSED MEDIA MARKETING ACCOUNTABILITY ACT OF 2001

INTRODUCTION

During the past two decades, American society has been significantly transformed by the convergence of two ongoing cultural evolutions: the proliferation of popular media made possible by advanced technology[1] and the liberalization of media content.[2] At the same time, Americans live in an era where there are constant reminders of the violent society that we inhabit.[3] Not surprisingly, tremendous attention is given to the youth of America, both in terms of the violence by which they are surrounded[4] and the violence that they commit.[5] As more children spend increasing amounts of time with music, movies, and electronic games,[6] which are increasingly more violent,[7] the effects of violent imagery on America's youth becomes of paramount concern.[8]

It is undeniable that a lot of material contained in motion pictures, music recordings, and electronic games is violent.[9] Further-

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[1] *See* OFFICE OF THE SURGEON GENERAL, YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL, *at* http://www.surgeongeneral.gov/library/youthviolence/youthvioreport.htm (Jan. 2001) (last visited Mar. 26, 2002) [hereinafter SURGEON GENERAL REPORT] ("American children and youths spend, on average, more than 4 hours a day with television, computers, videotaped movies, and video games.").

[2] *See* Megan Geroff, *Explicit Music: How it Affects a Young Audience*, RHYME & REASON, *available at* http://www.journalism.indiana.edu/gallery/student/j201spring01/eviall/mlreuter/ (last visited Aug. 31, 2001) ("Music lyrics have become generally more explicit over the past two decades. Music artists are allowed much more room to express taboo or explicit ideas through their music.").

[3] *See* Press Release, Center for Media and Public Affairs, In 1990s News Turns To Violence and Show Biz, *at* http://www.cmpa.com/pressrel/mm78pr.htm (Aug. 12, 1997) (finding that news coverage of overall crime tripled in 1997 from what it was in 1993, with coverage of murders rising over 700%).

[4] *See* FED. TRADE COMM'N, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A REVIEW OF SELF-REGULATION AND INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES, *at* http://www.ftc.gov/opa/2000/09/youthviol.htm, at 2 (Sept. 2000) (last visited Oct. 22, 2003) [hereinafter FTC REPORT]; *see also* CTR. FOR MEDIA AND PUB. AFFAIRS, *Merchandizing Mayhem, Violence in Popular Entertainment 1998-99*, *at* http://www.cmpa.com/archive/viol98.htm (last visited Mar. 26, 2002) [hereinafter *Merchandizing Mayhem*] ("The American Psychological Association estimates that the average twelve-year-old has seen 8,000 murders and 100,000 acts of violence on network television.").

[5] *See generally* SURGEON GENERAL REPORT, *supra* note 1.

[6] *See id.*

[7] *See generally Merchandizing Mayhem*, *supra* note 4 (studying not only violence, but sexual imagery and graphic language).

[8] *See* John M. Broder, *Searching for Answers After School Violence*, N.Y. TIMES, May 10, 1999, at A16 (reporting that President Clinton invited representatives from all segments of society to attend a conference on youth violence that would address, among other issues facing young people, the effect of violent imagery in the media).

[9] *See, e.g.*, FTC REPORT, *supra* note 4. *See generally Merchandizing Mayhem*, *supra* note 4. What is more significant than mere quantity, however, is the manner in which violence is

more, most Americans believe that exposure to violent media promotes violent and aggressive attitudes among impressionable young children.[10] At the same time, however, Americans remain divided as to how to address this problem—a situation which stems largely from the fact that attitudes differ about the nature and strength of the relationship between violent media and youth violence.[11] Some opine that the potentially dangerous effects of violent media can be eliminated by increased parental supervision. On the other hand, those who believe that exposure to violent media directly causes specific incidents of youth violence propose more than parental supervision to sever the relationship.[12]

In April 2001, Senator Joseph Lieberman (D-CT)[13] introduced the Media Marketing Accountability Act ("the MMAA"),[14] which endeavored "to prohibit the targeted marketing to minors of adult-rated media as an unfair or deceptive practice."[15] The introduc-

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portrayed in the media. *See* Press Release, Ctr. For Media and Pub. Affairs, I'm Okay, You're Dead!, *at* http://www.cmpa.com/pressrel/violence99.htm (last visited Sept. 22, 1999) (stating generally that even the most serious violence is often portrayed as harmless or justified). According to a study that examined the nature of violence contained in American television programming during three consecutive years, only 4% of the 61% of programs containing some violence also featured an anti-violent theme; 44% of the violent incidents involved perpetrators who had attractive qualities "worthy of emulation;" 43% of violent scenes involved humor; 75% of the violent scenes did not show immediate punishment or condemnation for violent acts; and 40% of the programs featured violent characters who were rarely, if ever, punished for their aggressive behavior. *See generally* SURGEON GENERAL REPORT, *supra* note 1 (reviewing the National Television Violence Survey, one of the largest and most recent content analysis studies to systematically examine violence on television).

10 *See Merchandizing Mayhem*, *supra* note 4, at 2 ("[P]olls show that majorities of Americans under age 30 (as well as their elders) hold the popular culture responsible for promoting violent crime, teen sex and drug abuse."). *But see* Press Release, ACLU Sees Political Opportunism, Not Science, In Report Linking Pop Culture and Youth Violence, *at* http://www.aclu.org/features/f091300a.html (last visited Sept. 13, 2000) (emphasizing that the correlation between youth violence and exposure to violence through popular media is "simply two things happening in proximity").

11 *See* FTC REPORT, *supra* note 4, at (i)-(ii) (conceding that exposure to violent media alone does not cause a child to commit a violent act, but maintaining that violent media is responsible for increasing aggressive attitudes, values and behavior).

12 *See* Senator Joseph Lieberman, Statement of Senator Joe Lieberman Introducing the Media Marketing Accountability Act of 2001, *at* http://lieberman.senate.gov/~lieberman/press/ 01/04/2001426639.html (Apr. 26, 2001) [hereinafter Introduction Statement] (proposing a legislative response to the entertainment industries' failure to adhere responsibly to self-regulation).

13 Senator Lieberman is a "long time critic of the entertainment industry" who has spent "eight years campaigning against explicit material." Bridget Byrne, *No Love for Lieberman in Hollywood*, *at* http://www.eonline.com/News/Items/0,1,8142,00.html (Apr. 19, 2001). See Senator Joe Lieberman, *Media, Culture & Values*, *at* http://lieberman.senate.gov/ newsite/media/cfm (last visited Aug. 28, 2001), for an overview of Senator Lieberman's efforts to improve the quality of America's cultural environment.

14 *See* Media Marketing Accountability Act of 2001, S. 792, 107th Cong. (2001) [hereinafter S. 792]. Representative Steven Israel (D-NY) introduced an identical bill in the House of Representatives. *See* H.R. 2246, 107th Cong. (2001).

15 S. 792. "Targeted advertising" includes advertising which is "intentionally directed to

tion was made in response to a problem that Senator Lieberman finds most troubling with American culture: Entertainment companies who acknowledge that their products are violent and unsuitable for children, but nevertheless aggressively market their products towards children.[16]

The MMAA generated much controversy when it was proposed, as critics were quick to point out that legislation designed to restrict media advertisements based upon the content of the underlying media is censorship.[17] In response, Senator Lieberman claimed, "that's not censorship, that's common sense."[18] Most critics ultimately failed to embrace the MMAA as common sense,[19] however, and in response to subsequent reports that found improvement regarding industry marketing practices, Senator Lieberman relented his pursuit of the MMAA.[20]

Nonetheless, the MMAA was innovative and is still worthy of comment. Congress has little ability to directly regulate motion pictures, music recordings, or electronic games based upon content. The MMAA, however, attempts to take advantage of the commercial speech doctrine, under which the advertisements for

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minors," "presented to an audience of which a substantial proportion is minors," or advertising which "the Commission determines that the advertising or marketing is otherwise directed or targeted to minors." *Id.*

16 *See generally* Introduction Statement, *supra* note 12 (asserting that some companies have included nine and ten-year-olds in focus groups for films rated R for violence and promoted other violent R-rated movies at Boys and Girls Clubs).

17 *See* U.S. NEWSWIRE, *Media Marketing Accountability Act Opposed by Artists*, *at* http://www.usnewswire. com/topnews/Current_Releases/0620-101.html (June 20, 2001) ("Actor and President of The Creative Coalition William Baldwin said, 'A governmental role in defining 'acceptable' entertainment is an indirect form of censorship.'"); Bill Hillberg, *Hollywood Faces FTC Regulation*, *at* http://www.dailynews.com/news/articles/0401/27/new01.asp (Apr. 27, 2001) ("[T]he MPAA's executive vice president and a constitutional law expert argued that the law could introduce government censorship by allowing FTC bureaucrats to set standards for marketing and potentially become involved in the rating of films.").

18 Introduction Statement, *supra* note 12.

19 *See* Press Release, Statement of the Nat'l Coalition Against Censorship Regarding the Media Marketing Accountability Act of 2001, *at* http://www.freeexpression.org/newswire/0426_2001.htm (Apr. 26, 2001) ("Since government-compelled ratings would raise serious constitutional issues, it follows that government restrictions on the marketing of legal material to reflect such ratings is similarly suspect."); Kenny Moore, *Media Marketing Accountability Act of 2001: The Empire Strikes Back*, *at* http://www.theroc.org/roc~news/media2001.htm (last visited Aug. 30, 2001) ("The legislation . . . targets the marketing practices of entertainment industries in an attempt to achieve censorship through the back door."). *But see* Press Release, Orthodox Union Applauds Introduction of Media Marketing Accountability Act by Senators Lieberman and Kohl, *at* http://www.ou.org/public/statements/2001/nate11.htm (May 3, 2001); Michelle Reuter, *To Censor or Not*, RHYME & REASON, *at* http://www.jouranalism.indiana.edu/gallery/student/j201spring01/eviall/mgoldbla/index.html (last visited Oct. 2, 2001) (commenting that the Concerned Women of America "are in favor of those in the music industry using common sense").

20 *See* Press Release, Ass'n of Nat'l Advertisers, FTC Releases Follow-Up Report on Marketing Violent Entertainment to Children, *at* http://www.ana.net/govt/what/12%5F17%5F01.cfm (Dec. 17, 2001).

violent media arguably can be regulated with greater ease than the violent media themselves. In effect, the MMAA treated violent media as a vice, such as gambling, alcohol, or tobacco. Advertisements concerning these subjects are frequently regulated with little objection.

This note argues that the MMAA is unconstitutional because (1) there is insufficient evidence to establish that the MMAA will directly further the government's substantial interest in eradicating youth violence; and (2) the MMAA is broader than necessary to accomplish the government's objective. Part one of this note discusses the nature of youth violence as it evolved through the 1990s, and the nature of the evidence explaining what causes youth violence. Part two addresses a study of marketing practices in the motion picture, music recording and electronic game industries, which was conducted by the Federal Trade Commission in response to the 1999 school shooting at Columbine High School in Littleton, Colorado, as well as the black letter of the MMAA itself. Part three discusses the commercial speech doctrine, both in general and as it would be applied to the MMAA. In conclusion, this note emphasizes why legislation is not the appropriate solution to the prevalence of media violence in American society.

I.

A. *The Evolving Nature of Youth Violence.*

On April 13, 1999, two teen-aged boys entered their high school in Littleton, Colorado, killed thirteen people before killing themselves, and helped the rest of the nation admit that violence is, indeed, a dominant thread in the fabric of American society.[21] The Columbine gunmen reportedly laughed as they set off homemade explosives and fired shots randomly at terrified schoolmates.[22] Although the Columbine tragedy will remain the most horrifying and callous schoolyard shooting to scar the nation in the 1990s,[23] it by no means introduced Americans to the concept of youth violence.[24] An epidemic of lethal schoolyard shootings rid-

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21 *See A Conference on Youth Violence*, N.Y. TIMES, May 11, 1999, at A22 (stating that the Columbine tragedy has forced a nation to confront the violent culture which it inhabits).

22 *See* Mike Anton, *School War Zone*, DENV. ROCKY MOUNTAIN NEWS, Apr. 20, 1999, at 2A.

23 The two young boys reportedly laughed while they detonated homemade bombs and fired random gunshots. As students and teachers hid in closets and cowered under desks, the gunmen allegedly consoled their crying and screaming schoolmates by saying, "Don't worry . . . . You're going to be dead in a few minutes." *Id.*

24 *See* FTC REPORT, *supra* note 4, at 57 n.4 (noting that in the two years preceding Littleton, more than a dozen students or teachers had been killed in six school related shootings and that after Littleton school shootings occurred in at least three other cities).

dled the nation during the 1990s,[25] which, incidentally, altered the profile of the modern violent youthful offender remarkably.[26]

Between July 1992 and June 1994, most acts of violence committed by students on or near school grounds or at school-related functions were motivated by interpersonal disputes and were gang related.[27] Those involved in gangs, those involved in drugs, and those involved with guns were responsible for committing the majority of serious youth violence.[28] At the greatest risk of becoming a victim were those who attended senior high schools located in urban school districts.[29] As for both victims and offenders, most were likely to be male, less than 20 years of age, belonging to a racial or ethnic minority.[30] Relatively speaking, school violence was easy to predict in terms of where it would happen, and it was easy to identify by whom and against whom it was likely to be perpetrated. Although it was a serious problem in the early 1990s, it was still an isolated problem that failed to generate nationwide attention.[31]

By the latter half of the decade, traces of schoolyard shootings such as Columbine began to emerge in scholarly studies.[32] Individual incidents of school violence became more severe,[33] and school

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25 *See* Tustin Amole, *Where to Place the Blame?*, DENV. ROCKY MOUNTAIN NEWS, Apr. 20, 1999, at 3A (reporting that in 1997, a 14-year-old student killed 3 students and wounded 5 at a high school in West Paducah, Kentucky; a 16-year-old boy shot 9 students, 2 fatally, at a high school in Pearl, Mississippi; in 1998, 2 boys, 11 and 13, killed 4 female students, 1 teacher, and wounded 10 at a middle school in Jonesboro, Arkansas; a 15-year-old boy opened fire, killing 2 students and wounding more than 20 at a high school in Springfield, Oregon; in 1999, a student fired 2 shotgun blasts without injuring anybody in Notus, Idaho).

26 One commentator has proposed that by a process called violent socialization, children learn to react violently to serious provocation. The use of violence then escalates until violence is used, not only in fear and self-defense, but also in anger and out of frustration. In part, this theory explains the transformation that emerged in the 1990s, whereby teens that once used violence as a response to provocation evolved into teens that resorted to unprovoked violence. *See* Richard Rhodes, *A Personal View: What Causes Brutality? The People Nurturing It*, N.Y. TIMES, Oct. 16, 1999, at B7.

27 *See generally* SURGEON GENERAL REPORT, *supra* note 1 (discussing a nationwide study conducted by the Centers for Disease Control and Prevention in collaboration with the United States Departments of Education and Justice that focused on school-related homicides).

28 *See id.*

29 *See id.*

30 *See id.*

31 *See* FTC REPORT, *supra* note 4, at 1 (noting that "the horrifying school shooting in Littleton, Colorado . . . [prompted] public calls for a national response to youth violence").

32 The Centers for Disease Control and Prevention conducted such a study from June 1994 - June 1999. *See* SURGEON GENERAL REPORT, *supra* note 1, *at* http://www.surgeongeneral.gov/library/youthviolence/chapter2/sec12.html (last visited Aug. 20, 2003).

33 From August 1992 to July 1995, there was an average of one multiple-victim homicide or homicide-suicide per year. From August 1995 to June 1998, the rate of multiple-victim homicides or homicide-suicides rose to five per year. *See id.*

violence in general became more evenly widespread.[34] Disturbingly, youth violence became more active instead of reactive,[35] thereby erasing the vital warning signs which parents and school officials looked for as indications of potential trouble.

In terms of public perception, consider that in 1977, 24% of parents surveyed said that they feared for their child's safety at school.[36] In contrast, 74% believed that a school shooting was likely to take place in their community in May 1999.[37] Interestingly, however, the proportion of school homicides in relation to all youth homicides remained at the same level in the latter half of the 1990s as it had been during the former — less than one percent.[38] In addition, the overall risk of violence and injury at school remained constant over the past twenty years.[39]

B. *The Evidence Explaining the Cause of Youth Violence.*

Throughout most of American history, the study of youth violence was primarily conducted by criminologists and social scientists, with an almost exclusive focus on rehabilitation.[40] A welcomed change occurred in 1985, when Surgeon General C. Everett Koop convinced the participants of an unprecedented Workshop on Violence and Public Health that it was time for public health officials to join, if not command, the campaign against youth violence.[41] The public health approach[42] presented an appealing alternative to the rehabilitation model because it emphasized prevention proactively instead of reactively.[43] Accordingly, "behavioral, environmental, and biological risk factors associated

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34 By 1998, the victimization rate was similar at urban, suburban and rural schools. While male students continued to be more likely than female students to become a victim of non-lethal school violence, victimization rates were greatest for students 12-14 years old. *See id.*

35 *See, e.g.*, Rhodes, *supra* note 26, at B7.

36 *See generally* SURGEON GENERAL REPORT, *supra* note 1.

37 *See id.*

38 *See id.*

39 *See id.*

40 *See* SURGEON GENERAL REPORT, *supra* note 1, *at* http://www.surgeongeneral.gov/library/youthviolence/chapter2/sec12.html (last visited Aug. 20, 2003).

41 *See id.* (noting that an increasing dissatisfaction with the rehabilitation ideal spurred the interest in developing a more effective response to youth violence).

42 The public health model can be summarily described in four steps: (1) define the problem by surveying data that establishes its nature and trends in its incidence and prevalence; (2) identify potential causes in terms of risk factors and protective factors; (3) design and develop effective intervention plans; and (4) publicize successful results in order to educate the public. *See id.*

43 *See id.* ("Broader than the medical model, which is concerned with the diagnosis, treatment, and mechanisms of specific illnesses in individual patients, public health offers a practical, goal-oriented, and community-based approach to promoting and maintaining health.").

with violence" are first identified.[44] Then, public health officials "educate individuals and communities and protect them from these risks."[45]

Conceding that there is no simple way to explain why some young people become violent, the public health approach tries to account for youth violence in terms of risk factors[46] and protective factors.[47] "Risk factors are personal characteristics or environmental conditions that *predict* the onset, continuity, or escalation of violence . . . [whereas a] protective factor is something that decreases the harmful effect of a risk factor."[48] The public health model is an appropriate approach to youth violence in light of the research that currently exists.[49] Such evidence indicates that violence is seldom caused by a single factor. Rather, multiple factors typically converge over time and collectively contribute to violent behavior.[50]

Although most studies analyze each factor independently, risk factors tend to accumulate and influence other factors.[51] To some degree, risk factors are manifest in every facet of a person's environment.[52] They also appear within the individual in terms of the way that he or she reacts, or is able to react, to external stimuli.[53] Furthermore, the predictive value of a risk factor changes as a child develops and depends on the social context or circumstances under which it arises.[54] During early development, the strongest risk factors include committing general offenses and using controlled substances.[55] Other significant factors include "being male, aggressiveness, low family socioeconomic status/poverty, and antisocial parents."[56] During later development, the strongest risk fac-

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44 *See id.*

45 *Id.*

46 In general, "[a] risk factor is anything that increases the probability that a person will suffer harm." SURGEON GENERAL REPORT, *supra* note 1, *at* http://www.surgeongeneral.gov/library/youthviolence/chapter4/sec1.html (last visited Aug. 20, 2003).

47 There are two ways to view a protective factor: "as the absence of risk and as something conceptually different than risk." *Id.*

48 *Id.* (emphasis in original).

49 *See* FTC REPORT, *supra* note 4, at 2 (mentioning two competing approaches, one which attributes youth violence to a child's ability to access handguns, and another which looks to various cultural explanations).

50 *See id.*

51 *See* SURGEON GENERAL REPORT, *supra* note 1, *at* http://www.surgeongeneral.gov/library/youthviolence/chapter4/sec1.html (last visited Aug. 20, 2003).

52 *See id.* (categorizing risk and protective factors into five groups: individual, family, peer group, school, and community).

53 *See id.*

54 *See id.*

55 *See* SURGEON GENERAL REPORT, *supra* note 1, *at* http://www.surgeongeneral.gov/library/youthviolence/chapter4/sec2.html (last visited Aug. 20, 2003).

56 *Id.*

tors are "weak social ties to conventional peers, ties to anti-social, delinquent peers, and belonging to a gang."[57]

According to the public health model, exposure to violent media is considered a relatively weak predictor of violence.[58] While most studies establish that there is a direct relationship between aggression and exposure to violent media,[59] this area of research is, concededly, underdeveloped at best. Most studies that pertain to media exposure focus on the effects of television violence.[60] However, one theory underlying the study of youth violence is based on the social learning model; and there is increasing concern that modern media—particularly, electronic games—have a greater negative impact than television because they allow children greater interaction.[61] The relationship between violent media and youth violence, therefore, is simply inconclusive until more modern research is conducted.[62]

Although it presents the most reliable framework for analyzing youth violence, the public health model remains vulnerable to criticism because risk factors are not causes.[63] While risk factors possess the "essential conditions for a causal relationship," scientists still cannot prove that "changing a risk factor produces changes in the onset or rate of violence."[64] The failure to establish a direct cause-and-effect relationship between a risk factor and the onset of violence raises questions about the effectiveness of any attempt to prevent youth violence by addressing any *sole* factor.[65]

II.

A. *Marketing Practices of the Entertainment Industries.*

In response to the shooting at Columbine High School, the

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57 *Id.*, *at* http://www.surgeongeneral.gov/library/youthviolence/chapter4/sec3.html (last visited Aug. 20, 2003).

58 *See id.*, *at* http://www.surgeongeneral.gov/library/youthviolence/chapter4/appendix4bsec3.html (last visited Aug. 20, 2003).

59 *See id.*

60 *See, e.g.*, *Merchandizing Mayhem*, *supra* note 4; SURGEON GENERAL REPORT, *supra* note 1, *at* http://www.surgeongeneral.gov/library/youthviolence/chapter4/appendix4bsec2.html (last visited Aug. 20, 2003) (finding that most research pertains to the effects of television violence).

61 *See* SURGEON GENERAL REPORT, *supra* note 1, *at* http://www.surgeongeneral.gov/library/youthviolence/chapter4/appendix4b.html (last visited Aug. 20, 2003).

62 *See id.*, *at* http://www.surgeongeneral.gov/library/youthviolence/chapter4/appendix4bsec3.html (last visited Aug. 20, 2003).

63 *See id.*, *at* http://www.surgeongeneral.gov/library/youthviolence/chapter4/sec1.html (last visited Aug. 20, 2003). A characteristic or condition is determined a risk factor if it has "a theoretical rationale and a demonstrated ability to predict violence . . . ." *Id.*

64 *Id.*

65 *See id.* (finding that effective prevention depends primarily on an accurate understanding of cause and effect).

Federal Trade Commission ("FTC") was authorized to study "whether the motion picture, music recording, and computer and video game industries market and advertise violent entertainment material to children and teenagers."[66] The FTC found that the entertainment industries take steps through a practice of voluntary self-regulation to identify and label products that may not be suitable for children under seventeen years-old because of violent content. For example, the motion picture industry labels films as "R" to signify that "the rating board has concluded that the film rated may contain some adult material."[67] R-rated films are restricted to children under seventeen years-old in most jurisdictions.[68] In addition, each film assigned a rating other than "G" also includes a brief explanation for the film's rating.[69]

The electronic game industry similarly utilizes an age-based rating system, where games rated "T" "contain content suitable only for persons ages 13 and older . . . [and] game titles rated M contain content suitable only for persons ages 17 and older . . . ."[70] The electronic game industry's rating system provides content descriptors as well to warn parents about language, sexual themes or violence.[71]

The music recording industry does not use an age-based rating system. Instead, "music recordings that contain explicit lyrics, including strong language or graphic references to violence, sex, or drug use, are identified with a parental advisory label."[72] The decision whether to include a parental advisory label, however, rests solely with the individual record companies and their artists.[73] In comparison, with respect to the motion picture and electronic game industries, there are rating boards that determine the rating to be assigned and standardized procedures to guide that determination.[74]

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66 FTC REPORT, *supra* note 4, at 1.

67 *Id.* at 6. The Motion Picture Association of America further explains that "parents are urged to learn more about the film before taking their children to see it. An R may be assigned due to, among other things, a film's use of language, theme, violence, sex or its portrayal of drug use." *Id.* at 6-7.

68 *See id.* On the other hand, motion picture films rated "PG-13" signify that "some material may be inappropriate for children under 13" years of age. *Id.*

69 For example, "'Rated R for terror, violence and language,' or 'Rated PG-13 for intense sci-fi violence, some sexuality and brief nudity.'" *Id.* at 7.

70 *Id.* at 38.

71 *See* FTC REPORT, *supra* note 4, at 38-39 (listing "Mild Animated Violence," "Mild Realistic Violence," "Comic Mischief," "Animated Blood and Gore," and "Realistic Blood" as some content descriptors relating to violence).

72 *Id.* at 21-22.

73 *See id.* at 22.

74 *See id.* at 23.

According to the FTC, the industries routinely undermine their rating systems by aggressively marketing their products to children under seventeen years-old.[75] With respect to the motion picture industry, the FTC found that "motion picture studios . . . advertise movies rated R for violence to children under 17 and movies rated PG-13 for violence to children under 13."[76] In its defense, the industry claims that marketing to minors is acceptable because the motion picture industry's rating system is merely meant to provide "cautionary warnings to parents."[77] In a similar vein, the music recording industry insisted that parental advisory stickers are "designed to provide a clear notice to parents to allow *them* to decide . . . what may or may not be appropriate music for their children."[78]

The FTC also reported that, in addition to *directly* marketing to minors, the entertainment industries *indirectly* market violence to minors by placing advertisements in "magazines that have a majority under-17 readership,"[79] and during television programs that have a substantially minor audience.[80] While the motion picture and music recording industries claim that direct and indirect marketing to children is consistent with their rating and labeling programs, the electronic game industry makes marketing to children a violation of its self-regulatory code.[81]

The FTC report concluded that as a result of the marketing practices of the motion picture, music recording, and electronic game industries, children are impressed with the notion that "these are movies they should see, music recordings they should listen to, and games they should play."[82] The FTC report listed several suggestions for improvement, including increased supervision by industry associations to ensure that members comply with regulation

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75 *See id.* at 52-53.

76 *Id.* at 12. A film rated PG-13:

> [s]ignifies that the film rated may be inappropriate for pre-teens. Parents should be especially careful about letting their younger children attend. Rough or persistent violence is absent; sexually-oriented nudity is generally absent; some scenes of drug use may be seen; some use of one of the harsher sexually-derived words may be heard.

Id. at 12. A film rated R "[s]ignifies that the rating board has concluded that the film rated may contain some adult material. Parents are urged to learn more about the film before taking their children to see it." *Id.* at 6-7.

77 FTC REPORT, *supra* note 4, at 12.

78 *Id.* at 28 (internal quotation marks omitted). A parental advisory label identifies that a recording includes strong language. *See id.* at 22.

79 *Id.* at 47 (discussing the electronic game industry).

80 *See id.* at 15 (referring to the motion picture industry).

81 This is not to say of course that violations do not persist. *See id.* at 53.

82 *Id.* at 54.

policies and sanctions for noncompliance.[83] The FTC report stressed that self-regulation within the three industries, coupled with continuous public oversight and Congressional monitoring, is a way to address the problem of entertainment companies who acknowledge that their products are violent and unsuitable for children but, nevertheless, aggressively market the same towards children.[84]

B. *The MMAA*

Against the foregoing advice of the FTC, the MMAA was drafted and introduced by Senator Lieberman. To justify the legislative initiative, the drafters made the following findings: (1) that, without having to leave their homes, children have easy access to media; (2) children do in fact spend large amounts of time watching motion pictures, listening to music recordings, and playing electronic games; (3) children spend significant amounts of money on such media making them an important consumer group in the eyes of marketers; (4) there is "a high correlation between exposure to violent content and aggressive or violent behavior . . . [and] exposure to violent content and a desensitization to and acceptance of violence in society;"[85] (5) children are routinely targeted by the entertainment industries in marketing adult-rated products; (6) the industries were asked to adopt voluntary policies to prohibit targeted marketing of adult-rated products to children; (7) the industries have failed to impose any such marketing code; and (8) because the entertainment industries have failed to act, legislation is needed to prevent companies from marketing adult-rated material to children.

The MMAA specifically prohibited "the targeted advertising or other marketing to minors of an adult-rated motion picture, music recording, or electronic game . . . ."[86] "Targeted advertising" is defined as advertising or marketing that is "intentionally directed to minors; or is presented to an audience of which a substantial proportion is minors; or the Commission determines that the advertising or marketing is otherwise directed or targeted to minors."[87] "Adult-rated" is defined as any motion picture or

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[83] *See* FTC REPORT, *supra* note 4.

[84] *See id.* at 56.

[85] S. 792.

[86] *Id.*

[87] *Id.* The MMAA also includes a safe harbor provision whereby industries who enact a self-regulatory regime prohibiting targeted marketing, including policies and sanctions for noncompliance, are not subject to the provisions of the MMAA. *See id.*

electronic game voluntarily rated by its producer or distributor to indicate that "such product is or may be appropriate or suitable only for adults; or access to such product by minors should be restricted . . . ."[88] With respect to music recordings, "adult-rated" means that the product is labeled so as to signify that "such product may contain explicit content, including strong language or expressions of violence, sex, or substance abuse."[89]

III.

A. *The Commercial Speech Doctrine:* Central Hudson *in light of* Lorillard Tobacco Co.

Beyond the black letter of the MMAA lies a commercial speech regulation.[90] Commercial speech has found itself a peculiar niche in First Amendment jurisprudence.[91] Commercial speech is regarded as neither speech that enjoys full First Amendment protection, nor speech that is left wholly unprotected.[92] Commercial speech is that speech incident to the sale or promotion of goods and services, which includes commercial advertis-

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88 *Id.*

89 *Id.*

90 The MMAA is a commercial speech regulation because the MMAA regulates advertisements and advertisements are classified as commercial speech. *See, e.g.,* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (discussing tobacco advertisements).

91 For a discussion concerning the specious origins of the commercial speech doctrine, *see generally* Alex Kozinski and Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 627 (1990) (pointing out that the commercial speech doctrine was plucked out of thin air in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), where Justice Roberts, writing for a unanimous court, cites no authority for concluding that "[w]e are clear . . . that the Constitution imposes no . . . restraint on government as respects purely commercial advertising"). For a discussion regarding the meandering evolution of the commercial speech doctrine, *see* Arlen Langvardt, *The Incremental Strengthening of First Amendment Protection for Commercial Speech: Lessons from Greater New Orleans Broadcasting*, 37 AM. BUS. L.J. 587, 587 *et seq.* (2000) (noting that the Supreme Court "officially departed from its prior course" in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 42 U.S 748 (1976), in holding that "the marketplace of ideas contemplated by the First Amendment was expansive enough to include a place for commercial speech"). The Supreme Court's most recent pronouncement regarding the commercial speech doctrine is *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (striking down a Massachusetts state law restricting the location of advertisements for tobacco products under the Central Hudson Test).

92 *See, e.g., Lorillard Tobacco Co.*, 533 U.S. at 553-54. Characterization of speech determines the amount of scrutiny that the Court will apply in deciding whether a speech regulation is constitutional. For example, "a content based regulation of speech afforded full First Amendment protection is only permissible if it is the least restrictive means available to serve a compelling state interest." Charles Gardner Geyh, *The Regulation of Speech Incident to the Sale or Promotion of Goods and Services: A Multifactor Approach*, 52 U. PITT. L. REV. 1, 7 (1990). *But see* Brandenberg v. Ohio, 395 U.S. 444 (1969) (stating that there is no constitutional right to speech that qualifies as incitement); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) (stating that defamatory speech is not entitled to any amount of First Amendment protection); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (declaring that commercial speech is afforded less protection than noncommercial speech).

ing,[93] and only enjoys First Amendment protection when it relates to a lawful activity and is not misleading.[94]

Regulations of commercial speech must satisfy the four-part test iterated in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York.*[95] In part one of the Central Hudson Test, the Court determines whether "the commercial speech affected by the government regulation at issue is entitled to an intermediate level of protection . . . ."[96] In parts two through four, the government has the burden of proof in establishing "that a substantial government interest underlies the commercial speech regulation . . . [and] that the regulation at issue directly advances the underlying government interest without being more extensive than necessary to further the government interest."[97]

Before considering the MMAA within the analytical framework of the Central Hudson Test, it is useful to review the Supreme Court's latest word about the commercial speech doctrine, articulated in *Lorillard Tobacco Co. v. Reilly.*[98] In *Lorillard Tobacco Co.*, the petitioners, manufacturers and retailers of tobacco products, chal-

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[93] *See* Geyh, *supra* note 92, at 48.

[94] *See Lorillard Tobacco Co.*, 533 U.S. at 553. Some have questioned the rationale that supports differentiating between commercial and private speech. *See, e.g., Lorillard Tobacco Co.*, 533 U.S. at 572 (Thomas, J., concurring in part and concurring in the judgment) ("I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial.'"). For example, Charles Gardner Geyh emphasizes that commercial speech is difficult to define or characterize. "Human speech is sometimes directed toward making the world a better place, sometimes toward making a buck, and frequently toward a combination of both." Geyh, *supra* note 92, at 2.

[95] 447 U.S. 557 (1980). This is an intermediate standard of review. *See* Geyh, *supra* note 92, at 4.

[96] Langvardt, *supra* note 91, at 589 n.15. The speech must be non-misleading and concern a lawful activity. *See* text accompanying note 93; *Lorillard Tobacco Co.*, 533 U.S. at 554.

[97] Langvardt, *supra* note 91, at 589 n.15; *see also Lorillard Tobacco Co.*, 533 U.S. at 554-55. With respect to the third part of the Central Hudson Test, the government must establish "that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 555. In other words, this "burden is not satisfied by mere speculation and conjecture." *Id.* Yet, at the same time, it is not required that "empirical data come . . . accompanied by a surfeit of background information . . . ." *Id.* Speech regulations can be justified "by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.'" *Id.* (citations and internal quotations omitted). As to the fourth part of Central Hudson Test, it complements the third part, and merely asks whether there is a reasonable "fit between the legislature's ends and the means chosen to accomplish those ends . . . ." *Id.* at 556. It is not required that the government use the least restrictive means. *See id.*

[98] 533 U.S. 525 (2001). *Lorillard Tobacco* was decided less than two months after the MMAA was introduced, and may have influenced Senator Lieberman's ultimate decision to relent his pursuit of the MMAA, as the *Lorillard* decision confirmed that the commercial speech doctrine has expanded during the Rehnquist Court, affording greater protection to commercial speech. *See* Erwin Chemerinsky, *The Rehnquist Court & Justice: An Oxymoron?* 1 WASH. U. J.L. & POL'Y. 37, 43 (1999) ("Generally, the Rehnquist Court has been protective of commercial speech.").

lenged several provisions of a Massachusetts regulatory scheme as violating the First Amendment and Due Process Clause of the Fourteenth Amendment.[99] In part, the regulations restricted the placement of outdoor and point-of-sale advertisements for tobacco products, and imposed certain restrictions on retail practices.[100] The petitioners asserted that the outdoor advertising provision[101] was over-inclusive, and contended that the state could not prove that the causal link between advertising and tobacco use was one "such that limiting advertising will materially alleviate any problem of underage use of their products."[102] The district court concluded that limiting youth exposure to advertising would combat the substantial problem of underage smoking and that the regulation burdened no more speech than was necessary to accomplish the state's objective.[103]

In a splintered opinion, written by Justice O'Connor, the Court began its analysis by stating that the speech affected by the Massachusetts regulations was entitled to an intermediate level of protection, and proceeded to apply the Central Hudson Test.[104] Noting that part two of the Central Hudson Test was not at issue in determining whether the regulations directly advanced the government's asserted interest, the Court, in moving to part three of the Central Hudson Test, accepted the idea that "product advertising stimulates demand for products, while suppressed advertising may have the opposite effect."[105] Based on numerous studies offered by the state to establish a connection between underage tobacco use and advertising, the Court rejected the petitioners' claim that the regulations were based upon speculation and conjecture.[106] The Court concluded, however, that the state failed to satisfy the fourth part of the Central Hudson Test and thus held the outdoor advertising provision unconstitutional.[107]

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99 *See Lorillard Tobacco Co.*, 533 U.S. at 532.

100 *See id.* at 533-37.

101 This provision prohibited outdoor advertising of tobacco products within 1,000 feet of a "public playground, playground area in a public park, elementary school or secondary school." *Id.* at 534-55.

102 *Id.* at 557.

103 *See id.* at 553.

104 The petitioners urged the Court to reject *Central Hudson* and apply strict scrutiny, as did Justice Thomas in a separate opinion, concurring in part and concurring in the judgment. *See id.* at 554. Justice O'Connor declined the option, citing no need to break new ground. Justice O'Connor stated that *Central Hudson* provided "an adequate basis for decision." *Id.* at 555.

105 *Lorillard Tobacco Co.*, 533 U.S. at 557. The state claimed that the regulations were necessary "to stop Big Tobacco from recruiting new customers among the children of Massachusetts." *Id.* at 533.

106 *See id.* at 559-61.

107 *See id.* at 561.

The Court found that the breadth and scope of the regulations did not reflect "a careful calculation of the speech interests involved,"[108] but rather "a lack of tailoring."[109] While acknowledging that the state had a substantial interest in preventing underage smoking, the Court found that the sale and use of tobacco products were lawful activities; and that retailers and manufacturers had an interest in conveying truthful information about their products.[110] The restrictions on outdoor advertisements, however, nearly amounted to a complete ban on "the communication of truthful information about smokeless tobacco and cigars to adult consumers,"[111] because, under the regulatory scheme, "outdoor advertising" included not only advertisements placed outside, but also indoor advertisements that were visible from the street.[112] Furthermore, the "unduly broad" restrictions on speech were unacceptable to the Court because, while studies had identified which particular advertising practices appeal to children, the regulation made no distinction among practices on this basis.[113] Tailoring, wrote Justice O'Connor, involves "targeting those practices while permitting others."[114] This, the outdoor advertising regulation failed to do.[115]

B. *The MMAA in light of the Commercial Doctrine.*

From *Valentine* to *Lorillard Tobacco Co.*, the commercial speech doctrine has meandered along a rather unpredictable course. Nevertheless, *Lorillard Tobacco Co.* provides a reasonable basis for specu-

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108 *Id.* at 562.

109 *Id.* at 563.

110 *See id.* at 564.

> A careful calculation of the costs of a speech regulation does not mean that a State must demonstrate that there is no incursion on legitimate speech interests, but a speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products.

Id. at 565.

111 *Lorillard Tobacco Co.*, 533 U.S. at 562.

112 *See id.* (suggesting that it is problematic that the regulations also covered advertisements of any size and oral statements).

113 *See id.* at 563.

114 *Id.*

115 The Court also found that the point-of-sale restrictions on advertising were unconstitutional, but on the ground that the regulation failed to meet the third step of the *Central Hudson* analysis. *See id.* at 566 ("A regulation cannot be sustained if it provides only ineffective or remote support for the government's purpose, or if there is little chance that the restriction will advance the state's goal.") (citations and internal quotation marks omitted). The sales practices provisions of the state regulation were upheld after the Court found that the restrictions (1) were narrowly tailored to prevent access to minors; (2) were unrelated to expression; (3) left open alternative avenues for vendors to convey information about their products; and (4) gave potential customers the ability to inspect products before purchasing. *See id.* at 567.

lating as to how the MMAA would fare under constitutional scrutiny because the tobacco advertising regulations that were at issue in *Lorillard Tobacco Co.* are incredibly similar to the MMAA, in terms of purpose (to promote the health and well-being of minors), scope (advertisements in close proximity to locations densely populated with minors), and effect (an effective ban of non-misleading and truthful information). Undoubtedly, therefore, the MMAA should be analyzed within the *Central Hudson* framework.[116]

Broadly speaking, let's assume that the substantial government interest underlying the MMAA is to promote the well-being of minors.[117] Assume further that this fact is uncontested, and consider only the last two parts of the Central Hudson Test. To reiterate, part three concerns "the relationship between the harm that underlies the State's interest and the means identified by the State to advance that interest."[118] There are two primary reasons why the MMAA will not pass part three of the Central Hudson Test: (1) there is insufficient evidence linking advertising for adult-rated media and use of adult-rated media among minors; and (2) even if sufficient evidence between advertising and use exists, the government should be required to prove that use causes violence, and there is insufficient evidence that the use of adult-rated media by minors creates violent minors.

"[P]roduct advertising stimulates demand for products while suppressed advertising may have the opposite effect."[119] This is a good starting point for the government in defending the MMAA,

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116 The sale of motion pictures rated PG-13 or R, electronic games rated T or M, and music recordings carrying a parental advisory label are lawful activities. Retailers and manufacturers have a legitimate interest in conveying truthful information about these media. Thus, because the advertisements subject to the MMAA are non-misleading and concern a lawful activity, the MMAA passes the threshold step for analysis under *Central Hudson.* In *Lorillard,* Justice Thomas argued that the tobacco advertising regulations should be treated as content-based regulations, which are subject to strict scrutiny. *See Lorillard Tobacco Co.,* 533 U.S. at 572-73. The same argument can be made here with the MMAA. Because the Central Hudson Test "provides an adequate basis for opinion," however, it is unlikely that the argument will have any more force here than it did in *Lorillard. See id.* at 555.

117 In *ACLU v. Reno,* the government, defending the Communications Decency Act of 1996, asserted an interest in "shielding minors from access to indecent materials." *See* 929 F.Supp. 824, 852 (1996). The government argued "in support [of] the statements of the Supreme Court that 'it is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling.'" *Id.* (citations and internal quotation marks omitted). The court responded by pointing out that "[t]hose statements were made in cases where the potential harm to children from the material was evident." *Id.* Thus, if the government asserted a broad interest in promoting the well being of minors in support of the MMAA, the court might accept it at face value; otherwise, the court might likely reject it based on the fact that the government cannot prove an *evident* harm to children caused by violent media.

118 *Lorillard Tobacco Co.,* 533 U.S. at 555.

119 *Id.* at 557 (citing United States v. Edge Broadcasting, 509 U.S. 418, 434 (1993)).

but, inevitably, this argument will only carry the government so far. Children demand adult-rated media for myriad reasons, and the government must be able to respond to this argument.[120] In *Lorillard Tobacco Co.*, the state satisfied its burden at part three by citing a study conducted by the Food and Drug Administration of "tobacco advertising and trends in the use of various tobacco products."[121] One of the most interesting facts that the Court cites in its opinion states: "children smoke fewer brands of cigarettes than adults, and those choices directly track the most heavily advertised brands, unlike adult choices, which are more dispersed and related to pricing."[122] While the FTC report goes to great lengths in explaining the marketing practices of the entertainment industries, it fails to provide any insight on the effects of those practices.[123] In other words, the government cannot rely on the FTC report because it does not demonstrate that use of adult-rated material among minors directly tracks the most heavily advertised products, evidence of which is critical to passing part three of the Central Hudson Test.

Furthermore, even if the government can produce evidence to establish that advertising causes use, it should be required to go a step further in demonstrating that use causes violence. In *Lorillard Tobacco Co.*, the regulations were designed to prevent underage smoking because underage smoking is detrimental to the health and well-being of minors. The MMAA similarly seeks to prevent the use of adult-rated media by minors because there is "a high correlation between exposure to violent content and aggressive or violent behavior . . . [and] exposure to violent content and a desensitization to and acceptance of violence in society."[124] Nonetheless,

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120 For instance, some children listen to music because they identify with the song's lyrics or the artist's message. *See, e.g,* Wendy Thoms, *Hop Onto the Hip-Hop Culture*, RHYME & REASON, *at* http://www.journalism.indiana. edu/gallery/student/j201spring01/eviall/sckenny/index.html (last updated May 2, 2001) (describing the rise of "hip hop," a genre of music, in the United States). Likewise, some children watch movies to be social with friends, or because the movie provides a reason to laugh for no reason at all. *See, e.g., South Park, The Show's Appeal is Keen for Teens*, MILWAUKEE J. SENTINEL, June 1, 1998 (interviewing teens about why they watch South Park, an animated television series known for its crude humor, that was turned into a full length feature film).

121 *Lorillard Tobacco Co.*, 533 U.S. at 557-58 ("The report found that 'there is sufficient evidence to conclude that advertising and labeling play a significant and important contributory role in a young person's decision to use cigarettes and smokeless tobacco products.'").

122 *Id.* at 558. ("Another study revealed that 72% of 6 year olds and 52% of children ages 3 to 6 recognized 'Joe Camel,' the anthropomorphic symbol of R.J. Reynolds Camel brand cigarettes. After the introduction of Joe Camel, Camel cigarettes share of the youth market rose from 4% to 13%.").

123 The same is true with respect to the FTC's follow-up reports.

124 S. 792.

the third part of the Central Hudson Test requires the government to establish "that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree."[125] In *Lorillard Tobacco Co.*, there was no need for the government to remind the Court that smoking tobacco causes lung cancer and emphysema. Nor was it necessary for the government to demonstrate that lung cancer and emphysema are rarely caused by factors unknown. On the other hand, it is less apparent that playing an adult-rated electronic game causes a youth to become violent, or that youth violence is caused by any single factor.[126] In order to surpass "mere speculation and conjecture,"[127] the government must be prepared to prove that the regulations will prevent an evident harm.[128] Therefore, the government should be required to produce evidence concerning the *ultimate* harm it seeks to avoid, which, here, goes beyond mere use.[129]

With respect to the fourth part of the Central Hudson Test, the government must show that there is a reasonable "fit between the legislature's ends and the means chosen to accomplish those ends," however, it is not required that the government use the least restrictive means.[130] The MMAA, as drafted in 2001, is an illogical way of addressing youth violence for several reasons. First, in attempting to work within the preexisting regulatory regimes of the entertainment industries, the MMAA fails to acknowledge that media is "adult-rated" for reasons other than violence.[131] In its oversight, the MMAA applies to motion pictures, music recordings, and electronic games that are adult-rated for sexual content and strong language, as well as those media adult-rated for violence.[132] As the

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125 *Lorillard Tobacco Co.*, 533 U.S. at 555.

126 *See supra* Part I.B.

127 *Lorillard Tobacco Co.*, 533 U.S. at 555.

128 *See, e.g., ACLU v. Reno*, 929 F.Supp. at 852 (noting that the government's interest becomes less compelling as the harm it cites becomes less evident).

129 In the future, the government's likelihood of proving a causal link between use and violence arguably becomes stronger. In 2001, the MMAA cited "a high correlation between exposure to violent content and aggressive or violent behavior . . . [and] exposure to violent content and a desensitization to and acceptance of violence in society" based on then existing research. *See* S. 792. Most of the existing research concerned television violence or otherwise predated the violent media revolution. Recently, however, parents and public health officials are concerned that exposure to electronic game violence is more detrimental to the well-being of minors than television violence. If modern research was generated in support of this theory, the government would have a stronger case in support of the MMAA.

130 *Lorillard Tobacco Co.*, 533 U.S. at 556.

131 *See generally* FTC REPORT, *supra* note 4 (discussing in detail the various reasons why a motion picture, music recording, or electronic game is assigned a particular rating or label).

132 With careful tailoring, the MMAA can be improved. Both motion pictures and electronic games are assigned a rating and a brief descriptive phrase that explains why the

Court stated in *Lorillard Tobacco Co.*, tailoring involves addressing problems that have been specifically identified while permitting those deemed harmless.[133]

Second, much like the tobacco advertising regulations in *Lorillard Tobacco Co.*, the MMAA will create a near absolute ban on "the communication of truthful information about [adult-rated material] to adult consumers."[134] The MMAA defines "targeted advertising" as advertising or marketing that is "intentionally directed to minors; or is presented to an audience of which a substantial proportion is minors; or the Commission determines that the advertising or marketing is otherwise directed or targeted to minors."[135] This provision could potentially prevent a movie producer from advertising an adult-rated film in a movie theater, and limit a recording artist from advertising a CD labeled for explicitness in a music store. Such a possibility, again, demonstrates that the MMAA is unduly broad and lacks tailoring.[136]

Finally, the unreasonableness of the MMAA is revealed by the following scenario: Eminem[137] releases a new song from his latest CD, which is labeled for its explicit lyrics, and the song contains repeated references to violence. MTV debuts the music video for the new song during its show *Total Request Live*, which is overwhelmingly popular with teens.[138] Naturally, MTV also sells commercial advertising during *Total Request Live*.[139] Under the MMAA,

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rating was assigned. *See supra* Part II.A. If the MMAA was limited to apply to adult-rated material bearing a descriptor for violence only, the government would demonstrate a more reasonable fit. Whether such an improvement is sufficient in allowing the government to pass the fourth part of the Central Hudson Test is a separate issue.

133 *See supra* text accompanying notes 108-15.

134 *Lorillard Tobacco Co.*, 533 U.S. at 562.

135 S. 792.

136 The MMAA can improve its chances for survival by only prohibiting the marketing practices that are specifically identified in the FTC report as practices that undermine the entertainment industry's self-regulation policies. For example, the electronic game industry makes targeting children a violation of its self-regulatory code. See FTC REPORT, *supra* note 4, at 44. Yet, violations are widespread and "all but two of the companies produced marketing documents containing plans to place ads for M-rated games in magazines that have a majority under-17 readership." *Id.* at 47. Assuming that the government was able to prove the requisite causal links between advertising and use, and use and violence, it could better defend the MMAA if it limited the scope of the MMAA to apply only to the specific practices it authorized the FTC to identify.

137 Eminem is a recording artist popularly known for his angry lyrics and defiant attitude. According to Eminem's biography at RollingStone.com, he is a "lyrical gymnast" who admits to saying things that he thinks will shock people. *See* Eminem, *at* http://www.rollingstone.com/artists/bio.asp (last visited Dec. 28, 2002).

138 *See* FTC REPORT, *supra* note 4, at 69 n.75; *see id.* at 84-85 nn.175-77 ("One studio document notes that 55% of MTV's audience is 12-24."). MTV does not disclose "on music videos that the song appears on a recording with explicit content." *Id.* at 85 n.176.

139 The FTC report noted that upon reviewing four episodes of *Total Request Live*, "at least one advertisement for a labeled recording was shown during each episode." *Id.* at n.177.

Eminem would not be allowed to advertise his latest CD during *Total Request Live*, but MTV would not be prevented from airing the music video. Such a possibility renders the MMAA unreasonable because a minor seeing the video becomes interested in buying the recording with explicit content, even without being exposed to its advertisement.[140]

CONCLUSION

Aside from being poorly tailored and lacking sufficient evidence to establish a casual link between targeted marketing and youth violence,[141] the MMAA poses a more difficult problem: the MMAA is a legislative band aid for the proverbial broken bone. There are myriad factors which could potentially increase a child's tendency to become violent. Seldom does one factor alone, such as using violent media, cause a child to become violent; and the fact that a child uses violent media has limited value in predicting the onset of violent behavior.[142] In focusing on targeted marketing of adult-rated media as the substantial cause of youth violence, the MMAA ignores the reality of the complex and multi-faceted nature of youth violence.[143]

In a similar vein, there are various reasons why a child prefers one genre of film, music, or game as opposed to the next. The MMAA fails to recognize that choice in music is easily influenced by a child's ability to relate to an artist; and that choice in film or game is just as influenced by a child's desire to be social with peers.[144] Thus, even if the MMAA effectively eliminated targeted marketing, it may not necessarily eliminate the demand for violent media; this is not "common sense."[145]

In addition, advertisements for violent media should not be regulated as if using violent media was as harmful as using tobacco or alcohol. Tobacco and alcohol advertisements are more suscepti-

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140 *See id.* at n.176 ("[A]lmost all the marketing materials for explicit-labeled recordings referred to the placement of music videos on [MTV] . . . even if edited to remove some explicit content, [the videos] play a key role in promoting the sale of explicit recordings to an under-17 audience.").

141 Theoretically, these are both problems which could be eliminated before the MMAA is passed. *See supra* Part III.

142 *See supra* Part II.B.

143 The cause of youth violence is not as readily identifiable as the cause of lung cancer. *See supra* notes 124-29 and accompanying text. Compare the epidemic of youth violence to a wildfire that is burning out of control. In attempting to contain the fire, the MMAA pays attention to one hot spot while ignoring other sources of vulnerability. This type of treatment is ineffective and lengthens the time period and efforts needed to gain control of the situation.

144 *See supra* note 120.

145 *See supra* note 18 and accompanying text.

ble to reasonable time, place, and manner restrictions because excessive use of tobacco and alcohol is evidently dangerous to one's health. Furthermore, minors may not be capable of appreciating such a risk.[146] The health risks created by the excessive use of tobacco and alcohol, however, are more concrete than the health risks created by the excessive use of violent media. Moreover, by expanding the category of activities whose advertisements are subject to stricter regulations to include violent media, the MMAA may provide an impetus for expanding the category further, to include other activities that also create an unappreciable risk to the health of children.

For example, there is a growing concern that Americans are becoming increasingly overweight.[147] Being overweight not only contributes to the onset of various physical illnesses, but can also complicate existing medical conditions. Part of the blame for America's weight crisis lies in the excessive consumption of "fast foods" that are high in calories, saturated fats and cholesterol. Compounding the problem further is the fact that fast food is typically served in portions that are larger than recommended. In general, doctors and medical experts agree that diets that include excessive amounts of fast food are unhealthy and, more importantly, that healthy eating habits are acquired during childhood.[148]

Yet, advertisements for fast food restaurants, among other places, appear commonly during television programming popular with children. Some suspect that the placement is strategic. Nonetheless, when one angry parent recently took the fast food company *McDonalds* to court, arguing that targeted marketing by fast food companies causes children to become overweight and contributes to weight-related illnesses, a federal judge dismissed his case.[149]

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146 Therefore, reasonable restrictions on time, place and manner of such advertisements are permitted, as long as the producers and distributors of such products can communicate truthful and non-misleading information to adult consumers.

147 *See* Denise Grady, *Why We Eat (and Eat and Eat)*, N.Y. TIMES, Nov. 26, 2002, at F1. ("In the United States, 64.5 percent of adults . . . are overweight. . . . In the United States, . . . 15 percent of children ages 6 to 19 are overweight."); Nat Ives, *Food Companies Are Urged To Act To Deflect Blame For the Nation's Increase in Obesity*, N.Y. TIMES, Dec. 4, 2002, at C4 (reporting that obesity in children has doubled in the last 23 years while, among teenagers, obesity has tripled).

148 Thus, one could argue that prohibiting targeted advertising by fast food companies decreases the demand for fast food by minors, contributing to healthier lifestyles later on, and reducing weight-related illnesses during adulthood.

149 The rationale behind dismissing the case against fast food does not stray far from the reasoning which belies *James v. Meow Media, Inc.*, 300 F.3d 683 (6th Cir. 2002), *Sanders v. Acclaim Entertainment, Inc.*, 188 F.Supp.2d 1264 (D. Colo. 2002), or any other case in which a litigant argued that a manufacturer of violent media should be held accountable for a specific incidence of youth violence.

The health risks associated with overeating unhealthy foods are much more concrete than the health risks associated with using violent media. Thus, if it were acceptable to regulate the time, place, and manner of violent media advertisements as the MMAA does, one would be hard pressed to think of a reason why not to regulate the advertisements for fast food restaurants any differently. Certainly, there must be other marketable products that pose health risks unappreciable to young children when used in excess. One wonders where to stop in drawing the line once we decide that it should be moved.[150] Instead of moving the line, there should be more meaningful consideration given to the recommendations contained in the FTC report in addressing a serious problem affecting this nation.[151]

*Angela M. Papalaskaris**

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150 In justifying the MMAA, some might question why the MMAA should not be passed if it was demonstrably certain that the MMAA will prevent even a single act of youth violence to save the life of at least one innocent person. Yet, even if the MMAA was certain to prevent 2, 3, or 4 specific acts of youth violence, this remains true: there are certain risks created when advertising increases the demand for a certain type of product by a certain demographic group. General censorship has never been the solution to the problem.

151 *See* FTC REPORT, *supra* note 4, at 54-56 (concluding that the industries should "establish or expand codes that prohibit target marketing and impose sanctions for violations . . . improve self-regulatory system at the retail level . . . [and] increase parental awareness of the ratings and labels.").

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