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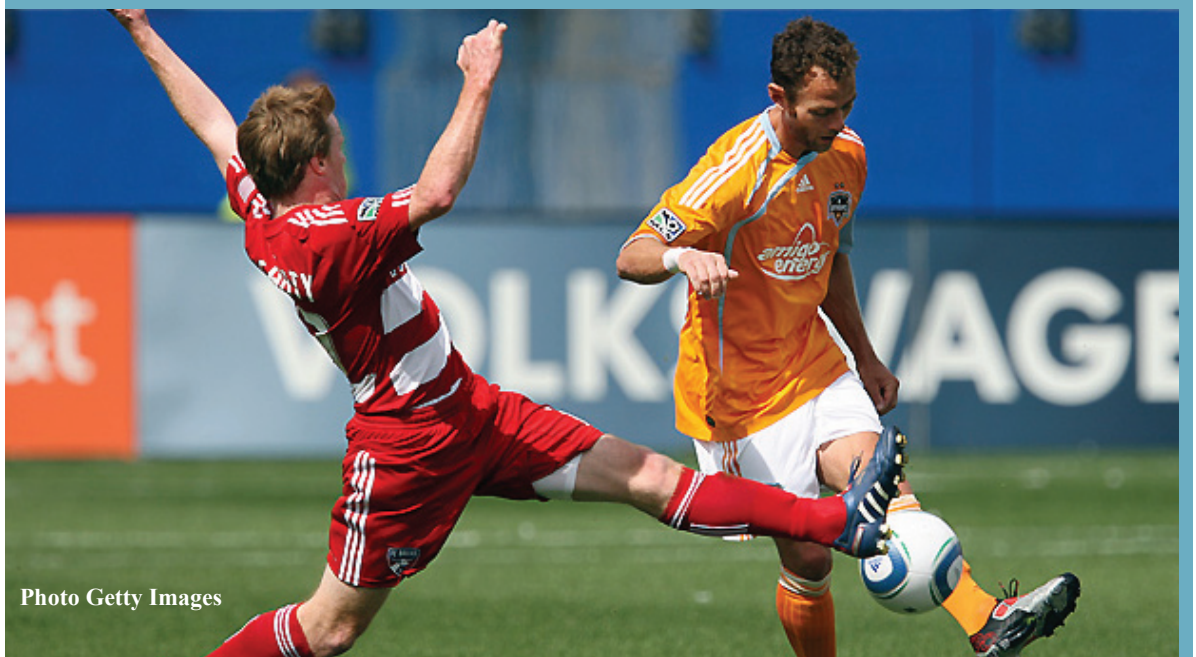

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CHAIR'S REPORT

Thank you for being a member of the State Bar of Texas Entertainment & Sports Law Section, also known as TESLAW! The 2009-2010 State Bar year is in full swing As a member of TESLAW, you are currently entitled to: 1) receive the acclaimed Texas Entertainment and Sports Law Journal; 2) join the TESLAW listserve; 3) earn free CLE credits; 4) receive a discount on the cost of the annual Entertainment Law Institute; and 5) become part of the growing Texas based entertainment and sports lawyer community. Visit the newly revamped www.teslaw.org website to find out more.

TESLAW will hold its Annual Meeting and CLE in Fort Worth on June 11, 2010. The Section will elect the new officers to serve during the 2009-2010 fiscal year. The current Council members and officers are identified on the front cover of this journal. We are fortunate to have secured top speakers for the CLE presentation. Carlos Linares, Sr. VP, RIAA, Washington, DC will present Protection of Music in Today's Viral Market Place; Joel Schoenfeld, Chief Legal Officer & General Counsel for eMusic.com, Inc. and for Dimensional Associates, the private equity fund that owns eMusic and other digital entertainment companies will present US and International Music Publishing Licensing Issues for Internet & Mobile Business Models; and Alec Scheiner, Sr. VP & General Counsel for the Dallas Cowboys Football Club and its affiliated entities (including merchandising, AFL, real estate, oil & gas, and other holdings of the Jones family will present. Legal Issues Involved in the Day-to-Day Operation of One of the World's Most Famous Sports Teams.

The 20th Annual Entertainment Law Institute (ELI) will be held on October 7-8, 2010 at the Radisson Town Lake in Austin. ELI is the premier event for Texas entertainment lawyers. More detailed information about the program is found in this journal, but we want to specifically recognize this year's Texas Star Award recipient, Mike Tolleson who will be speaking at the presentation. In addition to great presentations and CLE credit, ELI presents a great networking opportunity and a chance to get your practice questions answered. You won't want to miss this ELI!

Check out the Section's Website!

Check it out at www.teslaw.org. The password for members is "*galeria3*". Should you have any comments or suggestions to improve the site please feel free to e-mail Kenneth W. Pajak at ken@bannerot.com or the editor at srjaimelaw@comcast.net …

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FOR THE LEGAL RECORD ...

Sylvester R. Jaime, Editor

Electronic Journal? The Section has gone to an e-journal. No longer will the Journal be published in hard copy. Those who would like a copy of the Journal are requested to go to the Section's website and download the Journal for reading at your leisure or to copy an issue of the Journal. Any comments should be directed to your editor and they will be passed on to the Council. …

High School News - Everything is bigger in Texas, including high school football. The Dallas Cowboys usher in its newly completed Texas Stadium, with a capacity of 100,000. Allen, Texas (north of Dallas) residents approve $59.6 for a state of the art 18,000 seat stadium. Allen coach Tom Westerberg said, "It is not just for athletics." Allen voters approved a $120 million bond package, with nearly $60 million to be for the new high school facility. The high school has approximately 600,000 square feet for about 3,000 students - grades 10 through 12, and plans to sell 5,000 reserved seats, with 4,000 reserved for students and 5,000 seats for visitors. The school district's information director Tim Carroll said, "In Texas, funding is completely separate between capital projects and general education … if we don't build the stadium, none of that money could go to teachers or classrooms." The town has only one high school, and Carroll said "The cost may appear high to other parts of the country, but it compares to what people are doing here … the new stadium will be used for more than just football. This facility will be used by the entire community." …

College News - Elizabeth Williams claims that two senior athletic department officials used her as a "plaything." The claimant was a former fundraiser for Binghamton University, in upstate New York, who "discovered that her new bosses viewed women as playthings and expected women in the department to raise money by exploiting their sexuality." New York City attorney Anne Vladeck represents Williams. Vladeck was Anucha Brown Sanders' attorney in Sanders' suit against former New York Knicks coach Isiah Tomas and Madison Square Garden. Vladeck won a jury verdict of $11.6 million in damages for her client, Williams alleges that before an alumni gathering in New York City athletic department officials Jason Siegel and Chris Lewis, instructed her to dress provocatively and use her sexuality as a "business tactic." In the lawsuit against Binghamton, Williams said "One of the contributors "began laying down $100 bills on the table … and told Williams to stop him when it got to enough to sleep with him." She further alleges that when she complained to school officials, "nothing was done to punish the harassers." The lawsuit names the university and 2 of its alumni association members as defendants. A spokes person for the university said it "has zero tolerance" for harassment or discrimination …"

The NCAA's Board of Directors received a proposal to allow coaches to have "recruiting discussions" during summer camps and clinics on their own campus. NCAA managing director of academic and membership affairs Steve Mallonee said, "The coach cannot give (the recruits) campus tours and do the kinds of things that they would do on an official visit." From the standpoint of NCAA rules, there are two types of visits: "official" and "unofficial". The proposal addresses the problems with third party recruiting in collegiate sports such as agents. It does not mean coaches can do full recruiting official visits during their summer camps but they can talk with athletes they are recruiting during camp visits at a time when prospect's pay their own expenses.

The NCAA council also approved testing requirements for the sickle cell genetic trait that has been linked to the deaths of several athletes. According to the NCAA, athletes will be given 3 options by the new rule: "Take the test, provide documentation they have been tested or sign a release to decline the test." All athletes are to be tested as part of a response to a lawsuit settlement over the death of a former Rice University football player.

The NCAA council also:

- Passed legislation requiring "deserving" bowl-eligible teams to post a .500 record against Football Bowl Subdivision opponents.
- Delayed the effective date of charging an athlete, who played with professional teammates, a season of eligibility for each year he or she does not enroll in college after one year of high school graduation.
- Defeated legislation that would eliminate all printed media guides.
- Eliminated the number of phone calls that can be made during contact periods in all sports that have an established recruiting calendar, with the exception of football. (Reported by Michael Marot of the AP) …

While the University of Southern California awaits the results of Pac-10 and NCAA investigations regarding former All-American and Heisman Trophy winner Reggie Bush, Bush was ordered to give a deposition regarding illegal benefits he allegedly received at USC. In a lawsuit filed by sports marketing agent Lloyd Lake, Bush is accused of receiving in excess of $300,000.00 in cash and benefits when he played for the Trojans. Bush settled a previous lawsuit with Lake's previous partner, Michael Michaels. The order culminates 4 years of Lake's efforts to get Bush to give a deposition. Brian Watkins, attorney for Lakes said, "Basically Reggie Bush bought (Michaels} silence for $300,00.0, so he was unable to speak to the media, and … cooperate with the NCAA. Reggie Bush always has maintained he didn't do anything wrong, so it will be very interesting to see if Michael Michaels' testimony corroborates that of Reggie Bush or contradicts it." The Trojans stand to lose 2004 and 2005 national championships if Bush is found ineligible, with Bush facing the potential of losing his 2006 Heisman Trophy. …

Quick Hitters:

While Top Rank boxing promoter Bob Arum is trying to get a match between Manny Pacquiao and Floyd Mayweather, in an effort to get the fight in motion the Nevada boxing commission ordered both fighters to submit to urine tests within 48 hours of the order or face fines. The urine tests are part of an out of competition requirement recently approved by the Commission. Mayweather has insisted that Pacquiao submit to Olympic style blood tests prior to the fight. Pacquiao has refused. While Pacquiano considers the terms for a fight with Mayweather, he has proposed the fight with Mayweather be held in Texas Stadium. Texas requires urine test but does not require blood testing.

Former Oakland Raiders assistant coach Randy Harrison sued coach Tom Cable claiming injury from a fractured jaw from a training camp fight. No word on how the fight started or whether the Raiders will be included in the suit.

San Diego wide receiver Vincent Jackson pleaded guilty to a DUI. The Pro Bowl receiver was sentenced to 4 days in jail and 5 years probation.

Gary Kaplan founder of online gambling site BetOnSports.com got a 4-year sentence in St. Louis after an investigation and prosecution of one of the world's largest offshore sports gambling entities. In addition to the prison sentence, Kaplan forfeited $43.6 million. The prosecution claimed that the money was from illegally obtained revenues and that Kaplan still has more than $10,000,000.00 in bank accounts in Switzerland. …

Former Minnesota Twins 1991 American League Rookie of the year Chuck Knoblauch, (who also played with the Yankees and Royals) had bail set at $10,000.00, by Texas District Court Judge Hazel Jones. District Attorney Karl Allen, alleges that the former baseball player "returned from his girlfriend's home and began arguing with his wife …" Knoblauch is accused of assault by striking and choking his common-in-law wife, Stacey Stelmach,, which the prosecution claims resulted from a night of drinking and taking Xanax by the former player. Defense attorney Dan Cogdell said "It's a rough time for both of them and we hope to get this behind us as quickly as we can. We are sure it's all going to work out in his favor when it's all said and done." Knoblauch has been charged with assault of a family member, a third-degree felony. Cogdell also called the incident "a dispute between two divorcing people and charges were not necessary or appropriate."

In ruling against the NFL and Atlanta Falcons, Michael Vick can keep the $16 million in roster bonuses received from the Atlanta Falcons. In a suit to have Vick forfeit the money, the 8th U. S. Circuit Court of Appeals affirmed federal district court Judge David Doty's order holding that the money was earned before Vick's dog fighting conviction. The Philadelphia quarterback served 18 months in prison on the dog fighting conviction. …

Your comments or suggestions on the Section's website may be submitted to the Section's Webmaster Kenneth W. Pajak at ken@bannerot.com or to your editor at srjaimelaw@comcast.net …

SO I MARRIED AN AX MURDERER!

The *Force Majeure* Ax Strikes Again: What's a Strike Writer to Do?

by Victoria Branson

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I. INTRODUCTION

As the crowds dwindled and the picketing ceased, writers returned to the studios to resume work. However, nearly two dozen writers at ABC Studios were not given that luxury.[1] During the strike, studios including ABC, CBS, Universal, 20th Century Fox, and Warner Bros. terminated numerous writer-producer deals based on *force majeure* clauses in individual writer's contracts.[2] These clauses provide a remedy if certain events—*force majeure* events—prevent the development or production of a project.[3] If the event continues past a prescribed amount of time, supplied by the contract, the producer/studio is typically given the right to terminate the agreement.[4]

Historically, *force majeure* events only included "acts of God" and referred to natural causes whose effects could not be prevented by prudence, diligence, or care.[5] But many attorneys in the entertainment industry argue that industry custom embraces strikes as a standard *force majeure* event in industry agreements.[6] Further, many modern agreements expressly include "strikes," "lockouts," or "labor disputes" within their definition of *force majeure* events.[7] Are these strike writers inexcusably out of options, forced to roam the streets of Hollywood jobless? Or is a strike, contrary to popular belief, not a *force majeure* event allowing the studio to be relieved of its contractual obligations?

Independent of the previous question, the terminated writers may have a second recourse. Under the National Labor Relations Act (NLRA) employees have the right to engage in group activity which seeks to modify wages or working conditions—"protected concerted activity."[8] A violation occurs if an employer transfers, terminates, or otherwise punishes employees for engaging in this activity.[9] If a strike fulfills the requirements of protected concerted activity and a *force majeure* clause is put in writer's contracts to protect studios against this activity, then does such a clause essentially punish employees for engaging in strikes through termination of their contracts? This comment explores answers to the above questions concerning writer's recourse upon termination of their contracts based on the 2007-2008 Writer's Guild of America (WGA) Strike.

Section II of this comment will discuss the 2007-2008 WGA Strike including the main issues writers were lobbying for and the resolution of those issues resulting in the strike termination agreement. Section III of this comment will provide a basic overview of *force majeure* and its role in Contract Law. Section IV of this comment will analyze how *force majeure* clauses currently play a part in writer-producer contracts. Section V of this comment will analyze whether a strike, in particular the 2007-2008 WGA Strike, is considered a *force majeure* event allowing a party to be excused from its contractual obligations. Section VI of this comment will provide background information about the NLRA and the policies surrounding the enactment of the Act. Section VII of this comment will analyze whether *force majeure* clauses in writer-producer contracts are violations of the NLRA as a way for employers to terminate employees for engaging in protected concerted activity. Lastly, Section VIII of this comment will discuss the outcome of these answered questions and, perhaps, alternatives producers/studios can institute to protect their interests in the future.

As a final precursor, the reader should be aware of the following information to be able to understand why the arguments below were chosen to handle this particular legal issue. Because writer-producer deals and the guild collective bargaining agreement have arbitration clauses in the event of disputes,[10] it is difficult to actually find cases between these two entities. In fact, arbitration proceedings and the awards that follow are generally non-public and confidential.[11] Therefore, disputes between these parties remain private.

II. THE 2007-2008 WGA STRIKE

The endless reruns, the mind-numbing reality TV programs that would not cease, and the networks' failed attempts at keeping consumers tuned into the television are the first thoughts that come to the American public's minds when discussing that dismal period known as "The 2007-2008 WGA Strike." Many of us failed to look behind the scenes and see who was really suffering—the striking writers. It had been almost twenty years since the writers last lined up to picket in 1988 and not many things had changed: the writers were still working to increase their share of the "entertainment revenue pie."[12]

On November 5, 2007, approximately 12,000 workers represented by the WGA began another labor-management battle against the entertainment producers represented by the Alliance of Motion Picture and Television Producers (AMPTP).[13] The main issues involved increasing the writers' residuals for home video sales, new media technology, animation, and reality television.[14] These and other issues are governed by the Minimum Basic Agreement (MBA): the basic contract between the WGA and producing companies represented by the AMPTP.[15] At the time of the strike the writers were seeking to double their residual payments from DVD sales and rentals from 2% of net unit sales to 4%.[16] They also sought to get a cut of new media revenue generated from platforms such as the Internet and mobile phones and increase jurisdiction over reality television and prime-time animated shows.[17]

On the other side of the ring, producers claimed their present revenue share in DVD sales and rentals was necessary to offset the ever-rising production costs associated with televised and filmed entertainment.[18] This argument, first presented during the 1988 strike with regards to videocassettes, has been deflated due to the successful home video business model, decreased cost in production, and sky-rocketing revenues.[19] With regards to new media technology such as Internet streaming, similar claims have been made including the argument that streaming videos are "merely another form of promoting shows rather than a significant source of revenue."[20] Further, jurisdiction over reality television and animated shows are also big concerns given the producers' increasing reliance on the less-costly format of reality television and the increasing popularity of animated shows.[21]

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On February 12, 2008, the strike ended after an overwhelming 92.5% of writers voted in support of strike termination.[22] The most important victory for Guild members included terms in the Tentative 2008 MBA giving members jurisdiction over new media.[23] However, many concessions were made including WGA dropping its demand for higher residuals on DVDs and dropping its attempt to increase jurisdiction over reality television and animation.[24] Some blogs indicate mixed feelings regarding the success of the strike and believe the WGA lost a lot of bargaining power by rolling over and dropping their proposals.[25] For example, Jonathan Handel, an attorney at Troy Gould and seasoned practitioner in entertainment and digital media law, explained trading increased residuals for gains in new media was a "big mistake."[26] He argues "internet streaming and downloads will one day be huge, but based on predictions ranging even five years from now the majority of in-home revenue will be from physical media: DVD and BluRay and/or HD DVD."[27] Nonetheless, after a difficult three months, thousands of working writers were glad to cease picketing and return to work.[28] However, for those unfortunate writers who found their neck on the chopping block, the *force majeure* ax prevented them from such luxury.

III. *FORCE MAJEURE:* THE CONCEPT AND ITS ROLE IN CONTRACT LAW

Force Majeure, a French term meaning "a superior force," stems from the common-law concept of an "Act of God."[29] This concept has been defined as an occurrence or manifestation of the forces of nature that was not foreseeable and the effect of which could not have been avoided by due care.[30] Put simply, it refers to natural causes whose effects could not be prevented by the exercise of care.[31] Further, emphasis has been placed on the act being a product of natural causes without human intervention.[32] Some examples qualifying as an Act of God include extreme weather conditions such as lightning, earthquakes, extraordinary or unprecedented storms, winds, rains, floods, tides, snowfalls, or frosts.[33] However, not every violent act of nature rises to this level.[34]

However, *force majeure* is not necessarily limited to an Act of God.[35] It had also been interpreted to include acts of people, as well as acts of nature.[36] The test to determine if a certain event qualifies is whether, under the particular circumstances, there was an interference occurring without a party's intervention that could not have been prevented by the exercise of prudence, diligence, and care.[37] Distinctions have been made between natural events and the cause of nonperformance. If a party's conduct combined or concurred with the act of nature or of people—the *force majeure* event—then the damage did not result from the act alone and the conducting party may be held liable for damages.[38] For example, an earthquake is an act of nature, but the collapse of a defectively constructed building during the earthquake is not.[39] In order for a *force majeure* event to relieve parties from performance, the event must be the sole cause of injury.[40]

In the context of Contract Law, a claim of *force majeure* is equivalent to an affirmative defense.[41] What types of events constitute *force majeure* depend on the specific language in the clause itself.[42] A typical *force majeure* clause might read:

> The parties' performance under this Agreement is subject to acts of God, war, government, regulation, terrorism, disaster, strikes (except those involving [a party's] employees or agents), civil disorder, curtailment of transportation facilities, or any other emergency beyond the parties' control, making it inadvisable, illegal, or impossible to perform their obligations under this Agreement. Either party may cancel this Agreement for any one or more of such reasons upon written notice to the other.[43]

Again, note the emphasis on acts outside of a party's control. As seen above, this general *force majeure* provision excluded strikes involving a party's employees or agents. Further, acts of nature or of people that are common to a region or industry should be anticipated and are not considered *force majeure*.[44] Particularly, if human intervention creates a condition which a reasonably prudent person would have realized constituted a danger to the fulfillment of the contract, then the person intervening cannot defend on the ground that the loss or nonperformance was caused by an Act of God.[45]

If an event qualifies as *force majeure* under the contract clause, the next steps for the defendant are to show that the Act of God in fact occurred, and that the Act was the sole proximate cause of the plaintiff's injuries.[46] This defense further requires that the defendant did all that a reasonable person could have been expected to do to avoid the happening of the *force majeure* event.[47] If the event qualifies as *force majeure* under the contracts, the Act of God occurred, and that Act was the sole proximate cause of plaintiff's injuries, then the defendant is not liable for damages based on nonperformance or breach.[48]

IV. *FORCE MAJEURE* CLAUSES IN WRITER PRODUCER CONTRACTS

Referring specifically to writer-producer contracts, *force majeure* works a little differently. Instead of using this doctrine as an affirmative defense after litigation has begun, clauses have been put into these contracts to provide for a remedy in the event of *force majeure*.[49] This remedy varies per individual contract and can be provided to the producer/studio, the writer, or both.[50] Most writer-producer agreements allow for suspension of the agreement if *force majeure* events occur that prevent production or development of the project.[51] If the event continues for a prescribed period of time, the contract allows the producer/studio to terminate the agreement.[52] However, some contracts give the writer the power to give "notice of intent to terminate" when suspension based on *force majeure* events occurs.[53] Thereby, putting the ball in the writer's court and putting pressure on the producer/studio to "reinstate" the agreement or allow it to terminate.[54]

Another sticky aspect comes into play with many artist contracts—union agreements, also known as collective bargaining agreements. If the artist belongs to a union such as WGA, then the union agreement stands as the basis for the individual contracts.[55] To clarify, if there is a provision in the individual contract between artist and producer/studio that is less favorable then the same provision in the collective bargaining agreement, then the union agreement controls.[56] However, if the terms in the individual contract are better or exceed those in the union agreement, then the contract controls.[57] Basically, the union agreement is the "minimum" and the individual contract can only add favorable terms on top of the minimum.

V. IS A STRIKE *FORCE MAJEURE?*

On January 11, 2008, ABC Studios made the first swing using the *force majeure* ax.[58] Nearly two dozen writers were notified by the studio that it was terminating their agreements as a result of the 2007-2008 WGA Strike, cutting nearly a quarter of its roster.[59] On January 14, 2008, CBS Paramount Network TV, Universal Media Studios, 20th Century Fox Television, and Warner Brothers TV followed suit making their own cuts.[60] All of these writers' cuts were based on the *force majeure* clauses located in their individual contracts with the studios.[61] However, if the specific contract clause does not state what events constitute *force majeure* can it be argued that a strike is not such an event providing a remedy to terminate agreements? Further, even if the clause states "strikes" as *force majeure*, does this include strikes by one of the contracting parties?

Historically, as mentioned above in Section III, *force majeure* was limited to only include "Acts of God."[62] Courts allowed parties out of their contractual duties reasoning that no one could be found liable for an injury caused by an Act of God.[63] The concept required

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a superior or irresistible force of nature, absent human intervention, that could not have been foreseen and the effect of which could not have been avoided by the exercise of care.[64] Therefore, historically human acts such as labor strikes were not covered as *force majeure*.[65] However, modern entertainment contracts expressly include "strikes," "lockouts," or "labor disputes" as *force majeure* events.[66] Further, players in the entertainment industry argue that industry custom automatically embraces strikes, such as the 2007-2008 WGA Strike, as *force majeure* events.[67]

The first step is to determine if the individual writer-producer agreement specifically states "labor strikes" as a *force majeure* event. A basic *force majeure* clause reads as follows:

> The parties' performance under this Agreement is subject to acts of God, war, government, regulation, terrorism, disaster, strikes (except those involving [a party's] employees or agents), civil disorder, curtailment of transportation facilities, or any other emergency beyond the parties' control, making it inadvisable, illegal, or impossible to perform their obligations under this Agreement. Either party may cancel this Agreement for any one or more of such reasons upon written notice to the other.[68]

As mentioned above in Section IV, writer-producer contracts are slightly different because they usually provide a remedy for the producer/studio to terminate the contract, not the striking writer.[69] Only in limited circumstances do agreements allow for the writer to give "notice of intent to terminate."[70] These are only generally given to the top artists who write for the "big-bucks deals."[71] In fact, the ax most likely will fall on writers who are not currently working on a major series.[72]

Based on the provision above,[73] the 2007-2008 WGA Strike would fit the criteria for a *force majeure* event because it does not involve the party's employees or agents, but actually involves the party itself—the striking writer. This conclusion seems to contradict the basic concept of *force majeure* in that nonperformance must be due to causes beyond the control of a person who is performing under a contract.[74] California law further mimics this basic concept by requiring a "reasonable control limitation" on any *force majeure* event.[75] The term "reasonable control" includes two related notions.[76] First, a party may not affirmatively cause the event that prevents his performance.[77] Second, some courts will not allow a party to rely on an excusing event if he could have taken reasonable steps to prevent it.[78] If a writer joins a union strike and because of that strike does not perform his obligations under the contract, then it naturally follows that the joining of a strike effort was not beyond the party's control but actually a conscious decision. Based on this reasoning, nonperformance would not be excused because the party affirmatively caused the event that prevented his performance. Therefore, strikes involving one of the contracting parties would not be considered a *force majeure* event.

The California Supreme Court has noted that it is often difficult to determine with certainty what causes are beyond the control of the contracting parties: "Most fires can be prevented by the use of foresight and sufficient expenditure. Most strikes can be avoided by a judicious yielding or an abject surrender to demands."[79] A party is only excused under an express provision if he shows that his failure to perform was proximately caused by a listed *force majeure* event in the contract and that, in spite of the party's skill, diligence, and good faith on his part, performance became impossible or unreasonably expensive.[80] A producer/studio, desiring to end an agreement with a writer based on a *force majeure* provision, would likely argue that the writer's failure to perform was proximately caused by the 2007-2008 WGA Strike and performance was, therefore, impossible.

It is important not to forget who was on the other side of the 2007-2008 WGA Strike, producers represented by the AMPTP.[81] Because AMPTP represents over 350 American film production companies and studios,[82] in all likelihood these same producers were those terminating the writer's contracts. So, in a very direct way, these producers could have avoided this labor strike if they, represented by AMPTP, yielded to the WGA demands. It appears that parties on both sides, the writers in their WGA union capacity and the producers/studios in their trade association capacity, had "reasonable control"[83] over the culmination of the 2007-2008 WGA Strike. Together they affirmatively caused the event that prevented performance.[84]

It is important to remember that whichever party the finger of blame points toward in the context of the writer-producer agreements is arguably irrelevant because it appears that both parties had a hand in the WGA Strike. The focus should be to determine if the event could have been prevented by reasonable care and diligence of the parties.[85] To reiterate, the writer-producer deals differ from the basic *force majeure* clauses existing in many other types of production contracts.[86] The events triggering the *force majeure* provision to come into effect, in the modern agreements, are likely laid out in the language of the contract.[87] Therefore, the question becomes although a strike is expressly mentioned as a triggering event should a strike really be considered *force majeure*? Based on California case law,[88] statutes,[89] and secondary sources[90] it can validly be argued that it should not.

VI. BACKGROUND AND POLICY BEHIND THE ENACTMENT OF THE NLRA

In 1935, Congress enacted the NLRA to encourage collective bargaining and protect the right of employees to organize thereby unclogging certain types of obstruction in the flow of commerce caused by industrial strife or unrest.[91] The Act provides protection over certain employee rights and protection against certain unfair labor practices.[92] Under the Act, an "employee" includes any employee and is not limited to the employees of a particular employer.[93] It includes any individual whose work has stopped based on any current labor dispute or any unfair labor practice.[94] Therefore, the Act extends these rights to many private-sector employees.[95]

These protected employee rights include: the right to self-organization including the right to form, join, or assist labor organizations; the right to bargain collectively through representatives; the right to engage in other concerted activities for the purpose of collective bargaining; and the right to refrain from any or all such activities except to the extent that such right may be affected by the requirement to become a union member as a condition of employment.[96] The following qualify as unfair labor practices by employers: to interfere with, restrain, or coerce employees in the exercise of their protected rights; to dominate or interfere with the formation or administration of any labor organization; to encourage or discourage membership in any labor organization by discrimination in regards to hiring, tenure, or condition of employment; to discharge or otherwise discriminate against an employee who has filed charges against its employer; or to refuse to bargain collectively with employees' representatives.[97]

The National Labor Relations Board ("Board"), an agency of the United States,[98] is empowered to prevent any person from engaging in any unfair labor practice affecting commerce.[99] If the Board, upon preponderance of the testimony given, finds any person has engaged or is engaging in an unfair labor practice they shall issue a cease and desist order and take affirmative action including reinstatement of employees.[100]

In particular, Section VII of this article will focus an employee's right to engage in concerted activities for the purposes of collective bargaining. The term "concerted activities" applies to any group action (two or more employees acting together) for the legitimate furtherance of the group's common interests including any form of

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pressure upon the employer to obtain favorable results, including strikes and all lawful measures to make them effective.[101] An employer is prohibited from interfering with or restraining the exercise of employee's right to engage in any concerted activities.[102] An example of employer misconduct that violates the NLRA is when an employer transfers, lays off, terminates, assigns employees to more difficult work, or otherwise punishes employees for engaging in concerted activities.[103] This so-called retaliation against a striking employee is prohibited under the Act, but is a *force majeure* contract clause retaliation in terms of the statute or is it more analogous to a bargaining tool, such as a "no-strike clause?"

VII. ARE *FORCE MAJEURE* CLAUSES VIOLATIONS OF THE NLRA?

A basic writer's contract includes a provision[104] that allows the company or studio to terminate the agreement based on an uncontrollable *force majeure* event.[105] After a prescribed suspension period has passed, if the *force majeure* event is still in effect this power to terminate can be enforced.[106] Many of these agreements expressly include "strikes" within their definition of *force majeure*.[107] These provisions are put into place to protect the parties (arguably protection is afforded to the studio exclusively) in event of a labor strike. Industry custom further embraces such a clause[108] to relieve parties from their contractual obligations.

These individual contracts, however, are excluded by the collective bargaining agreement made between studio and guild meaning if more favorable provisions exist in the collective bargaining agreement, the agreement prevails over the individual contract.[109] The 2004 MBA, the collective bargaining agreement between the WGA and AMPTP, states the following *force majeure* provision:

> Company shall have the right to suspend a writer employed on a week-to-week basis or for a definite term during all or any part of any period of so-called force majeure. If any such suspension continues for a period of five (5) or more weeks after its commencement, the writer shall have the right to terminate his/her employment during the continuance of such suspension by giving Company, after the expiration of such period of five (5) weeks, written notice of such termination to be effective not less than one (1) week after the actual receipt by Company of such notice; provided, however, that such employment shall not be terminated if within one (1) week after the actual receipt of such notice Company reinstates such employment, at the agreed upon compensation provided for there under. Nothing herein contained shall be considered to deprive Company of its right after such reinstatement to suspend any such employment by reason of another event of force majeure, or of Company's right to terminate any such employment at any time after the commencement of the suspension period.[110]

Looking over the provision as a whole, the writer is given the option to terminate employment after five weeks of suspension has passed by giving the company, or in this case producer/studio, written notice.[111] The company, in response, has the option to reinstate such an employee within one week after receipt of the termination notice.[112] Lastly, and most importantly, this provision does not deprive the producer/studio of its right to terminate employment at any time after commencement of the suspension period.[113] Therefore, the individual *force majeure* provision[114] and collective bargaining *force majeure* provision[115] seem to fit together with one another.

As mentioned above, the NLRA protects an employee's right to engage in concerted activities such as strikes.[116] When an employer interferes or restrains an employee from engaging in such activities, then the employer is in violation of the Act.[117] Further, strikers, if engaging in a permissible labor dispute, maintain their status as employees during a strike unless properly discharged for some other reason.[118] Refusal to re-employ striking employees because they engaged in a strike is an interference with their right to engage in "concerted activities" if (1) the strike was for a legitimate purpose such as their mutual aid or protection, assistance to their labor organization, or in opposition of an unfair labor practice[119] and (2) the striker's job was not permanently filled by a replacement during the strike.[120]

Referring back to the *force majeure* provisions in both the individual[121] and collective bargaining agreements,[122] if the writers join a strike and the strike continues for a prescribed period of time, the studios are given the power to terminate the agreements. Because strikes are protected by § 7 as concerted activities and employers, therefore, cannot interfere or restrain such right[123] it is questionable whether a *force majeure* provision has the effect of inhibiting the exercise of the right to strike. Such a provision would likely discourage employees from participating in union strikes for fear the strike would continue for the prescribed period of time and they would be terminated from their employment, thereby roaming the streets of Hollywood jobless. However, this situation is not quite analogous to the situations where the right to strike has been inhibited in violation of the NLRA.[124] For example, interference with the right to strike occurs when an employer provides awards, such as bonuses[125] or increased seniority,[126] to non-striking employees while refusing to give a similar award to striking employees.[127] Therefore, a striking writer would be required to make a claim that he or she was treated differently than other studio employees.

With regards to refusal to re-employ striking workers,[128] producers would likely argue writers were properly discharged for some other reason thereby effectively destroying an NLRA claim against them.[129] ABC Studios, for example, explained to *Variety* that "the ongoing strike has had a significant detrimental impact on development and production…so we are forced to make the difficult decision to release a number of talented, respected individuals from their development deals."[130] This statement puts emphasis on the required decrease in development and production of shows in response to "strike economics."[131] Legitimate lay-offs occur when industries lag and cash inflow significantly takes a hit. On the opposite end of the spectrum, producers could also destroy an NLRA claim if the writer's job was permanently filled by a replacement worker during the strike.[132]

Although the right to strike is protected under § 7,[133] such right may be waived by putting appropriate provisions into a contract or the collective bargaining agreement or both.[134] If an employee violates such provision, commonly referred to as "no-strike" clauses, by participating in a labor strike, then violation constitutes an effective breach of contract and the striking employee is not entitled to reinstatement.[135] Basically, the employer can refuse to re-employ the striking employee without violating the NLRA.[136] However, these waivers are strictly scrutinized in court and where there is not an express waiver of an employee's right to strike, the evidence of waiver is required to be "clear and unmistakable."[137] This evidence may be found in unequivocal extrinsic evidence bearing on ambiguous contract language or implied by a binding arbitration clause.[138]

Under the 2004 MBA,[139] the express no-strike provision reads as follows:

> The Guild agrees that during the term hereof it will not call or engage in any strike, slowdown or stoppage of work affecting theatrical or television motion picture production against the Company. If, after the expiration or other termination of the effective term of this Basic Agreement, the Guild shall call a strike against any Company, then each respective then current employment contract of writer members of the Guild (hereinafter for convenience referred to as "members") with such Company shall be deemed

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> automatically suspended, both as to service and compensation, while such strike is in effect, and each such member of the Guild shall incur no liability for breach of his/her respective employment contract by respecting such strike call, provided such member shall promptly, upon the termination of such strike, and on the demand of the Company, perform as hereinafter in this paragraph provided.[140]

The collective bargaining agreement effectively waives the employee's right to strike, acting as an express waiver, during the term of the agreement. However, the term of the agreement ended on November 1, 2007[141] after which the WGA engaged in a strike starting November 5, 2007.[142] Therefore, the no-strike clause was not breached. The contract further stipulates that strikes are allowed after the term expires.[143]

Even though there is no express strike waiver upon conclusion of the term,[144] the force majeure clause in the individual contracts could be construed as a waiver if it was "clear and unmistakable."[145] To reiterate, the provision states that in the event of force majeure such as a strike the producer/studio shall have the right to terminate the agreement after completion of the suspension period.[146] The provision, however, does not mention the §7 right to strike or contain language prohibiting strike activity.[147] The provision merely provides a release from contractual obligations in event of a strike.[148] Because of the strict standard governing no-strike clauses[149] and the lack of extrinsic evidence signifying relinquishment of such right,[150] the force majeure provisions in writer's contracts will not likely be construed as no-strike clauses.

Lastly, if an employer makes individual contracts with workers for the purpose of precluding or forbidding collective action under § 7, such as strikes, their actions may be treated as an unfair labor practice and held invalid by the Board.[151] Also, employees will likely be entitled to reinstatement notwithstanding the invalid provisions.[152] Before action can be taken, proof of improper motive or derogatory provisions must be put forth.[153] If the contracts have been made in good faith and are required by law or by the nature of the business, then employees who strike in breach of them, however, are not entitled to reinstatement[154] (as seen above).

A striking writer terminated based on *force majeure* gets one last chance to invalidate the provision if they can bring forth proof that their employer had the improper motive to preclude collective action by placing these *force majeure* provisions in the contract.[155] Taking another look at a sample *force majeure* provision in detail:

> The parties' performance under this Agreement is subject to acts of God, war, government, regulation, terrorism, disaster, strikes, civil disorder, curtailment of transportation facilities, or any other emergency beyond the parties' control, making it inadvisable, illegal, or impossible to perform their obligations under this Agreement. [The producer/studio] may cancel this Agreement for any one or more of such reasons upon written notice to the other.[156]

The provision[157] lists several acts that fall under *force majeure* excusing the producer from performance. Of the following acts listed, only one is concerted activity protected by § 7[158]— "strikes." As a reminder, protected employee rights include: the right to self-organization including the right to form, join, or assist labor organizations; the right to bargain collectively through representatives; the right to engage in other concerted activities for the purpose of collective bargaining; and the right to refrain from any or all such activities except to the extent that such right may be affected by the requirement to become a union member as a condition of employment.[159]

Because only one of the ten events listed are protected by the NLRA,[160] writers may have a difficult time arguing their individual contracts were made for the purpose of precluding or forbidding collective action.[161] However, this argument should not be abandoned because the effect of the provision, at least to some degree, discourages writers from joining union strikes. Therefore, it could successfully be argued that if the provision discourages writers from joining in strikes, then the purpose of the provision must be to discourage collective action. Because this provision is customary[162] throughout the entertainment industry and grants the producer/studio the control to swiftly lower the *force majeure* ax and terminate agreements without repercussion,[163] this almost limitless power[164] could easily be abused for the purpose of precluding collective action.[165]

On the other side of the coin, the producer/studio would be given a chance to rebut proof of bad motive by, ironically enough, putting forth evidence that their actions were done in good faith.[166] The claim could also successfully be defeated by showing the provision was required by law or by the nature of the business.[167] A producer could argue, for example, the entertainment industry is controlled by different collective bargaining entities working together harmoniously to produce high-quality, low-cost productions. Considering strikes periodically[168] occur in at least one or more of these entities, it can be argued the nature of the business requires the entities to protect themselves when they are deprived of workers for an inestimable amount of time. Therefore, these types of "get out of jail free cards"[169] are required by the nature of the business.[170]

Also, other evidence of motive could be put forth to rebut the bad-faith claim. Producers perhaps put these provisions in the individual contracts to protect themselves in the event of strike. During a strike writers are suspended, production is at a standstill, and profits dwindle. *Force majeure* may be used to offset income lost during the strike by cancelling out "many big-money contracts and development pacts."[171] Perhaps a studio now wishes they hadn't committed themselves to a three-picture deal when the first deal tanked, or began a project that looks like, no matter what cost-reducing actions are taken, will still go over budget.[172] *Force majeure* looks like a "quick, easy way to perform a large-scale financial reset and restricting for the studios."[173] As on manager turned producer put it, "If force majeure clauses kick in within eight weeks of a work stoppage, and if the strike lasts a month or so, it makes sense for the studios to let the strike run on for another few weeks to allow force majeure to take effect. That's money they don't have to pay out which could offset income they're losing during the strike."[174]

If a writer is able to show his employer, the producer/studio, made his individual employment contract for the purpose of precluding or forbidding collective action under § 7, then the Board may treat the contract as an unfair labor practice and issue a cease and desist order.[175] The provisions can also be held invalid entitling striking employees to reinstatement.[176] If, however, the producer/studio is able to rebut such claim by showing they acted in good faith, acted as required by law, or acted as required by the nature of the business, then the writers would not be entitled to reinstatement.[177]

VII. CONCLUSION: OUTCOMES AND ALTERNATIVE MEASURES

Are the weary writers walking the tough streets of Hollywood in search of greener pastures given any recourse against the big, bad studio wolf for axing their agreements? Because these provisions listing strikes as *force majeure* events are custom in the industry,[178] part of every basic writer-producer agreement,[179] and parties are generally free to contract in any manner they choose,[180] strikes may be considered by a court as *force majeure* even though the historic definition[181] of such would not cover a controllable act of one of the parties. Again, the emphasis will be put on the quality of the argument made by both parties.

Secondly, the NLRA protections[182] afforded to employees cannot be inhibited or restrained[183] including the right to strike.

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The case law on this subject, however, places emphasis on treating striking employees differently from non-striking employees.[184] In the context of writer-producer deals, evidence would have to be put forth to such effect. Also, these protections can be waived by a no-strike clause if the clause is either express, or the waiver is "clear and unmistakable."[185] The *force majeure* provisions,[186] however, do not resemble a common no-strike clause and the language of the contract will not likely be found to be a "clear and unmistakable" waiver. Therefore, the striking writer will not have to worry about their former employer putting forth evidence they waived their rights under the NLRA.

Further, and likely the strongest argument on behalf of the writers, would be to argue their employers set up these individual contracts for the purpose of precluding or forbidding collective action[187]—mainly strikes. The writers would be required to put forth proof showing improper motive[188] on behalf of the studios. This could be evidenced through the "abuse of power theory"[189] mentioned above. Writers would also need a concrete response to the producer's rebuttal that they, the studio, acted in good faith and *force majeure* provisions are required by the nature of the business.[190]

Based on privacy over arbitration and the lack of litigation over these matters,[191] both parties would be given considerable leeway to make creative arguments. Therefore, in this game of cat and mouse, the players and the strengths of their arguments will control this end result. Do the writers have recourse over their recent termination based on *force majeure* provisions in their individual contracts with the studios? Certainly. Let the games begin.

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184 *N.L.R.B. v. Rubatex Corp.*, 601 F.2d 147, 150 (4th Cir. 1979); *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221, 235-36 (1963).
185 *Amcar Div., ACF Industries Inc. v. N.L.R.B.*, 641 F.2d 561, 566 (8th Cir. 1981).
186 *OWBR LLC v. Clear Channel Communications, Inc.*, 266 F. Supp. 2d 1214, 1216 (D. Hawaii 2003); 2004 WGA Minimum Basic Agreement (pg. 251). http://www.wga.org/content/default.aspx?id=1610; "Entertainment News: Force Majeure Wreak Havoc on Talent Deals." http://www.entertainmentlitigationblog.com/2008/01/entertainment_news_force_majeu.html
187 6 A.L.R.2d 416 § 13 (2008).
188 *Id.*
189 *See* Section VII (pg. 22).
190 6 A.L.R.2d 416 § 13 (2008).
191 2004 WGA Minimum Basic Agreement (pg. 43). http://www.wga.org/content/default.aspx?id=1610; "What is Arbitration? Comparison" http://www.thearbitrationcompany.com/what-is-arbitration/comparison.htm

The Lazarri Award

The 2009 Cindi Lazzari Artist Advocate Award was presented posthumously to Robin Shivers co-founder of the Health Alliance for Austin Musicians (HAAM). Robin passed away unexpectedly in October 2009. The presentation occurred during the Austin Music Awards ceremony on March 20, 2010 at the Austin Music Hall. The Austin Music Awards are presented annually during SXSW. Susan Antone of the world-famous Antone's nightclub in Austin and Austin singer-songwriter Troy Campbell, both long-time friends of Robin's, accepted the award on Robin's behalf. Joe Priestnitz, Cindi's husband, and Cindi's daughter Copeland and son Enzo were also present for the presentation as was Casey Monahan, director of the Texas Music Office and 2007 recipient of the Cindi Lazzari Artist Advocate Award. ■

Standing (left to right): Ed Fair, Mike Tolleson, Craig Barker, Enzo Priestnitz, Joe Priestnitz and Troy Campbell.

Seated (left to right): Bud Shivers (Robin's husband), Copeland Priestnitz, Susan Antone and Casey Monahan.

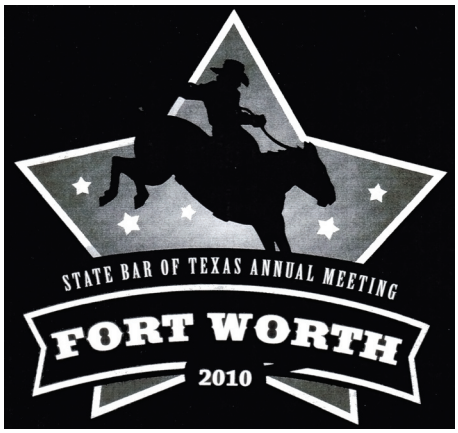
The Texas Star Award

The 2009 Texas Star Award was given posthumously to Shannon Jones Jr., co-founder of the Dallas based Passman Jones law firm. Mike Tolleson (left) presented the award to Jerry Alexander (right) who accepted it on behalf of Shannon Jones and the Passman Jones firm October 1, 2009, at the Hyatt Regency Hotel in Austin during the Entertainment Law Institute luncheon. The award is given each year by the Entertainment and Sports law Section to an attorney or individual who has made a significant contribution to the practice of entertainment law. ■

SECTION PROGRAM

Will Be Held In Fort Worth, Texas As Part Of The Annual State Bar Convention

June 10-11, 2010
FORT WORTH CONVENTION CENTER and OMNI HOTEL



Entertainment & Sports Law

Friday, June 11

12:00 PM 12:30 PM
Section Council Meeting

12:30 PM 1:00 PM
Section Membership Meeting

1:00 PM 1:45 PM .75 hours
Protection of Music in Today's Viral Marketplace
L. Carlos Linares, Jr.

1:45 PM 2:30 PM .75 hour
U.S. and International Music Publishing Licensing Issues for Internet and Mobile Business Models
Joel Schoenfeld

2:30 PM 3:15 PM .75 hour
Legal Issues Involved in the Day to Day Operation of One of the World's Most Famous Sports Teams
Alec Scheiner

ENTERTAINMENT AND ENTERTAINERS LEGAL NEWS

NO Puffing on stage in Colorado. The Colorado Supreme Court ruled that public health beats an actor's freedom of expression and expanded the state's ban on smoking on stage. Ruling 6-1 the court's held that smoking indoors may be applied to "imitation" tobacco cigarettes. Theatre companies argued that tobacco and the smoke left on stage sets the mood, and develops the character but they did not persuade the court. Colorado and 24 other states, applies the smoking ban to theatrical performances. The court said "[P]erformances typically convey their message by imitation rather than by scientific demonstration and that there are alternatives to smoking on stage." Justice Gregory Hobbs in his dissent said "… allowing only prop cigarettes, including those filled with talcum powder would be 'untenable and laughable.'" He went on to write "The characters and plots would lack depth and expressive force without hovering smoke on stage, the poignant exhale of a puff of smoke, and even the ability or inability to smoke." Justice Hobbs referenced ***The Graduate*** as a performance where smoking is crucial and specifically Mrs. Robinson's "strategic" smoking that allowed here to dominate her younger lover.

Playtation3 and Ninedo Wii could lead to life in jail. Michael L. Grayson is a 33 year old who has been charged with robbing stores of video games. Being a 2 time felon Grayson could be prosecuted under California's Three Strikes Law. Police accused Grayson of stealing the games from stores and then returning the stolen items for money. A Game Stop in Oakland, California identified Grayson's return items as being stolen. Grayson was found at his apartment and arrested on multiple counts of armed robbery related to sores in Oakland and other California cities.

A grand jury indictment in Arizona resulted in 3 Houston, TX residents being charged with making bootleg DVDs of popular television movies. Chuen Han Yuen, 29, aka Jason Yuen, Man Yam Yuen, 58, and Tsao Ping Ng, 54, were arrested and Sin I. Yuen, aka Michelle Yuen, was allowed to voluntarily surrender to police. The 4 are accused of illegally copying and distributing movies such as ***Get Smart*** and ***Don Adams Complete DVD TV Series and Bonus Movie***. The conspiracy charge could result in a 5 years in prison sentence for the 4 and fines of $250,000.00 if convicted. They also are charged with fraud, which also carries a maximum prison sentence of 20 years and a $250,000.00 fine.

Mexico detained Texas singer Ramon Ayala on charges of having ties to organized crime. The Grammy winner was caught during a drug raid at a drug cartel's Christmas party. Mexican defense lawyer Adolfo Vega Elizondo, said that Ayala also faces charges of money laundering. The singer through Vega denied that Ayala or his band ***Los Bravos del Norte*** had ties to drug cartels. Ayala said that they were at the party to play. Vega said "They have never in any moment belonged to organized crime." Mexican officials of the Attorney Generals' Office brought the charges and federal police in Mexico City following the raid of a drug cartel party. Norteno bands like Ayala and his band sing songs of drug trafficking and violence and are rumored to perform at cartel parties. None of the norteno bands have been convicted of the charges.

Courtney Love was banned from any contact with her 17 year old daughter, Frances Bean Cobain. Love lost custody when a district court judge granted a temporary restraining order placing the daughter in the custody of Love's now deceased former husband, Kurt Cobain's mother. Cobain's mother accused Love of drug abuse relapse. Love responded by posting "angry comments" on Facebook. Love's attorney said she is "completely clean" despite the temporary restraining order banning Love from having any direct or indirect contact with her daughter.

REDUCING TV VIOLENCE
THE UPS AND DOWNS OF VARIOUS REGULATORY OPTIONS

By: Timothy W. Havlir

Juris Doctor from DePaul University College of Law 2008; Bachelor of Science in Electrical Engineering from the University of Illinois at Champaign-Urbana, 2004. *I would like to thank Professor John Roberts for his guidance and advice.*

> *"In 1961, I worried that my children would not benefit much from television. But in 1991, I worry that my grandchildren will actually be harmed by it."*[1]
>
> -Newton Minnow

I. INTRODUCTION AND THE APRIL REPORT

Democrats are as eager to crack down on TV violence as Republicans are to crack down on TV sex, says an old Washington maxim.[2] But while Congress has banned TV sex—known in legal terms as "indecency"[3] —in the broadcast medium during all but late-night hours, TV violence remains unrestricted. The asymmetry in the regulations is curious. Many studies have found that TV violence is harmful to children, but not one has ever shown the same for indecency. The government seems to have it backwards. And even with increasing pressure to limit the amount of violence in the media, there is a significant legal obstacle frustrating many attempts to regulate: the First Amendment.

In its vast First Amendment jurisprudence, the Supreme Court has tackled both violence[5] and broadcasting,[6] but never the intersection of the two. Courts have rejected restrictions on *violent* video games, but accepted restrictions on indecent *broadcasting*. So where does that leave *violent broadcasting?* And what about cable and satellite TV? These are difficult questions complicated by an inconsistent body of law. One scholar has observed:

> There is today, for instance, no general first amendment test at all. Rather, there are merely congeries of tests, each as the Court itself declares, without seeing the irony, "a law unto itself." A random walk through any modern casebook in constitutional law will discover the extent to which the first amendment has been fragmented and scattered virtually out of sight by a miming of the common law process—of carefully sorting, weighing, and balancing each interest with professional detachment, with no particular predisposition to find freedom of speech or of the press more entitled to control the outcome than the other things at stake.[7]

Of course, this constitutional minefield has not deterred our lawmakers from investigating. Periodically, a member of Congress introduces a bill attempting to reduce violence on television, but most of these bills have not passed into law. To date, the only noteworthy regulation has been through the V-chip, a device inserted into television sets that allows a user to block certain categories of objectionable content corresponding to ratings supplied by the programmer. The V-chip was approved in 1998,[8] but it has been criticized as both ineffective and underutilized during its first decade of existence,[9] leading some members of Congress to look into stricter regulations. Amid various bills that have been introduced in the Senate,[10] thirty-nine members of the House of Representatives requested in March of 2004 that the Federal Communications Commission ("FCC") undertake an inquiry on television violence.[11]

In response, the FCC issued a report in April of 2007 (the "April Report"[12]) offering its views on some of the relevant issues. The Commission found that "there is strong evidence that exposure to violence in the media can increase aggressive behavior in children, at least in the short term," and that remedial efforts thus far have been unsuccessful.[13] To combat the problem, the Commission recommended, as both effective and constitutional, two options: (1) Congress could ban or otherwise limit violence in the broadcast medium during hours when children are likely to be in the audience; or (2) Congress could force cable operators to unbundle their tiered channel packages.[14] The April Report acknowledged some free speech concerns but indicated they could be overcome.[15]

Unfortunately, the legal analysis was insubstantial and the recommendations were inadequate. Simply, the FCC punted. As Commissioner Adelstein said, "[T]he *Report* passes the buck . . . . We leave much of the real work to Congress to tackle the tough issues Congress asked us to help them with."[16] Because the April Report was light on constitutional analysis,[17] this paper will offer a fuller discussion of the free speech issues at stake.

There are a number of different regulatory routes—some better than others—to limit violence on television. But with unpredictable free speech issues lurking, each possible regulatory scheme carries some risk of ultimately being declared unconstitutional. This risk should be balanced against the likely effectiveness and costs of each scheme to determine which is the best course of action. After evaluating each alternative, this paper will conclude that Congress should implement non-coercive solutions in conjunction with the TV industry's input. Specifically, Congress should continue with the V-chip system, but devote more resources to simplify it and adequately educate the public about its use. Congress should also encourage TV stations to mutually commit to a family hour on their own terms.

II. CONSTITUTIONAL CHALLENGES

Because "Congress shall make no law . . . abridging the freedom of speech,"[18] regulations on violence cannot place an impermissible burden on the right to free expression. The First Amendment provides two angles of attack. First, even a carefully considered definition of "violence" may be too vague to be enforced with predictability. As vagueness causes speakers to "steer far wider of the unlawful zone,"[19] the regulations can chill too much protected speech. Second, a ban on violence is a content-based restriction on governmentally disfavored speech, and such laws are subject to stringent judicial review.[20] Each of these challenges will be addressed in turn.

A. Definitional and Vagueness Concerns

In the majority of conceivable regulatory schemes, the government would have to adequately define "violence." How broad would it be? Would it include *Peter Pan* (when Captain Hook is eaten by a crocodile)? Would it include a hockey game (with occasional fights between players)?[21] Some of the proposed regulations worried the National Hockey League so much that it filed a comment in response to the FCC's notice of inquiry to argue that sports should be specifically excluded.

And even if the FCC were to provide a clear definition of violence, there is the further challenge of parsing out material that should not be regulated regardless of its violent content. Would it include *Saving Private Ryan* (with its anti-violence message)? Would

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it include detailed news coverage of a gruesome murder (at the core of First Amendment protection)? Failed attempts to limit violence in video games have yielded a clear lesson: setting a definition is tricky. [23]

1. Context

"Not all violence is created equal."[24] Just as speech that has serious literary, artistic, political, or scientific value is deemed to be not obscene,[25] so too can violence serve legitimate purposes in the message of an artist, entertainer, or news reporter. Violence itself is often necessary to effectively depict the deleterious consequences of violence. In an influential article, Judge Wald of the D.C. Circuit asked, "Do we really want our children protected from true depictions of our country's violent history: lynchings, assassinations of Presidents, wars fought in the name of justice and freedom, the Rodney King tapes?"[26] Similarly, a reference to violence in classic works of literature is common; for example, one commentator noted,

> The magnificent movie "Gettysburg" depicts more deaths than an entire season's worth of TV police shows. Should "Gettysburg" be edited so that it depicts the event as a mere skirmish instead of the bloodbath it was? . . . The works of Shakespeare are leavened with richly drawn accounts of patricide, infanticide, and general mayhem. In terms of sheer gruesomeness, the Bard was way ahead of modern filmmakers. In "King Lear," when Cornwall exclaims: "Out, vile jelly!" he is plucking eyes, not serving toast.[27]

Because context is so critical, regulations would have to evaluate many considerations. In the April Report, the FCC concluded that this sort of adaptable definition is indeed possible, listing several proposed factors that could anchor the standard.[28] The Commission might call such an approach flexible; those opposed to regulation call it vague.

The Supreme Court has long recognized that an overbroad prohibition can deter the legitimate exercise of free speech rights.[29] A vague standard causes cautious speakers to avoid anything approaching the prohibited line, which silences a substantial amount of protected speech. Moreover, vagueness gives the FCC too much latitude in interpreting the standards, opening up the potential for an abuse of regulatory authority.[30] Obviously, formulating a universal standard would be a thorny task. It is somewhat telling that not even researchers studying the harmful effects of media violence have used a consistent definition.[31]

None of this is to say that any definition of violence is inevitably doomed to be vague. On the contrary, past indecency rulings indicate that a carefully worded definition can be sustainable.[32] But this ultimately depends on how the government chooses to word its regulation, and, more importantly, on the inclinations of a particular court.

2. Analysis

We begin the legal analysis with a comparison to video games. Regulations of violent video games have often been struck down on the grounds of vagueness.[33] For example, in *Entertainment Software Ass'n v. Blagojevich,*[34] the Northern District of Illinois struck down a statute containing a definition providing that "violent video games"

> include [] depictions of or simulations of human-on-human violence in which the player kills or otherwise causes serious physical harm to another human. "Serious physical harm" includes depictions of death, dismemberment, amputation, decapitation, maiming, disfigurement, mutilation of body parts, or rape.[35]

In holding that this provision was void for vagueness, the court reasoned that it is difficult to say for certain what is "human-on-human"; it may or may not include, for example, realistic cartoons or semi-human life forms.[36] The court also noted that game creators, manufacturers, and retailers would only be guessing about whether their speech was subject to sanctions.[37]

Quite the opposite, however, courts have generally upheld regulations of sexually related materials in print and on television.[38] In *Miller v. California*, the Supreme Court itself set the standard for obscenity:

> The basic guidelines for the trier of fact must be: (a) whether "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) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[40]

There is a good argument that this is no less vague than what the court struck down in *Blagojevich*. Both definitions require widely discretionary judgments with a gut-instinct feel. Both definitions describe a type of offensive material as best as the English language permits. Both definitions rely on adjudicative bodies, whose function is to interpret language and make individualized determinations.

While the disparate treatment seems arbitrary (and none of the cases explain it), perhaps it is due to American culture. For whatever historical reasons, this nation has traditionally been more hostile to sex than to violence. While Janet Jackson's wardrobe malfunction horrified Americans and generated 540,000 official complaints to the FCC,[41] the major networks today freely average about 4.41 instances of violence per hour during prime time.[42] Many courts and scholarly articles have drawn attention to the violence steeped in many glorified works of literature, often graphic and gratuitous.[43] Blood lust is acceptable; sexual lust is not.

Besides the disparity between sex and violence, another distinction is between video games and television. It is unfair to impose subjective restrictions on video game makers after they have devoted significant time and money into developing each game. After months of research, design, testing, manufacturing, and distribution, video game makers have a large investment in their product. Banning sales can be devastating because altering a video game to eliminate the violence is likely to involve a major restructuring of programming, delaying the final product in an industry where the next best thing is never far away. On the contrary, TV programs that violate the standards are subject to a one-time fine that can easily be absorbed by large television corporations. Whereas video game makers rely on a small number of games to generate a large profit, TV stations can fall back on hundreds of different shows. Banning sales of a particular video game is perhaps too harsh a penalty when subjective judgments are involved.

Definitions of violence do have at least one advantage over definitions of indecency. Without any basis showing what types of indecency are harmful (or for that matter, if any type is harmful), the FCC has been floundering for years attempting to explain why some dirty words are taboo while others are not.[44] In contrast, a wave of studies on media violence are beginning to show exactly which types of violence, and in which contexts, have negative impacts. For example, the April Order spoke favorably of a study performed by Barbara Wilson, a professor at the University of Illinois, identifying eight specific contextual factors thought to be important in determining the impact of violence on young viewers.[45] A definition of prohibited violence could be keyed to a similar list of factors, and the Commission could apply these factors with more predictability than it does the indecency test. Furthermore, such a definition is logically and tightly connected with the asserted governmental interest of protecting minors.

Notwithstanding these considerations, nothing prevents a court from holding that a definition is indeed too vague. With precedents going in both directions, a court would be free to rule as it pleased. On the whole, the vagueness argument adds substantial uncertainty to the constitutionality of any regulation that relies on a definition supplied by the government.

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B. Surviving Scrutiny

The second constitutional hurdle stems from the fact that a regulation targeting violence is content-based and subject to judicial review. The general rule is that content-based restrictions are reviewed under strict scrutiny, meaning they are valid only if they are the least restrictive means to advance a compelling governmental interest.[46] But there are exceptions. Each regulatory scheme affects the constitutional balance in its own unique way, and each must be analyzed separately. This section will address some of the issues that are common to each regulatory framework.

1. Asserted Governmental Interest

There are two interests recognized by courts: (1) the well-being of children and (2) aiding parents in supervising their children.[47] In *Ginsberg v. New York*,[48] the Supreme Court recognized these as independent governmental interests to justify a state law forbidding the sale of literature displaying nudity to minors.[49] It is noteworthy that *Ginsberg* was decided under rational basis, and the Supreme Court has never explicitly labeled the interests compelling. Nonetheless, in *Action for Children's Television v. FCC ("ACT III"),*[50] the D.C. Circuit deemed the interests to be compelling for protecting minors from indecent content on broadcast television.[51]

Some critics have noticed that there is an inherent contradiction between the two *Ginsberg* interests. To rely on both interests at once is to assume that all parents wish to rear their children in an environment free from indecency or violence. But there is a wider variety of parenting techniques. "Some parents may prohibit their children from any exposure to indecent material; some may impose a modified prohibition depending upon the content of the programming and the child's maturity; still others may view or listen to indecent material with their children, either to criticize, endorse, or remain neutral about what they see or hear."[52]

In light of these realities, it may be inherently impossible to advance both interests at once. A regulation aimed at protecting the well-being of minors (e.g. time channeling)[53] interferes with a parent's right to use protected speech to aid in rearing his or her children. Likewise, a regulation aimed at facilitating parental supervision (e.g. blocking technologies)[54] may not fully protect the well-being of minors because "parents, no matter how attentive, sincere or knowledgeable, are not in a position to really exercise effective control" over what a child sees on television.[55] Despite this logical inconsistency, most courts have permitted the government to assert these interests side-by-side. [56]

The more important question is to what extent the government must show scientific proof that minors are harmed before it can assert a need to protect them. In the April Report, the FCC reviewed a comprehensive body of studies and concluded that exposure to violence in the media can increase aggressive behavior in children.[57] The networks and media associations challenge these findings, generally arguing that the Commission overstates the conclusions of the reports.[58] Because the data is vehemently disputed and it is not entirely clear whether a court would insist on decisive evidence, this is a critical point.

As with the vagueness issue, we begin the analysis with a comparison to video games. And also like vagueness, the cases here tend to be split along two lines. First, there are the "indecent television" cases,[59] where courts have deferentially accepted a bare assertion of harm. Second, there are the "violent video game" cases, where courts have required a strict showing of harm as well as a nexus between the video games and the harm.

In *Ginsberg*, the Supreme Court admitted it was "very doubtful" that scientific studies showed that sexually explicit magazines impair the ethical and moral development of children.[60] The Court did not require such strict evidence, however, stating that it "d[id] not demand of legislatures scientifically certain criteria of legislation."[61] In *ACT III,* the D.C. Circuit took a broad reading of *Ginsberg* and followed this lax approach even under heightened scrutiny, saying the interests were not limited to cases of "clinically measurable injury."[62]

On the other hand, cases involving violent video games have universally struck down regulations for a lack of hard evidence demonstrating tangible, harmful effects. The first and most influential of these cases was *American Amusement Machine Association v. Kendrick,*[63] where the Seventh Circuit addressed an Indianapolis ordinance seeking to limit the access of minors to video games containing graphic violence.[64] Writing for the court, Judge Posner noted that the studies on which the government relied merely showed a link between violent video games and increased feelings of aggression in children; there was no evidence that video games caused an increase in specific acts of violence or in the average level of violence in society.[65] *Kendrick* explicitly addressed whether *Ginsberg* required the court to defer to the legislature's bare assertion of harm:

> *Ginsberg* did not insist on social scientific evidence that quasi-obscene images are harmful to children. The Court, as we have noted, thought this a matter of common sense. It was in 1968; it may not be today; but that is not our case. We are not concerned with the part of the Indianapolis ordinance that concerns sexually graphic expression. The video games at issue in this case do not involve sex, but instead a children's world of violent adventures. Common sense says that the City's claim of harm to its citizens from these games is implausible, at best wildly speculative. Common sense is sometimes another word for prejudice, and the common sense reaction to the Indianapolis ordinance could be overcome by social scientific evidence, but has not been.[66]

Subsequent video game cases have followed *Kendrick's* lead: With respect to violence, as opposed to indecency, courts have not indulged the "common sense" justification for regulating.[67]

Interestingly, *Kendrick* also rejected outright the independent governmental interest of aiding parents in shielding their children from violence.[68] The court reasoned that because eighteen-year-olds have the right to vote, they must be allowed to form their political opinions on the basis of all uncensored speech before they turn that age.[69] The rights belong to the children, not the parents.[70] "People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble."[71] Thus, parents have no right to enlist the state's help in confining their children within the "bubble."[72]

Again, the reason for the difference in treatment between sex and violence is not obvious.[73] As previously mentioned, much of it probably results from cultural attitudes and the way Americans feel about what is appropriate.[74] The difference is reflected widely in First Amendment jurisprudence, as sexual speech is often thought to be of low value. While the Supreme Court has—at times—afforded indecent speech the same protection as any other speech,[75] it has at other times treated sexually explicit materials as on the "outer perimeters of the First Amendment, though . . . only marginally so."[76] In contrast, violent materials have been always given strong protection from the Supreme Court on down. No regulation of violent materials has ever passed constitutional muster.[77]

Because video games are a relatively recent phenomenon, there is not yet a large body of studies on them. Of the two main studies cited in cases—the Anderson study and the Kronenberger study[79] —neither have proven persuasive to the courts.[80] The Anderson study found that aggression in children increases after viewing violent images, but *Kendrick* rejected the study for failing to show that "video games have ever caused anyone to commit a violent act."[81] Similarly, the Kronenberger study found that violent video games had negative effects on the brain function and behavior of

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minors, but *Entertainment Software Association v. Granholm*[82] held that "this research did not evaluate the independent effect of violent video games, and thus provides no support for the Act's singling out of video games from other media."[83]

Television violence has been more exhaustively studied, offering a greater amount of data. One expert testified to Congress, "There is probably no issue in social science that has been studied more over the past 30 years than television violence."[84] However, the increased quantity does not offer more conclusive results. Most of these studies find a correlation between exposure to media violence and one or more of three things: (1) increased antisocial behavior, including imitations of aggression or negative interactions with others, (2) increased desensitization to violence, or (3) increased fear of becoming a victim of violence.[85] While correlation is clear, causation is disputed.[86] A joint statement by various U.S. medical associations listed each of these three phenomena, but stopped short of asserting a causal link.[87]

Under the rigorous requirements of *Kendrick*, the studies are probably insufficient to show a compelling interest to regulate TV violence. They do not show that it has ever caused anyone to commit a violent act; nor do they show that it has caused the average level of violence to increase anywhere. Any regulatory scheme that triggers strict scrutiny faces high hurdles. Yet not all courts are quite as stringent as *Kendrick,* and many of the video game cases have hedged, indicating that in some circumstances regulations could be valid.[88] It is possible, especially with mounting public pressure, that a court could take a looser approach akin to *ACT III* and the indecency cases. In any event, this issue injects more uncertainty into the total equation.

2. Narrowly Tailored

Any restrictions on violence would have to be narrowly tailored so as not to silence any more protected speech than necessary. This requirement has become stricter with more recent cases. In *Ashcroft v. ACLU*,[89] the Supreme Court upheld a preliminary injunction against enforcement of the Child Online Protection Act (COPA), which criminalized the posting of sexually obscene materials on the internet.[90] Drawing attention to filtering software that could block sexual material from a user's computer, the Court held that the COPA's ban was not the least restrictive alternative. Filtering software, said the Court, could impose selective restrictions at the receiving end rather than broad restrictions at the source.[91]

Likewise, *U.S. v. Playboy Entertainment Group*[92] struck down a federal law requiring cable channels primarily dedicated to sexually-oriented programming to either fully scramble or block those channels or to limit their transmission to between 10 p.m. and 6 a.m.[93] The Supreme Court reviewed the law under strict scrutiny and held that there were less restrictive alternatives. The Court pointed to "a key difference between cable television and the broadcasting media, which is the point on which this case turns: Cable systems have the capacity to block unwanted channels on a household-by-household basis."[94]

Ashcroft and *Playboy* stand for the proposition that where technological developments offer a solution that can more selectively filter objectionable content, a broader prohibition is no longer constitutionally valid. This is especially important in electronic communications media, where the transmitting and receiving devices are intimately linked to Moore's Law[95] and the rapid improvement of electronic capabilities. An all-encompassing ban is less likely to be accepted if engineers have developed a less restrictive solution.

III. VIOLENCE IN BROADCASTING

With these general constitutional principles in mind, we now turn to the specific case of regulating the broadcast medium. Broadcasting is diminishing in importance, but it is an attractive target because it is, in a constitutional sense, the most vulnerable to regulations. And while currently about 86 percent of households receive their television via cable or satellite,[96] regulations geared toward broadcasting are not as toothless as they might seem. Cable and satellite TV carry the major broadcast networks' programming, and these programs draw the most viewers.[97] As a typical example, the week of February 11, 2008 saw each of the top ten programs on broadcast TV attract more than 11 million viewers, while only two programs on cable managed to attract more than 5 million viewers. If Congress were to regulate broadcasting, then CBS, NBC, ABC, and FOX—comprising 43.4 percent of the TV viewer market share in 2007[98]—would all have to limit violence on their shows. And the broadcasters certainly do not lack gore on their programming. As one journalist said, ". . . a disturbingly grisly procedural in which murder victims are rendered into gorgeously art-directed gore . . . . They have a name in the TV business for that kind of series: a CBS show."[99] Focusing solely on broadcasting would be a partial but not wholly ineffective remedy.

A. Case Law

Regulating broadcast violence has parallels to regulating broadcast indecency, which has been litigated intermittently over the past thirty years. And while enforcing the prohibitions on indecent broadcasting has fluctuated with the political climate,[100] courts have generally held that at least some level of regulation is constitutionally permissible.[101] In order to understand the comparisons, it is necessary to begin with a survey of broadcasting and indecency cases. This section will offer a brief overview of how courts have handled such cases.

To begin, Supreme Court precedent has widely acknowledged that the level of free speech protection depends on the medium. *Red Lion Broadcasting Co. v. FCC*[103] placed the broadcast medium particularly low on the hierarchy. There are a limited number of frequencies that can be used at any given time, and only a tiny fraction of people can ever hope to communicate by TV or radio.[104] According to the "scarcity rationale," the limited availability of spectrum space places a licensee under additional obligations to act in the public interest.[105]

1. Pacifica

Red Lion's scarcity rationale does not by itself justify indecency regulations. While "scarcity has justified increasing the diversity of speakers and speech, it has never been held to justify censorship."[106] Thus, in *FCC v. Pacifica Foundation*[107] the Supreme Court would use additional justifications for upholding regulations on broadcast indecency.

In *Pacifica*, a radio station broadcast a George Carlin monologue entitled "Filthy Words" at 2pm on a Tuesday.[108] The topic of the monologue was, as Carlin put it, "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely couldn't say, ever," and Carlin listed and repeated those words.[109] The FCC issued an order stating that the radio station could have been subject to sanctions,[110] and the case eventually made its way up to the Supreme Court.[111]

The Court addressed the question of "whether the First Amendment denies government any power to restrict the public broadcast of indecent language in any circumstances."[112] Citing *Red Lion*, the Court noted that broadcasting has received the most limited First Amendment protection.[113] The Court then identified two aspects of the broadcast medium that limit its free speech protection as it pertains to indecency. First, broadcast is a "uniquely pervasive presence in the lives of all Americans."[114] Broadcasting invades the privacy of the home, where a nuisance rationale shields homeowners from unwanted intrusions.[115] Second, broadcasting is "uniquely accessible to children, even those too young to read." Unlike written materials, radio and TV can easily be understood by children, and the broadcasts can "enlarge a child's vocabulary in an instant."[117]

Citing *Ginsberg*, the Court noted interests in both protecting the well-being of its youth and supporting parents' claim to authority in

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their own household.[118] In light of these interests, and because of the limited protection for broadcasting, the Court held that the sanctions were justified.[119] Finally, the Court explicitly emphasized the narrowness of its holding, declaring that "context is all-important."[120] There was a whole host of variables that justified possible sanctions in this case, most notably the time of day.[121]

2. ACT III

In the late 1980s, ten years after *Pacifica*, the government became increasingly interested in regulating indecency.[122] Following an almost decade-long dance among the FCC, Congress, and the D.C. Circuit,[123] Congress enacted section 16(1) of the Public Telecommunications Act of 1992,[124] which provided that indecent materials could only be broadcast between the hours of midnight and 6am.[125] The provision had a "public broadcaster exception" in which public radio and TV stations that went off the air by midnight were permitted to broadcast indecent materials after 10pm.[126] When the FCC implemented this Congressional mandate, the regulations were challenged in the D.C. Circuit in *Action for Children's Television v. FCC ("ACT III").*[127]

In *ACT III*, the court addressed a free speech challenge to the new regulations.[128] Performing a traditional First Amendment analysis, the court first defined the proper scrutiny level.[129] The court said that because the regulations were content-based, they were subject to strict scrutiny: They would be upheld only if the "Government's ends are compelling [and its] means [are] carefully tailored to achieve those ends."[130] However, the court noted that Pacifica seemed to lower the constitutional level of scrutiny for broadcast indecency.[131] Thus, while the court applied the exacting strict scrutiny standard, it did so with particular sensitivity to "the unique context of the broadcast medium."[132] Under this framework, the court held that *Ginsberg's* two interests were sufficient to justify the ban.[133]

The court also held that the regulations were narrowly tailored, basing this conclusion on data indicating that the number of children watching TV fell sharply during late hours.[134] Thus, channeling indecent material between 10pm and 6am advanced the interests without overburdening speech.[135] However, because the public broadcaster exception did not bear any relation to the governmental interest, this distinction was arbitrary. The court remanded the case to the FCC with instructions that all indecency prohibitions should be limited to the time between 6am and 10pm.[137] The Supreme Court denied certiorari,[138] whether it tacitly approved or just did not want to thrust itself into the case.

B. Time Channeling as a Regulatory Option

With reduced First Amendment protections, broadcasting is the lone candidate for "time channeling," i.e. fully banning content during specified hours, as in *ACT III*.[139] While this approach is currently only applied to indecency, the concept is not new to violence. In 1975 the broadcasters bowed to governmental pressure and temporarily agreed to experiment with a "family hour," where the first hour of prime time every night was to be free from violence and sex.[140] A federal district court held that the FCC's pressuring the networks into family hour was unconstitutional,[141] but the Ninth Circuit vacated the ruling on unrelated grounds.[142] By the time the case was remanded, the networks had dropped the family hour experiment.[143] In any event, these precedents have been largely superceded by more recent cases, especially *ACT III*.[144]

Legislators have made more direct attempts to import time channeling into TV violence. A 1997 bill introduced by Senator Fritz Hollings would have required periods of television free from violence when a large portion the audience was likely to be children—presumably, like indecency, before 10pm.[145] Partially because this was a time when most people were still optimistic about the V-chip, the bill ultimately failed by a 60-39 vote, with most critics pointing to governmental censorship and vagueness.[146] But the FCC has since lost confidence in the V-chip, and the April Report recommended time channeling instead.[147] This section will address the effectiveness and likely constitutionality of time channeling.

1. Effectiveness

Time channeling advances the governmental interest of protecting the well-being of minors (without regard to the interest of supporting individualized parental supervision). This means that violence would have to be broadcast at a time when few children are likely to be watching television. Consistent with *ACT III,* the FCC would probably have to produce statistics to correlate the time of day with the number of children watching TV.[148] Time channeling can only be effective to the extent that certain percentages of children, based on numerical averages, are screened from the audience of broadcast television shows. To this end, time channeling is only a partial solution.

2. Constitutionality

In the April Order, the FCC cited Pacifica and [ACT III] to defend its assertion that the First Amendment would permit time channeling violence.[149] This assertion warrants further examination. Pacifica relied on two special characteristics of broadcasting—that it is especially pervasive and accessible to children—to justify regulations. But since Pacifica in 1978, telecommunications has changed so much that most electronic communications media now share these twin characteristics with broadcasting. As mentioned above, 86 percent of households now receive a cable or satellite TV signal directly into their homes (making them "pervasive"), and very few parents restrict their children's access to the TV ("accessible to children").[150] In spite of these realities, the Supreme Court has always applied a more rigorous standard to content-based restrictions in the cable medium.[151]

Likewise, children are increasingly granted unrestricted access to the internet in their homes. Studies have shown that only 52 percent of parents "moderately supervise" their children's internet use, and 20 percent of parents do not monitor children's internet use at all.[152] Children have become "the computer experts in our Nation's families."[153] And like cable, the Supreme Court has applied heightened scrutiny to speech regulations on the internet.[154] Because there is little meaningful difference between broadcasting and other media in terms of pervasiveness and accessibility to minors, there are good reasons to believe that *Pacifica* should not give the FCC more extensive authority to regulate broadcasting.[155]

Nonetheless, the Supreme Court has never bought into this argument. Notwithstanding the erosion of broadcasting's special attributes, *Pacifica* is still good law, and the Court has repeatedly expressed confidence in a First Amendment distinction based on broadcasting's characteristics.[156] Following the guidance of the Court, the FCC also stands by *Pacifica*.[157] Even critics of indecency regulations have admitted that the precedent set by *Pacifica* continues to authorize such regulations.[158] The Supreme Court may one day choose to rethink the twin rationales of *Pacifica*, but for now, we must take them at face value.

Applying these principles to the time channeling of violence, we first note that there is no explicit legal test to anchor the discussion. *Pacifica* reaffirmed that broadcasting receives the most limited First Amendment protection, but it did not define a standard.[159] Confronted with Pacifica's ambiguity, *ACT III* used this test:

> In light of these differences, radio and television broadcasts may properly be subject to different—and often more restrictive—regulation than is permissible for other media under the First Amendment. While we apply strict scrutiny to regulations of this kind regardless of the medium affected by them, our assessment of whether section 16(a) survives that scrutiny must necessarily take into account the unique context of the broadcast medium.[160]

ACT III's test sounds somewhat like intermediate scrutiny,[161] but

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about all that can be said for certain is that a regulation of broadcast violence would be subject to something less than strict scrutiny.

Whether the studies showing that media violence is harmful would pass this level of scrutiny—or any other level of scrutiny—is not clear. A potentially bigger problem is that time channeling is not the least restrictive alternative. It is both overinclusive (often restricting access to adults) and underinclusive (failing to restrict access to all minors). True, the D.C. Circuit in *ACT III* gave its stamp of approval to a blunt, broad-scale time channeling approach that prohibited protected speech for sixteen of every twenty-four hours.[162] But a modern court might not be so forgiving. With new technologies come increasingly precise means to keep objectionable content out of one's home. More and more video programming is being delivered via the internet and cell phones, and sophisticated devices offer the potential for enhanced content filtering. What is a "narrowly tailored" solution has changed a great deal since *ACT III*, and time channeling is no longer the least restrictive means. This is especially true after *Ashcroft* and *Playboy*, and new digital format delivery offers even greater potential. Yet another problem is that time channeling relies on the government to supply a definition of prohibited violence, leaving vagueness challenges open. Balancing all of these considerations, the constitutionality of time channeling is highly questionable.

IV. VIOLENCE ON CABLE TV AND IN OTHER MEDIA

Cable is the dominant force in television today, and a truly effective regulatory scheme should not ignore cable or satellite TV. Unlike broadcasting, cable receives full First Amendment protection; regulations are dissected under strict scrutiny.[163] The FCC has not unilaterally regulated content on cable television in the past, and it would probably seek congressional approval before it began to do so.

A. The V-chip

It is easy to forget that mild regulations of violence are already in place in today's industry. The Telecommunications Act of 1996 delegated authority to the FCC to implement a ratings system with viewer-initiated blocking.[164] Sections 551(b) and (e) authorized the Commission to propose guidelines and recommend procedures for a ratings system if industry did not create an acceptable one of its own within one year.[165] The industry quickly proposed guidelines for a "V-chip," and the FCC approved.[166]

A V-chip is a device inside a television that allows a user to block programs that contain certain objectionable content. On a voluntary basis, programmers rate their own programs as TV-Y (suitable for viewing by all children), TV-Y7 (suitable for older children), TV-G (suitable for general audiences), TV-PG (parental guidance suggested), TV-14 (parents strongly cautioned), or TV-MA (suitable only for mature audiences).[167] Moreover, there are more specific descriptors accompanying the ratings: S (sexual content), L (language), V (violence), FV (fantasy violence), and D (suggestive dialogue).[168] The rating is embedded into the program signal, and a user specifies which type of programs the V-chip should block. The Telecommunications Act of 1996 mandated that as of January 1, 2000, all television sets manufactured in the United States or shipped in interstate commerce with a picture screen of thirteen inches or larger must be equipped with a V-chip.[169] Outside of this mandate, participation in the system is voluntary.

1. Constitutionality

On first glance it may seem that because the program ratings are voluntary, the scheme cannot run afoul of the First Amendment. However, according to the state action doctrine, conduct can be imputed to the government in instances of coercion or significant encouragement, either overt or covert.[170] Plenty of "encouragement" went along with the birth of the V-chip. Some critics allege that the networks agreed to participate in the ratings system in the hope that the government would give them lucrative spectrum space for digital television.[171] Moreover, television stations were facing pending legislation that was more severe than a self-rating system: For one thing, the FCC was authorized to set up a committee to create its own blocking system if industry did not quickly create one on its own.[172] And even if industry did propose its own system, it was entirely subject to FCC approval.[173] Thus, the V-chip has been called "censorship by congressional intimidation."[174]

Yet this form of regulating by pressure is commonplace in the administrative context, and courts have given the FCC some latitude to engage in jawboning and "regulation by raised eyebrow."[175] And even if a court finds the V-chip to constitute state action, the government could still attempt to justify its regulations as the least restrictive means to advance a compelling interest. Unlike time channeling, the V-chip is narrowly tailored; it filters content on a *per program* basis, allowing fully customizable blocking of objectionable content. Moreover, if the TV programmers perform the ratings themselves, there are no problems with vaguely worded government regulations. On balance, the V-chip is likely constitutional. And all of this assumes that a TV station would challenge the regulations in the first place.

2. Effectiveness

Unfortunately, few parents take advantage of the V-chip. For instance, a study conducted by the Kaiser Foundation showed that only 15 percent of all parents have actually used the V-chip.[176] In 2000-2001, 14 percent of parents had not even heard of the ratings system; in 2004 that number increased to 20 percent.[177] Eighty-eight percent of parents did not know what the FV rating stood for.[178] A small portion of parents identified it as a positive label, thinking it meant "family viewing,"[179] but in reality it stands for "fantasy violence."[180] Part of the problem is that the system is so confusing: A study by the Annenberg Public Policy Center indicated that only 27 percent of parents could even figure out how to use the V-chip.[181]

And besides the low usage statistics, there have been problems with allowing the programmers to rate their own programming. One study in 2002 found that shows tend to be under-rated. For instance, according to the study, 68 percent of prime-time network shows not having an "adult language" label should have had it. And the problem went well beyond that category: "[I]n all four areas of sensitive material—violence, sexual behavior, sexual dialogue, and adult language—the large majority of programs that contain such depictions are not identified by a content descriptor."[182] The Kaiser study found that many parents concurred with this assessment: 39 percent of parents found the ratings to be inaccurate.[183]

Although many critics have condemned the V-chip as horribly ineffective,[184] the system does work from a technological standpoint. Parents who choose to learn and implement their TV's V-chip are empowered to block a program on the basis of its rating. The system breaks down only as a result of underutilization and inaccurate ratings.

B. Mandatory Ratings Scheme

In response to the shortcomings of the V-chip, Senator Mark Pryor introduced the Child Safe Viewing Act,[185] (commonly referred to as the "super V-chip" legislation), which would oblige the FCC to investigate new blocking technologies across a wide variety of distribution platforms.[186] The Senate Commerce Committee approved the bill in August 2007.[187]

The bill's key phrase directs that the new system "operate *independently of* ratings pre-assigned by the creator of such video or audio programming."[188] It would seem that there are two ways to accomplish this: (1) keep the core of the V-chip system but have an independent body perform the ratings; or (2) develop entirely new technologies that do not rely on ratings at all. This section will address the former.

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An independent ratings body is not a new concept. In the April Report, the FCC addressed this possibility, which it termed "viewer-initiated blocking and mandatory ratings."[189] The goal is to make the ratings more accurate—the networks have proven to be too biased to rate their own programs.

1. Constitutionality

Such government-mandated ratings are extremely vulnerable to First Amendment attacks. While the original V-chip legislation avoided constitutional problems by making the rating of programs voluntary,[190] a mandatory system runs much closer to impermissible governmental censorship. The constitutional analyses are similar, but there are key distinctions. A compulsory system involving a government-sponsored body is clearly state action. The government is not just pressuring; it is forcing. This exposes the system both to strict scrutiny (because the government is showing disapproval with speech on cable TV based on its content) and to vagueness challenges (because the government must supply the definitions). And as a more pragmatic consideration, TV programmers are far more likely to fight a mandatory system in court.

2. Effectiveness

Even aside from grave constitutional concerns, it is not clear that independent ratings would lead to significant improvement. In the April Report, the FCC said, "Experience leads us to question whether such a ratings system would ever be sufficiently accurate given the myriad of practical difficulties that would accompany any comprehensive effort to ensure the accuracy of ratings."[191] Other critics have expressed similar concerns.[192] Given the sheer amount of new TV programming, it would be a massive task for one independent body to rate everything in advance. Some have also questioned whether the ratings system of an independent body would be any more accurate or reliable than the networks' flawed system.[193]

C. Modern Technology

The second alternative of the Child Safe Viewing Act, a system wholly without ratings, is grounded in emerging technology—for example, engineers could invent an advanced filter that would scan a television signal for violent content at the end-user level. Such a filter would seemingly solve all of the shortcomings and drawbacks of other systems. It is nice to imagine one.

Unfortunately, the Act is overly optimistic to the extent that it is intended to make this a reality. Technology is nowhere near such advanced filtering. This is illustrated by failed attempts to filter internet web sites based on their content. The first problem is that a computer is insensitive to context. Internet filters work by matching words found on a web site with words on the filter's predetermined list.

> Thus, any prose, poetry, or educational material mentioning "breast," even in the innocuous sense of referring to a person's upper torso, or "sex," in the educational contexts of gender, safe sex, or sex education, would likely be filtered. This shortcoming was most starkly manifested a few years ago when sports fans were searching for information on "Super Bowl XXX."[194]

Even with extraordinarily simple word-to-word matches, filters have lacked the sophistication to assess content within its context.

The second problem is that pictures—and especially video streams—are too complicated to analyze with an algorithm. Regarding nudity in pictures, one scholar has noted, "The best machines in the world couldn't distinguish . . . a skin-zine from a medical text. And because automatic identification [is] impossible, the theorists told us, automatic filtering was computationally impossible as well."[195] It is true that speech recognition software can detect four-letter words, but scanning a video feed for depictions of violence is infinitely more difficult than scanning an audio stream. The size and density of video data, arranged in two dimensions, elevate the complexity to prohibitive levels. And that problem is compounded by the hopelessness of trying to teach a computer-based filtering device to judge violence within context—a subjective task difficult even for human beings.

D. A La Carte

The April Report spoke favorably about imposing on cable and satellite providers a requirement to offer channels "a la carte" (or "unbundling"), meaning consumers purchase cable channels on an individualized basis rather than buying groups of channels that are tied together. For example, a customer could purchase ESPN and the Discovery Channel without obligation to buy the remainder of the bundled basic-tier cable channels along with them. In recent years, the Commission has been a vocal advocate of unbundling, claiming it would save consumers money and restrict the flow of indecent and violent content.

1. Constitutionality

As an initial matter, not even a primarily economic regulation such as unbundling is completely immune from constitutional scrutiny. In reaction to the April Report, Professor Laurence Tribe testified before Congress that compelling cable networks to unbundle their channels violates the First Amendment.[198] Tribe argued that unbundling interferes with a cable provider's editorial discretion by depriving it of the ability to provide channels in chosen combinations.[199] "For example," testified Tribe, "a cable operator may wish to provide a public service by bundling C-SPAN or local public-access channels with more popular fare such as ESPN."[200] While Tribe may place more emphasis on cable providers' editorial discretion than do others,[201] his testimony nonetheless highlights a potential hurdle for a la carte.

2. Effectiveness

Even if unbundling is constitutional, it does not seem likely to be effective in combating media violence. The problem is that there is a variety of content—some violent, some innocuous—on *each* channel. Violence on television is not segregated by channel, and attempting to make a distinction between "good" and "bad" channels is not helpful. Outside of the premium channels (HBO, Showtime, etc.), there is little difference in the level of violence among any other stations. In fact, network programming is frequently the worst offender,[202] but it does not seem likely that many parents would request, for example, that CBS be blocked from their household. Compounding the problem, commercials and promos for shows on other channels, which may or may not be in a viewer's subscription plan, can be just as offensive as the shows themselves.

V. RECOMMENDATIONS

Before recommending the best course of action, we should clearly identify why Congress wishes to regulate in the first place. There are two reasons, closely corresponding to the *Ginsberg* interests: (1) aiding parental authority to shield their children from TV violence, and (2) limiting all children's exposure in order to decrease violence on a broader societal level. These are two very different aspects of the TV violence problem, and each requires a separate course of action. On the whole, the solutions advanced here are non-coercive. This eliminates First Amendment challenges and invites cooperation between government and industry.

A. Aiding Parental Authority Over Their Children

The first concern is that TV stations are injecting unwanted and inappropriate material into the homes of Americans, bypassing the parents' right to raise their children as they see fit. This is of some concern because parents cannot monitor a child's viewing all hours of the day. But if the focus remains solely on parental rights, the V-chip and other forms of viewer-initiated blocking have mostly solved this problem already.

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1. Suggestions

Studies evaluating V-chip usage offer puzzling results. The vast majority of parents think there is too much violence on TV; yet at the same time, the vast majority of parents do not use the V-chip.[203] On first glance, the most obvious answer to the discrepancy is that parents are generally unaware of their ability to block programs. To remedy this problem, the TV industry poured over $550 million into a V-chip education initiative, the "TV Boss" campaign, which began in 2005 and featured TV ads where a mother speaks with fictional characters—a biker gang or the mafia—and explains to them they are inappropriate for her children's viewing.[204] But none of this seems to have worked. The most recent poll, funded by the Parents Television Council[205] and conducted separately in September 2006 and March 2007, asked the following questions:

> 1.) Do you agree or disagree that there is too much sex, violence and coarse language on television?
>
> 2.) In the past week, how many times have you used your V-chip or cable box parental controls to block unwanted content from your television?
>
> 3.) Define the content descriptors D,L,S,V (Dialog, Language, Sex and Violence) by choosing the correct answer out of four options.
>
> On the "too much violence" question, 80% said yes in September, 79% in March; 87% said they had not used the V-chip in September, 88% in March; and only 7% could pick the right descriptors definition in September, 8% in March.[206]

With $550 million spent at their benefit, parents have certainly been given an opportunity to learn about the V-chip.[207] Dozens of websites contain information about the ratings, and almost all television sets are equipped to block violent programs. So why is there still such a wide discrepancy between parental concern and V-chip usage? Though mildly disconcerting, I offer this explanation: Many parents simply do not care as much as they say they do.

Nothing moves industry like consumer demand. Yet after twelve years since viewer-initiated blocking was passed into law, few parents have bothered to take notice. If parents were truly interested in a system that allowed them to shield their children from TV violence, industry would have adjusted to that demand. V-chip interfaces would be user-friendly (they are not); ratings would be in accord with societal attitudes toward what content is inappropriate (they are not); and the term "V-chip" might even be in common vocabulary (it is not). At bottom, the failure of the V-chip is due, at least in part, to the lack of a willing consumer market for it. For all the polls where parents claim to condemn the violent content on TV, their superficial preferences have not moved them to act.

This is not to say that all parents are apathetic. Indeed, 10-15 percent of parents use the V-chip.[208] Of those that do not, many explained the reason was that they were usually present when their children watch TV.[209] Moreover, there are other forms of viewer-initiated blocking. Many cable subscribers have set-top boxes that allow parents to block shows with certain ratings, with certain titles, by time and date, or by channel.[210] Satellite TV subscribers have access to similar features, such as DirecTV's Locks & Limits feature or Dish Network's Adult Guard.[211] Whether by direct supervision or through technological solutions, parents are largely empowered to control content viewed by their children. To the extent that critics have called the V-chip a failure, no one ever claimed that the chip does not do what it is supposed to.

Because the V-chip and other content blockers give parents authority to control their children's viewing habits, Congress should take only minimal efforts on this front. The best solution is to make improvements on the system that is already in place. This is best accomplished by devoting government funds to further public education. The more people know about viewer-initiated blocking, the more common its use will be. The $550 million spent by industry was a start, but the V-chip never entered the public consciousness quite like other outcomes of consumer education—for example, the Y2K scare.[212] Congress recently appropriated $1.5 billion to the digital TV transition campaign,[213] and it may want to consider funding the TV violence campaign as well. As advocated by Commissioner Adelstein's opinion in the April Report, the FCC could initiate a multi-faceted program that would expand industry-led education efforts such as TV Boss; ensure all programming is rated, including news, promotions, and commercials; promote media literacy at schools; and encourage the development of enhanced V-chip capabilities.[214]

A less preferred method of increasing usage is to simplify the ratings categories. For example, parents might be more willing to learn a system based solely on the age-based ratings (Y, Y7, G, PG, 14, MA) without content-based ratings (S, L, V, FV, D),[215] much like movie ratings. However, this simplification comes at a price. Part of the appeal of the V-chip is in its customization capabilities. Some parents might permit their children to watch programs with adult language but deny them programs with violence. The marginally higher cost in complexity is well worth the ability to use combinations of the content ratings to suit a particular parent's taste.

All of this still leaves the challenge of fixing the inaccuracy of the TV programmers' voluntary self-ratings. The FCC's April Report referenced an economist who studied the problem of why networks under-rate their programs.[216] According to James Hamilton, programs with more restrictive ratings command lower advertising rates; so the programmers are responding to economic incentives.[217] As described above,[218] the First Amendment likely prevents the government from supplying the ratings, and in any case, the FCC lacks the resources to rate every TV program. Thus, the solution of making the ratings more accurate will have to come from within industry.

This is a serious problem, but it is best reduced through increased public education as well. A greater awareness of the ratings system would lead to more recognition of the discrepancy between the content of a television show and what the ratings say is the content of that show. And if TV ratings were to become familiarly discussed—as much as movie ratings, for example—industry might feel pressure to adjust to consumer preferences. Frequent public discussion, and in particular viewer complaints, would give TV stations a tangible incentive to keep their ratings in accord with society's desires.

2. Advantages

Making adjustments to the current system has several advantages. First, the government would avoid lengthy court battles involving unpredictable cases in front of unpredictable judges. As described above, the TV programmers have an exceptionally weak First Amendment argument against the V-chip, and they would be unlikely to challenge a voluntary system. If persistent public pressure means that content restrictions will probably occur in some form, then the TV stations prefer to have control over the restrictions. The stations are not likely to attack a mild burden, the demise of which could lead to a more onerous burden.

The second advantage is that the system is already in place. Over the past eight years, TV manufacturers have become accustomed to inserting a device into their televisions, TV programmers have become accustomed to rating their programs, and viewers have become accustomed to ratings appearing on their television screens. By merely updating the V-chip, the industry does not have to restructure itself. And the V-chip is cheap to manufacture, especially compared to the overall cost of television sets.[219] Moreover, the latest generation of the V-chip technology, which by FCC mandate must be installed in most new digital TVs, can be adapted to modify

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future rating systems.[120] Such flexibility allows for adjustments in the future. The V-chip is also readily adaptable to computers and cell phones if either one proves to be the dominant video device of the future. Finally, the V-chip offers comprehensiveness and customizable control. The chip works with all TV signals, not just broadcasts, and, rather than fully ban programming, it permits parents to selectively block it.

B. Decreasing Violence in Society

The second problem with TV violence that needs to be addressed is on a broader cultural level—that exposure to violent acts at a young age can contribute to an aggressive, hostile, gun-filled society that is harmful to everyone. The thought is that if children are not desensitized to aggression at an early age, perhaps societal violence will diminish.

Given parents' apparent lack of interest in blocking violent programming, the only governmental solution here is some form of time channeling, as a sort of congressional substitution for good parenting. *ACT III*-style time channeling can only be applied to the broadcast medium, and even then, it is probably too blunt to be constitutional.[221] A more nuanced solution is in order. Perhaps a voluntary "family hour"—one or two hours during prime time—would be more successful. Congress worked *with* industry (rather than regulating at industry) to launch the V-chip, and a similar path could work here. To initiate further efforts by TV stations, Congress could consider legislation that explicitly exempts from antitrust law both a family hour and a universal television code.[222] This would permit a comprehensive undertaking from broadcasting, cable, satellite, and advertising companies to establish an inter-industry code for TV violence.[223] With all TV delivery formats cooperating, Congress could encourage a pledge that peak times of children's viewership will be free from violence. It is not a complete solution, but it is probably the best that the First Amendment will allow; and it carves out at least some media violence.

As previously mentioned,[224] the last time that industry banded together to implement a family hour, a federal district court struck it down based in part on the First Amendment and the state action doctrine. Thus, Congress would have to avoid an application of the state action doctrine by limiting governmental pressure and truly letting industry take the lead. While it may be somewhat optimistic to hope that industry will be so accommodating, it is the most effective solution within constitutional boundaries.

VI. CONCLUSION

Acts of aggression and violence in the media are omnipresent—a point with which even the Media Associations agree, as they argued in their comments:

> [T]he effect of regulating "violent" programming, especially as it is broadly defined by some critics, would be far more widespread than with indecency, as it would impose a wholesale reordering of programming available on television. . . . [T]he National Television Violence Study suggested that "[v]iolence predominates on television." As a result, a "safe harbor" requirement for violence could mean that much television programming would be relegated to what the D.C. Circuit has described as "broadcasting Siberia."[225]

To be sure, it is a brash argument by the Media Associations to use their own proliferation of violence as a reason to continue the violence. But they have a point. "Broadcasting Siberia" is the regrettable result of overly severe regulations, and this is neither constitutional nor desirable.

Some price must be paid for free speech. The marketplace of ideas is teeming with good ideas and bad ideas alike. Sometimes it may be tempting to suppress a bad idea that is flourishing, but the First Amendment reflects the reality that "one man's vulgarity is another's lyric."[226] It is no different for media violence, and Congress and the FCC should carefully evaluate their First Amendment limits before leaping to action. The solutions proposed in this article represent the best ways to minimize the harmful effects of TV violence while not running afoul of the First Amendment.

1 This is an old quotation from Newton Minow, a former chair of the FCC. See Emily Watson, *There's No Violence in Mr. Rogers' Neighborhood,* GUELPH MERCURY, Dec. 20, 2007, at A9.
2 John Eggerton, *Violence: The New Indecency? Washington Considers A Crackdown On TV Gore,* BROADCASTING AND CABLE, Jan. 22, 2007, at 18.
3 "Indecency" and "obscenity" each have specific meanings in First Amendment cases. *See infra* Part II.A.1.
4 *Violence in the Media: Hearing Before the S. Comm. on Commerce, Science and Transportation,* 110th Cong. (2007) (statement of Dr. Dale Kunkel, Professor, Department of Communication, University of Arizona).
5 *See infra* Parts II.A.2, II.B.1.
6 *See infra* Part III.A.
7 William W. Van Alstyne, *First Amendment Limitations on Recovery from the Press—An Extended Comment on "The Anderson Solution"*, 25 WM. & MARY L. REV. 795, 818 (1984). Alstyne was writing about libel law, but his First Amendment observations are well applied to this discussion.
8 The V-chip was created by industry in response to the Telecommunications Act of 1996, Pub. L. No. 104-104, § 551, 110 Stat. 139-42 (1996), which authorized the FCC to devise its own system of viewer-initiated blocking. *See infra* Part IV.A.
9 For a detailed account of the V-chip's effectiveness, *see infra* Part IV.A.2.
10 On March 14, 2005, the Senator Rockefeller introduced the Indecent and Gratuitous and Excessively Violent Programming Control Act of 2005, S. 616, 109th Cong. (2005). This bill provides that the FCC should closely examine violence on television and, if it determines there is a problem, to take remedial measures such as time channeling. Id. Similarly, in 2007 Senator Mark Pryor introduced the Child Safe Viewing Act, S. 602, 110th Cong. (2007). For more information, *see infra* Part IV.B.
11 Letter from Joe Barton, Chairman, U.S. House of Representatives Committee on Energy and Commerce to Michael K. Powell, Chairman, FCC (Mar. 5, 2004).
12 *Violent Television Programming and Its Impact on Children*, 22 F.C.C.R. 7929 (2007).
13 *Id.* at 7931.
14 *Id.* The Report also evaluated a third option: continuing with V-chip-like blocking but have the programs rated independently. *Id.* at 7941. While the Commission opined that this was likely constitutional, it expressed doubts that this option would be effective in practice. *See infra* Part IV.B.2.
15 *Violent Television Programming, supra* note 12, at 7931.
16 *Id.* at 7959 (statement of Jonathan S. Adelstein).
17 *Id.* ("Specifically, this Report does not deal adequately with the constitutional dimensions of regulating violent content on free over-the-air TV, or subscription-based cable and satellite TV services. In fact, it muddies the issues and legal distinctions . . . .").
18 U.S. CONST. amend. I.
19 Media Associations Comments at 44, *Violent Television Programming and its Impact on Children,* 22 F.C.C.R. 7929 (2007) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).
20 Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989). *See generally* RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 4:2 (2007).
21 Many of these examples highlighting the problem of vagueness are taken from Media Associations Comments, *supra* note 19, at 42-43.
22 National Hockey League Comments, *Violent Television Programming and its Impact on Children*, 22 F.C.C.R. 7929 (2007).
23 Paul M. Smith & Katherine A. Fallow, *Bam! Pow! Splat! Ssssss... FCC'S Proposal to Restrict Violence on Television Won't Work for the Constitution or the Kids,* LEGAL TIMES, May 7, 2007, at 70. See also *infra* Part II.A.2.
24 UCLA CENTER FOR COMMUNICATION POLICY, THE UCLA TELEVISION VIOLENCE REPORT § II.D.1 (1997). The report stated, "The rationale and methodology of this monitoring project are based on the belief that not all violence is created equal. While parents, critics and others complain about the problem of violence on television, it is not the mere presence of violence that is the problem." *Id.*
25 Both obscentiy and indecency carve out exceptions for these categories of speech. *See infra* Part II.A.2.
26 Patricia M. Wald, *Doing Right by Our Kids: A Case Study in the Perils of Making Policy on Television Violence,* 23 U. BALT. L. REV. 397, 417 (1994).
27 Lawrence J. Siskind, *The Folly and Futility of Censoring Violence: There's Not Much of a Basis for Suing the Entertainment Industry for the Violent Acts of Viewers, and There's Not Much of a Case for Regulation Either,* LEGAL TIMES, Nov. 22, 1993, at 28.
28 The Report listed three factors: the presence of weapons, whether the violence is extensive or graphic, and whether the violence is realistic. *Violent Television Programming, supra* note 12, at 7948-49.
29 Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975).
30 See Media Associations Comments, *supra* note 19, at 44.
31 American Civil Liberties Union Comments at 4, *Violent Television Programming and its Impact on Children*, 22 F.C.C.R. 7929 (2007) (citing FEDERAL TRADE COMMISSION, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A REVIEW OF SELF-REGULATION AND INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING, & ELECTRONIC GAME INDUSTRIES (2000)).
32 *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 743 (1978). The Court stated: It is true that the Commission's order may lead some broadcasters to censor themselves. At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern. The danger dismissed so summarily in Red Lion, in contrast, was that broadcasters would respond to the vagueness of the regulations by refusing to present programs dealing with important social and political controversies. *Id.* (internal citations omitted). *See also* Action for Children's Television v. FCC, 58 F.3d 654, 659 (D.C. Cir. 1995).
33 *See, e.g.*, Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051 (N.D. Ill. 2005); Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180 (W.D. Wash. 2004). One the other hand, one case, *Video Software Dealers Ass'n v. Schwarzenegger,* 401 F. Supp. 2d 1034 (N.D. Cal. 2005), explicitly refused to hold the definition of a violent video game vague.
34 404 F. Supp. 2d 1051 (N.D. Ill. 2005).
35 *Id.* at 1077.
36 *Id.*
37 *Id.*
38 *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 743 (1978); Hamling v. United States, 418 U.S. 87, 118 (1974); Action for Children's Television v. FCC, 58 F.3d 654, 659 (D.C. Cir. 1995) ("*ACT III*"). "[I]f acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge is not implicit in *Pacifica,* we have misunderstood Higher Authority and welcome correction." Action for Children's Television v. FCC, 852 F.2d 1332, 1339 (D.C. Cir. 1988) ("ACT I").
39 Miller v. California, 413 U.S. 15 (1973).
40 *Id.* at 24.
41 Bruce Horovitz, NFL *Strives to Ensure Superclean Super Bowl,* USA TODAY, Jan. 20, 2005, at 01A.
42 PARENTS TELEVISION COUNCIL, DYING TO ENTERTAIN 1 (2007), *available at* http://www.parentstv.org/ PTC/publications/reports/violencestudy/DyingtoEntertain.pdf.
43 *See Violent Television Programming, supra* note 12, at 7947. See also Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001) (Judge Posner referencing classic literature).
44 *See, e.g., Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005,* 21 F.C.C.R. 13299 (2006).
45 The eight factors were: (1) the nature of the perpetrator, including in particular whether the perpetrator is attractive; (2) the motive or reason for the violence, including whether it is morally defensible or unjustified; (3) the presence of weapons; (4) whether the violence is extensive or graphic; (5) whether the violence seems realistic; (6) whether the violence is explicitly rewarded or goes unpunished; (7) the consequences of violence for the victim; (8) whether the violence is portrayed as humorous. Wilson et al., *Violence in Children's Television Programming:* Assessing the Risks, 52 J. COMM. 5 (2003).
46 Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) ("The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.").
47 Ginsberg v. New York, 390 U.S. 629, 639-40 (1968).
48 *Id.*
49 *Id.* at 631-32.
50 Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995) ("ACT III").
51 *Id.* at 660. The Supreme Court did not grant certiorari. Id., cert. denied, 516 U.S. 1043 (1996).
52 *ACT III*, 58 F.3d at 678-79 (Edwards, J., dissenting). Judge Edwards wrote a thorough dissent in *ACT III*, criticizing many aspects of time channeling. *See id.*
53 *See infra* Part III.B.
54 *See infra* Part IV.A-B.
55 *Action for Children's Television*, 50 F.C.C.2d 17, 26 (1974).
56 *See, e.g., ACT III*, 58 F.3d at 678-79; Ginsberg v. New York, 390 U.S. 629, 639-40 (1968). But see Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001). *Kendrick* is an important exception because it rejected parents' rights to enlist the state in aiding them from shielding their children from violent video games. *See id.*
57 Violent Television Programming, *supra* note 12, at 7931.
58 Media Association Comments, *supra* note 19, at 1.
59 *See, e.g.*, Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954 (8th Cir. 2003); Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001); Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051 (N.D. Ill. 2005); Video Software Dealers Ass'n v. Schwarzenegger, 401 F. Supp. 2d 1034 (N.D. Cal. 2005); Entm't Software Ass'n v. Granholm, 404 F. Supp. 2d 978 (E.D. Mich. 2005); Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180 (W.D. Wash. 2004). The common thread running through these cases is a movement toward giving strong protection to video games. *See generally* Jon B. Robinson, *From Pong to Porn: Considering the First Amendment, Violent Video Games, and the Federal Trade Commission's Constitutional Concerns*, 52 LOY. L. REV. 409 (2006).
60 *Ginsberg*, 390 U.S. at 641.
61 *Id.*
62 *ACT III*, 58 F.3d at 661-63. "With respect to the second question begged by petitioners, the Supreme Court has never suggested that a scientific demonstration of psychological harm is required in order to establish the constitutionality of measures protecting minors from exposure to indecent speech." Id. at 661-62. See also Bethel School District No. 403 v. Fraser, 478 U.S. 675, 684 (1986) (no requirement of a scientific demonstration of psychic injury where there was an interest in protecting students from an indecent speech at a high school assembly).
63 Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001).
64 *Id.* at 573.
65 *Id.* at 578-79.
66 *Id.* at 579.
67 These cases frequently cite to the Supreme Court case *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997), where an oft-quoted line says that the government must show the "harms are real, not merely conjectural." *Id.* at 664. It is worth noting that *Turner* dealt with must-carry provisions whereby cable providers were forced to transmit certain third party signals. *See id.* at 630-32. The asserted "harm" was completely different, as the regulation was intended to ensure a multiplicity of information sources, not to protect the well-being of minors. *See id.* at 663.
68 *Kendrick*, 244 F.3d at 577.
69 *Id.*
70 *Id.*
71 *Id.*
72 *Id.*

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73 It should be noted that some scholars do no think there should be any distinction at all. They have argued that violence should be outside the First Amendment just like obscenity. *See, e.g.*, KEVIN W. SAUNDERS, VIOLENCE AS OBSCENITY: LIMITING THE MEDIA'S FIRST AMENDMENT PROTECTION (l996) ("Violence is at least as obscene as sex. If sexual images may go sufficiently beyond community standards for candor and offensiveness, and hence be unprotected, there is no reason why the same should not be true of violence.").
74 *See supra* Part II.A.2.
75 Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 NW. U. L. REV. 1487, 1524 n.176 (1995). *See also* Reno v. ACLU, 521 U.S. 844, 874 (1997); Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).
76 Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) (plurality). *See also* FCC v. Pacifica Found., 438 U.S. 726, 744-45 (1978) (plurality).
77 Media Associations Comments, supra note 19, at 29. See also Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180, 1182 (W.D. Wash. 2004).
78 Craig A. Anderson & Karen E. Dill, *Personality Processes and Individual Differences—Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and in Life*, 78 J. PERSONALITY & SOC. PSYCH. 772 (2000).
79 *See* Entm't Software Ass'n v. Granholm, 404 F. Supp. 2d 978, 982 (E.D. Mich. 2005). The Michigan legislature used the Kronenberger study as part of its justification to regulate violent video games. *Id.*
80 Robinson, *supra* note 59, at 443.
81 Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 578 (7th Cir. 2001).
82 404 F. Supp. 2d 978 (E.D. Mich. 2005).
83 *Kendrick*, 244 F.3d at 982.
84 *Government's Role in Television Programming: Hearing Before the Subcomm. on Oversight of Gov't Mgmt., Restructuring and the Dist. of Columbia of the S. Comm. on Governmental Affairs*, 105th Cong. 3 (1997) (statement of Jeffrey I. Cole, Director, UCLA Center for Comm. Policy).
85 *Violent Television Programming, supra* note 12, at 7932.
86 *Id*. at 7934.
87 *Id*. (quoting AMERICAN ACADEMY OF PEDIATRICS ET AL., JOINT STATEMENT ON THE IMPACT OF ENTERTAINMENT VIOLENCE ON CHILDREN (2000)). The statement said: • Viewing violence can lead to emotional desensitization towards violence in real life. • Children exposed to violent programming at a young age have a higher tendency for violent and aggressive behavior later in life than children who are not so exposed. • Children exposed to violence are more likely to assume that acts of violence are acceptable behavior. • Viewing violence increases fear of becoming a victim of violence, with a resultant increase in self-protective behaviors and a mistrust of others. *Id.*
88 *See, e.g.*, Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180 (W.D. Wash. 2004). Judge Lasnik did not attempt to hide his contempt for violent video games, and he did not foreclose the possibility of a regulation that could be consistent with the First Amendment. See id. at 1190.
89 542 U.S. 656 (2004).
90 *Id*. at 661. The Court explained the statute in detail: In response to the Court's decision in *Reno*, Congress passed COPA. COPA imposes criminal penalties of a $50,000 fine and six months in prison for the knowing posting, for "commercial purposes," of World Wide Web content that is "harmful to minors." § 231(a)(1). Material that is "harmful to minors" is defined as: "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that- "(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest; "(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and "(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." § 231(e)(6). Id. at 661-62.
91 *Id*. at 667.
92 529 U.S. 803 (2000).
93 *Id*. at 806.
94 *Id*. at 815.
95 Moore's Law predicts that the number of transistors that can be placed on a silicon chip continues to double at regular intervals for the foreseeable future, and this roughly corresponds to a doubling of technological capabilities. John Markoff, *It's Moore's Law, But Another Had the Idea First, N.Y. TIMES*, Apr. 18, 2005, at C1.
96 *Complaints Regarding Various Television Broadcasts, supra* note 44, at 13318.
97 See Nielsen Media Research, *Top 10 Broadcast TV Programs for the Week of September 18, 2006; Nielsen Media Research, Top 10 Cable TV Programs for the Week of September 18, 2006*.
98 R. Thomas Umstead, *Nets Survive '24,' 'Idol': Basic Channels Hold Serve Against Broadcast's Best*, MULTICHANNEL NEWS, Feb. 5, 2007, at 6. Four networks, with almost half of TV viewership, are dominant. In fact, among households, broadcasting accounted for 348 of the top 349 programs for the 2006-2007 season. Broadcast TV Dominated Program Rankings in 2006-2007 Season, TVB RESEARCH CENTRAL, available at http://www.tvb.org/rcentral/ViewerTrack/FullSeason/fs-b-c.asp?ms=2006-2007.asp.
99 James Poniewozik, *An Unkind Cut*, TIME, Feb. 14, 2008, at 20. Poniewozik continued, "The network has had a successful formula for years with series like CSI and Criminal Minds, bloody odes to killers and the science nerds who catch them." Id.
100 *See generally* Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 449-51 (2d Cir. 2007) (noting that after Pacifica in 1978, the FCC would not find another broadcast indecent until 1987, and a restrained enforcement policy continued until 2003 when the frequency of fines dramatically increased).
101 *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978); Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995).
102 *See, e.g.*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502-03 (1952).
103 395 U.S. 367 (1969).
104 *Id*. at 388.
105 *See id*. at 389-90.
106 Pacifica Found. v. FCC, 556 F.2d 9, 29 (D.C. Cir. 1977). Although the government attempted to argue that *Red Lion* justified regulations on broadcast indecency, the circuit court's opinion in *Pacifica* articulated the limitations of the scarcity rationale. See id. Spectrum scarcity is a reason for forcing broadcasters to offer diverse viewpoints on political matters; but censorship works in the opposite direction by removing certain types of speech from public discourse. *See id.*
107 438 U.S. 726 (1978).
108 *Id*. at 729-30.
109 *Id*. Pacifica argued that the monologue was a social satire intending to point out that the words are essentially harmless and that society tends to overreact to them. *Id*. at 730.
110 *Id*. at 730. While the FCC did not impose formal sanctions, it did issue an order that would be "associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress." *Id*.
111 *See id*. at 734.
112 *Id*. at 744.
113 *Id*. ("And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection.").
114 *Id*.
115 *See id*. at 748-50.
116 *Id*. at 749. Note that the two rationales cited in this part of the *Pacifica* opinion have come under intense scrutiny, especially as the evolving structure of the TV and video entertainment industry has changed the unique status of the broadcast medium.
117 *Id*. at 749.
118 *Id*.
119 *Id*.
120 *Id*. at 750. Listing specific examples of how the case may have come out differently, the Court stated, "This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy." *Id*.
121 *Id*.
122 *See, e.g., Infinity Broad. Corp. of Penn. et al.*, 3 F.C.C.R. 930 (1987).
123 The procedural history of this case is indeed a long and elaborate series of events. For a full detail of the procedural posture, see Action for Children's Television v. FCC, 58 F.3d 654, 658-59 (D.C. Cir. 1995).
124 Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949 (1992).
125 Specifically, the law stated: The Federal Communications Commission shall promulgate regulations to prohibit the broadcasting of indecent programming—(1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and (2) between 6 a.m. and 12 midnight on any day for any radio or television broadcasting station not described in paragraph (1). § 16(a).
126 *Id*.
127 Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995) ("*ACT III*").
128 *Id*. at 659.
129 *Id*.
130 *Id*. (quoting Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989)) (edits in original).
131 *Id*. at 659-60.
132 *Id*. at 660.
133 *Id*. The court stated, "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*.
134 *Id*. at 665. At the time, the data showed that while 4.3 million (21 percent) of teenagers watched broadcast television between 11:00 and 11:30pm, the number fell to 3.1 million (15.2 percent) between 11:30pm and 1:00am, and to less than 1 million (4.8 percent) between 1:45 and 2:00 a.m. *Id.*
135 *Id*. at 667.
136 *Id*. at 667-68.
137 *Id*. at 669-70.
138 *Id., cert. denied*, 516 U.S. 1043 (1996).
139 Cable and Satellite, as well as the internet, have been given stronger First Amendment protections. Time channeling would clearly not be constitutional in any of these media. Also, it is noteworthy that the April Report recommended time channeling as a feasible solution. *Violent Television Programming, supra* note 12, at 7940-41.
140 *See infra* Part V.B.
141 Writers Guild of Am., W., Inc. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976). In general, the court held that the FCC exerted too much pressure on the networks, constituting governmental action; that family hour was unconstitutional against the First Amendment; and that the FCC should have followed the procedures of the APA rather than engage in jawboning. *See id.*
142 Those grounds were that the primary jurisdiction of the case should have rest with the FCC. Writers Guild of Am., West, Inc. v. American Broad. Co., Inc., 609 F.2d 355 (9th Cir. 1979). In holding that primary jurisdiction was with the FCC, the court quoted *ACT I*: The Commission, as the expert agency entrusted by Congress with the administration and regulation of the crucial, dynamic communications field, required and deserves some latitude in carrying out its substantial responsibilities. It may not be the sole guardian of the public's interest in broadcasting licensees, the courts and the general public in varying ways share responsibility with it for defining and advancing that interest but, in the formulation of broadcast policy, the Commission nevertheless must continue to play a leading role. If our relationship with the Commission and other federal agencies is to remain a partnership, we may not succumb to the temptation of casting ourselves in the unsuited role of Primus inter pares. Id. at 366 (quoting Action for Children's Television v. FCC, 564 F.2d 458, 482 (D.C. Cir. 1977)).
143 See The Museum of Broadcast Communications, *Family Viewing Time*, http://www.museum.tv/archives/etv/F/htmlF/familyviewin/familyviewin.htm.
144 Although *ACT III* did not mention *Writers Guild*, its constitutional principles implicitly overturn much of the *Writers Guild* holding.
145 Children's Protection from Violent Programming Act, H.R. 910, 105th Cong. (1997).
146 *See* Michelle R. Davis, *Senator Sees Progress in Effort to Limit Television Violence*, THE STATE (COLUMBIA, S.C.), May 14, 1999.
147 *Violent Television Programming, supra* note 12, at 7931.
148 The FCC did this in *ACT III*, which was critical to the validity of its regulation. *ACT III*, 58 F.3d at 665. At the time, the Commission found: The data collected by the FCC and republished in the Congressional Record for June 1, 1992, indicate that while 4.3 million, or approximately 21 percent, of "teenagers" (defined as children ages 12 to 17) watch broadcast television between 11:00 and 11:30 p.m., the number drops to 3.1 million (15.2 percent) between 11:30 p.m. and 1:00 a.m. and to less than 1 million (4.8 percent) between 1:45 and 2:00 a.m. 138. Comparable national averages are not available for children under 12, but the figures for particular major cities are instructive. In New York, for example, 6 percent of those aged 2 to 11 watch television between 11:00 and 11:30 p.m. on weekdays while the figures for Washington, D.C., and Los Angeles are 6 percent and 3 percent, respectively. *Id.* (internal citations omitted). More recently, the Commission has said that 68 percent of children aged eight to eighteen are reported to have a television set in their bedrooms. *Complaints Regarding Various Television Broadcasts*, *supra* note 44, at 13318. Moreover, nearly half of those television sets do not have cable or satellite connections. *Id*.
149 *Violent Television Programming, supra* note 12, at 7939-40.
150 *Complaints Regarding Various Television Broadcasts, supra* note 44, at 13318-19. Moreover, cable stations carry broadcast signals as "duplicates," further blurring the line between the media.
151 U.S. v. Playboy Entm't Group, 529 U.S. 803, 814 (2000) ("[T]he answer should be clear: The standard is strict scrutiny.").
152 Idaho Department of Administration, Information Technology Resource Management Control, *Cyber Security Awareness: Protecting Our Children from Online Predators and Other Internet Threats*, http://adm.idaho.gov/about/fact_sheets/CyberSecurityOct06.pdf.
153 141 CONG. REC. S8332 (daily ed. June 14, 1995) (remarks of Sen. Coats).
154 *See, e.g.*, Ashcroft v. ACLU, 542 U.S. 656, 666-67 (2004); Reno v. ACLU, 521 U.S. 844, 870 (1997) (stating that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium").
155 *See* National Association of Broadcasters Comments at 25, *Violent Television Programming and its Impact on Children*, 22 F.C.C.R. 7929 (2007).
156 *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 867 (1997) (noting that broadcast television has always enjoyed less First Amendment protection than other media).
157 *See Complaints Regarding Various Television Broadcasts, supra* note 44, at 13318 (providing that "[t]he broadcast media continue to have 'a uniquely pervasive presence' in American life").
158 For instance, the Second Circuit expressed serious doubts about whether the FCC's indecency guidelines are consistent with the First Amendment. Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007). In a long section of dicta devoted to free speech concerns, the court wrote that it was troubled by the vagueness of the guidelines and the notion that the Commission was prohibiting speech based on its subjective view of the speech's merit. *Id*. at 463-64. But on the contention that *Pacifica's* rationales have eroded, the court rebuffed: "Whatever merit these arguments may have, they cannot sway us in light of Supreme Court precedent." *Id*. at 465.
159 FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).
160 Action for Children's Television v. FCC, 58 F.3d 654, 660 (D.C. Cir. 1995) ("*ACT III*"). The court in *ACT III* borrowed much from *Sable*. *See* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989).
161 In *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984), a Supreme Court case addressing a regulation forbidding some public stations to engage in editorializing, the Court used a test that sounds like intermediate scrutiny: "restriction is narrowly tailored to further a substantial government interest . . ." Id. at 380. Moreover, a footnote in that case arguably confirms that Pacifica was decided under intermediate scrutiny: This Court's decision in FCC v. Pacifica Foundation, upholding an exercise of the Commission's authority to regulate broadcasts containing "indecent" language as applied to a particular afternoon broadcast of a George Carlin monologue, is consistent with the approach taken in our other broadcast cases . . . . The governmental interest in reduction of those risks through Commission regulation of the timing and character of such "indecent broadcasting" was thought sufficiently substantial to outweigh the broadcaster's First Amendment interest in controlling the presentation of its programming. Id. at 380 n.13 (emphasis added) (internal citations omitted). Note that the Court distinguished that case from Pacifica: "In this case, by contrast, we are faced not with indecent expression, but rather with expression that is at the core of First Amendment protections, and no claim is made by the Government that the expression of editorial opinion by noncommercial stations will create a substantial "nuisance" of the kind addressed in FCC v. Pacifica Foundation." *Id.*
162 The bill that prompted the April Report made the empty assertion that time channeling is a narrowly tailored means if viewer-initiated blocking is ineffective. (19) After further study, pursuant to a rulemaking, the Federal Communications Commission may conclude that content-based ratings and blocking technology do not effectively protect children from the harm of violent video programming. (20) If the Federal Communications Commission reaches the conclusion described in paragraph (19), the channeling of violent video programming will be the least restrictive means of limiting the exposure of children to the harmful influences of violent video programming. Children's Protection from Violent Programming Act, H.R. 910, 105th Cong. (1997).
163 *See, e.g.*, U.S. v. Playboy Entm't Group, 529 U.S. 803 (2000).
164 Telecommunications Act of 1996, Pub. L. No. 104-104, § 551, 110 Stat. 139-42 (1996).
165 *Id.*
166 *See Implementation of Section 551 of the Telecommunications Act of 1996*, 13 F.C.C.R. 8232, 8232 (1998).
167 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, 827 (1999).
168 *Id.*
169 Telecommunications Act of 1996, Pub. L. No. 104-104, § 551, 110 Stat. 56, 111-112 (codified at 47 U.S.C. § 303(x) (2006)).
170 Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).
171 Fitzgerald Ryan, *supra* note 167, at 828. *See also Denise R. Polivy, Virtue By Machine: A First Amendment Analysis of the V-Chip Provisions of the Telecommunications Act of 1996*, 29 CONN. L. REV. 1749, 1772 (1997).
172 Telecommunications Act of 1996, Pub. L. No. 104-104, § 551(b), (e), 110 Stat. 139-42 (1996). *See also* Fitzgerald Ryan, *supra* note 167, at 828.
173 Id. § 551(e) (providing that industry's proposal is only valid "if the Commission determines, in consultation with appropriate public interest groups and interested individuals from the private sector, that distributors of video programming have" created an acceptable system).
174 Lawrie Mifflin, *Senator Tells Networks to Revamp New Ratings*, N.Y. TIMES, June 4, 1997, at C13.
175 Writers Guild of Am., W., Inc. v. American Broad. Co., Inc., 609 F.2d 355, 365 (9th Cir. 1979). While the court was troubled by the FCC's actions in this case, the court eventually deferred to the FCC: "The development of standards governing the agency's use of informal methods to influence broadcast industry policy is an issue 'that should be dealt with in the first instance by those especially familiar with the customs and practices of the industry.'" *Id*. at 365-66 (quoting Ricci v. Chi. Mercantile Exch., 409 U.S. 289, 305 (1973)).
176 PARENTS, MEDIA AND PUBLIC POLICY: A KAISER FAMILY FOUNDATION SURVEY 7 (2004) [hereinafter KAISER STUDY].
177 *Id*. at 6.
178 *Id.*
179 *Id.*
180 *Id.*
181 ANNENBERG PUBLIC POLICY CENTER, PARENTS' USE OF THE V-CHIP TO SUPERVISE CHILDREN'S TELEVISION USE 3 (2003).
182 Dale Kunkel et al., *Deciphering the V-chip: An Examination of the Television Industry's Program Rating Judgments*, 52 J. COMM. 112 (2002).
183 KAISER STUDY, *supra* note 176, at 5. Additionally, the ratings can even produce the opposite of their intended effect: The well known admonition "parental discretion advised" can have a strong effect on boys' viewing reality-action programs. *Violent Television Programming, supra* note 12, at 7945 n.106.
184 *Violent Television Programming, supra* note 12, at 7942. The Parents Television Council used harsher language, calling the V-chip "a failure." Press Release, Parents Television Council, PTC Declares the Industry's V-Chip Education Campaign a Failure: New Zogby Poll Data Shows Blocking Technologies Aren't Used and Aren't Understood (Mar. 15, 2007), *available at* http://www.parentstv.org/PTC/ publications/release/2007/0315.asp.
185 S. 602, 110th Cong. (2007).
186 *Id.* Notably, this bill applies to the internet as well as all other forms of content distribution, making it broader in scope than similar bills. *See id.*
187 Brooks Boliek, It's *Super V-chip to the Rescue of Kids*, MEDIAWEEK, Aug. 6, 2007, http://www.mediaweek.com/mw/news/recent_display.jsp?vnu_content_id=1003621132. "My bill simply lights a fire under the FCC to take a fresh look at new options in the marketplace," said Senator Pryor. *Id.*
188 S. 602 (emphasis added).
189 *Violent Television Programming, supra* note 12, at 7941.
190 *See generally* Fitzgerald Ryan, *supra* note 167. As Congressman Markey explained the rating system, "At no time will the advisory board or any other governmentally created group rate any of the programs." *Id*. at 827 (quoting Why the Markey Chip Won't Hurt You, BROADCAST & CABLE, Aug. 14, 1995, at 10).
191 Violent Television Programming, *supra* note 12, at 7945.
192 *See, e.g.*, Adam Thierer, *Convergence-Era Content Regulation? S. 602, "The Child Safe Viewing Act of 2007"*, PROGRESS ON POINT, Aug. 2007, at 4.
193 *Id*. ("But, even setting aside the clear First Amendment concerns, there is no practical reason to believe that the government could actually do a better job of assigning ratings or creating parental control tools.").
194 Richard Whitney Johnson, *Trademark for Creating a Kid-Friendly Cyberplayground on the Internet*, 2006 UTAH L. REV. 465, 478 (2006).
195 Lawrence Lessig, What Things Regulate Speech: CDA 2.0 vs. Filtering, 38 JURIMETRICS J. 629, 658 (1998).
196 *Violent Television Programming, supra* note 12, at 7949.
197 Ted Hearn, *'War on Cable'* Cited in Court, MULTICHANNEL NEWS, Feb. 11, 2008, at 38.
198 *Violence in the Media – Part 5: Hearing Before the S. Comm. on Commerce, Science and Transportation*, 110th Cong. (2007) (testimony of Lawrence H. Tribe, Carl M. Loeb University Professor, Harvard University) [hereinafter Tribe Testimony].
199 *Id.*
200 *Id.*
201 Unbundling would probably be considered content-neutral and subject to only intermediate scrutiny. In *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), the Supreme Court held that must-carry provisions relating to cable were content-neutral. Id. at 661-62. However, Tribe's testimony distinguished *Turner*, arguing that strict scrutiny should be applied here because the purpose behind the regulations would be content-based. *Tribe Testimony, supra* note 198.
202 *See supra* text accompanying note 99.
203 *See supra* Part IV.A.2.
204 *See* Kevin Jackson, *8 of 10 Americans: Too Much Sex, Violence, Profanity on TV*, CHRISTIAN POST, Mar. 21, 2007, http://www.christianpost.com/article/20070321/26430_8_of_10_Americans:_Too_Much_Sex,_Violence,_Profanity_on_TV.htm.
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206 John Eggerton, *PTC Pans, Valenti Defends TV Boss*, BROADCASTING & CABLE, Mar. 15, 2007, http://www.broadcastingcable.com/article/CA6425049.html?display=Search+Results&text=Valenti.
207 Industry leaders often emphasize their voluntary efforts to educate the public about the V-chip. For a sampling of testimony in congressional hearings on this matter, see Images Kids See on the Screen: Hearing Before the Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce, 110th Cong. (2007) (statement of Dan Glickman, Chairman and CEO, Motion Picture Association of America, Inc); *Violence in the Media: Hearing Before the S. Comm. on Commerce, Science and Transportation*, 110th Cong. (2007) (Statement of Peter Liguori, President, Entertainment, Fox Broadcasting Company); *Images Kids See on the Screen: Hearing Before the Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce*, 110th Cong. (2007) (Statement of Kyle McSlarrow, President and Chief Executive Officer, National Cable and Telecommunications Association).
208 *See supra* Part IV.A.2.
209 Diane Hollenbeck, *Got V-chip? You Probably Do!*, MORALMETRIC, July 2, 2007, http://www.moralmetric.com/articles/entertainment/tv/1091-got-v-chip-you-probably-do.
210 *Violent Television Programming*, *supra* note 12, at 7960 (statement of Jonathan S. Adelstein).
211 *Id.*
212 Congress passed the Year 2000 Information and Readiness Disclosure Act, S. 2392, 105th Cong. (1998), whose stated purposes were, among others, to promote disclosure of information and assist consumers in responding to problems. § 2(b). With respect to Y2K telecommunications issues, the FCC implemented a comprehensive plan to disseminate information through speeches, articles in periodicals, letters to companies and governments, and public forums. THE FEDERAL COMMUNICATIONS COMMISSION AND THE NETWORK RELIABILITY & INTEROPERABILITY COUNCIL, Y2K COMMUNICATIONS SECTOR REPORT (1999). The FCC also boasted about its Y2K "well-designed website that is easily accessible and user friendly," and the Commission carefully tracked the number of visits to the site. *Id*. at 17.
213 John Eggerton, DTV Hard Date Passes … Again, BROADCASTING & CABLE, Feb. 1, 2006, http://www.broadcastingcable.com/article/CA6304165.html?display=Breaking+News.
214 *Violent Television Programming, supra* note 12, at 7962 (statement of Jonathan S. Adelstein).
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216 *Violent Television Programming, supra* note 12, at 7945.
217 *Id.*
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219 Doug Abrahams, *Regulators adopt plan for V-Chip, TV ratings*, WASHINGTON TIMES, Mar. 13, 1998, at B9.
220 Evan Blass, V-Chip 2.0, or v.gis, Set To Debut in DTVs, ENGADGET, Feb. 24, 2006, http://www.engadget.com/2006/02/24/v-chip-2-0-or-v-gis-set-to-debut-in-dtvs/.
221 *See supra* Part III.B.2.
222 *Violent Television Programming, supra* note 12, at 7962 (statement of Jonathan S. Adelstein).
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225 Media Associations Comments, *supra* note 19, at 59 (internal citations omitted) (emphasis added).
226 Cohen v. California, 403 U.S. 15, 25 (1971).

RECENT CASES OF INTEREST

Prepared by the South Texas College of Law Students
South Texas College of Sports Law & Entertainment Society

FORMER UCLA BASKETBALL PLAYER SCORES INITIAL VICTORY AGAINST NCAA

In a recent federal district court decision, former UCLA basketball player Ed O'Bannon and a class of former student-athletes scored an early victory over the National Collegiate Athletic Association (NCAA) and the Collegiate Licensing Company (CLC) by dismissing the NCAA's motion to dismiss. O'Bannon v. National Collegiate Athletic Ass'n, 2010 WL 445190 (N.D.Cal.). The crux of O'Bannon's claim was that the NCAA should be required to compensate student-athletes for using their likenesses in advertising and promotional work. O'Bannon claims that "the NCAA's rules and regulations constitute anti-competitive conduct" when it requires student-athletes to sign a form before competing that allows the NCAA to use their "name or picture generally to promote NCAA championships or other NCAA events, activities, or programs." O'Bannon asserts that the form forces student-athletes to "relinquish all rights in perpetuity to the commercial use of their images, including after they graduate and are no longer subject to NCAA regulations." O'Bannon states that without signing this form, student-athletes are not allowed to compete in their sport. These forms have allowed the NCAA to use the names, faces, and likenesses of student-athletes to promote the NCAA in a variety of ways, including the promotion of the March Madness Tournament, video games, and other NCAA paraphernalia. The student-athletes do not receive any compensation for these uses.

By requiring the signing of the forms as a condition of participating in intercollegiate athletics, yet not compensating the athletes for the use of the likenesses, O'Bannon claims a Sherman Antitrust Act violation. More specifically, his complaint states that "because the NCAA has rights to images of him from his collegiate career, it, along with its co-conspirators, fix the price for the use of his image at 'zero.'" In order to have a valid claim under Section 1 of the Sherman Act, the plaintiff must show three things: (1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality of a rule of reason analysis; and (3) that the restraint affected interstate commerce.

The court found that O'Bannon had satisfied all three prongs. The first prong was satisfied because the signing of the form (and subsequent sanctions if not signed) demonstrated an agreement among the NCAA and its members. Further, after signing the forms, CLC "brokers agreements that do not compensate him [O'Bannon] or the putative class members for use of their images." As to the second prong, the court found that, under a rule of reason analysis, O'Bannon met his burden of alleging a "relevant market" and "significant anticompetitive effects." The court found that the vast number of agreements entered into by the NCAA and its members showed a relevant market. Additionally, O'Bannon sufficiently pled the anticompetitive effects, because O'Bannon and the class members were excluded from the market by the actions of the NCAA and CLC. Finally, with respect to the third prong, the court found that O'Bannon successfully pled that the anticompetitive effects happened in interstate commerce because it took place nationwide.

By: Bradley V. Rochman, South Texas College of Law

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