1989

Regulating a Video Revolution

Richard P. Salgado
Regulating a Video Revolution

Richard P. Salgado

In the past five years the medium of videotape has grown tremendously.\(^1\) Movies can be rented on videotape from a diverse and ever increasing number of sources, including convenience stores,\(^2\) supermarkets,\(^3\) and even automatic vending machines.\(^4\) Home video earns nearly three times as much annual revenue as the theatrical movie industry,\(^5\) and the video rental market has grown an average of 25% per year.\(^6\) Some estimate that by 1990 videocassette recorders (VCRs) will be in 78% percent of American homes\(^7\) and that 50% of all households will own two VCRs.\(^8\) Home viewing of major productions is now commonplace in America with the typical VCR-owning family renting more than six videotapes each month.\(^9\)

The impact of this developing entertainment forum on everyday life has not gone unnoticed by state and local legislatures.\(^10\) Concerns that children may now have access to the corrupting influences of ultra-violent or sexually indecent movies by patronizing the neighborhood video rental store have led to pressures on legislatures to regulate which videotapes may be distributed and to whom.

---

2. Variety, July 6, 1988, at 35 (4.9% of all videos rented come from convenience stores).
3. See, e.g., HFD, Aug. 27, 1984, at 84 (announcing opening of video rental stores in East Coast supermarkets).
7. Blowen, supra note 5, at 77. But see Variety, supra note 2, at 35 (citing American Video Association survey indicating peak of market may have been reached).
8. Blowen, supra note 5, at 86.
10. With the notable exceptions of the licensing scheme for broadcasting, see Dyk, Full First Amendment Freedom for Broadcasters: The Industry as Eliza on the Ice and Congress as the Friendly Overseer, 5 Yale J. on Reg. 299 (1988), and obscenity prosecutions under the Racketeer Influenced and Corrupt Organizations Act, see Note, supra note 1, at 1274, the federal government has left the job of policing media largely to other legislative levels.
Regulating a Video Revolution

Apparently unsure how to draft such regulations and under public pressure to act quickly, some state and local legislatures have enacted statutes that purport to regulate obscenity or indecency by referring to the standards set forth by the Motion Picture Association of America (MPAA). The MPAA is a private organization comprising several major film companies, including MGM, Columbia, Paramount, Twentieth Century-Fox, United Artists, Universal, and Warner Brothers.\(^\text{11}\) Although member companies agree to submit their films to the MPAA for rating, nonmembers may also submit their productions. The system uses five ratings: \textit{G}, \textit{PG}, \textit{PG-13}, \textit{R} and \textit{X}.\(^\text{12}\) As the most widely used rating system,\(^\text{13}\) the MPAA classifications provide an easy method to regulate video rentals. For example, a legislature need only prohibit video rental stores from renting \textit{R} or \textit{X} rated videos to minors. Such statutes have been proposed in some localities,\(^\text{14}\) and statutes reflecting a similar approach currently exist.\(^\text{15}\)

\(^{11}\) Movie Ratings and the Independent Producer, Hearings Before the Subcomm. on Special Small Business Problems of the House Comm. on Small Business, 95th Cong., 1st Sess. 19 (1977) (prepared statement of MPAA President Jack Valenti) \[hereinafter Valenti Statement\].

\(^{12}\) See infra notes 19-28 and accompanying text.

\(^{13}\) Since its inception in 1968, the MPAA has assigned more than 8,000 ratings: 11\% of these films received a \textit{G}, 34\% received a \textit{PG}, 4\% received the relatively new \textit{PG-13}, 47\% received an \textit{R}, and 4\% received an \textit{X}. Variety, Nov. 9, 1988, at 26.

Miscellaneous groups have attempted to persuade the MPAA to further modify its rating system. For example, the federal government recently pressured the MPAA to adopt a \textit{D} rating to indicate glorification of illegal drug use, S. Res. 492, 99th Cong., 2d Sess., 132 Cong. Rec. 13201 (Sept. 22, 1986), and some critics of the system have pushed for the adoption of an \textit{A} rating to indicate subject matter that is for adults only but is not pornographic. Roger Ebert and Gene Siskel, two famous Chicago film critics, won Premiere magazine’s “Lost Cause of the Year” award for their unsuccessful efforts to bring about this change. Premiere, Feb. 1988, at 63. The MPAA has not been completely deaf to the cries for change. For example, the addition of the \textit{PG-13} rating was in response to public demands, see infra note 20, as was the creation of the automatic \textit{PG-13} rule for films that mention illegal drug use, see infra note 28 and accompanying text.


\(^{15}\) For a partial list of these statutes see infra notes 38-39. A similar phenomenon may also become more common in the field of cable television. See Krattenmaker & Esterow, Censoring Indecent Cable Programs: The New Morality Meets the New Media, 51 Fordham L. Rev. 606, 611-12 (1983); Kleinman, State Seeks Rules for “Hard R”
Although administratively efficient and relatively easy to enforce, this method of regulating obscene or indecent videotaped movie distribution is unconstitutional under the first and fourteenth amendments to the United States Constitution, and perhaps under particular state constitutions that forbid delegation of legislative authority to private entities. By codifying MPAA ratings through statutory inference, such statutes grant to the private organization the power to determine the constitutional status of movies and videos; the MPAA, in effect, takes on the role of a government agency. The practice amounts to a prior restraint without any judicial review; films are rated by the MPAA without any judicial supervision and subjected to state legal restrictions based on the rating. This circumvents the constitutional procedural restrictions set out by the Supreme Court in *Freedman v. Maryland*.\(^\text{16}\) In addition, because the MPAA uses vague standards (if any), the statutes imputing the rating system are inherently unconstitutional under the substantive requirements of *Interstate Circuit v. Dallas*.\(^\text{17}\)

It is crucial for local legislatures to resist the temptation to codify MPAA ratings. Instead, they must fashion regulations with utmost care for the preservation of precious constitutional rights. The codification of the MPAA rating mechanism can be, and has been, accomplished in subtle ways. The effect on constitutional guarantees of free speech is especially pernicious here because the rating system of the MPAA is largely a result of government pressure on the movie industry to self-regulate.\(^\text{18}\) The public's concern with protecting its children from harmful influences is indeed weighty, but

---


16. 380 U.S. 51, 58-59 (1965) (when classifying films, (1) burden is on government to establish that film is unprotected; and (2) rating must be subject to prompt judicial review).

17. 390 U.S. 676 (1968) (statutes calling for classification of films must meet minimum level of specificity).

18. This Current Topic does not undertake to discuss the constitutional viability of the MPAA. See Friedman, *supra* note 13; Note, Private Censorship of Movies, 22 Stan. L. Rev. 618 (1970). However, some of the issues are relevant here. One such issue is the interplay of government pressure to force self-regulation and subsequent codification by the government of the standards generated as a result of the state coerced self-regulation. This is discussed in the context of the broadcast media in Dyk & Goldberg, The First Amendment and Congressional Investigations of Broadcast Programming, 3 J.L. & Pol'y 625, 634 (1987) where the authors argue that congressional investigations designed to coerce “voluntary” action (as they term it, “regulation by lifted eyebrow”) can chill constitutionally protected speech.
Regulating a Video Revolution

freedom of speech demands the use of sensitive tools, and even subtle intrusions must be weeded out.

The more prudent path is to give the video rental industry time to develop a system of self-regulation designed in accordance with the unique characteristics of the video industry. In the meantime, legislatures may choose to enact obscenity statutes aimed specifically at the problems associated with the distribution of videos. They may even create classification and rating boards to dictate what videos may be rented to children. However, they can do so only by using procedures that provide for prompt judicial review of the ratings and by using rating standards that are specific and clear.

I. The Motion Picture Association of America Rating System

The MPAA rating scheme consists of five categories: G indicating suitability for general audiences, PG recommending parental guidance for children,19 PG-13 strongly recommending parental guidance for children under 13,20 R forbidding admittance to persons under 17 without parent or guardian, and X forbidding admittance to persons under 17.21 The X rating is the only rating in the MPAA system that is not copyrighted,22 and film directors are free to apply the X rating to their own films. The triple-X rating is the creation of the pornography industry and has no official relation to the MPAA rating scheme.23

The ratings are issued through the MPAA’s Code and Rating Administration (CARA). The CARA is a six member board headed by a chairman who is appointed (and dismissed) by the president of the MPAA.24 Members sit for two year terms and are full-time salaried

19. The PG rating has a history of name changes. Originally the rating was M (for mature audiences); later, the rating was changed to GP. Valenti Statement, supra note 11, at 20 & n.3; see also Note, 59 Geo. L.J. 1205, 1213 n.43 (1971).
21. The X category was created because of the continued threat of government regulation. See Valenti Statement, supra note 11, at 20.
22. Id. at 22.
employees. They view approximately two films per day. CARA uses four general criteria to rate films submitted: theme, nature and amount of violence, sexual content (including nudity), and language. Other than these nebulous categories there are only two other rating "rules": first, a film using "harsher, sexually-derived words" will receive (at least) an automatic R, and second, any mention of an illegal drug will receive (at least) an automatic PG-13.

II. Regulation Proposed and Adopted: Protecting Our Children

As the Supreme Court held in Ginsberg v. New York and FCC v. Pacifica Foundation, even speech that is not obscene for adults under the now familiar Miller test can be denied first amendment protection if it is obscene for children. The interest in protecting children is the basis for this limitation on the scope of free speech. The power of the government to regulate in the name of protecting children has not been lost on the video industry.

A. The Pressure to Regulate Access to Videotapes

One result of the explosive growth of video rental popularity has been easy access to a wide variety of movies. From how-to videos to ultra-violent or steamy sexual flicks, many neighborhood video stores offer it all to those who enter. And those who enter are often children.

27. Id.
29. 390 U.S. 629 (1968) (state interest in well-being of youth provides sufficient basis to prohibit sale of indecent magazine to 16-year-old).
30. 438 U.S. 726 (1978) (sufficient state interest in preventing children from hearing George Carlin's "7 dirty words").
31. Miller v. California, 413 U.S. 15, 24 (1973). To determine whether material is obscene and thus without first amendment protection, Miller compels the decision maker to consider: whether the average person applying contemporary community standards would find that the work as a whole appeals to the prurient interest; whether the work describes or depicts, in a patently offensive manner, sexual conduct specifically defined by applicable state law; and whether the work taken as a whole lacks serious literary, artistic, political, or scientific value.
Regulating a Video Revolution

Concern over what videotapes children are renting has increased in recent years. As one commentator has mentioned, "[T]he video explosion has confronted parents, video store owners and workers, politicians and, in some towns, the police with a new genre of concern that has moral and legal ramifications." Public opinion polls indicate that American adults are in favor of an effective check to prevent children from renting obscene or indecent videos. Even Tipper Gore has turned her attention to the video industry. Gore, co-founder of the Parents' Music Resource Center, was a major figure in the effort to pressure the record industry to place warning labels on albums containing potentially offensive lyrics. She now advocates a similar labeling scheme warning parents of videotapes' contents.

Some states, unwilling to wait for the video industry to engage in more comprehensive self-regulation, have legislated to prohibit or restrict access by minors to harmful movies. Some of the proposed and enacted legislation has explicitly incorporated the rating system of the MPAA. For example, in Tennessee it is illegal for a video rental store to rent or sell to a minor a video that has been

32. See, e.g., Mansnerus, Rating Game: Parents Try to Fill Gap in Guidelines, N.Y. Times, Feb. 11, 1988, § C, at 1 (parent reporting that daughter brought home video "about Santa Claus slicing people up").
34. The Wall Street Journal noted a recent 900-number telephone poll in which some 21,000 callers supported legislation regulating the rental of videotapes to minors while only about 2,500 opposed such legislation. Wall St. J., Nov. 1, 1988, § B, at 1; see infra note 91 and accompanying text (L.A. Times poll showing 92% interviewed want ratings system enforced).
36. See infra notes 67-72, 80-86 and accompanying text.
37. A proposed law in Virginia reads:
   It shall be unlawful to knowingly sell or rent to a juvenile (i) any film with an official rating of 'X' or (ii) any film with an official rating of 'R' unless the parent or legal guardian of the juvenile is present or gives written authorization for such sale or rental of the "R" rated film.
   S. 344, Code of Va., (1988) (on file with author). "Film" includes videotapes and "official rating" is defined as that rating given by the CARA of the MPAA. Id. See also Wall St. J., Nov. 1, 1988, § B, at 1; Mansnerus, supra note 32, at 10.
rated X by the MPAA,\textsuperscript{38} while in other states, laws require that videos carry and clearly display a rating.\textsuperscript{39}

B. Video Industry Self-Regulation as a Defense

Video rental and sales businesses have felt the pressure from state and local governments threatening to pass laws enforcing some rating scheme. In an effort to stem the flow of new government regulations, some members of the video industry have attempted to


Ironically, some contend, this effort comes at a time when it appears that video stores, by offering X rated titles, are driving dedicated “porn” theaters out of business. According to David Friedman, founder of the Adult Film Association, at one time there were more than 800 “sex cinemas” in the U.S., but today that number is down to fewer than 200. He claims that pushing adult videos out of video stores will result in more “sex cinemas” in suburban areas. See Mathews, supra note 14, at 5; Movie-Rating System Needs to Clean Up Its Act, L.A. Times, Feb. 18, 1987, § VI, at 1.
organize a drive toward self-regulation,\textsuperscript{40} reminiscent of the beginnings of the MPAA's rating system in 1968.\textsuperscript{41} The most salient problem that these efforts face is that the majority of videotapes now available do not carry a rating at all. Precise statistics on the number of unrated video cassettes are not readily available, but some have estimated that well over 50\% of all videos do not carry an MPAA rating.\textsuperscript{42}

There are several reasons why many films and videos are not submitted for an MPAA rating. Many of these works are released from small independent producers who are loath to incur the often high cost of an MPAA rating, which is priced based on their production budget.\textsuperscript{43} For example, obtaining an MPAA rating for a film or video with a budget of $15 million could cost $8,000.\textsuperscript{44}

In addition, producers and directors may know that their particular film or video will receive an X rating if submitted to the MPAA,\textsuperscript{45} and wish to avoid the stigma that accompanies that rating.\textsuperscript{46} Because the X rating has become synonymous with hardcore pornography, film and video companies that make a nonsexual but adult

\begin{itemize}
\item \textsuperscript{40} As a recent article noted, (A) number of communities are talking about passing local ordinances forbidding the sale or rental of non-rated videos. It is therefore a matter of survival for homevideo companies—particularly we independents, who do not have the sources or the enormous budgets to acquire recent theatrically released films—to police our own product. Christian Science Monitor, Jan. 7, 1988, at 22 (quoting Danny Kopels, president of the Independent Video Programmers Association). The Video Software Dealers Association, during a convention in 1987, expressed much consternation over government efforts to regulate the rental of adult video. See Mathews, supra note 14, at 1.

\item \textsuperscript{41} With the possibility of a patchwork of community film censorship boards after the 1968 Supreme Court Ginsberg decision, the modern MPAA rating system was born. See supra note 13 and sources cited therein. Jack Valenti, president of the MPAA and one of the founders of the modern rating system, noted that one of the MPAA's primary aims is “to keep the government from stepping in.” Boston Globe, Feb. 24, 1989, at 38.

\item \textsuperscript{42} See Hunt, Unrated Films Confound Retailers Too, L.A. Times, July 8, 1988, § VI, at 11 (Independent Video Programmers Association President Danny Kopels estimates that 150 of 200 to 250 video titles released each month not rated); Mansnerus, supra note 32, at 10 (editor of Video Business magazine John Gaffney estimates that 60\% to 70\% of video titles not rated).

\item \textsuperscript{43} Hunt, supra note 42, at 10.

\item \textsuperscript{44} Premiere, Jan. 1988, at 9.

\item \textsuperscript{45} Some of the smaller film companies have charged that the MPAA is more willing to give an X rating to their films than to the big companies' films. See, e.g., H.R. Rep. No. 996, 95th Cong., 2d sess., at 32 (1978) (statement of witness Riddell, independent producer and director); Hodgson, supra note 25, at 1.

\item \textsuperscript{46} Much of the stigma comes not from the content of the film but from its rating. For example, the R rated version of Dawn of the Dead was a disaster at the box office while the original unedited version, which probably would have earned an X rating, was a success. N.Y. Times, Mar. 5, 1987, § C, at 19. For theater box office revenues, an X rating, like a G rating, can mean a “financial kiss of death” for films trying to reach a wide audience. Wood, Dressed to Kill—How a Film Changes from 'X' to 'R,' N.Y. Times, July 20, 1980.
product are hesitant to seek an MPAA rating. This is especially common for the blood-and-gore genre of films that would receive an X rating for violence. For example, the director of the film *Evil Dead II: Dead by Dawn* intentionally did not seek an MPAA rating. He assumed that his film would automatically receive an X rating due to a scene where “a decapitated woman waltzes with her own head.”

Bob Guccione, publisher of *Penthouse* magazine, also refused to submit his film *Caligula* to the MPAA. Instead of accepting an X or cutting the film to receive an R, Guccione applied his own rating: MA, for Mature Audiences. By avoiding the MPAA rating system, and thus also avoiding a sure X rating, the directors were able to avert the label of pornography and to advertise their films in newspapers that had a *per se* policy against advertising X rated films.

Studios, too, are reluctant to release films and videos that carry an X rating. Such was the case with *Scarface* when it was initially rated X. Most major studios will not attempt to market X rated pictures, thus forcing the director to edit the offending footage. Directors working for major studios often must contractually agree to create a final product that is not rated X. In 1980, twenty-six films received an initial X rating from CARA, and in all cases the directors cut footage to obtain an R. Director Alan Parker had to edit his film *Angel Heart* several times, frame-by-frame, until the MPAA ratings board gave the film an R rating. The resulting movie was but ten spicy seconds shorter than the original. The directors of

---

§ 2, at 13. But see Record Broken for Reorders by Cinderella, Variety, Oct. 26, 1988, at 35 (reporting record reordering of G rated *Cinderella*).

47. See Film Advisory Board to Rate Nontheatrical Videocassette Releases, Communications Daily, Jan. 7, 1988, at 6-7 (quoting Independent Video Programmers Association President Danny Kopels)[hereinafter Film Advisory Board].


50. See Mathews, How *Evil Dead* 2 Dodged the Kiss of Death—An X, L.A. Times, Mar. 13, 1987, § VI, at 1. The *Los Angeles Times*, for example, will not advertise unrated films, but will advertise unrated films if the ad is “acceptable.” Id. at 14.

51. After *Scarface* was rated X by the MPAA, Universal said that it would not release the film. N.Y. Times, Oct. 30, 1988, § 1, pt. 1, at 66. On appeal to the MPAA, the rating was changed to R. N.Y. Times, Nov. 9, 1983, § C, at 28. But see Thompson, Controversy Sells, Premiere, Nov. 1987, at 5 (advertisements for film *Patty Rocks* emphasized its original X rating); Premiere, Jan. 1988, at 33 (advertisement for *Patty Rocks*).

52. Mathews, supra note 20, at 1.


55. Mathews, supra note 20, at 1.

Regulating a Video Revolution

Crimes of Passion, 57 9½ Weeks, 58 Going in Style, 59 The Postman Always Rings Twice, 60 and RoboCop 61 recently saw their films undergo similar celluloid surgery.

Another reason many videos go without an MPAA rating is that some films, originally edited for the purpose of obtaining an R rating, have been re-released on video in unedited and unrated form. Angel Heart was released on video in its unrated state, 62 as were Crimes of Passion, 63 and 9½ Weeks. 64 Sales of the unedited, unrated video version of Angel Heart have outpaced the edited and rated version by a ratio of five to one. 65 Many foreign films also do not carry any rating. For example, Pelle the Conqueror and 36 Fillette are both critically acclaimed unrated foreign films with adult themes. 66

In one recent response to the threat of government regulation, a group of small independent companies created the Independent Video Programmers Association (IVPA). 67 The IVPA assigns ratings to videos submitted through its Film Advisory Board. Videos are assigned one of five basic labels according to audience suitability: C for children, F for family, M for mature, MM for very mature, MMM for extremely mature, and the familiar X. The ratings warn further of specific content: L warning of possibly offensive language, EL shorthand for “extreme language,” V warning of violence, EV short for “extreme violence,” S warning of sexual content, EPS warning of explicit sexual content, N warning of nudity, EN shorthand for “extreme nudity,” and SA warning of substance abuse. 68

---

57. Id. (6 minutes of footage cut in order to receive R rather than X rating).
58. Id. (90 seconds of footage cut to receive R rather than X rating). Ironically, both Crimes of Passion and 9½ Weeks were criticized for being “too tame.” See Premiere, Nov. 1987, at 5.
60. The director, Bob Rafelson, was quoted as saying, “I shot for X and cut for R.” Hodgson, supra note 25, at 13.
63. Harmetz, supra note 56, at 20; Mathews, supra note 14, at 5.
64. Harmetz, supra note 56, at 20; Mathews, supra note 14, at 5.
65. Harmetz, supra note 56, at 20; Premiere, Feb. 1988, at 63 (sales of R rated Angel Heart: 28,000; sales of unrated version: 140,000).
68. See Film Advisory Board, supra note 47, at 7; Hunt, supra note 42, at 10; Wood, supra note 46, at 22. This system is very similar to that used by the cable company Home
The IVPA system seems to answer the main criticisms lodged against the current MPAA scheme. First, it provides more specific detail about the content of the films and more clearly notifies the video distributor of the reasons for a particular rating. A 1987 Los Angeles Times telephone poll revealed that 73% of American adults surveyed would like to see the MPAA rating system altered to indicate more specifically the content of the films that earn its ratings. Second, the IVPA charges less for its rating service than the standard MPAA charge. The cost of an IVPA rating can be as low as $200 (for half-hour videos), but no higher than $350 (for full two-hour videos). In contrast, until recently the lowest charge for an MPAA rating of a full-length video was $800.

Even so, and although the IVPA is still in its early stages, there is already concern that it will not succeed. Between January and July of 1988, the IVPA had rated only 24 videos. In contrast, the MPAA rated an average of more than 279 films for that same time period. The biggest barrier to the IVPA system is its low visibility. Few members of the video industry know of the service the IVPA can provide. Furthermore, the new system, with all its coding letters, may be too complicated for consumers to embrace. Tom Spain, writing for the Washington Post, hypothesized that the MPAA R rated film Fatal Attraction would carry an IVPA rating of MMM-L/N/EV/EPS for its sexual and violent theme. Not surprisingly, and perhaps in an effort to protect its own turf, the MPAA publicly opposes the new system. President Jack Valenti claims that the IVPA effort will damage the MPAA's system, and merely confuse the

---

69. See Blowen, supra note 66, at 38.
70. Mathews, supra note 20, at 1; see also Blowen, supra note 66, at 38 (noting effort to add more detailed ratings to MPAA system).
71. Film Advisory Board, supra note 47, at 7.
72. Id. The MPAA has countered by offering its service for free or at a nominal cost. See infra note 81 and accompanying text.
73. Hunt, supra note 42, at 11. One of the first videos to be rated by the IVPA was Cooking With Beefcake Too. It was given an M/M/N. See Film Advisory Board, supra note 47, at 7. Apparently, Beefcake Too is for seasoned viewers interested in seeing Jaye P. Morgan indulge "in some very mature recipe trading with her G-stringed, muscle-bound kitchen help." Spain, C is for Confusing, Wash. Post, Jan. 14, 1988, § C, at 7.
75. "[The IVPA] won't get industry support until more people know what they are." Hunt, supra note 42, at 11 (quoting Jack Schember, editor for Software Dealer magazine).
76. Spain, supra note 73, at 7. In one real world comparison, Death of an Angel was rated M/I' by the IVPA and PG by the MPAA. See Film Advisory Board, supra note 47, at 7.
Regulating a Video Revolution

public.\textsuperscript{77} Even one of IVPA’s members, the president of Prism Entertainment (a company that releases primarily unrated videos) has been publicly skeptical that consumers will be receptive to another rating system.\textsuperscript{78} The IVPA’s official view, however, is that even a long series of codes is preferable to governmental regulation. IVPA Chairman Danny Kopels said that “[i]t is . . . incumbent upon the segment of this industry that provides these titles to offer a fair and viable rating system, lest local communities develop inconsistent and confusing systems on an individual basis.”\textsuperscript{79}

A second response to the threat of governmental regulation comes from a more familiar voice: the MPAA. Until recently, the cost of receiving an MPAA rating was prohibitive for independent small video companies, thus contributing to the high number of unrated videos.\textsuperscript{80} Now, however, the MPAA has offered to rate made-for-video movies virtually free of cost. Valenti stated, “[i]f the producer can’t afford to have a film rated, we do it free. Nobody who comes in for a rating is ever turned away.”\textsuperscript{81} Some have urged the video industry to reject the expansion of the MPAA to the realm of video, arguing that “video outlets are the only hope that serious film buffs have of ever seeing certain films.”\textsuperscript{82} It is still too soon to know how successful the program will be,\textsuperscript{83} but the MPAA has persuaded the Video Software Dealers’ Association to use the MPAA system for videos available at their members’ stores.\textsuperscript{84}

Many individual video rental enterprises have crafted their own methods to prevent children from renting inappropriate videos. For example, most rental stores prohibit those under 18 from renting X rated films. To ensure that minors do not have easy access, the stores often hide the adult fare behind the counters or in a separate room from the other titles.\textsuperscript{85} Some video stores use a membership

\textsuperscript{77} See Film Advisory Board, \textit{supra} note 47, at 7; Hunt, \textit{supra} note 42, at 11.
\textsuperscript{78} Hunt, \textit{supra} note 42, at 11.
\textsuperscript{79} Film Advisory Board, \textit{supra} note 47, at 7; see Spain, \textit{supra} note 73, at 7 (quoting IVPA Chairman Danny Kopels).
\textsuperscript{80} See L.A. Times, Nov. 18, 1988, § VI, at 2; \textit{supra} notes 43-44 and accompanying text.
\textsuperscript{81} Hunt, \textit{supra} note 42, at 10; see L.A. Times, Dec. 2, 1988, § VI, at 6 (free or nominal-cost rating service offered to video producers who have not submitted made-for-video movies because of cost).
\textsuperscript{82} Mathews, \textit{supra} note 14, at 5.
\textsuperscript{83} See Stevens, MPAA Widens Reach of its Rating Services, Chicago Tribune, Jan. 6, 1989, § 7, at 57.
\textsuperscript{84} See Home Video Suppliers Seen Using Rating Code, \textit{HFD}, Aug. 27, 1984, at 83. The Association has a membership of close to 3,000 rental and sales stores. Landro, \textit{supra} note 14, at 1.
\textsuperscript{85} Burden of the ’80s: Policing Videos, Boston Globe, Sept. 1, 1988, at 82.
scheme much like that of a community library. When a customer signs up for a rental membership, he or she is asked whether the store should rent $R$ rated videos to minors who use the membership.\(^8\) The decision is left to the parent.

However, these private efforts to stop government regulation have not been entirely successful. There is doubt that video rental stores enforce the rating system. Movie critic Roger Ebert contends that "videocassette stores generally do not enforce the [MPAA] code and, in any event, do not have any control over who sees the cassette once it is rented."\(^7\) Those stores that do abide by the MPAA system still must contend with the surfeit of unrated videos.

Even with the recent flurry of action by the video industry to establish some voluntary video rating system, threats of government regulation continue to loom in the background.\(^8\) So far, the most drastic response to the problem of children's access to indecent videos has come from Tennessee. Section 39-6-1141 of the Tennessee Code prohibits a business from selling or renting an MPAA X rated video to anyone under 18 years of age.\(^9\) Another section requires that all videos display the MPAA rating.\(^10\) These sections represent a new tide of laws designed to address the difficult problem of keeping harmful videotapes out of the hands of our most vulnerable citizens. Rather than rely on the video industry itself to find a solution, the jurisdictions adopting statutes similar to the Tennessee legislation are in effect codifying the MPAA rating system and thereby forcing retailers of videotapes to adopt that "voluntary" system. This circumvents the procedures that are required when the government is the agent issuing the ratings.

III. Concern for the First Amendment and Legislative Power

At first glance, the statutes importing MPAA ratings appear very civic-minded; if the video industry cannot or will not provide effective measures to prevent 10-year-old children from renting $X$ rated videos...
Regulating a Video Revolution

videos, then it is the state's job to provide an incentive through the sanction of law. Certainly public opinion favors the creation of some mechanism to prevent children from renting adult videos. A Los Angeles Times poll voiced the "clear message" that "Americans are adamant about needing a monitoring system for the movies their children see."91

But most courts agree that codification of the MPAA rating system is not the answer. Although no Supreme Court decisions have discussed the application of MPAA ratings to determine the legal status of films or videos, a look at the case law from lower federal courts and state courts establishes that the new video-regulating statutes are vulnerable to challenge. Simply stated, a determination by the MPAA, using its own vague standards,92 that a film or video deserves a restrictive rating means very little. The MPAA is not a governmental body, and its rating procedures and criteria are not subject to judicial supervision or correction. The first and fourteenth amendments to the United States Constitution and, in some states, separation of power clauses in state constitutions provide solid ground to invalidate laws that abdicate the job of constitutional classification to the MPAA.

A. Constitutional Guidelines: Procedural and Substantive

In Freedman v. Maryland93 the United States Supreme Court declared a Maryland film classification system unconstitutional under the first amendment. The Court held that, to be in harmony with the Constitution, a state rating system must meet two minimum procedural requirements. First, the state must bear the burden of establishing that the film is unprotected speech.94 Second, the procedures must provide for prompt judicial determination of the film's constitutional status.95 "[B]ecause only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a judicial determination suffices to impose a valid final restraint."96 The definition of obscenity may

91. Mathews, supra note 20, at 1. According to the survey, "92% of poll respondents agreed that video stores should enforce the ratings system and not rent or sell R, X or unrated films to minors." Id.
92. See Blowen, supra note 66, at 38.
94. Id. at 58.
95. Id. at 59.
96. Id. at 58-59.
change when the viewer is a child rather than an adult, but the pro-
cedural steps required by the first amendment do not vary.97

Likewise, the substantive standards used must meet the minimum
specificity requirements set forth in the Supreme Court decision Inter-
state Circuit v. Dallas.98 There, the Court faced a vagueness chal-
lenge to standards used by the city film review board. The board's
job was to classify films as either "suitable for young persons" or
"not suitable for young persons."99 The considerations used by the
board to classify films were certainly more precise than those used
by the MPAA,100 but the Court struck down the Dallas standards on
the grounds that the criteria were not "narrowly drawn, reasonable,
and definite."101 It is unimportant, for the purposes of this specific-
ity requirement, that the goal of the classification system is to pro-
tect children.

Nor is it an answer to an argument that a particular regulation of ex-
pression is vague to say that it was adopted for the salutary purpose of
protecting children. The permissible extent of vagueness is not di-
rectly proportional to, or a function of, the extent of the power to reg-
ulate or control expression with respect to children. . . . The vices—
the lack of guidance to those who seek to adjust their conduct and to
those who seek to administer the law, as well as the possible practical
curtailing of the effectiveness of judicial review—are the same.102

B. Direct Statutory Embodiment of the MPAA Rating System to Regulate
Speech

From time to time, legislatures create laws that use the MPAA rat-
ings of films or videos to define the legal status of the films or
videos. For example, Section 39-6-1141 of the Tennessee Code
uses the X rating as the standard for determining what videos may

---

97. See, e.g., Cruz v. Ferre, 755 F.2d 1415, 1422 (11th Cir. 1985); Thomas v. Board of
Educ., 607 F.2d 1043 (2d Cir. 1979) ("... the caselaw explicating the limits of govern-
mental authority over expression counsels, both implicitly and explicitly, that the consti-
tutional status of speech be determined by the judiciary, the one institution of
government intentionally designed to render dispassionate justice.").
99. A "young person" was anyone under 16 years old. Id. at 678.
100. Compare Interstate Circuit, 390 U.S. at 678 (Dallas standards) with infra notes
19-28 and accompanying text (MPAA standards); see also infra notes 105-114 (arbitrary
nature of MPAA ratings).
101. Interstate Circuit, 390 U.S. at 690 (quoting Niemotko v. Maryland, 340 U.S.
268, 271 (1958)).
102. Id. at 689-90.
Regulating a Video Revolution

not be rented to minors. By doing so, the legislature of Tennessee effectively delegates the difficult job of classifying certain speech as "legally unsuitable for children" to a private organization. By rating a particular film X, the MPAA has, by virtue of the statute, defined the legal rights of both the potential viewer (the minor) and speaker (the creator of the film). Courts have dealt with such statutes fairly consistently. Although most of the cases have involved using MPAA ratings to define what is obscene (and thus without any first amendment protection), the rationale for the cases applies to defining speech that is obscene for minors (and thus is afforded less than full first amendment status).

In the obscenity context, courts have invalidated statutes that allocate to the MPAA the duty of defining the legal concept of obscenity. One basic reason for this is that the ratings often seem arbitrary, and it is not clear what standards the MPAA uses when assigning a particular rating to a particular film. Other than the four general criteria for rating films (theme, sex, violence, and language) "each rating represents the [CARA members'] spontaneous

103. That section also prohibits minors from renting videos that are "harmful" even if not rated X.

104. See supra notes 97, 102 and accompanying text. It is true that the MPAA has never contended that its rating system identifies obscene videos or films for adults, see Swope v. Lubbers, 560 F. Supp. at 1328, 1340 (W.D. Mich. 1983) (App. 1) (appendix by MPAA president Valenti stating that "Rating Board does not attempt to mark films as obscene or pornographic; that is for the courts to decide legally"), but does claim that its system is geared to warn parents in order to protect children, see id. This, however, does not mean that legislatures may constitutionally use MPAA ratings as a short-hand guide to define what is obscene for children. The obscenity standards are different according to the age of viewers, but the Freedman procedural requirements and the Interstate Circuit specificity requirements are the same. See supra notes 93-102 and accompanying text. The problems inherent in using MPAA ratings for defining obscenity for adults are just as powerful in the context of obscenity for children, as is illustrated by the Engdahl case discussed infra notes 115-118 and accompanying text.

105. See Swope v. Lubbers, 560 F. Supp. at 1334 ("it is well-established that the Motion Picture ratings may not be used as a standard for a determination of constitutional status"); Brown v. Pornography Comm'n of Lower Southampton, 620 F. Supp. 1199, 1217 (E.D. Pa. 1985) (city sought to enforce obscenity law against video rental vendor; court noted in dicta that X rating not synonymous with obscenity); In re Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, 62 Rad. Reg. 2d (P & F) 1517, 1523 (May 15, 1987) (nexus between X rating and obscenity not strong enough to allow MDS common carriers to categorically refuse to transmit X rated films). In State v. Martin, the Tennessee Supreme Court recognized that an X rating does not necessarily mean that a film is obscene, but the court failed to invalidate the statute that made such an assumption. 719 S.W.2d 522 (Tenn. 1986) (court construing statute, limiting showing of X rated films to enclosed theaters, as applying to non-obscene speech as well as obscene); see 84 Op. Att'y Gen. of Tenn. No. 279 (Oct. 2, 1984) (same construction of statute).

106. See Mathews, supra note 20, at 1.
judgment on the individual picture brought before it." To a casual observer, the difference between an R and an X can be amusingly minuscule. RoboCop, for example, was rated X until two frames were removed. Going in Style was rated X until an expletive, uttered only once in the entire film, was deleted. To a producer or studio, the difference between an X and an R can mean the very success or failure of a film. The vagueness concerns raised in Interstate Circuit abound when statutes incorporate this arbitrariness into law.

Furthermore, standards of indecency and obscenity may change over time, yet the rating remains intact. For example, Midnight Cowboy received an X rating when it was released. Today, critics agree, the film would probably receive an R. By the same token, True Grit, rated G in 1969, would today earn an R for its multitude of murders. Statutes that codify the MPAA judgments lock in the outdated ratings and lock out a potential audience.

There is also a danger that the MPAA ratings are not simply vague and arbitrary, but vulnerable to abuse as well. For example, All the President's Men, some critics complain, deserved an automatic R for its harsh language; yet the film received a PG. The critics allege that the exception to the automatic-R rule was a result of the political views expressed in the movie. Jack Valenti, president of the MPAA, defended the rating and claimed that the exception to the language rule was a result of the film's social and artistic values. Whatever the reasons, the incident does expose the possibility that the MPAA system is susceptible to corruption.

Given these realities, it is not surprising that, generally, courts have proscribed the codification of MPAA ratings. In the pre-Miller case, Engdahl v. City of Kenosha, the district court faced a statute that restricted access of persons under 18 years old to R or X rated movies. The film at issue in the case was Woodstock, rated R by the MPAA. The court struck down the statute on first amendment

---

107. Sterritt, supra note 26, at 8; see supra notes 26-28 and accompanying text (MPAA rating standards).
109. Sterritt, supra note 59, at 19; see also Wood, supra note 46, at 13; supra notes 54-61 and accompanying text (discussing films cut in order to receive rating other than X).
110. See supra notes 45-53 and accompanying text.
111. Hodgson, supra note 25, at 1; Sterritt, supra note 26, at 8; Wood, supra note 46, at 19.
113. See Sterritt, supra note 26, at 8.
114. Sterritt, supra note 59, at 19.
Regulating a Video Revolution

grounds as a prior restraint. The statute provided procedures whereby the rating of the MPAA could be appealed by citizens. According to the court, however, the initial burden rested with the wrong party; it was the government’s duty to establish that a particular movie is “adult,” not the defendant’s duty to appeal the MPAA rating through the governmental structure. Judicial supervision, the court reasoned, is essential to the determination of whether particular speech is unprotected for the purpose of issuing a prior restraint. The court went on to note that “[i]n this case, the judgment as to what is protected or unprotected expression with regard to minors is not even exercised by the City of Kenosha. Rather, the judgment is reached by the Motion Picture Association using standards and procedures, if any, known only to them and unknown to both the defendants and this court.

In a similar vein, a Pennsylvania district court struck down a statute that criminalized the presentation of a preview or a full film rated by the MPAA as not suitable for children when the advertisement for the feature film indicated that the showing would be suitable for children. The court held that the MPAA ratings are “patently vague and lacking in any ascertainable standards,” and that their codification would “infringe upon plaintiff’s right to freedom of expression, as protected by the First and Fourteenth Amendments . . . .”

Courts have also invalidated statutes that provide exemptions from obscenity laws to films or videos rated and approved by the MPAA. For example, in State v. Watkins, the Supreme Court of South Carolina used the state constitution to strike down a statute that exempted from the state obscenity laws all G, PG, and R rated films. The court ruled that the exemption delegated legislative authority

116. Id. at 1135.
117. Id. at 1136.
118. Id.
120. Id. at 826. This result may seem questionable if one views the statute as a form of false advertising; that is, the law prohibits a theater from advertising that a given film was rated PG by the MPAA when it was actually rated R. The court, however, construed the statute such that it “subjects to criminal sanctions only those who show films rated by the Association, since exhibitors who do not show rated films—and there are many—cannot violate this law. Such discrimination tends strongly to discourage the exercise by plaintiffs of First Amendment freedom.” Id.
122. S.C. Code Ann. § 16-414.9 (1962). Effectively, the statute defined all X rated and unrated films as “legally obscene.”
to the MPAA. 123 “Exclusion from prosecution cannot be made dependent upon the whim or will of [the MPAA].” 124 Similarly in Potter v. State, 125 an obscenity exemption statute was struck down as a violation of due process because the legislature had unconstitutionally delegated to the MPAA the power “to determine what motion pictures may be seen in Oklahoma.” 126

In a not-so-hidden attempt to regulate speech, the legislature of South Carolina imposed a 20% tax on admissions to all X rated and unrated movies. 127 The statute was struck down by the South Carolina Supreme Court as an unconstitutional delegation of legislative authority under the state constitution. 128

Under the reasoning of the cases that deal head-on with the issue, many of the recent statutes designed to protect children from indecent film and video are unconstitutional. 129 Such statutes leave to the MPAA the power to dictate what legally may and may not be shown to minors, which should be the exclusive job of the state. Under these statutes, the government bears no initial burden of showing that a regulated video has a lowered constitutional status, and there is no guarantee of judicial determination of the MPAA rating at all. The standards used are vague and not readily identifiable. The legal status of videos is left to the caprice of the MPAA.

C. Hidden Statutory Incorporation of the MPAA Rating System to Regulate Speech

Statutes and legal decisions that effectively codify the MPAA scheme do not always come in readily identifiable forms. In some instances, the incorporation of the “voluntary” ratings is done in a more subtle manner. Nonetheless, the first amendment consequences are serious. 130

123. 191 S.E.2d at 143-44; see S.C. Const. art. I, § 8.
124. 191 S.E.2d at 144.
126. Id. at 935.
129. E.g., statutes cited supra note 38-39. See, e.g., State v. Tavone, 446 A.2d 741 (R.I. 1982) (condition of bail prohibiting showing of X rated movies by defendant, who was convicted of violating obscenity statute, lacked sufficient relationship to bail system's goal of assuring presence in court).
130. Of course, not all reference to MPAA ratings by all lawmaking bodies is forbidden. Certainly federal trademark laws and state consumer protection laws have some degree of latitude to impute MPAA ratings. See, e.g., Motion Picture Ass'n of Am. v. Rated R Clothing, 646 F. Supp. 22 (S.D.N.Y. 1986) (trademark infringement, false designation of origin, unfair competition and dilution action under federal and state law).
Regulating a Video Revolution

Zoning regulations are a common tool used to restrict access to video vendors carrying X rated titles. The first amendment implications from zoning requirements based on subject matter of speech are pervasive. In *Gascoe Ltd v. Newtown Township,* the court struck down the denial of a zoning permit on the grounds that it constituted an unconstitutional prior restraint. In discussing the growth of video as a forum for access to ideas, the court held that a flat ban on zoning permits to vendors wishing to rent "adult" or X rated videos is unconstitutional under the first amendment.

Granting or denying certain rights and benefits has also hinged on the rating scheme. For example, in *Swope v. Lubbers,* plaintiffs, students of a public college, challenged the decision of the college to deny funds for rental of the X rated video *Inserts* and sought a preliminary injunction. In the past, the school had allocated $60,000 for extracurricular activities, including showing movies. But after the students proposed to show this film, the school adopted a policy against funding the rental of X rated videos. The college argued that their no-X policy was rational for three reasons: first, X rated films usually do not meet standards of quality; second, use of the ratings is administratively efficient; and third, the students benefit because funding decisions are not determined by subjective judgments of campus officials. The court rejected this "rationality" approach and called for "strict scrutiny." According to the court, the standards of the MPAA cannot meet the *Miller* obscenity test, and the college had no system to ensure prompt judicial overview. In short, use of the MPAA X rating amounted to an unconstitutional prior restraint.

In *Cheeseman v. American Multi-Cinema,* plaintiffs, ages six to 15, brought an action under Michigan's Civil Rights Act alleging age discrimination. Plaintiffs had been denied access to the movie

---

131. See Neiderhiser v. Borough of Berwick, 840 F.2d 213 (3d Cir. 1988). In *Neiderhiser,* a video store owner brought an action under 42 U.S.C. § 1983 claiming that the store's application for a zoning permit had been denied because it planned to rent X rated videos along with other videos (with the X titles expected to comprise 20% of its gross retail sales). The district court dismissed for lack of case or controversy, *id.* at 216, but the court of appeals reversed. In doing so, the court held that the store owner stated a cause of action for (1) due process violation in that the zoning permit denial was irrational or arbitrary and (2) first amendment violation in that the denial was an attempt to regulate speech based on subject matter alone. *Id.* at 218. The court also noted that the zoning permit denial may constitute a prior restraint. *Id.* at 218 n.8.

133. *Id.* at 1097.
135. *Id.* at 1333-34.
Animal House as the result of a theater policy of not admitting persons under 18, unaccompanied by an adult, to an MPAA R rated film.\textsuperscript{137} Although the Michigan Court of Appeals found for the defendants because the policy was a "reasonable" method of complying with the juvenile obscenity statute,\textsuperscript{138} the result is questionable. Contrary to the court’s belief that the rating system was not on trial,\textsuperscript{139} the statutory rights of the plaintiffs were, in the end, determined by the private organization. Presumably, if a movie had been rated G by the MPAA, not allowing the plaintiffs to attend would be "unreasonable." Thus the application of the Michigan Civil Rights Act turned on MPAA decisions.

Prosecutors may also constructively incorporate MPAA ratings. By threatening to seek prosecution under obscenity statutes only against vendors of X rated material, for example, the prosecutor may effectively place a prior restraint on speech,\textsuperscript{140} or chill protected speech.\textsuperscript{141}

The recent attempts by legislatures to incorporate MPAA ratings into statutes are no more valid in the video context than in the theatrical movie context. Whether the attempts are veiled as zoning ordinances or are direct adoption of MPAA ratings, they are as dangerous to first amendment values as the statutes struck down in \textit{Engdahl, Watkins, Potter and Gascoe}. The MPAA is not an appropriate body to rule on the legal status of videotapes. The unbridled discretion of CARA members makes unrealistic the hope of reasonably definite standards.\textsuperscript{142} The procedures set forth in \textit{Freedman} should

\begin{itemize}
  \item \textsuperscript{137} \textit{Id.} at 410.
  \item \textsuperscript{138} \textit{Id.} at 414.
  \item \textsuperscript{139} \textit{Id.}
  \item \textsuperscript{140} \textit{See Bantam Books, Inc. v. Sullivan}, 372 U.S. 58 (1963) (informal censorship amounting to a prior restraint found where government notices intimidated distributors and retailers from selling certain books and magazines); \textit{United Artists v. Proskin}, 336 F. Supp. 406 (N.D.N.Y. 1973) (issue raised but not resolved: after theater owner withdrew showing of X rated \textit{Last Tango in Paris} because of threat of prosecution, United Artists sued on basis that prosecutor’s announced intention to subpoena all X rated videos constituted unlawful delegation of legislative authority); \textit{see also Gates v. Ney}, No. 85-3110 (6th Cir. Jan. 9, 1986) (Westlaw, Allfed library) (plaintiff alleged existence of agreement between prosecutor and cable company providing for dismissal of obscenity indictment in return for stipulation that cable company will not present X rated films).
  \item \textsuperscript{142} \textit{See supra} notes 24-28, 106-109; \textit{Allied Artists Pictures Corp. v. Alford}, 410 F. Supp. 1348, 1357 (W.D. Tenn. 1976) (section of ordinance authorizing board of review to apply for injunctions against exhibitors of films "constituted an excessively subjective judgement as to what might be deemed ‘obscene to juveniles.’ ").
\end{itemize}
Regulating a Video Revolution

not be circumvented by reliance on the MPAA. Nor should the strict specificity requirements of **Interstate Circuit** fall by the wayside.

**IV. Conclusion**

The recent trend of legislators to rely on the MPAA rating system to define categories of speech certainly attests to the success of that rating system. The MPAA rating is "an accepted part of the cultural landscape." It is a scheme common, highly visible and part of the everyday life in the United States. Reference to it is easy, and most consumers and video vendors will understand what the regulations require. Administrative advantages aside, however, the use of MPAA ratings violates the Constitution. A lottery, randomly assigning ratings, would be efficient as well. There is no question that a lottery would violate **Freedman** procedures and **Interstate Circuit** specificity requirements; the MPAA is little better than a lottery from a constitutional perspective. Legislatures must bear the burden of their task and either give the video industry more time to establish its own scheme or draft regulations wholly apart from any voluntary system. The video industry, although still unsure of the specifics, is moving forward with a self-regulatory strategy. The result may be embraced as warmly by consumers as the MPAA movie rating system and may help avoid the sticky issues involved in governmental rating boards. If not, legislatures are certainly free to draft statutes that classify videos as indecent for children, but they must do so consistently with the standards set forth by the Supreme Court. Abdicating the responsibility for doing the "dirty work" of video evaluation to private organizations which are virtually immune from judicial scrutiny is not the answer.

143. In a survey by the Los Angeles Times, 60% of American adults found the MPAA ratings a useful tool for determining what their children should see. Mathews, supra note 20, at 1. Opinion Research Corporation conducted a survey for the MPAA recently that showed 73% of parents with children under 17 found the rating system “very/fairly” helpful. Landro, supra note 14, at 1.

144. Mathews, supra note 20, at 1.

145. But see Terry v. Houston County Bd. of Educ., 342 S.E.2d 774-75 (Ga. Ct. App. 1986) (court noting testimony of appellant Terry, elderly man fired from teaching job for showing R rated Blue Thunder, that “even if [Terry] had seen the ‘R,’ he would not have fully understood its significance, since the last movie he had seen was Clarence the Cross-Eyed Lion in 1963”).