Self-Regulation and the Media

Angela J. Campbell*

* Professor, Georgetown University Law Center. The Author wishes to thank Randi Albert, Michael Kautsch, Joel Reidenberg, Mark Tushnet, and Stefaan Verhulst, as well as the participants at the University of Kansas's Legal Theory Workshop and at the Georgetown Faculty Research Workshop, for their helpful comments and suggestions. The Author is also indebted to Nicole Lemire for her valuable research assistance. The views expressed here are solely those of the Author. However, as Associate Director of the Institute for Public Representation, a clinical program at Georgetown University Law Center, Professor Campbell serves as counsel to some of the parties involved in some of the proceedings discussed in this Article, and her experience informs her perspective. For example, Professor Campbell has worked closely with the Center for Media Education and other advocacy groups to protect the online privacy of children and to implement the V-Chip legislation.

I. INTRODUCTION

Calls for self-regulation of electronic media have recently been heard in Washington, D.C. In December 1998, a Presidential Advisory Committee recommended that digital television broadcasters adopt a voluntary Code of Conduct highlighting their public interest commitments.[1] The Advisory Committee Report even included a "Model Voluntary Code" drafted by a subcommittee headed by Professor Cass Sunstein.[2]

Similarly, President Clinton has called for industry self-regulation to address consumer privacy concerns on the Internet.[3] This theme has been

1. NTIA ADVISORY COMMITTEE ON PUBLIC INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS, CHARTING THE DIGITAL BROADCASTING FUTURE, FINAL REPORT OF THE ADVISORY COMMITTEE ON PUBLIC INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS 46 (1998), *available at* <http://www.ntia.doc.gov/pubintadvcom/piacreport.pdf> [hereinafter PIAC REPORT]. As described in this Report, "[d]igital television is a new technology for transmitting and receiving broadcast television signals. It delivers better pictures and sound, uses the broadcast spectrum more efficiently, and adds versatility to the range of applications." *Id*. at xi. The Advisory Committee was charged with developing recommendations concerning public interest obligations to be imposed on television stations as they convert to digital television. Exec. Order No. 13,038, 62 Fed. Reg. 12,063 (1997). It consisted of 22 members representing both the broadcast industry and the public. *See* NTIA, *Advisory Committee on Public Interest: Obligations of Digital Television Broadcasters* (visited Mar. 15, 1999) <http://www.ntia.doc.gov/pubintadvcom/pubint.htm>. The Advisory Committee met over a period of 15 months. The topic of self-regulation was discussed at the Advisory Committee meetings held on June 8, 1998, and September 9, 1998. Transcripts of these meetings may be found at <http://www.ntia.doc.gov/pubintadvcom>.

2. PIAC REPORT, *supra* note 1, at 106-26.

3. PRESIDENT WILLIAM J. CLINTON & VICE PRESIDENT ALBERT GORE, JR., A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE 18 (1997).

echoed by the Department of Commerce's National Telecommunications and Information Administration (NTIA)[4] and the Federal Trade Commission (FTC).[5] However, the FTC released a report in June 1998, finding that self-regulation had not been successful thus far in protecting consumer privacy.[6] It recommended congressional action specifically to address the issue of children's privacy online, while giving more time to industry to prove it can regulate itself before calling for general privacy legislation.[7]

In the last few days of the 1998 session, Congress in fact passed legislation designed to protect the privacy of children online. Yet, the regulatory scheme established by this legislation contains specific incentives for industry to self-regulate.[8]

Why are the Advisory Committee, the Clinton Administration, and the FTC all calling for self-regulation? It is most likely that they see self-regulation as superior to (or at least more politically acceptable than) government regulation. Many scholars have also touted the benefits of self-regulation, but self-regulation is not without its critics.

> The Administration supports private sector efforts now underway to implement meaningful, consumer-friendly, self-regulatory privacy regimes. These include mechanisms for facilitating awareness and the exercise of choice online, evaluating private sector adoption of and adherence to fair information practices, and dispute resolution.
>
> . . . If privacy concerns are not addressed by industry through self-regulation and technology, the Administration will face increasing pressure to play a more direct role in safeguarding consumer choice regarding privacy online.

Id.

4. Elements of Effective Self Regulation for the Protection of Privacy and Questions Related to Online Privacy, *Notice and Request for Public Comment*, 63 Fed. Reg. 30,729 (NTIA 1998).

5. *See, e.g.*, FTC, PRIVACY ONLINE: A REPORT TO CONGRESS i-ii (1998) (noting that the FTC's "goal has been to encourage and facilitate effective self-regulation as the preferred approach to protecting consumer privacy online") [hereinafter PRIVACY REPORT].

6. *Id.* at 41.

7. *Id.* at 42. *See also Electronic Commerce: Hearings on H.R. 2368 Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Comm. on Commerce*, 105th Cong. 307 (1998) [hereinafter *Electronic Commerce Hearings*] (statement of Robert Pitofsky, Chairman, FTC).

8. Children's Online Privacy Protection Act of 1998, Pub. L. No. 105-277, §§ 1301-1308, 112 Stat. 2681, 2728-35 (to be codified at 15 U.S.C. §§ 6501-6506). Section 1303 directs the FTC to promulgate regulations that generally require commercial Web site operators to give notice and obtain consent from the parent of a child under the age of 13 before collecting personally identifiable information from the child. Section 1304 directs the FTC to "provide incentives for self-regulation" by offering a "safe harbor" from prosecution for companies that comply with self-regulatory guidelines issued by industry that have been found, after notice and comment, by the FTC to meet the requirements of the law. *See also Electronic Commerce Hearings*, *supra* note 7, at 309-10 (statement of Robert Pitofsky, Chairman, FTC) (describing how a safe harbor would work).

Part II of this Article reviews the literature on self-regulation to define what is meant by the term, to identify the purported advantages and disadvantages of self-regulation, and to identify the conditions needed for its success. Part III examines situations involving media where self-regulation has been utilized to determine why it was undertaken and whether is has been successful.[9] Based on these examples, Part IV suggests some tentative conclusions about the circumstances under which self-regulation works. Finally, it applies these findings to recent proposals to utilize self-regulation in connection with digital television and privacy on the Internet.

II. SELF-REGULATION

A. The Definition of Self-Regulation

The term self-regulation means different things to different people. In introducing a collection of papers analyzing the prospects of self-regulation for protecting privacy on the Internet, Assistant Secretary of Commerce Larry Irving observed:

> Most basically, we need to define what we mean, as the term "self-regulation" itself has a range of definitions. At one end of the spectrum, the term is used quite narrowly, to refer only to those instances where the government has formally delegated the power to regulate, as in the delegation of securities industry oversight to the stock exchanges. At the other end of the spectrum, the term is used when the private sector perceives the need to regulate itself for whatever reason—to respond to consumer demand, to carry out its ethical beliefs, to enhance industry reputation, or to level the market playing field—and does so.[10]

To devise a definition for purposes of this Article, it is useful to break apart the term "self-regulation." The word "self" refers to the actor. It could mean a single company. More commonly, however, and for purposes of this Article, it is used to refer to a group of companies acting collectively, for example, through a trade association.[11] The word "regulation" refers to what the actor is doing. Regulation has three components: (1) legislation, that is,

9. In analyzing success, the Author primarily considers whether self-regulatory codes have been successful in achieving their stated purposes. The separate, but important question of whether the stated purposes are in the public interest is beyond the scope of this Article.

10. Larry Irving, *Introduction* to PRIVACY AND SELF-REGULATION IN THE INFORMATION AGE (NTIA 1997), *available at* <http://www.ntia.doc.gov/reports/privacy/privacy_rpt.htm>.

11. Other writers may define self-regulatory activities more broadly. *See, e.g.*, Everette E. Dennis, *Internal Examination: Self-Regulation and the American Media*, 13 CARDOZO ARTS & ENT. L.J. 697 (1995) (including public opinion and media critics in survey of self-regulatory efforts of print media).

defining appropriate rules; (2) enforcement, such as initiating actions against violators; and (3) adjudication, that is, deciding whether a violation has taken place and imposing an appropriate sanction.[12]

Thus, the term "self-regulation" means that the industry or profession rather than the government is doing the regulation. However, it is not necessarily the case that government involvement is entirely lacking.[13] Instead of taking over all three components of regulation, industry may be involved in only one or two. For example, an industry may be involved at the legislation stage by developing a code of practice, while leaving enforcement to the government, or the government may establish regulations, but delegate enforcement to the private sector. Sometimes government will mandate that an industry adopt and enforce a code of self-regulation.[14] Often times, an industry will engage in self-regulation in an attempt to stave off government regulation. Alternatively, self-regulation may be undertaken to implement or supplement legislation.[15]

B. Arguments in Favor of Self-Regulation

The claimed advantages of self-regulation over governmental regulation include efficiency, increased flexibility, increased incentives for compliance, and reduced cost. For example, it is argued that industry participants are likely to have "superior knowledge of the subject compared to [a] government agency."[16] Therefore, it is more efficient for government to rely on

12. Peter P. Swire, *Markets, Self-Regulation, and Government Enforcement in the Protection of Personal Information*, *in* PRIVACY AND SELF-REGULATION IN THE INFORMATION AGE, *supra* note 10, at 9.

13. *But see* Robert Corn-Revere, *Self-Regulation and the Public Interest*, *in* DIGITAL BROADCASTING AND THE PUBLIC INTEREST: REPORTS AND PAPERS OF THE ASPEN INSTITUTE COMMUNICATIONS AND SOCIETY PROGRAM 63 (Charles M. Firestone & Amy Korzick Garmer eds., 1998), *available at* <http://www.aspeninst.org/dir/polpro/CSP/DBPI/dbpi14.html> (arguing that self-regulation is best promoted by ending all direct and indirect government content control and that efforts to promote government policies by means of threat, indirect pressure, or suggested industry codes are not true self-regulation).

14. IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 103 (1992) (viewing self-regulation as a form of subcontracting regulatory functions to private actors). In some countries, laws require industries to adopt codes of practice. For example, Australia requires broadcasting industry groups to develop codes of practice, in consultation with the regulatory authority, concerning such topics as preventing the broadcast of unsuitable programs, promoting accuracy and fairness in news and current affairs, and protecting children from harmful program material. Broadcasting Services Act, 1992, § 123 (Austl.).

15. Frank Kuitenbrouwer, *Self-Regulation: Some Dutch Experiences*, *in* PRIVACY AND SELF-REGULATION IN THE INFORMATION AGE, *supra* note 10, at 113.

16. Douglas C. Michael, *Federal Agency Use of Audited Self-Regulation as a Regulatory Technique*, 47 ADMIN. L. REV. 171, 181-82 (1995); AYRES & BRAITHWAITE, *supra* note 14, at 110-12.

the industry's collective expertise than to reproduce it at the agency level. This factor may be particularly important where technical knowledge is needed to develop appropriate rules and determine whether they have been violated.

Second, it is argued that self-regulation is more flexible than government regulation.[17] It is easier for a trade association to modify rules in response to changing circumstances than for a government agency to amend its rules. Not only are government agencies bound to follow the notice and comment procedures of the Administrative Procedure Act, but it is often difficult for an agency to obtain the political support and consensus needed to act. It is argued that industry is better able to determine when a rule may be changed to result in better compliance. Moreover, self-regulation can be more tailored to the particular industry than government regulation. While "command and control" regulation may have worked well in the past when addressing near monopolies, it does not work well with different types of market failures.[18] Given the sheer magnitude of individual problems, general rules may lead to absurd results.

Another argument in support of self-regulation is that it provides greater incentives for compliance.[19] It is thought that if rules are developed by the industry, industry participants are more likely to perceive them as reasonable. Companies may be more willing to comply with rules developed by their peers rather than those coming from the outside.[20]

Fourth, it is argued that self-regulation is less costly to the government because it shifts the cost of developing and enforcing rules to the industry.[21] Of course, the government may still be involved in supervision, but supervision requires fewer resources than direct regulation. Indeed, Ian Ayres and John Braithwaite argue that self-regulation is an attractive alternative to direct government regulation because the state "cannot afford to do an adequate job on its own."[22] They acknowledge, however, that self-regulation will only result in a net reduction of cost if the costs to industry are lower than the government's cost savings.[23]

17. Michael, *supra* note 16, at 181-82; AYRES & BRAITHWAITE, *supra* note 14, at 110-12.

18. Michael, *supra* note 16, at 186-88.

19. *Id.* at 181, 183-84; AYRES & BRAITHWAITE, *supra* note 14, at 115.

20. Swire, *supra* note 12, at 4; AYRES & BRAITHWAITE, *supra* note 14, at 115-16.

21. *See, e.g.*, Michael, *supra* note 16, at 184; AYRES & BRAITHWAITE, *supra* note 14, at 114.

22. AYRES & BRAITHWAITE, *supra* note 14, at 103.

23. *Id.* at 120-21. If industry expertise is important, it may be the case that the costs to industry are lower.

Self-regulation may also be justified where the rules or adjudicatory procedures differ from the surrounding community or the rules of the surrounding community are inapplicable. Specifically, the argument is sometimes made with respect to the Internet, where jurisdictional and sovereignty issues make it difficult for nations to enforce their laws.[24]

Finally, self-regulation may be used instead of governmental regulation to avoid constitutional issues.[25] For example, it is doubtful under the First Amendment whether government can prohibit the advertising of alcoholic beverages.[26] However, no constitutional question arises if a station or group of stations independently decides not to accept alcohol advertising.

C. Arguments Against Self-Regulation

Critics of self-regulation question the basis for the arguments in favor of self-regulation. For example, while acknowledging that industry may possess greater technical expertise than government, Professor Peter Swire questions whether companies will use that expertise to the benefit of the public, suggesting instead that they are more likely to employ their expertise to maximize the industry's profits.[27] Similarly, the idea that industry will comply more willingly with its own regulations than those imposed from the outside seems somewhat weak where industry is actively involved in developing regulations at the agency.[28]

Other criticisms are directed against self-regulation itself. Leaving regulation to the industry creates the possibility that industry may subvert regulatory goals to its own business goals; or as one article put it, "self-regulators often combine—and sometimes confuse—self-regulation with self-service."[29] Self-regulatory groups may be more subject to industry pressure than government agencies. Moreover, the private nature of self-

24. *See, e.g.*, David R. Johnson & David Post, *Law and Borders—the Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1370-76 (1996).

25. *See generally* Duncan A. MacDonald, *Privacy, Self-Regulation, and the Contractual Model: A Report from Citicorp Credit Services, Inc.*, *in* PRIVACY AND SELF-REGULATION IN THE INFORMATION AGE, *supra* note 10, at 133, 134 (arguing that self-regulatory measures can avoid constitutional issues arising under the First, Fourth, and Fifth Amendments).

26. *See generally* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

27. Swire, *supra* note 12, at 13.

28. In the Author's experience in rule makings at the FCC, industry tends to dominate the process. An alternative process that may offer similar opportunities for industry involvement and commitment to regulations is the negotiated rulemaking process.

29. Donald I. Baker & W. Todd Miller, *Privacy, Antitrust and the National Information Infrastructure: Is Self-Regulation of Telecommunications-Related Personal Information a Workable Tool?*, *in* PRIVACY AND SELF-REGULATION IN THE INFORMATION AGE, *supra* note 10, at 93-94.

regulation may fail to give adequate attention to the needs of the public or the views of affected parties outside the industry.

Many question the adequacy of enforcement in self-regulatory regimes.[30] Industry may be unwilling to commit the resources needed for vigorous self-enforcement.[31] It is also unclear whether industry has the power to enforce adequate sanctions. At most, a trade association may punish noncompliance with expulsion. Whether expulsion is an effective deterrent depends on whether the benefits of membership are important.[32] In many cases, expulsion or other sanctions, such as denial of the right to display a seal, are insufficient.[33]

Without adequate incentives to comply, "bad actors" will be unlikely to comply, and the "good actors" that do comply will be placed at a competitive disadvantage.[34] Where a company can make greater profit by ignoring self-regulation than complying, it is likely to do so, especially where noncompliance is not easily detected by the consumer or likely to harm the particular company's reputation.[35] Like cartels, self-regulatory frameworks may unravel because of cheaters.[36] On the other hand, when enforcement actions are taken, concerns are raised about the exercise of unreviewable discretion.[37]

Another problem with self-regulation is that it can facilitate anticompetitive conduct.[38] Self-regulation, as that term is used in this Article, involves competitors getting together to agree on how they will conduct their

30. *See, e.g.*, Michael, *supra* note 16, at 189; Mark E. Budnitz, *Privacy Protection for Consumer Transactions in Electronic Commerce: Why Self-Regulation Is Inadequate*, 49 S.C. L. REV. 847, 874-77 (1998); Deidre K. Mulligan & Janlori Goldman, *The Limits and the Necessity of Self-Regulation: The Case for Both*, *in* PRIVACY AND SELF-REGULATION IN THE INFORMATION AGE, *supra* note 10, at 67-68.

31. Stephen Balkam, *Content Ratings for the Internet and Recreational Software*, *in* PRIVACY AND SELF-REGULATION IN THE INFORMATION AGE, *supra* note 10, at 145 (pointing out that self-regulation requires considerable effort, time, resources, good judgment, and honesty).

32. Henry H. Perritt, Jr., *Regulatory Models for Protecting Privacy in the Internet*, *in* PRIVACY AND SELF-REGULATION IN THE INFORMATION AGE, *supra* note 10, at 110.

33. Such sanctions may be ineffective where consumers lack the knowledge of how a company is viewed by its peers. Moreover, trade associations generally are reluctant to expel their members, especially when the members pay dues to support the association's activities.

34. *Electronic Commerce Hearings*, *supra* note 7, at 356 (testimony of Kathryn Montgomery, President, Center for Media Education).

35. Swire, *supra* note 12, at 6.

36. Perritt, *supra* note 32, at 109-10.

37. Michael, *supra* note 16, at 190; AYRES & BRAITHWAITE, *supra* note 14, at 124-25.

38. *See, e.g.*, Baker & Miller, *supra* note 29, at 93; Joseph Kattan & Carl Shapiro, *Privacy, Self-Regulation, and Antitrust*, *in* PRIVACY AND SELF-REGULATION IN THE INFORMATION AGE, *supra* note 10, at 99.

business. As one article points out, this type of agreement inherently raises antitrust issues, and agreements by professional organizations have sometimes been challenged by the government under antitrust laws.[39]

D. Conditions for Successful Use of Self-Regulation

Professor Douglas C. Michael has surveyed the use of "audited self-regulation" by federal agencies.[40] This term refers to the delegation of power to implement laws or agency regulations to a nongovernmental entity where the federal agency is involved in verifying the soundness of rules, checking compliance, and spot-checking the accuracy of information supplied to it.

Although audited self-regulation is somewhat more narrow than the examples of self-regulation discussed below, Michael's observations about the conditions for successful self-regulation might have broader application. Michael reviewed the literature and hypothesized that audited self-regulation would work best where certain conditions were met:

> First, the private entity to which self-regulatory authority is granted must have both the expertise and motivation to perform the delegated task. Second, the agency staff must possess the expertise to "audit" the self-regulatory activity, which includes independent plenary authority to enforce rules or to review decisions of the delegated authority. Third, the statute must consist of relatively narrow rules related output-based standards. . . . Finally, the agency's and delegated authority's decision must observe rules for notice, hearing, impartiality, and written records of proceedings and decisions.[41]

Michael examined twelve different self-regulatory programs of seven different agencies in the areas of financial institutions, services and products, government benefit programs, nuclear power, and agricultural marketing.[42] His survey confirmed the importance of the industry organization having both expertise and the incentive to self-regulate.[43] Where industry expertise and incentives were missing, self-regulatory programs were abandoned or modified.[44] However, it was not essential to have a preexisting industry organization; rather, "successful regulatory organizations [could] be established contemporaneously with the regulation."[45] The lack of agency expertise also turned out not to be an obstacle because agencies were able to develop the required expertise.[46] Confirming his third hypothesis, he found

39. Kattan & Shapiro, *supra* note 38, at 99.
40. Michael, *supra* note 16.
41. *Id.* at 192.
42. *Id.* at 203-41. Some of these programs were successful, while others were not.
43. *Id.* at 241.
44. *Id.* at 242.
45. *Id.* at 241-42.
46. *Id.* at 242.

that the programs with the most subjective standards experienced the most difficulty in implementation.[47] Finally, he found that self-regulatory programs failed where procedural fairness, through such means as rule making on the record with notice and opportunity for comment from all affected groups, was lacking.[48]

III. USE OF SELF-REGULATION BY THE MEDIA

Self-regulation has been tried since the earliest days of electronic media, beginning with radio in the 1920s. The National Association of Broadcasters' (NAB) Radio Code existed for over fifty years, while the Television Code was in effect for about thirty years. Advertisers also have their own codes applicable to broadcast advertising. Examples of the latter include the Guidelines of the Children's Advertising Review Unit (CARU) and the Code of Practice of the Distilled Spirits Industry (DISCUS). Self-regulation has been employed with respect to news reporting, comic books, motion pictures, video games, and the Internet as well. This Part examines several of these examples of self-regulation. It focuses primarily on the experience with the NAB Code and the CARU Guidelines since they are most closely related to the proposals to use self-regulation for digital television (DTV) and privacy on the Internet.

A. The NAB Code

The NAB's efforts at self-regulation date back to its beginnings. Founded in 1923,[49] the NAB sought to address the problem of interference by asking radio stations to operate voluntarily only on their assigned wavelengths at assigned hours.[50] This effort failed, however, because too many stations refused to go along. As one commentator notes, "[t]he problem was enforcement of a self-regulatory plan in a circumstance where the natural incentives to break the rules were overwhelming. It might be in the industry's best interest for a particular broadcaster to leave the airwaves, but why would any particular broadcaster voluntarily do this?"[51] The recognition that

47. *Id.*

48. *Id.* at 245.

49. The NAB was formed originally in an attempt to resolve disputes over copyright issues between broadcasters and the American Society of Composers, Authors, and Publishers (ASCAP). David R. Mackey, *The Development of the National Association of Broadcasters*, 1 J. BRDCST. 307, 307 (1957).

50. Mark M. MacCarthy, *Broadcast Self-Regulation: The NAB Codes, Family Viewing Hour, and Television Violence*, 13 CARDOZO ARTS & ENT. L.J. 667, 668-69 (1995).

51. *Id.* at 669.

self-regulation was not working to eliminate the chaos on the airwaves was one of the factors leading to the passage of the Radio Act of 1927.[52]

1. Radio Code

Passage of the 1927 Radio Act made clear that if broadcasters failed to control their activities, the government would do it for them.[53] So, after more than a year of discussion and drafting, the NAB adopted its first Radio Code in 1929. It contained two sections—a code of ethics and standards of commercial practices. However, it lacked any enforcement provisions. Once the document was passed, it was largely forgotten.[54]

In 1933, the NAB submitted the Radio Code to the National Recovery Administration, and it was signed by President Roosevelt. This had the effect of turning the voluntary code into a federal law with a federally appointed authority to supervise compliance.[55] However, in 1935, the Supreme Court found such codes unconstitutional in *Schechter Poultry Corp. v. United States*.[56] The NAB thereafter adopted a voluntary code that was, according to one commentator, "placed . . . in an obscure office file . . . not to be dusted off again until 1939."[57] In that year, the Code was amended in response to strong criticism of the industry to make it more specific and to create an enforcement group called the Compliance Committee.[58]

For the first time, the Code was enforced. A provision that prohibited the sale of time for the airing of controversial views was applied to stations that sold time to the popular anticommunist, anticapitalist, anti-Semitic demagogue Father Charles E. Coughlin. Enough stations complied with the NAB Code that Father Coughlin found it difficult to find outlets and eventu-

52. *Id.*; Mackey, *supra* note 49, at 320-21.

53. BRUCE A. LINTON, SELF-REGULATION IN BROADCASTING 12 (1967). *See also* Lynda M. Maddox & Eric J. Zanot, *Suspension of the NAB Code and Its Effect on the Regulation of Advertising*, 61 JOURNALISM Q. 125, 126 (1984) (noting that after the Federal Radio Commission called for regulation of the amount and character of advertising, the NAB adopted the Radio Code calling for the voluntary elimination of all commercials between 7 P.M. and 11 P.M.).

54. LINTON, SELF-REGULATION IN BROADCASTING, *supra* note 53, at 12.

55. *Id.*

56. *Schechter Poultry Corp.*, 295 U.S. 495 (1935).

57. LINTON, SELF-REGULATION IN BROADCASTING, *supra* note 53, at 13.

58. *Id.* These changes were adopted in part to respond to the perception that the FCC was prepared to regulate content in wake of the broadcast of *War of the Worlds*. MacCarthy, *supra* note 50, at 672. Among other things, the 1938 Code called for close supervision of children's programs, required fair discussion of controversial issues, banned the sale of time for controversial issues, required news to be fair and accurate, limited the amount and type of commercials, and prohibited advertising of hard liquor and fortune telling. *Id.* at 672-73.

ally went off the air in 1940.[59] A few years later, the NAB revised the Code to conform to a Federal Communications Commission (FCC or Commission) ruling that airtime should be sold for the airing of controversial views[60] and made it clear that the Code provisions were meant merely to guide broadcasters and would not be enforced.[61]

2. Television Code

The first Television Code was adopted at the end of 1951.[62] Based on both the Radio Code and the Motion Picture Code,[63] it was drafted to head off proposed legislation that would have created a citizens advisory board for radio and television.[64]

The Television Code was amended at various points.[65] It probably had its greatest effect in the 1960s and 1970s. In 1961, the NAB expanded its budget and staff to include an overall Code Authority Director for both the Television and Radio Codes.[66] Writing in 1967, Professor Bruce Linton describes the activities of the Code Authority.[67] One function was to interpret the Code by providing advice, publishing guidelines and amendments to clarify Code provisions, and issuing rulings on specific programs or commercials. He notes that most cases were brought to successful conclusion through negotiation rather than issuing a ruling.[68] Most of the daily work of the Code staff concerned commercials rather than program content.[69]

59. MacCarthy, *supra* note 50, at 673.

60. United Brdcst. Co., *Decision and Order*, 10 F.C.C. 515 (1945).

61. MacCarthy, *supra* note 50, at 673; LINTON, SELF-REGULATION IN BROADCASTING, *supra* note 53, at 13-14.

62. LINTON, SELF-REGULATION IN BROADCASTING, *supra* note 53, at 15-16; MacCarthy, *supra* note 50, at 674.

63. The Motion Picture Code is discussed *infra* Part III.C.4.

64. MacCarthy, *supra* note 50, at 674 (describing Senator William Benton's bill to establish a National Citizens Advisory Board for Radio and Television to oversee programming and to submit a yearly report to Congress on the extent to which broadcasting served the public interest). Brenner attributes the Television Code "partly as a reaction to congressional ire over hard liquor advertisements on TV." Daniel Brenner, Note, *The Limits of Broadcast Self-Regulation Under the First Amendment*, 27 STAN. L. REV. 1527, 1529 (1975). *See also Liquor Advertising over Radio and Television: Hearings on S. 2444 Before the Senate Comm. on Interstate and Foreign Commerce*, 82d Cong. 227-28 (1952).

65. In the 1950s, changes were made in the aftermath of the quiz show scandals. MacCarthy, *supra* note 50, at 675.

66. LINTON, SELF-REGULATION IN BROADCASTING, *supra* note 53, at 18.

67. *Id.* at 34-46.

68. In 1966, for example, the New York Code Office dealt with 115 advertising agencies and acted on over 1,640 commercials for over 800 different products. *Id.* at 37.

69. LINTON, SELF-REGULATION IN BROADCASTING, *supra* note 53, at 39.

Another function of the Code Authority was that of enforcement. Linton notes that there were

> two areas of compliance involved—one with the [advertising] agencies and producers, and the other with the Code subscribers. The agencies and producers must comply with Code rulings or risk not having their material scheduled on Code stations. The Code subscribers must conform to the Code and comply with Code rulings or run the risk of losing the Code Seal and Code membership.[70]

He found a "considerable amount of 'due process'" for advertisers.[71] All negotiations were confidential unless a finding of noncompliance was made. While confidentiality protected advertisers from criticism, it also "serve[d] to mask from the public any real appreciation of the work of the Code Authority."[72]

Linton observed that determining whether stations were in compliance with the NAB Code was "a fantastically difficult job."[73] Compliance was checked through a system of twice-per-year monitoring backed up by letters of complaint, which came mostly from competing stations. The only sanction for violation was the revocation of subscription, which meant that the station no longer had the right to display the Seal of Good Practice. He noted that the process for removal was "complex and full of 'due process.'"[74]

Writing in the mid-1970s, Daniel Brenner provides a similar account of the Code administration bureaucracy.[75] The Code Authority handled the Code's day-to-day operations.[76] The Code Authority had three offices—one each in New York, Hollywood, and Washington, D.C.[77] It was involved in "clearing every new network series and individual controversial episodes, consulting with advertising agencies and independent program producers on standards of taste, evaluating commercials for Code compliance, receiving complaints, and monitoring subscribers."[78] The Code Authority even published *Code News*, a monthly newsletter.[79]

70. *Id.* at 40. Other functions of the Code Authority included acting as a liaison with government and other organizations and publicizing the Code's work. *Id.* at 43-46.

71. *Id.* at 40.

72. *Id.* at 41.

73. *Id.*

74. *Id.* at 42.

75. This description of the Code enforcement bureaucracy is from Brenner, *supra* note 64, at 1530-33.

76. *Id.* at 1530.

77. *Id.* at 1531 n.20.

78. *Id.* at 1530 n.15.

79. *Id.* at 1531 n.20.

Decisions of the Code Authority were reviewed by the Television Code Review Board.[80] This Board consisted of nine members representing subscribing stations, including one member for each of three major networks.[81] It reported directly to the Television Board of Directors at the NAB. The Television Code Review Board also considered revisions to the Code.[82]

Both the Radio and Television Codes were repealed after the Department of Justice (DOJ) filed suit against the NAB alleging that the advertising provisions of the Code violated the antitrust laws.[83] The DOJ argued that provisions limiting the number of minutes per hour of commercials, the number of commercials per hour, and the number of products advertised in a commercial, had the actual purpose and effect of manipulating the supply of commercial television time, with the result that the price of the time was raised to advertisers in violation of section 1 of the Sherman Act.[84] After the district court granted partial summary judgment for the DOJ, the NAB entered into a consent decree in which the NAB agreed to cease enforcing the advertising guidelines.[85] Although only certain advertising provisions had been challenged, the NAB abandoned the Code in its entirety in January 1983.[86]

At the time the NAB decided to abandon the Code, it had become clear that the FCC, then under Republican Chairman Mark Fowler, was abandoning the public trustee concept and dismantling the system of broadcast regulation that had grown up around it.[87] In 1981, the FCC had "deregulated" radio by repealing ascertainment requirements,[88] repealing processing

80. *Id.* at 1530.

81. *Id.*

82. *Id.*

83. United States v. NAB, 536 F. Supp. 149 (D.D.C. 1982).

84. The NAB argued that the limits were voluntary guidelines enacted in the public interest. *See* Patricia Brosterhous, United States v. National Association of Broadcasters: *The Deregulation of Self-Regulation*, 35 FED. COMM. L.J. 313 (1983).

85. United States v. NAB, *Proposed Final Judgment and Competitive Impact Statement*, 47 Fed. Reg. 32,810 (DOJ 1982).

86. A few years after the Code was eliminated, Professor Linton found that each of the three major networks had adopted parts of the NAB Code, which were implemented through the networks' Standards and Practices Divisions. He found that the absence of the Code had the greatest impact at the station level. Bruce A. Linton, *Self-Regulation in Broadcasting Revisited*, 64 JOURNALISM Q. 483 (1987).

87. Instead of treating broadcasters as public trustees, Fowler and Brenner believed that the public interest was best served by leaving broadcasters to respond solely to market forces. *See, e.g.*, Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982); Brosterhous, *supra* note 84, at 342-43.

88. Under ascertainment, stations were required to interview representatives of important groups within their community, determine their concerns, and provide programming responsive to those concerns.

guidelines that essentially required stations to broadcast news, public affairs, and other informational programming, eliminating limits on the amount of time devoted to commercials, and eliminating program reporting requirements.[89] With the deregulation of radio and the FCC's fundamental questioning of the public trustee concept, television deregulation was sure to follow.[90] Because the NAB Code had been adopted to stave off government regulation, once the threat of government regulation was removed, the industry saw no reason to retain the Code.[91]

3. Effectiveness of the NAB Code

It is difficult to evaluate the effectiveness of the NAB Code because there has been little academic study of it.[92] Moreover, the NAB Code covered many different aspects of broadcasting and was frequently amended. In evaluating effectiveness, this Article first examines some general limitations on the Code's effectiveness and then looks at the effectiveness of specific provisions.

89. Deregulation of Radio (Part 1 of 2), *Report and Order (Proceeding Terminated)*, 84 F.C.C.2d 968, 49 Rad. Reg. 2d (P & F) 1 (1981), *recons.*, *Memorandum Opinion and Order*, 87 F.C.C.2d 797, 50 Rad. Reg. 2d (P & F) 93 (1981), *aff'd in part and remanded in part*, Office of Comm. of United Church of Christ v. FCC, 911 F.2d 803 (D.C. Cir. 1990) [hereinafter *Deregulation of Radio Report and Order*]. That same year, the FCC eliminated the requirement that stations include in their renewal applications any information about their program efforts. Radio Broadcast Services: Revision of Applications for Renewal of License of Commercial and Noncommercial AM, FM, and Television Licensees, *Report and Order*, 49 Rad. Reg. 2d (P & F) 740 (1981), *recons.*, *Memorandum Opinion and Order*, 87 F.C.C.2d 1127, 50 Rad. Reg. 2d (P & F) 704 (1982), *aff'd sub nom.* Black Citizens for a Fair Media v. FCC, 719 F.2d 407 (D.C. Cir. 1983).

90. In fact, television was deregulated in 1984. Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, *Report and Order*, 98 F.C.C.2d 1076, 56 Rad. Reg. 2d (P & F) 1005 (1984), *recons.*, *Memorandum Opinion and Order*, 104 F.C.C.2d 358, 60 Rad. Reg. 2d (P & F) 526 (1986), *aff'd in part and remanded in part*, Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987) [hereinafter *Deregulation of Television Report and Order*].

91. In 1990, the NAB did issue "voluntary programming principles" concerning children's television, indecency and obscenity, drugs and substance abuse, and violence. MacCarthy, *supra* note 50, at 687. However, it made clear that the application, interpretation, and enforcement of these principles remained at the sole discretion of individual licensees. *Id.* at 688. The NAB's Statement of Principles of Radio and Television Broadcasting are included as Appendix C to the PIAC REPORT, *supra* note 1, at 127.

92. Professor Bruce A. Linton, the Chairman of the Radio-TV-Film Department of the University of Kansas, published a useful outline in 1967. LINTON, SELF-REGULATION IN BROADCASTING, *supra* note 53, at 12. It summarizes the history, current activities, and some of the problems with the NAB Code, but it cites no studies analyzing its effectiveness. Most law review writing about the NAB Code focuses, not surprisingly, on the antitrust suit and the Writers Guild's challenge to the Family Viewing Hour.

a. General Limitations on Effectiveness

Linton, writing in 1967, found that the biggest obstacle to the NAB's self-regulation was the extent of subscribership.[93] At that time, 396 out of 631 television stations (63 percent) subscribed, and the percentage for radio stations was even lower.[94] The most common reason for a station's refusal to subscribe was that it could not comply with the advertising restrictions and still make a profit.[95] Some stations objected more on grounds of ideology or fear of government regulation: They viewed the Code of Practice as providing "*a clear blueprint for increased government control of broadcasting*."[96] Yet, other stations declined to subscribe because they found the standards too low.[97]

In a 1975 article, Brenner characterized the "[a]pprehension of violations by the Code Authority [as] spotty at best."[98] Code monitoring was done by a randomly rotated, quantitative review of subscribers' program logs conducted twice yearly. Because the staff could not be expected to cover member stations with any regularity, it was forced to "rely mainly on complaints by those few viewers aware of [the Code Authority's] existence or by subscribers themselves, who request Code review."[99]

Where violations were found, the Code provided for "a 21-part suspension procedure with final review residing with the Television Board of Directors."[100] Suspension was rare.[101] As Brenner points out, the NAB was reluctant to suspend stations because it did not want to lose dues-paying

93. *Id.* at 41-42.

94. These figures are consistent with Brenner's statement that as of January 1, 1975, 60% of television stations subscribed. Brenner, *supra* note 64, at 1530 n.17. In 1979, 65% of television stations were members of the NAB, but the Television Code's influence may have been greater than these numbers suggest. These 65% of stations accounted for 85% of all viewing. Moreover, as far as commercials were concerned, since all of the three major networks were members of the NAB and most stations at that time were network affiliates, the network commercials presumably complied with the Code even if the affiliate was not a member. Maddox & Zanot, *supra* note 53, at 125.

95. LINTON, SELF-REGULATION IN BROADCASTING, *supra* note 53, at 50.

96. *Id*. at 52.

97. Brenner, *supra* note 64, at 1531 n.21.

98. *Id.* at 1531 n.22.

99. *Id.* Linton notes that stations listened to each other and often complained to the Code Authority if a competitor was not in compliance. LINTON, SELF-REGULATION IN BROADCASTING, *supra* note 53, at 41.

100. Brenner, *supra* note 64, at 1532 n.22.

101. Indeed, the only case of suspension the Author found, involved the suspension or withdrawal of 39 stations in the early 1960s for airing a commercial for "Preparation H," which the Code Review Board found unsuitable for television. However, several years later, the Television Board of Directors reversed the Board's position, and 23 of the stations rejoined. *Id.*

members.[102] Moreover, the NAB's ultimate sanction was ineffective. Broadcast historian Erik Barnouw describes the Television Code's "enforcement machinery" as

> among its most absurd features. If a subscribing station was charged with violating the code and found guilty by an NAB review board, the station (according to the rules) would lose the right to display on the screen the NAB "seal of good practice." Since the seal meant nothing to viewers and its absence would be virtually impossible to notice, the machinery meant nothing.[103]

Thus in general, effective enforcement of the Television Code was hampered by the less-than-universal industry participation, limited resources, and inadequate enforcement incentives.

b. Commercial Provisions

Most enforcement actions involving the NAB Code concerned the commercial restrictions.[104] The NAB Code contained a variety of restrictions on the amount and type of commercial matter that could be broadcast. For example, the amount of nonprogram material (including advertising) was limited to 9.5 minutes per hour in prime time and to sixteen minutes per hour at all other times.[105] Advertising of hard liquor, fortune telling, and fireworks was prohibited, while commercials for beer, wine, and products of a personal nature were permitted so long as they were in "good taste."[106] In addition, broadcasters were responsible for making available documentation to support the truthfulness of claims, demonstrations, and testimonials contained in commercials.[107]

In 1963, the FCC sought to transform the commercial time restrictions contained in the Code into regulations,[108] but this effort was abandoned due to the objections of the broadcasters.[109] Nonetheless, during the 1960s and

---

102. *Id.*

103. 3 ERIK BARNOUW, THE IMAGE EMPIRE: A HISTORY OF BROADCASTING IN THE UNITED STATES FROM 1953, at 251 (1970).

104. LINTON, SELF-REGULATION IN BROADCASTING, *supra* note 53, at 39.

105. NAB, THE TELEVISION CODE 16-20 (19th ed. June 1976) [hereinafter TELEVISION CODE]. Different advertising limits applied to children's programs. *See infra* Part III.A.3.b(ii).

106. TELEVISION CODE, *supra* note 105, at 10-12.

107. *Id.* at 12-14. *See generally* Herbert J. Rotfeld et al., *Self-Regulation and Television Advertising*, 19 J. ADVER. 18, 19 (1990) (describing the advertising clearance procedures when the NAB Code was in effect and how they changed after repeal of the Code).

108. Amendment of Part 3 of the Comm'n's Rules and Regulations with Respect to Advertising on Standard, FM, and Television Broadcasting Stations, *Report and Order*, 36 F.C.C. 45 (1964).

109. Broadcasters overwhelmingly opposed the FCC's proposal. *Id.* para. 2. In addition to opposing the FCC's proposals in their comments, broadcasters complained to Congress

1970s, the FCC staff utilized the NAB Code as a processing guideline in reviewing station license renewals.[110] These processing guidelines, in effect, established NAB Code compliance as a "safe harbor" with detailed government review of the record of stations not meeting the Code. Few stations were found to exceed the guidelines.[111] Thus, at least during the 1960s and 1970s, the NAB Code was generally successful in limiting the amount of commercials. Next, this Article examines some specific types of advertising—cigarette advertising and advertising to children.

(i) Cigarette Advertising

One type of advertising that the NAB Code was unsuccessful in restricting was that of cigarette advertising. In the 1960s, there was a great deal of public concern about the impact of smoking on health.[112] Much of this concern focused on cigarette advertising. At that time, cigarette advertising accounted for 10 percent of all broadcasting advertising revenues.[113]

According to the congressional testimony of Warren Braren, who was the manager of the New York Code Authority office from 1960 until he resigned in 1969, the NAB Code Authority staff proposed strict guidelines for cigarette advertising in the summer of 1966.[114] The proposed guidelines

and influenced the House of Representative to pass a bill that would have prevented the FCC from adopting rules limiting the number of commercials. ERWIN G. KRASNOW ET AL., THE POLITICS OF BROADCAST REGULATION 193-96 (3d ed. 1982).

110. KRASNOW ET AL., *supra* note 109, at 196-97. *See, e.g.*, Amendment of Part O of the Comm'n's Rules, *Order*, 43 F.C.C.2d 638, 640 (1973) (delegating authority to Chief of the Broadcast Bureau and directing that television stations proposing more than 16 minutes per hour of commercial time be referred to the full Commission). These "delegations of authority" to the staff, which permitted the staff to renew radio and television licenses so long as they did not exceed certain advertising limits based on the NAB Code, were repealed in 1981 for radio and 1984 for television. *See Deregulation of Radio Report and Order*, *supra* note 89; *Deregulation of Television Report and Order*, *supra* note 90.

111. *Deregulation of Radio Report and Order*, *supra* note 89, para. 83; *Deregulation of Television Report and Order*, *supra* note 90, para. 59. In the antitrust litigation, however, the court found the extent to which the NAB Code influenced the supply and price of commercial time to be "a disputed issue of material fact." United States v. NAB, 536 F. Supp. 149, 158 (D.D.C. 1982).

112. *See generally* RICHARD KLUGER, ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS 221-62 (1996).

113. MacCarthy, *supra* note 50, at 676. Moreover, broadcast advertising accounted for approximately 70% of the cigarette makers' advertising budgets. KLUGER, *supra* note 112, at 302.

114. *Regulation of Radio and Television Cigarette Advertisements: Hearing Before the House Comm. on Interstate and Foreign Commerce*, 91st Cong. 5-10 (1969) [hereinafter *Cigarette Regulation Hearing*] (statement of Warren Braren, Former Manager, New York Office, National Association of Broadcasters Code Authority). *See also* KLUGER, *supra* note 112, at 331-32 (describing how Braren's testimony came about).

would have prohibited the use of heroes to promote smoking, banned depictions of smoking in advertisements, and ruled out cigarette advertisements in sports settings. Yet, the Television Code Review Board rejected these proposals, instead adopting weaker guidelines that required few or no changes in then-existing advertising practices.

Even these limited guidelines were resisted by the tobacco companies and television networks. Braren describes how the attempts at self-regulation were rendered ineffectual due to the actions of some networks and tobacco companies.[115] He attributed the network subscribers' lack of support for the Code Authority to the impact on their advertising revenues.[116] Braren asserted that "the code authority is little more than a 'step-child' of the NAB. The autonomy and power needed in order to become a truly professional body acting objectively to serve the public interest is absent."[117] The NAB's failure to address the concerns about cigarette advertising was one of the factors responsible for Congress's adoption of an outright prohibition on broadcast advertising of cigarettes.[118]

(ii) Children's Advertising

The Television Code met greater success, at least for a time, in limiting the amount of advertising on children's programs as well as preventing direct governmental regulation of advertising on children's television. The NAB first adopted toy advertising guidelines in 1961. These guidelines were modest in scope and substance. At that time, there was little advertising directed at children and little research about children's understanding of advertising.[119] By the 1970s, however, the nature of advertising to children had changed. The concentration of children's programming on Saturday mornings led to more focused advertising.[120] Concerns about advertising on chil-

115. For example, he describes how the American Tobacco Co., which had withdrawn from the tobacco industry's own code in 1967, repeatedly violated the broadcasting guidelines by airing commercials that had never been submitted to the Code Authority. American Tobacco took the view that if a commercial was approved by television networks, there was no reason for the Code Authority to raise any questions. *Cigarette Regulation Hearing*, *supra* note 114, at 7.

116. *Id.* at 9.

117. *Id.* at 10.

118. Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1335 (1994). Interestingly, it was broadcasters, rather than the tobacco companies that unsuccessfully challenged the constitutionality of the advertising prohibition. *See* Capital Brdcst. Co. v. Mitchell, 405 U.S. 1000 (1972).

119. Dale Kunkel & Walter Gantz, *Assessing Compliance with Industry Self-Regulation of Television Advertising to Children*, 21 J. APPLIED COMM. RESEARCH 148, 151 (1993) [hereinafter Kunkel & Gantz, *Assessing Compliance*].

120. *Id*.

dren's television were raised in the early 1970s by groups such as Action for Children's Television (ACT). Action for Children's Television called on the FCC, as well as the FTC, to prohibit or limit advertising directed at children.

While the FCC deliberated on the ACT proposal, the NAB amended the Television Code to diminish the number of children's advertisements.[121] In 1974,[122] the FCC declined to adopt limits on children's advertising, noting that the NAB had proposed limits to go into effect in 1976 of 9.5 minutes on weekend children's programs and twelve minutes for children's programs shown during the week.[123]

In 1979, a task force established by the FCC found that broadcasters had in general complied with the NAB's advertising guidelines.[124] However, with the subsequent abandonment of the NAB Code in 1983 and the deregulation of television in 1984, all limits on advertising on children's shows were removed and advertising increased.[125] Eventually, Congress directed the FCC to adopt numerical limits in the Children's Television Act of

121. KRASNOW ET AL., *supra* note 109, at 198. In response to the FCC's urging, the NAB also amended its Code to prohibit host selling on children's programs. *See* American Federation of Television and Radio Artists v. NAB, 407 F. Supp. 900, 901-02 (S.D.N.Y. 1976).

122. Also in 1974, the National Association of Advertisers created the Children's Advertising Review Unit (CARU), which is discussed *infra* Part III.B.

123. Petition of Action for Children's Television (ACT) for Rulemaking Looking Toward the Elimination of Sponsorship and Commercial Content in Children's Programming and the Establishment of a Weekly 14-Hour Quota of Children's Television Programs, *Children's Television Report and Policy Statement*, 50 F.C.C.2d 1, para. 43, 31 Rad. Reg. 2d (P & F) 1228 (1974) [hereinafter *Children's Television Report and Policy Statement*]. The FCC also relied on the fact that the Association of Independent Television Stations (INTV) had also proposed limits. Moreover, the NAB had recently amended its advertising Code to require a separation device between programming and commercials and to prohibit host selling. *Id.* paras. 49, 52. The FCC acknowledged that some stations were not members of either the NAB or INTV, but warned they too would be expected to bring their advertising practices into conformance with the Code requirements. *Id.* para. 43 n.13. Action for Children's Television appealed the FCC's decision to rely on industry self-regulation, and the court found the FCC's actions reasonable. *See* Action for Children's Television v. FCC, 564 F.2d 458, 481 (D.C. Cir. 1977).

124. Children's Television Programming and Advertising Practices, *Noticed of Proposed Rulemaking*, 75 F.C.C.2d 138, para. 5 (1979) (citing 2 FCC, TELEVISION PROGRAMMING FOR CHILDREN: A REPORT OF THE CHILDREN'S TELEVISION TASK FORCE 47-60 (Oct. 1979)).

125. *See, e.g.*, Dale Kunkel & Donald Roberts, *Young Minds and Marketplace Values: Issues in Children's Television Advertising*, 47 J. SOC. ISSUES 57, 68 (1991); Dale Kunkel & Walter Gantz, *Children's Television Advertising in the Multichannel Environment*, 42 J. COMM. 134, 143-44, 147 (1992) (finding children's advertising on networks in 1990 averaged 10:05 minutes per hour compared to eight minutes in 1983; also noting the development of a new type of advertising/program combinations).

1990.[126] The numerical limits in the Act—10.5 minutes per hour on weekends and twelve minutes per hour on weekdays[127]—were slightly higher than those in the former NAB Code. Thus, with the exception of cigarette advertising, the NAB Code seems to have enjoyed relative success in limiting advertising.

c. Programming Provisions

In contrast to advertising, the NAB's Television Code seems to have had less effect in the programming area. The Program Standards of the Television Code contained both general and specific prescriptions and proscriptions. For example, Part I, Principles Governing Program Content, advised broadcasters to "be conversant with the general and specific needs, interests and aspirations . . . of the communities they serve. They should affirmatively seek out responsible representatives of all parts of their communities so that they may structure a broad range of programs that will inform, enlighten, and entertain the total audience."[128]

Other sections dealt with responsibility toward children, community responsibility, special program standards, treatment of news and public events, controversial public issues, political telecasts, and religious programs. As one writer put it, the Code served as "a readymade articulation of . . . professional conscience that may be exhibited in the event of inquiry by the FCC or community groups."[129] It was closely tied to and represented a further articulation of the public trustee concept in broadcasting.[130]

Few studies analyzing compliance with programming provisions exist, and they are limited to children's programming.[131] Such studies would have been difficult to conduct because many of the program areas covered by the Television Code were also subject to FCC regulation,[132] and thus, it would

126. Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (codified as amended at 47 U.S.C. § 303a (1994)).

127. 47 U.S.C. § 303a(b) (1994).

128. TELEVISION CODE, *supra* note 105, at 2. This principle essentially embodied the FCC's then-existing requirement that broadcast stations conduct ascertainment. *See supra* note 88.

129. Brenner, *supra* note 64, at 1531.

130. Brosterhous, *supra* note 84, at 314.

131. There is some anecdotal evidence that Code provisions were effective in keeping some types of programming off the air. For example, in the *Mark* case, NBC cited the NAB Code as the reason for declining to allow an astrologist to appear as a guest on the *Tonight Show*. *Mark v. FCC*, 468 F.2d 266 (1st Cir. 1972).

132. Brosterhous, *supra* note 84, at 314.

be difficult if not impossible to attribute findings of compliance to the Television Code rather than to the FCC's regulation.[133]

The study by the FCC Task Force suggests that self-regulation of children's programming was generally ineffective. The one program provision in the NAB Code that seemed to be effective—the so-called "Family Viewing Policy"—was subject to litigation and eventually repealed.

(i) Children's Program Provisions

Part II of the Television Code, "Responsibility Toward Children," addressed affirmative programming responsibilities:

> Broadcasters have a special responsibility to children. Programs designed primarily for children should take into account the range of interests and needs of children from instructional and cultural material to a wide variety of entertainment material. In their totality, programs should contribute to the sound, balanced development of children to help them achieve a sense of the world at large and informed adjustments to their society.[134]

This Part appears to have had little effect. Peggy Charren, the founder of Action for Children's Television and a member of the Advisory Committee, observed at the meeting discussing the proposed voluntary code:

> There are aspects of the old [NAB] code, like the description of how to serve children, that were never paid any attention to. They actually sounded like I wrote them, and if they were happening during the 30 years I was in business, I never would have started [Action for Children's Television].[135]

Indeed, the Children's Television Task Force, which was directed by the FCC to "determine the effectiveness of industry self-regulation," found that broadcasters had not complied with programming guidelines.[136] Specifically, it found that broadcasters had failed to provide a reasonable amount of educational and informational programming.[137] Public and congressional

133. For example, the provisions concerning controversial public issues (Part VI) track the FCC's Fairness Doctrine. Indeed, the section on Political Telecasts (Part VII) refers to the Communications Act and FCC regulations on political broadcasting. TELEVISION CODE, *supra* note 105.

134. *Id.* at 3.

135. *Open Meeting of Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, June 8, 1998*, at 24-25 (visited Mar. 15, 1999) <http://www.ntia.doc.gov/pubintadvcom/junemtg/transcript-am.htm>.

136. 1 FCC, TELEVISION PROGRAMMING FOR CHILDREN: A REPORT OF THE CHILDREN'S TELEVISION TASK FORCE REPORT 2 (Oct. 1979) [hereinafter TASK FORCE REPORT VOL. 1].

137. 2 FCC, TELEVISION PROGRAMMING FOR CHILDREN: A REPORT OF THE CHILDREN'S TELEVISION TASK FORCE REPORT 25 (Oct. 1979) [hereinafter TASK FORCE REPORT VOL. 2]. It also found that television stations had failed to increase the overall amount of children's programming, *id.* at 17, had failed to air age-specific programs for children, *id.* at 28, and

dissatisfaction with broadcasters' program offerings for children eventually led to the passage of the Children's Television Act of 1990,[138] and ultimately, the guideline that each station offer a minimum of three hours per week of programming specifically designed to serve the educational and informational needs of children.[139]

(ii) The Family Viewing Policy

In addition to imposing a duty to affirmatively provide programming for children, the Television Code was amended in 1975 to limit children's exposure to programming containing violence, sex, or offensive language. Under what came to be known as the Family Viewing Policy, programs deemed inappropriate for general family audiences could not be shown during the first two hours of network programming in prime time.[140] The practical effect of this policy was to require that such programs be scheduled after 9 P.M. This action came after a great deal of pressure from Congress and the FCC to address the problem of televised violence.[141] The Writers Guild, which represented program producers, challenged the Family Viewing Policy in district court. It argued that the NAB's adoption of the Family Viewing Policy was not the result of voluntary industry self-regulation, but had been coerced by the government, and as a result, it constituted state action in violation of the First Amendment.

The district court allowed extensive discovery, and some of its findings provide interesting insights into the operation of the NAB Code. For example, the court found that a high level official at CBS was genuinely concerned with the level of violence on television, but

> feared that if CBS publicly committed itself to [the family viewing policy] that the commitment would work to CBS's competitive disadvantage in the absence of a binding enforcement mechanism applicable to the industry at large. Past experience in children's programming had led him to the conviction that broadcasters, more interested in dollars than in the public interest, would use violence as a tool to hike program ratings if they were left free to program in their own discretion. CBS was thus prepared to delegate its program discretion

that many stations were continuing to schedule children's programming only on weekends, *id*. at 42.

138. Pub. L. No. 101-437, 104 Stat. 996-1000 (codified as amended at 47 U.S.C. §§ 303a, 303b, and 394 (1994)).

139. Policy and Rules Concerning Children's Television Programming, *Report and Order*, 11 F.C.C.R. 10,660, paras. 159-63, 3 Comm. Reg. (P & F) 1385 (1996).

140. Writers Guild of Am., W., Inc. v. FCC, 423 F. Supp. 1064, 1072 (C.D. Cal. 1976).

141. *Id.* at 1094-95.

> to the NAB, but only if its major competitors could be persuaded to do so as well.[142]

The court found that at least as to the Family Viewing Policy, "the NAB function[ed] as an effective enforcement mechanism."[143]

The district court agreed with the Writers Guild on the state action claim and found that the FCC had violated the First Amendment.[144] Although the court conceded that there would be no First Amendment issue if the networks had truly decided to regulate themselves, or even if the regulation was the product of government "encouragement," it found that the type of indirect coercion engaged in by the government raised censorship issues under the First Amendment and the Communications Act.[145]

The district court's decision was overturned by the court of appeals for lack of jurisdiction.[146] The court of appeals also questioned the existence of state action and remanded the case to the FCC for determination. Not surprisingly, the FCC concluded that no improper coercion had occurred.[147] Yet, the Family Viewing Policy was never restored. In the meantime, the DOJ had brought an antitrust suit against the NAB. Although nothing in the antitrust suit required abandonment of the parts of the Code concerning violence and other programming inappropriate for children, the NAB decided to abandon the Code in its entirety.[148]

A few years later, Congress passed a law exempting broadcasters from the antitrust laws so that they could take collective action to reduce violent programming.[149] They did nothing to take advantage of this legislation, however. The broadcasters' failure to do so once the risk of antitrust liability was removed suggests that they had instituted the Family Viewing Policy

142. *Id.* at 1094.

143. *Id.* at 1123-34.

144. *Id.* at 1151. The court also found that the FCC violated the Administrative Procedure Act because it had adopted a new policy without conducting a notice and comment rule making as required by section 553. *Id.*

145. *Id.* The court made detailed factual findings about the role of the FCC, and particularly its Chairman, in pressuring the networks and the NAB into adopting the family viewing hour policy. *Id.* at 1092-122.

146. Writers Guild of Am., W., Inc. v. American Brdcst. Cos., 609 F.2d 355 (9th Cir. 1979).

147. Primary Jurisdiction Referral of Claims Against Government Defendant Arising from the Inclusion in the NAB Television Code of the "Family Viewing Policy," *Report*, 95 F.C.C.2d 700 (1983).

148. *See supra* Part III.A.2.

149. Television Program Improvement Act of 1990, Pub. L. No. 101-650, 104 Stat. 5127 (codified at 47 U.S.C. § 303c (1994)). *See also* MacCarthy, *supra* note 50, at 686-93 (describing the Television Program Improvement Act of 1990, sponsored by Senator Paul Simon, that granted broadcasters a three-year exemption from the antitrust laws to permit the industry to draft joint standards to reduce violence on television).

only to respond to government pressure and that they believed the First Amendment insulated them from such pressure.[150]

Thus, in general, during the thirty years in which the Television Code was in effect, it had its greatest effect on advertising. However, some of the advertising provisions were found to violate the antitrust laws. The programming provisions were generally ignored or at least not enforced. The one programming provision that actually had an impact—the Family Viewing Hour—was found to violate the First Amendment.

B. Children's Advertising Review Unit

Although not as old as the NAB Code, the Guidelines of the Children's Advertising Review Unit (CARU) have been in operation for almost twenty-five years. The National Advertising Division (NAD) of the Council of Better Business Bureaus created CARU in 1974, the same year that the FCC issued its *Children's Television Report and Policy Statement*.[151] At that time, Action for Children's Television had not only asked the FCC to eliminate or restrict advertising on children's programs, but it and other consumer groups had petitioned the FTC to take action with respect to children's advertising. In response, the FTC proposed to prohibit all advertising to children under age eight and to limit other types of advertising directed at children, particularly sugared cereals.[152]

The CARU was "established to forestall efforts by groups outside the industry which would severely restrict or even ban advertising to children."[153] Yet, its creation was met with considerable skepticism by the FTC and consumer groups that questioned whether an organization funded by industry, especially one with so little consumer representation, could objectively regulate advertising practices.[154]

150. Eventually, of course, most of the industry agreed to provide program ratings that were designed to allow parents to block programming they thought unsuitable for their children. *See infra* Part III.C.6.

151. The NAD also administers a code for advertising generally. *See* NAD, *Procedures* (visited Mar. 15, 1999) <http://www.bbb.com/advertising/nadproc.html>. This Article does not attempt to assess the effectiveness of that effort. Self-regulation of advertising is fairly common throughout the world. *See generally* JEAN J. BODDEWYN, GLOBAL PERSPECTIVES ON ADVERTISING SELF-REGULATION (1992) (surveying self-regulation of advertising in 38 countries).

152. FTC, FTC STAFF REPORT ON TELEVISION ADVERTISING TO CHILDREN 320-24, 328-41 (Feb. 1978). The FTC never adopted these rules, however, as Congress terminated its authority to do so. *See* Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 11, 94 Stat. 374 (amending 15 U.S.C. § 57a (1994)).

153. Gary M. Armstrong, *An Evaluation of the Children's Advertising Review Unit*, 3 J. PUB. POL'Y & MKTG. 38, 40 (1984).

154. *Id*. at 38.

The CARU promulgated guidelines that apply to all forms of children's advertising. The CARU Guidelines list six basic principles for advertising directed to children.[155] For example, advertisers are advised to "always take into account the level of knowledge, sophistication and maturity of the audience" and that they "have a special responsibility to protect children from their own susceptibilities."[156] Likewise, they should "exercise care not to exploit unfairly the imaginative quality of children."[157] In addition, separate sections address specific problem areas: product presentation and claims; sales pressure; comparative claims; endorsement and promotion by program or editorial characters; premiums, promotions, and sweepstakes; and safety.[158]

Some provisions duplicate FCC policies, while others go beyond them. For example, the prohibition on the use of program personalities to sell products is similar to the FCC's policy against "host selling,"[159] while the prohibition on urging children to ask parents or others to buy products is not an FCC policy. Other provisions delineate deceptive or unfair advertising practices that might run afoul of section 5 of the Federal Trade Commission Act.[160] The Guidelines have been amended from time to time. Most significantly, CARU issued special guidelines in 1994 concerning recorded telephone messages and again in 1997 concerning online advertising. With the demise of the NAB Code in 1982, the CARU Guidelines were left as the only remaining industry-wide policy for children's advertising.[161]

1. Effectiveness of CARU's Advertising Guidelines

Several studies have evaluated CARU's effectiveness.[162] Armstrong reviewed CARU's activities during its first ten years.[163] He found that a

155. *The Children's Advertising Review Unit 1997 Self Regulatory Guidelines for Children's Advertising* (visited Mar. 15, 1999) <http://www.bbb.org/advertising/caruguid.html> [hereinafter *CARU Guidelines*].

156. *Id. Principle 1*.

157. *Id. Principle 2*.

158. *Id.*

159. *Children's Television Report and Policy Statement, supra* note 123, paras. 49-52.

160. For example, in Azrak-Hamway International, Inc., *Consent Agreement*, 61 Fed. Reg. 6841 (FTC 1996), the FTC alleged that certain toy advertisements on television depicting toys doing things that they could not do in actual use were false and misleading under section 5 of the FTC Act. As part of the proposed settlement, the company agreed to send letters to the stations running the spots advising them of the CARU Guidelines. The letter notes that in adopting the CARU Guidelines, "the advertising industry has undertaken various self-regulatory efforts to assist companies to comply with the law and to promote other industry goals." *Id.* at 6846.

161. Kunkel & Gantz, *Assessing Compliance*, *supra* note 119, at 148.

162. One study by Gary M. Armstrong was published in 1984 and evaluated the first 10 years of CARU's existence. *See supra* note 153. The other study was conducted by Dale

large proportion of CARU's activities involved casework.[164] The CARU staff (which consisted of four persons including secretarial personnel) monitored children's advertising. It also received complaints from outside sources, but Armstrong found that only 14 percent of cases came from sources other than monitoring.[165] The staff would evaluate advertisements against the Guidelines. The CARU could address problems informally[166] or by opening a formal investigation. After an investigation, which may involve internal review, product testing, or consultation with outside experts, the CARU had three options. First, it could find the advertisement acceptable and dismiss the case. Second, it could find the advertisement unacceptable and request that the advertiser discontinue or modify the advertisement. Third, it could find the advertisement questionable and request substantiation.[167] Armstrong found that CARU dismissed 7 percent of the cases, requested advertisers to discontinue or modify the advertisement in 71 percent of the cases, and sought substantiation in 22 percent of the cases.[168]

Compliance with CARU's rulings is purely voluntary. The CARU has no sanctions or enforcement power. Where an advertiser is noncooperative, CARU may refer the case to regulatory agencies such as the FTC and FCC.[169] Armstrong observes that "CARU's most powerful sanction is pub-

Kunkel and Walter Gantz in 1990. The results of this study are presented in two different papers: DALE KUNKEL & WALTER GANTZ, TELEVISION ADVERTISING TO CHILDREN: MESSAGE CONTENT IN 1990, REPORT TO THE CHILDREN'S ADVERTISING REVIEW UNIT (Jan. 1991) [hereinafter KUNKEL & GANTZ, CARU REPORT] and Kunkel & Gantz, *Assessing Compliance*, *supra* note 119.

163. The following description is from Armstrong, *supra* note 153, at 41.

164. Other activities include a voluntary film submission program in which advertisers may submit review copies before running a commercial, a Clearinghouse for Research on Children's Advertising, and occasional "outreach" activities. Armstrong notes that CARU's activities in these areas had been substantially cut back. *Id.*

165. Specifically, CARU staff monitors network, independent, and cable television programming at "child viewing times," as well as child-directed advertisements at nonchild viewing times. It also monitors children's magazines and comic books. *Id.*

166. *Id.* This behind-the-scenes activity was not reported. The practice of dealing with problems informally continues today. The CARU Web page reports that in 1994 while it monitored more than 17,000 television commercials, it initiated only 55 informal inquiries and five formal cases. *Children's Advertising Review Unit* (visited Mar. 15, 1999) <http://www.bbb.org/advertising/childrensMonitor.html>.

167. Armstrong, *supra* note 153, at 47-49.

168. *Id.*

169. *See, e.g.*, Dr. Frederick Beitenfeld, Jr., President WHYY, Inc., *Letter*, 7 F.C.C.R. 7123, 71 Rad. Reg. 2d (P & F) 1014 (1992). CARU filed a complaint alleging that a public television station in Philadelphia violated the FCC's policy against host selling. *Self-Reg Unit Refers Toy Ad to FTC*, FTC: WATCH, Sept. 18, 1996 (noting that CARU referred a television advertisement to the FTC alleging possible deception and safety concerns about a television advertisement portraying a doll whose eyelids, lips, and legs are shown changing color and that is shown with a razor resembling a real razor, and the advertiser

lic notice."[170] Case summaries are reported by the National Advertising Division and are typically covered by the press.[171]

Armstrong analyzed all reported cases from the creation of CARU through October 1982.[172] There were 147 cases, 63 percent of which dealt with television advertisements. The cases involved eighty-five different advertisers, the majority of whom were selling toys or food products. He found that deception was the most common violation.

Armstrong found that CARU had a small case load, averaging fifteen cases per year and falling. He notes that "[t]hough casework may provide input for the development and testing of the [CARU's] guidelines, this volume of cases is probably too small to enforce the guidelines effectively or to set meaningful precedents for the improvement of advertising to children."[173]

In addition, he found that "[t]he level of case activity appears to fluctuate substantially with external pressures on children's advertising. For example, efforts peaked in 1978-79 when the industry was threatened by the FTC trade regulation rule on children's advertising. When the threat had passed, the caseload decreased considerably."[174] He concludes that "[i]n the face of harsh constraints, [CARU] has made notable contributions toward improvement of child-directed advertising, especially in its earlier years. However, CARU has been given too much to do with too little means."[175]

Another study by Kunkel and Gantz was designed to assess: "How effective are [the CARU] self-regulatory guidelines at generating compliance with their stated policies?"[176] They identified thirty-nine measurable criteria

refused to participate in self-regulatory process). Referral to federal agencies is rare. According to CARU Director Elizabeth Lascoutx, in it first 23 years, CARU only referred complaints to federal agencies three times—two to the FTC and one to the FCC. Michael Hartnett, *Hold on There, Soupy! Advertising Guidelines by the Children's Advertising Review Unit*, 16 FOOD & BEVERAGE MKTG. 24 (1997). Recently, at least one additional referral has been made. *See* FTC: WATCH, Jan. 26, 1998 (reporting that CARU referred complaint to FTC where advertisement showed baby doll shedding tears without any method of operation and producer promised but failed to make recommended changes).

170. Armstrong, *supra* note 153, at 41.

171. According to Armstrong, the summaries were reported regularly in *Advertising Age* and the *New York Times*. In addition, they were published in a Council of Better Business Bureaus (CBBB) volume titled NAD/NARB Decisions. *Id.* at 42. That practice continues today.

172. Decisions may be appealed through the National Advertising Review Board (NARB) appeals procedure. However, at the time Armstrong was writing, no appeals had been made. *Id.* at 41.

173. *Id.* at 51.

174. *Id.* at 51-52.

175. *Id*. at 52.

176. Kunkel & Gantz, *Assessing Compliance*, *supra* note 119, at 152.

in the guidelines,[177] and using samples of programs recorded in 1990, they analyzed the commercials using the identified criteria.[178]

Out of 10,329 commercials reviewed, they found 385 (3.7 percent) violated the CARU Guidelines in one or more respects.[179] They found violations across all channels, with cable networks more likely to have violations than independent stations, and independent stations more likely to have violations than major network (ABC, CBS, and NBC) affiliates. They also found violations across product types. Of six basic product groups, advertisements for toys and breakfast cereals were the least likely to have violations, while advertisements for fast foods and recorded telephone message service were the most likely to violate the CARU Guidelines.[180]

Given the limits on CARU's operation and the burgeoning marketplace of advertising to children, Kunkel and Gantz found it "impressive" that 96 percent of all commercials observed in the study were found to comply; and that even greater compliance was found for the two types of products most frequently advertised on children's programs.[181] At the same time, they caution that their study does not provide an overall assessment of the CARU Guidelines. They cite research indicating that some problems with children's advertising are not addressed by the Guidelines.[182]

It is difficult to draw any firm conclusions about the effectiveness of the CARU Guidelines from these two studies conducted at different times looking at different data. While Kunkel and Gantz suggest that CARU has been largely successful in implementing the stated goals of the Guidelines, another interpretation is possible. One might wonder why if almost 4 percent of children's commercials shown in one week violate the CARU Guidelines,

177. *Id.* Two guidelines were excluded from the study because the researchers were not able to measure compliance: The guideline that states that "personal endorsements should reflect the actual experiences and beliefs of the endorser" was excluded because the researchers lacked knowledge of the endorser's experience. *Id.* at 153. Similarly, the guideline that states that "care should be taken not to exploit a child's imagination" was excluded as too subjective to evaluate. *Id*.

178. They recorded a total of 604 hours of children's programming, which included 10,329 commercials (many were repetitions). Samples were recorded in seven medium to large television markets around the country. The sample included programming from broadcast networks, independent stations, and basic cable channels. They used a technique called the composite week. *Id.* at 152-53.

179. *Id*. at 154. Of the 385 advertisements found in violation, 85 contained multiple violations, for a total of 492 violations. *Id.*

180. *Id.* at 155.

181. *Id.* at 159.

182. *Id.* at 160. For example, while cereal advertisers adhere to the guidelines that require sugared cereals to be portrayed as only a part of a healthy diet, research showed that disclaimers accomplished little in terms of improving children's understanding about the product. *Id.*

CARU has only brought an average of fifteen cases per year. Moreover, the number of cases in recent years seems to have declined. During the first eight months of 1995, CARU reportedly monitored more than 10,000 commercials, yet initiated only thirty-five informal inquiries and three formal cases.[183] Children's Advertising Review Unit Director Elizabeth Lascoutx asserts that more cases are not filed because advertisers have learned to follow the rules, and "'[t]hey know that the alternative to this kind of self-regulation is government regulation that could be much more intrusive.'"[184] But, the low number of cases could also mean that CARU is not doing its job.[185]

2. Children's Advertising Review Unit's Online Privacy Guidelines

In 1997, with the rapid growth of the Internet and other online services, CARU amended its Guidelines to take into account a new form of advertising to children—online advertising. The Children's Advertising Review Unit's action was prompted by concerns raised about the collection of information from children on Web sites by the FTC. This issue was first discussed at the FTC's roundtable on Consumer Privacy on the Global Information Infrastructure held in June 1996.[186] After the FTC announced that it was going to hold a second workshop on privacy issues, CARU revised its Guidelines to include online advertising in April 1997.[187]

In the section labeled "Guidelines for Interactive Electronic Media (e.g. Internet and Online Services)," CARU made it clear that the general principles regarding children's advertising applied to online and Internet advertising. It also adopted some specific guidelines governing online sales to children and the collection of data from children online. For example, in the section on data collection, the Guidelines state that advertisers should: (1) remind children to obtain parental permission before asking them to supply information; (2) disclose why information is being requested and whether it will be shared with others; (3) disclose the passive collection of information; and (4) make "reasonable efforts" to obtain parental permission if they col-

183. Rick Montgomery, *Wouldn't It Be Cool If . . .* , KANSAS CITY STAR, Nov. 5, 1995, at A21.

184. *Id.* (quoting Elizabeth Lascoutx, Director, CARU).

185. *Id. See also* Ray Richmond, *Singing? Under Water? With the Holidays Coming, It's Time to Beware of Deceptive Toy Ads*, CHI. TRIB., Nov. 23, 1992, at E3 (noting complaints by consumer representatives that many television commercials targeting children exaggerate, deceive, and mislead and that effective policing is lacking).

186. FTC, *Workshop on Consumer Privacy on the Global Information Infrastructure* (visited Mar. 15, 1999) <http://www.ftc.gov/bcp/privacy/wkshp96/privacy.htm> [hereinafter *Privacy Workshop*].

187. *CARU Guidelines*, *supra* note 155.

lect identifiable information. When CARU finds that an advertisement or Web site is inconsistent with the Guidelines, it "seeks changes through the voluntary cooperation of advertisers."[188]

Since adopting these new Guidelines, CARU has brought a few formal cases involving Web sites as well as undertaken some informal reviews. The Children's Advertising Review Unit's first case was against the Beanie Babies Web site. This site came to CARU's attention because of a report issued by the Center for Media Education. The Children's Advertising Review Unit found that although the site contained several areas where visitors could enter information about themselves and communicate directly with each other, it had no notice of its information collection or privacy policies.[189] In 1998, CARU took formal action involving at least two other Web sites.[190] In addition, CARU undertook informal investigations of Web sites and conducted compliance reviews on request.[191]

The FTC examined the adequacy of the CARU Guidelines in its *Report to Congress* in June 1998. It found that the CARU Guidelines were consistent with the principles outlined earlier by the FTC staff in an opinion letter regarding the KidsCom Web site.[192] Moreover, it noted that CARU has an enforcement mechanism in place and has

188. *Id.*

189. Ty, Inc., operator of the Beanie Babies Web site, responded by making changes to the site. *Beanie Babies Website*, 27 NAD Case Reports (CBBB) 194 (Nov. 1997). *See also* Stuart Elliott, *Self-Regulation in Cyberspace: The Web Site for Beanie Babies Undergoes Several Changes*, N.Y. TIMES, Dec. 8, 1997, at D3.

190. *Lisa Frank Website*, 28 NAD Case Reports (CBBB) 225 (Sept. 1998) (finding failure to give notice regarding information collection policy or privacy policy and inadequate labeling of advertising material); *Trendmasters, Inc. Website*, 28 NAD Case Reports (CBBB) 244 (Sept. 1998) (finding Web site featuring information about toy product lines, downloadable games, and survey failed to include privacy policy and did not clearly identify advertising).

191. The NAD Case Reports notes that when advertising is "immediately modified or discontinued, CARU will not open a formal case in the matter" but does report the results. *Inquiries*, 28 NAD Case Reports (CBBB) 247 (Sept. 1998). The NAD Case Reports discloses informal investigations of the Nickelodeon and Dole Web sites and review of the Chevron site. *Id. See also The Jupiter Interview: Elizabeth Lascoutx, CARU*, DIGITAL KIDS REPORT, Aug. 1996, at 12 (describing how General Mills' You Rule School advertising site went through approval process with CARU).

192. PRIVACY REPORT, *supra* note 5, at 17. In contrast to the CARU Guidelines, the FTC found that the Children's Guidelines of the Direct Marketing Association did not conform to the Staff Opinion Letter. *Id.* at 18. The Staff Opinion Letter was issued in July 1997, in response to a complaint filed by the Center for Media Education, for which the Author served as counsel. The complaint alleged that KidsCom, a Web site directed at children ages four to fifteen, violated section 5 of the FTC Act. Since KidsCom had changed its practices, the FTC declined to take enforcement action against it. However, the FTC letter set forth the staff's analysis of KidsCom's past practices "[t]o provide guidance in this area" and to offer "several broad principles [which] apply generally to online infor-

> achieved a remarkably high level of compliance under this mechanism in the offline media over a long period of time. While CARU has worked to encourage Web sites to adhere to its privacy guidelines with respect to the collection of personal information from children online, to date it has not achieved the same widespread adherence it has achieved in other media.[193]

Indeed, the FTC found that as of March 1998, nearly a year after issuance of the CARU Guidelines, serious problems still remained.[194] The FTC surveyed 212 Web sites directed to children. It found that 89 percent of those sites collected one or more types of personal information from children,[195] and that "[o]ften the sites that collect personal identifying information also collect several other types of information, enabling them to form a detailed profile of a child."[196] The survey revealed that sites used a variety of techniques to solicit personal information, including registration, contests, imaginary characters, guest books, pen pal programs, and prizes.[197]

Using a very broad definition of disclosure, the FTC found that 54 percent of children's sites had some kind of disclosure.[198] However, no site's information practice disclosure statement discussed the full range of fair information practice principles. Moreover, many sites disclosed children's personal information to third parties, thereby creating a risk of injury or exploitation. Only 23 percent of Web sites told children to ask parents for

---

mation collection from children." Letter from Jodie Bernstein, Director, FTC's Bureau of Consumer Protection, to Kathryn C. Mongtomery, President, and Jeffrey A. Chester, Executive Director, Center for Media Education 2 (July 15, 1997) (on file with author).

The FTC found that KidsCom's information collection practices had likely violated section 5 in two ways. First, the FTC found that it was

> a deceptive practice to represent that a Web site is collecting personally identifiable information from a child for a particular purpose (*e.g.*, to earn points to redeem a premium), when the information will also be used for another purpose which parents would find material, in the absence of a clear and prominent disclosure to that effect.

Id. at 3-4 (citation omitted). Second, the FTC found it was an unfair practice "to collect personally identifiable information . . . from children and sell or otherwise disclose such identifiable information to third parties without providing parents with adequate notice . . . and an opportunity to control the collection and use of the information." *Id.* at 5.

193. PRIVACY REPORT, *supra* note 5, at 17 (footnotes omitted).

194. *Id.*

195. *Id.* at 31. Personal information collected included name, e-mail address, postal address, telephone number, social security number, age, date of birth, gender, education, interests, and hobbies. *Id.* at 31-32.

196. *Id.* at 32.

197. *Id.* at 33.

198. *Id.* at 34. Of sites that collect personal information and have at least one information practice disclosure, 43% say they provide children or parents choice about how information is used; 12% say they offer access or an opportunity to correct information; 8% say they provide security; and 12% say they will notify parents. Only 24% of sites that collected personal information had posted a privacy policy notice. *Id.*

permission, while only 1 percent required parental consent before personal information was collected or used.[199] The FTC concluded that its survey showed "a very low level of compliance with the basic parental control principles contained in the staff opinion letter and the CARU guidelines more than seven months after these documents were released."[200]

Finding its own authority insufficient to address the problems, the FTC recommended that Congress adopt legislation. Even in calling for legislation, however, the FTC emphasized its preference for self-regulation:

> The Commission has encouraged industry to address consumer concerns regarding online privacy through self-regulation. The Internet is a rapidly changing marketplace. Effective self-regulation remains desirable because it allows firms to respond quickly to technological changes and employ new technologies to protect consumer privacy. Accordingly, a private-sector response to consumer concerns that incorporates widely-accepted fair information practices and provides for effective enforcement mechanisms could afford consumers adequate privacy protection. To date, however, the Commission has not seen an effective self-regulatory system emerge.[201]

Nonetheless, the FTC's legislative proposal closely tracked CARU's Guidelines.[202]

The legislation passed by Congress authorizes the FTC to promulgate regulations that generally require commercial Web site operators to give notice and obtain consent from the parent of a child under the age of thirteen before collecting personally identifiable information from the child. It also directs the FTC to "provide incentives for self-regulation" by offering a "safe harbor" from prosecution for companies that comply with self-regulatory guidelines issued by industry that have been found by the FTC, after notice and comment, to meet the requirements of the law.[203]

In sum, CARU has had moderate to good success in ensuring that television advertisers comply with its advertising guidelines. It has had little success, however, with the children's online privacy guidelines. Several factors might explain the different levels of success. First, the number of products advertised to children on television is fairly limited, consisting pri-

199. *Id.* at 37. Only 8% say that parents can ask for a child's information to be deleted or not used ("opt-out").

200. *Id.* at 38.

201. *Id.* at 41.

202. *Compare id.* at 43, *with CARU's Reasonable Efforts Standard* (visited Mar. 15, 1999) <http://www.bbb.org/advertising/carueffortsl.html> (noting that both would require prior parental consent where personally identifiable information would allow someone to contact the child offline or where it is publicly posted or disclosed to third parties).

203. Children's Online Privacy Protection Act of 1998, Pub. L. No. 105-277, § 1304, 112 Stat. 2681, 2732-33 (to be codified at 15 U.S.C. § 6503).

marily of toys, breakfast foods, and fast foods.[204] However, the number of companies offering Web sites to children, while including these same advertisers, appears to be much larger and diverse.[205] Moreover, in the case of television advertising, if CARU was unable to get voluntary cooperation from an advertiser, it could always file a complaint with the FCC or FTC. In the case of children's privacy, however, the FTC acknowledged that its ability to act in this area was limited.[206] Finally, the privacy guidelines have been in effect for a much shorter period of time.

C. Other Self-Regulatory Efforts Involving Media

1. Advertising of Hard Liquor

While the NAB Code prohibited the advertising of hard liquor,[207] broadcast advertising of hard liquor was also prohibited by the "Code of Good Practice" of DISCUS.[208] Distilled Spirits Council of the United States is the national trade association of producers and marketers of distilled spirits. Thus, even after the NAB Code was repealed in 1983, the DISCUS Code prohibited advertising on radio and television stations as well as on cable and satellite services.[209]

In March 1996, Seagram, the second largest marketer of distilled spirits, violated the Code of Practice by airing a liquor advertisement on a small sports cable network. A few months later, it violated the ban again by airing an advertisement on an ABC affiliate in Corpus Christi, Texas. Instead of imposing sanctions, however, DISCUS voted in November 1996 to repeal

204. KUNKEL & GANTZ, CARU REPORT, *supra* note 162, at 23.

205. For example, the FTC Staff Survey of Child-Oriented Commercial Web Sites included sites for television networks, crafts, magazines, and books, as well as a variety of sites oriented to young people such as KidsCom and Yahooligans Club.

206. PRIVACY REPORT, *supra* note 5, at 40-41.

207. *See* TELEVISION CODE, *supra* note 105, at 10-12 ("The advertising of hard liquor (distilled spirits) is not acceptable.").

208. The radio ban was adopted in 1936 and the television ban in 1948. The 1995 DISCUS Code of Good Practice defined the broadcast media to include cable and satellite. Separate provisions prohibited advertising on the screen of motion picture theaters or videotapes and prohibited paying compensation for advertising "plugs" on the broadcast media.

209. CODE OF GOOD PRACTICE FOR DISTILLED SPIRITS ADVERTISING AND MARKETING (Distilled Spirits Council, 1995) [hereinafter DISCUS CODE OF GOOD PRACTICE]. Despite these voluntary restrictions, some companies did seek to advertise hard liquor on television once the NAB Code was repealed. However, these advertisements were soon stopped in response to public and congressional pressure. Linton, *Self-Regulation in Broadcasting Revisited*, *supra* note 86, at 484-85.

the voluntary prohibition.[210] Competitive concerns as well as changes in technologies had undermined industry support for the voluntary ban.[211] According to DISCUS's President, the association saw no basis for allowing the broadcast advertising of beer and wine and not other alcoholic beverages.[212] A Seagram's executive also pointed out that the ban on television advertising no longer made sense when distilled spirits could be advertised on the Internet.[213]

The members of DISCUS were undoubtedly aware of the Supreme Court's decision in *44 Liquormart, Inc. v. Rhode Island* announced in May 1996.[214] That decision struck down a state law prohibiting the advertisement of liquor prices. Because the law banned truthful commercial speech about a lawful product, the Court reviewed it with "'special care.'"[215] This decision effectively removed the credible threat of government regulation.[216]

Although DISCUS repealed the ban on broadcast advertising, other provisions of the DISCUS Code of Practice remained in effect. For example, the Code cautioned that distilled spirits should be portrayed "in a responsible manner" and "should not be advertised or marketed in any manner directed or primarily intended to appeal to persons below the legal purchase age."[217] The Codes of Practice of the beer and wine industries have similar provisions. Recently, however, the Federal Trade Commission has questioned the efficacy of some of these provisions. In August 1998, the FTC began an inquiry into the advertising practices of eight of the nation's top marketers of

210. Stuart Elliott, *Liquor Industry Ends Its Ad Ban in Broadcasting*, N.Y. TIMES, Nov. 8, 1996, at A1. Repeal of the voluntary ban was protested by various public health groups. Two FCC Chairmen attempted to start proceedings to consider imposing a ban or other restrictions, but lacked the votes to proceed. A bill to prohibit the broadcasting of hard liquor advertisements was introduced in Congress, but did not pass. *Id.*

211. "Liquor consumption [declined] 40% since its peak in 1979 as drinkers have shifted to wine and beer." Denise Gellene, *Seagram Bucks Voluntary Ban on TV Advertising with Spot on Cable*, L.A. TIMES, May 1, 1996, at D3.

212. Elliott, *supra* note 210. Added another industry executive, "'The members of the distilled-spirits industry have felt for many years that their competitive position has been with one hand tied behind their back . . . because they too would like access to a medium they think would be very efficient for them.'" *Id.*

213. *Id. See generally* CENTER FOR MEDIA EDUCATION, ALCOHOL & TOBACCO ON THE WEB: NEW THREATS TO YOUTH (Mar. 1997) (describing Web sites promoting alcoholic beverages) (on file with author).

214. *44 Liquormart, Inc.*, 517 U.S. 484 (1996).

215. *Id.* at 504. Although they employed different reasoning, all nine Justices found the Rhode Island statute unconstitutional. *Id.*

216. *See generally* Claudia MacLachlan, *Law Murky on Stopping Liquor Ads*, NAT'L L.J., Nov. 25, 1996, at A1. ("[M]any lawyers believe a ban on liquor ads would be deemed unconstitutional in light of the Supreme Court's decision last May in *44 Liquormart, Inc. v. Rhode Island*.").

217. DISCUS CODE OF GOOD PRACTICE, *supra* note 209.

beer, wine, and liquor.[218] It specifically sought information about how the companies had implemented Code provisions that prohibited advertising intended to appeal to or reach persons below the legal drinking age.[219]

On the same date, the FTC filed a complaint and proposed consent decree charging that advertisements for Beck's beer that depicted young adults partying and drinking beer on a sail boat were "unfair acts or practices" in violation of section 5(a) of the Federal Trade Commission Act. The complaint noted that the advertisements were inconsistent with the Beer Institute's Code because they portrayed boating passengers drinking beer "while engaged in activities that require a high degree of alertness and coordination to avoid falling overboard."[220] These recent actions by the FTC suggest that the self-regulatory codes of the alcoholic beverages industry are not being effectively enforced.

2. Self-Regulation of News: The Press Councils

One type of media self-regulation that has clearly been unsuccessful in the United States is the attempt to promote public accountability and fairness in news reporting by the use of a press council. Modeled after the British Press Council, press councils were established in several states in the late 1960s, and in 1973, the National News Council (NNC) was established. However, the NNC closed in 1984, and by that time, most of the state press councils had closed as well.[221]

218. Sally Beatty & John Simons, *FTC Eyes Liquor Ads' Kid-Appeal*, WALL ST. J., Aug. 7, 1998, at B1.

219. *Order to File Special Report* (visited Mar. 15, 1999) <http://www.ftc.gov/os/1998/9808/6(b)sptr.fin.htm> and <http://www.ftc.gov/os/1998/9808/6(b)brre.fin.htm >.

220. Beck's North America, Inc., *Complaint*, *available at* <http://www.ftc.gov/os/1998/9808/9823092.cmp.htm>. *See also* Beck's North America, Inc., *Agreement Containing Consent Order*, File No. 982-3092, *available at* <http://www.ftc.gov/os/1998/9808/9823092.agr.htm>; *Alcohol Companies to Supply Data on Their Self-Regulatory Activities to FTC* (visited Mar. 15, 1999) <http://www.ftc. gov/opa/1998/9808/alcohol.htm>.

221. The only surviving press council in the United States is in Minnesota. *Minnesota News Council* (visited Mar. 15, 1999) <http://www.mtn.org/newscouncil>. However, press councils are found in many other countries. One study reports that 48 countries have press councils. K. TRIKHA, THE PRESS COUNCIL: A SELF-REGULATORY MECHANISM FOR THE PRESS 2 (Bombay, Somaiya Publications Pvt. 1986). The first press council was established in Sweden in 1916. Today, 12 countries in the European Union have press councils. *See* EMMANUEL E. PARASCHOS, MEDIA LAW AND REGULATION IN THE EUROPEAN UNION: NATIONAL, TRANSNATIONAL AND U.S. PERSPECTIVES ch. 9 (Ames: Iowa State University Press 1998) (describing press councils in Austria, Belgium, Denmark, Finland, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Sweden, and the United Kingdom).

Patrick Brogan has done a detailed study of the NNC and the reasons for its failure.[222] The idea of an NNC came out of a task force put together by the Twentieth Century Fund in 1971. At the time, the press had been under a great deal of attack, particularly by the Nixon Administration.[223] According to Brogan, those who set up the NNC were concerned that if the press failed to establish its own standards, public criticism would increase to the point where pressure to change the freedoms enjoyed by the press under the First Amendment could not be resisted.[224]

The NNC consisted of fifteen members representing both the public and the media. It considered complaints against national newspapers, news agencies, magazines, and television networks. Complainants would waive their right to use any of the council's proceedings as evidence in court.[225] The NNC staff analyzed complaints and made initial judgments about their merit. If a complaint was found to have merit, it was sent to a grievance committee composed of members of the Council, which in turn, made recommendations to the full Council.[226] The Council judged the cases and issued verdicts. Over the decade of its existence, the NNC dealt with 227 complaints.[227] Its decisions were made public, although not widely reported.[228] It had no power of enforcement, but relied on publicity to encourage the press to mend its ways.

Brogan found that

> [d]espite all its good intentions and ten years of strenuous endeavor, the council was spurned by the press and neglected by the public. Without press or public support, it could win no publicity. Without that, it could not raise the money it needed to carry on operations—and earn the support of press or public.[229]

222. *See generally* PATRICK BROGAN, SPIKED: THE SHORT LIFE AND DEATH OF THE NATIONAL NEWS COUNCIL (Priority Press Publications, N.Y. 1985) (A Twentieth Century Fund Paper).

223. *Id.* at 10-12.

224. *Id.* at 4.

225. *Id.* at 6.

226. The NNC also considered matters of general journalistic ethics and attacks upon the press from government, private interests, and individuals. *Id*. at 49-50, 53-54.

227. Brogan describes many of the cases as trivial, but asserts that over time, "the council's rulings established a body of case law that made a useful contribution to journalistic ethics and practice." *Id*. at 38.

228. For a time, its decisions were published in the *Columbia Journalism Review*. *Id.* at 47, 61. However, the failure to obtain wide dissemination of its operations is one of the reasons contributing to the demise of the NNC. GANNETT CENTER FOR MEDIA STUDIES AND SILHA CENTER FOR THE STUDY OF MEDIA ETHICS, MEDIA FREEDOM AND ACCOUNTABILITY: A CONFERENCE REPORT 27 (1988) [hereinafter GANNETT REPORT].

229. BROGAN, *supra* note 222, at 7.

From the beginning, the NNC faced vigorous opposition from a large segment of the press, including the *New York Times*, which viewed the NNC as a threat to its First Amendment freedoms.[230] Some press organizations declined to cooperate with the Council. While over time the NNC gained more support among the press, the industry was never willing to provide financial support for its operations.[231]

Most of the funding for the NNC came from two foundations: the Twentieth Century Fund and the Markle Foundation.[232] Lack of sufficient funding contributed to the problems faced by the NNC. To effectively review whether a story had been reported fairly, the Council had to in effect report a story, which required a large amount of resources and a staff of experienced journalists capable of retracing and assessing the steps taken by the original reporting team. Lacking funding for such an effort, the NNC tended to rely upon graduate students to do its investigations.[233] Lack of funding also made it difficult for the NNC to pay high enough salaries to attract high quality staff.[234]

In analyzing why the NNC has failed but the British Press Council has succeeded, Brogan notes that "the situation is different in Britain. The British Bill of Rights does not mention the press, and there is nothing to stop Parliament from imposing statutory control over the press should the public ever insistently demand it."[235] Moreover, Brogan observes that

> [t]he council was conceived in a period when the press was under attack and feared that its enemies might carry the day and seriously restrict its freedom. In the event, the fears proved exaggerated. The press easily survived Richard Nixon and Spiro Agnew, and therefore

230. *Id.* at 27-29.

231. *Id.* at 28.

232. *Id.* at 21-22 & app. E. The failure of the NNC to obtain funding from the Ford Foundation is also cited as one of the reasons contributing to its demise. *Id.* at 21. *See also* GANNETT REPORT, *supra* note 228, at 24.

233. GANNETT REPORT, *supra* note 228, at 28.

234. BROGAN, *supra* note 222, at 45, 95.

235. *Id.* at 6. Of course, there are other differences as well. Brogan notes that the British Press Council started small and took a long time to become accepted. *Id.* at 90-91. More-over, according to its Director, the British Press Council

> enjoys two significant advantages that an American equivalent would be unlikely to obtain. First, the targets of the Council's censure willingly publish the results of the proceeding in full, prominently displayed, . . . —something that few U.S. publications, and probably no network news departments, would allow. . . . Second, complainants to the Council are obliged to treat its proceedings as an alternative to libel litigation rather than a preliminary skirmish, and thus persuade news organizations to open their books and cooperate, whereas in the litigious United States a potential plaintiff would not . . . sign away his rights, and therefore a potential defendant would likely resist all inquiries.

GANNETT REPORT, *supra* note 228, at 27.

> never saw any need for the dubious protection of the fledgling council.[236]

Thus, without the threat of government regulation, effectively barred in the United States by the First Amendment, members of the press saw no reason to pay for or submit to outside reviews of their fairness.[237]

3. Comic Books

The comic book industry engaged in self-regulation after crime and horror comics became popular in the 1950s, and many states passed laws making it unlawful to distribute such comic books to minors.[238] In 1954, Congress held hearings about the effects of comic books on youth evidencing concern about violence. While earlier attempts at self-regulation had failed, the Association of Comic Magazine Publishers promised renewed action when the Senate began investigating. It adopted the Comics Code and provided for the display of its seal of approval on comics that met Code requirements.[239]

This action had the desired effect, at least in the short to intermediate term. The subcommittee decided not to recommend regulation of comic books, but instead recommended reliance on industry self-regulation. Many publishers of crime and horror comics went out of business because wholesalers refused to distribute comics without a seal.[240] But after twenty years, comic book violence began to make a comeback. Publishers found they could avoid complying with the Code by shipping directly to specialty stores.[241] Even major publishers began to produce non-Code compliant editions. Thus, over time, self-regulation of violence in comic books lost its effectiveness.[242]

---

236. BROGAN, *supra* note 222, at 92.

237. *See also* Dennis, *supra* note 11. In this survey of self-regulation of the print media, Dennis notes that because of the First Amendment, the print media have been virtually exempt from regulation, and accountability has been a strictly voluntary affair.

238. Kevin W. Saunders, *Media Self-Regulation of Depictions of Violence: A Last Opportunity*, 47 OKLA. L. REV. 445, 446-47 (1994). Some of these statutes were found unconstitutional.

239. *Id.* at 452.

240. *Id.* (citing Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—from Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741, 793 (1992)).

241. *Id.*

242. *Id.* at 452-53. Saunders notes that even though "the level of crime, horror and violence in present day comics is as bad today as it was in 1955," and some public concern has been expressed, the issue appears to be of less concern than in the 1950s. *Id.* at 452. He attributes the lesser concern to "the availability of violent images in so many other media" that "make comic book violence not seem so bad." *Id.* at 453.

4. Motion Pictures

The 1930 Production Code of the Motion Picture Association of America (MPAA) resulted from public pressure, largely organized through the Roman Catholic Church, to "clean up" movies.[243] Like many other media industry codes, the Production Code contained both general provisions and specific affirmative and negative provisions.[244] The Production Code proved quite successful because "[f]ilms without the Code Seal of Approval were doomed to failure" since the theaters, which were mostly owned by major studios, would not exhibit films without the MPAA seal.[245]

Several factors have been identified as contributing to the success of the Production Code in dictating content during the 1930s and 1940s.[246] First, there was little competition from other forms of entertainment.[247] Second, the oligopolistic structure of the movie industry enabled the MPAA-member companies to enforce the Code.[248] Third, the Code was insulated from constitutional challenge by the position of the Supreme Court that movies were not entitled to First Amendment protection.[249]

After World War II, circumstances changed. The public demanded more realistic films. Television started competing with the movies. These

243. Roy Eugene Bates, *Private Censorship of Movies*, 22 STAN. L. REV. 618, 619 (1970).

244. For example, under the first section, General Principles, it is stated that the "motion picture has special *Moral obligations*." The Motion Picture Code of 1930, *reprinted in* HOLLYWOOD'S AMERICA: UNITED STATES HISTORY THROUGH ITS FILMS 142, 144 (Steven Mintz & Randy Roberts eds., 1993). The second section, Working Principles, states that "[n]o picture should lower the moral standards of those who see it." *Id.* at 145. Specific provisions address such topics as the portrayal of sin and evil, adultery, vulgarity, dance, and religion. For example, the subject of adultery should be avoided and is never a fit subject for comedy. When it is portrayed in serious drama, it should not appear justified or presented as attractive or alluring. *Id.* at 147.

245. Bates, *supra* note 243, at 619. In its first 30 years, 25,000 films, including 12,000 full-length features were reviewed by the Code Office. Producers would submit scripts, which would be read by at least two members of the staff to determine whether they met the Code. The staff met daily to discuss problems. They would send written decisions to the producer, including suggestions as to how any problems might be solved. Finished films were also reviewed by the Code staff. Appeals could be made to a review board. It appears that most difficulties were worked out by making changes. *See generally Self-Policing of the Movie and Publishing Industry: Hearing Before the Subcomm. on Postal Operations of the House Comm. on Post Office and Civil Service*, 86th Cong. 28-30 (1960) (statement of Geoffrey M. Shurlock, Director, Production Code Administration, Motion Picture Association of America).

246. Bates, *supra* note 243, at 619-20.

247. *Id.* at 619.

248. *Id.* at 619-20.

249. *Id.* at 620; Mutual Film Corp. v. Ohio Indus. Comm'n, 236 U.S. 230, 243-45 (1915), *overruled in part by* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

developments created pressure to break away from Code-imposed standards. In addition, the *Paramount* case altered the industry structure and loosened the hold of the studios, which made enforcement difficult.[250] The number of independently produced movies increased, and starting in 1952, the Supreme Court came to recognize motion pictures as a form of expression protected by the First Amendment.[251] With this decision, as one commentator noted, "the main reason for movie industry self-regulation—fear of governmental censorship—almost disappeared."[252]

As the Code lost most of its effectiveness in limiting film content and movies became more explicit in the treatment of nudity and sex in the 1960s, the public demanded government control. In 1965, the City of Dallas enacted the first movie classification ordinance designed solely to protect children. Although the Supreme Court overturned the ordinance, *dictum* in its decision supported the use of an age-classification scheme.[253] These developments convinced MPAA officials that industry self-regulation would have to take the form of an age-classification system to prevent a flood of new censorial statutes. Motion Picture Association of America President Jack Valenti met with leaders of industry and outside parties to revise the Code.[254] The rating system that grew out of this process took effect in 1968, and remains substantially unchanged today.

Under the MPAA rating systems all films produced or distributed by MPAA members are submitted to the ratings board for rating.[255] Nonmembers may also submit films to be rated. Preliminary ratings are based on the script, while final judgment is reserved until the film is viewed. Producers unhappy with their rating may appeal. While no one is required to obtain a rating, most producers do so because approximately 85 percent of theaters cooperate with the MPAA.[256] Films that are not rated or are rated with an X rating (now called NC-17) find their opportunities for distribution limited.[257]

250. United States v. Paramount Pictures, 334 U.S. 131 (1948). In this case, the Supreme Court found that the ownership of the majority of movie theaters by the major studios violated the Sherman Act, and it ordered the dissolution of this monopoly.

251. *Joseph Burstyn, Inc.*, 343 U.S. 495.

252. Bates, *supra* note 243, at 621.

253. Interstate Cir., Inc. v. City of Dallas, 390 U.S. 676, 682 (1968).

254. For Jack Valenti's description of how the ratings system came about and how it works, see *Swope v. Lubbers*, 560 F. Supp. 1328, 1335-38 (W.D. Mich. 1983).

255. For a description of the MPAA rating scheme and how films are rated, see Richard P. Salgado, *Regulating a Video Revolution*, 7 YALE L. & POL'Y REV. 516, 519-20 (1989).

256. *Swope*, 560 F. Supp. at 1338.

257. Salgado, *supra* note 255, at 523-25 (describing obstacles faced by X-rated films). *See generally* Jacob Septimus, Note, *The MPAA Ratings System: A Regime of Private Censorship and Cultural Manipulation*, 21 COLUM.-VLA J.L. & ARTS 69 (1996).

5. Video Games

Another medium where a rating scheme has been utilized is video games.[258] Senator Lieberman became concerned about violent video games, such as Mortal Kombat. In December 1993, Senators Lieberman and Kohl convened hearings where they proposed legislation establishing an independent agency to oversee development of voluntary industry standards.[259] On the day of the hearings, the Software Publishers Association, the largest trade association in the computer software sector, announced its intent to create its own rating and warning system that would meet the elements specified by Senator Lieberman.[260]

The industry commissioned the development of a self-rating system.[261] The nonprofit Recreational Software Advisory Council (RSAC) was formed to administer the rating system. Its bylaws require that a majority of its board members come from outside the industry.[262] Software makers using RSAC's self-rating scheme must sign a contract that permits, among other things, RSAC to require corrective labeling, consumer and press advisories, product recalls, and monetary fines.[263] Spot checks and audits are performed by the Psychology Department at Yale.[264] Disputes over ratings may be addressed by the RSAC Appeals Committee.[265]

Although use of the RSAC rating system is voluntary, Balkam suggests that video game companies feel compelled to rate or face limited opportunities for distribution. Under pressure from members of Congress, WalMart, Toys R Us, and other retailers announced they would only stock rated games.[266] Balkam concludes that "[t]hrough a process of carrot and stick, the government has ensured that the industry has 'voluntarily' imposed a regulatory rating scheme upon itself without the need of a dedicated government department and all the expenditure required to bring one into place."[267]

258. Balkam, *supra* note 31, at 139. *See also* Saunders, *supra* note 238, at 458.

259. Balkam, *supra* note 31, at 139.

260. *Id.*

261. *Id.* at 140 (describing how self-rating works).

262. According to Stephen Balkam, Executive Director of RSAC, outside board members were "a vital part of its early success that the organization could be seen to be fair, balanced and not unduly influenced by game makers." *Id*. at 140.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at 141. Balkam notes that Senator Lieberman and Senator Kohl wrote to major retail outlets and held a press conference praising those who agreed and criticizing others.

267. *Id.*

6. Television Violence: Ratings and the V-Chip

A somewhat similar approach—that of ratings—was recently implemented to address violent and sexual content on television. After the failure of the Family Viewing Policy,[268] many efforts were made to reduce violent and sexual content on television.[269] Unlike video games, however, Congress eventually did pass legislation that provided for a voluntary rating scheme. The Telecommunications Act of 1996 mandates that television sets be equipped with a chip that will permit programs with certain ratings to be blocked.[270] It gave the industry one year to come up with "*voluntary* rules for rating video programming that contains sexual, violent, or other indecent materials about which parents should be informed before it is displayed to children" and to agree "*voluntarily* to broadcast signals that contain ratings of such programming."[271] If the industry failed to develop rules acceptable to the FCC, the FCC was required to establish an advisory committee to recommend a rating system; to prescribe guidelines and procedures for rating video programs; and to require stations to include the ratings on any program that is rated.[272]

Regarding the statutory language, Professor J.M. Balkin notes:

> The Act's "fail-safe" provision deliberately stops short of requiring that broadcasters accept the ratings system devised by the advisory committee. It requires only that, if video programming already is rated by the broadcaster, the rating must also be encoded so that it can be read by a V-Chip system.[273]

The Act's

> fail-safe provision is left deliberately toothless to avoid constitutional problems of prior restraint and compelled speech. Instead, the true goal of the legislation is to present broadcasters with a set of unpalatable alternatives. If they do nothing, they risk the appointment of an advisory committee telling them how to rate their programs. Even if the FCC cannot constitutionally require that they accept the ratings system as a condition of broadcasting, there will be enormous public pressure on broadcasters to accept a system that has already been worked out with attendant public fanfare. Faced with this possibility, broadcasters and distributors will instead choose to create their own ratings system.[274]

---

268. *See supra* Part III.A.3.c(ii).

269. *See* MacCarthy, *supra* note 50, at 685-95.

270. Pub. L. No. 104-104, § 551(d), 110 Stat. 56, 141 (codified at 47 U.S.C. § 330(c)(1)-(4) (Supp. II 1996)).

271. *Id.* § 551(e)(1)(A), (B), 110 Stat. at 142 (emphasis added).

272. *Id.*

273. J.M. Balkin, *Media Filters, the V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1157 (1996).

274. *Id.* at 1158.

In fact, they did.[275] As the one-year deadline approached, the movie, broadcast, and cable industries—as represented by the MPAA, NAB, and National Cable Television Association (NCTA)—jointly developed a rating system based in large part upon the existing system for rating motion pictures.[276] After public and congressional opposition,[277] the proposal was revised. The FCC found the revised rating scheme to be acceptable, and thus there was no need to convene an advisory committee.[278]

It is too early to assess whether this system is going to be successful in meeting the stated goal of providing parents with effective tools to supervise their children's viewing of inappropriate content.[279] However, it is an inter-

275. Although television executives initially threatened to challenge the V-Chip legislation in court, they agreed to develop an industry rating system after a White House summit in February 1996. Paul Farhi & John F. Harris, *TV Industry Agrees to Use Rating System*, WASH. POST, Feb. 29, 1996, at A1. Noting that the industry had been forced to act at the White House Summit because of the V-Chip legislation, Ted Turner reportedly said, "'Let's be honest; this is not voluntary.'" Richard Zoglin, *Prime-Time Summit*, TIME, Mar. 11, 1996, at 64, 66.

276. Letter from Jack Valenti, President, Motion Picture Association of America, et al., to William F. Caton, Secretary, FCC (Jan. 17, 1997), *available at* <http://www.fcc.gov/Bureaus/Cable/Public_Notices/1997/fcc97034.txt>.

277. For example, Senator Hollings introduced the Children's Protection from Violent Programming Act on February 26, 1997, to make it unlawful "to distribute . . . violent video programming not blockable by electronic means *specifically on the basis of its violent content* during hours when children are reasonably likely to comprise a substantial portion of the audience." 143 CONG. REC. S1670, S1671 (daily ed. Feb. 26, 1997) (emphasis added). This bill would also have given the FCC the right to revoke a license for failure to rate based on violent content. *Id.* at S1670-71 (statement of Sen. Hollings). Senator Coats also introduced legislation to authorize the FCC not to grant or renew a license unless the network used a content descriptive rating system. 143 CONG. REC. S4015, S4016 (daily ed. May 6, 1997) (statement of Sen. Coats). To fend off legislation of this type, the industry, except for NBC, agreed to changes in the industry-proposed rating system. Regarding the changes, MPAA President Jack Valenti said, "'[t]his is not something we celebrated as a great victory . . . [t]his is something we did because we had to do it.'" Paige Albiniak, *Ratings Get Revamped*, BRDCST. & CABLE, July 14, 1997, at 4.

278. Implementation of Section 551 of the Telecommunications Act of 1996; Video Programming Ratings, *Report and Order*, 13 F.C.C.R. 8232, paras. 18-26, 11 Comm. Reg. (P & F) 934 (1998) [hereinafter *Implementation Report and Order*]. The proposal was revised in response to public protest that the original proposal failed to provide adequate information to parents about the type of objectionable content. *Id.* paras. 12-17. The compromise reached after negotiations was to retain the age-based categories but to add content descriptions. Thus, for example, instead of rating a program simply TV-PG, the rating might include V indicating moderate violence, S indicating some sexual situation, L indicating infrequent coarse language, or D for some suggestive dialog. *Id*. para. 7. Most of the major industry players except NBC and Black Entertainment Television (BET) agreed to go along with the revised rating system. *Id.* para. 30.

279. The full effect cannot properly be assessed until a significant number of television sets equipped with the V-Chip are in use, which will not occur for some time. The FCC has required television manufacturers to include blocking technology on at least half of their sets with a screen 13 inches or larger by July 1999, and the rest by January 2000.

esting example of where self-regulation may be preferable to government regulation because government regulation would raise constitutional difficulties. Indeed, some have questioned whether the industry decision to utilize ratings is sufficiently voluntary to avoid constitutional problems.[280]

IV. ANALYSIS

The examples discussed above include a broad range of self-regulatory efforts involving the media. They provide some support for the claimed advantages and disadvantages of self-regulation as well as general support for Michael's hypotheses about the conditions needed for effective self-regulation. In addition, they provide a basis for assessing the proposed use of self-regulation for digital television and online privacy.

A. The Advantages and Disadvantages of Self-Regulation

The examples discussed above do not provide a great deal of support for the claimed advantages of self-regulation. At best, some, such as the video games example, illustrate the ability of self-regulatory organizations to act more quickly than government. But on the other hand, in the case of protecting children's privacy on the Internet, it has taken some time for the industry to act, and the government presumably could have acted more quickly but preferred to wait to give industry a chance to fix the problem first.

Some examples also suggest that self-regulation can result in the costs of regulation being borne by the industry instead of the government. Examples might include the NAB Code[281] and the CARU Advertising Guidelines. The examples also supply limited support for the claim that self-regulation

Technical Requirements to Enable Blocking of Video Programming Based on Program Ratings, *Report and Order*, 13 F.C.C.R. 11,248, para. 23, 11 Comm. Reg. (P & F) 907 (1998). Once television sets with V-Chips are available, it will still take years for people to replace their old sets. Initial sales have been slow. Marta W. Aldrich, *Parents Slow to Embrace V-Chip*, ASSOCIATED PRESS, Feb. 4, 1999, *available at* 1999 WL 11924613. However, a recent study by the Kaiser Family Foundation does suggest some problems. DALE KUNKEL ET AL., RATING THE TV RATINGS: ONE YEAR OUT, AN ASSESSMENT OF THE TELEVISION INDUSTRY'S USE OF V-CHIP RATINGS (Kaiser Family Foundation 1998). For example, it found that "[p]arents cannot rely on the content descriptors, as currently employed, to effectively block all shows containing violence, sexual material, or adult language." *Id*. at 89.

280. *See, e.g.*, Corn-Revere, *supra* note 13, at 64-65 (arguing that industry acceptance of ratings is not voluntary due to congressional threats to adopt even less palatable legislation and because broadcasters must seek license renewal from the FCC).

281. Running the Code Authority accounted for approximately 14% of the NAB's budget. Maddox & Zanot, *supra* note 53, at 130. When the Code was abandoned, however, it appears that most of the enforcement costs were shifted to the networks and stations rather than to the government. *Id.* at 128-30.

can be used where direct government regulation would raise constitutional problems. For example, it has been argued that the MPAA rating scheme would be unconstitutional if imposed by the government.[282] However, the experience with the Family Viewing Policy suggests limits to what the government can do to encourage self-regulation without turning voluntary action into state action.[283] The V-Chip example presents a case where the voluntary nature of the self-regulation is questionable.[284]

Another benefit of self-regulation is that it can provide a forum for testing rules that may ultimately become regulations.[285] For example, the NAB Code's limits on children's advertising formed the basis for the Children's Television Act's limit on advertising.[286] Similarly, the FTC's legislative proposals regarding children's privacy seemed to draw upon the CARU self-regulatory guidelines.[287]

The examples also support some arguments against self-regulation. Some examples suggest that inadequate enforcement may be a problem under self-regulation. There are few examples of the NAB taking any action against television stations that violated the Code. The Children's Advertising Review Unit brings only a small number of cases each year against television advertisers, even though evidence suggests that hundreds of noncompliant advertisements are broadcast each week. And more recently, CARU has only concluded a few cases involving Web sites that collect information from children, even though the FTC has documented that a large number of Web sites are not in compliance with the CARU Guidelines.

Inadequate sanctions also presented a problem in some cases. For example, denial of the right to display the NAB seal did not provide a meaningful sanction for broadcast stations. Finally, the DOJ's antitrust suit against the NAB illustrates how self-regulation can result in anticompetitive conduct.[288]

B. Conditions in Which Self-Regulation Can Work

There are many ways in which one might measure the "success" of self-regulatory schemes. It might be measured in terms of whether the self-regulation meets the stated goals or whether the stated goals are the correct or best goals. Likewise, self-regulation could be considered successful when

282. Bates, *supra* note 243, at 625; Septimus, *supra* note 257, at 86-87.
283. *See supra* Part III.A.3.c(ii).
284. *See supra* Part III.C.6.
285. Mulligan & Goldman, *supra* note 30, at 65-67.
286. *See supra* Part III.A.3.c.
287. *See supra* note 202.
288. *See supra* Part III.A.2.

it meets other (perhaps unstated) industry objectives, such as "avoiding intrusive government regulation" or restricting competition, even when those goals may not benefit the public.

For purposes of this Article, the focus is on whether self-regulatory codes have been successful in achieving their stated purposes. At least some of the above examples of self-regulatory schemes involving the media have enjoyed success in that way. Indeed, in some cases, voluntary codes have been in effect for a long period of time. Among the successful (or at least partially successful) examples of self-regulation are the NAB commercial time limits, including the NAB's children's advertising limits, the NAB's Family Viewing Policy, CARU's Advertising Guidelines, DISCUS's prohibition on broadcast advertising, the MPAA Production Code, the MPAA rating scheme, and the Comic Book Code. Yet, of these arguably successful schemes, only two—the CARU advertising limits and the MPAA rating scheme—remain in effect. The NAB commercial time limits were found to have raised antitrust problems; the Family Viewing Policy was found unconstitutional; the NAB's children's advertising limits were repealed and ultimately replaced by a statute; DISCUS has rescinded its ban on broadcast advertising; the MPAA Production Code has been replaced by a rating system; and the Comic Book Code seems to have lost its effectiveness.

Among the unsuccessful self-regulatory schemes are the NAB's early attempt to regulate frequency assignments, the NAB's attempt to limit cigarette advertising, the NAB's attempt to encourage diverse cultural and educational programming for children, and the NNC's attempt to promote fairness in news coverage. The Children's Advertising Review Unit's attempt to protect children's online privacy has largely been ineffective as well; however, it may achieve greater success over time.[289]

What are some of the factors that may account for these successes and failures? First, these examples are used to test the four criteria identified by Michael.[290] Second, they suggest an additional factor that may influence the success or failure of self-regulatory schemes.

1. Industry Incentives and Expertise

Michael hypothesized that for self-regulation to be successful, the self-regulatory body must have both the expertise and motivation to perform the self-regulation. The media examples support this hypothesis. In most exam-

289. Several other schemes—video games and the V-Chip—are too new to assess. Although the content provisions of the alcoholic beverages industry codes have been in existence for some time, the Author is not aware of any studies of their effectiveness. The FTC's current investigation may shed some light on this question.

290. *See supra* Part II.D.

ples, a major motivating factor was fear that if the industry failed to act on its own, the government would regulate.[291] Where the threat of government regulation receded—as in the case of the National News Council—self-regulation failed. Further, in cases where the credible threat of governmental regulation disappeared, so did the self-regulation. For example, the NAB decided to abandon the entire Code instead of simply eliminating the sections challenged in the antitrust suit because it was clear that the FCC was no longer interested in regulating broadcast content.[292] Likewise, CARU's efforts to police children's advertising have varied depending on the intensity of governmental interest.[293]

In the above examples, the threat of government regulation was due to a change in the political climate. In other cases, legal constraints have mitigated the possibility of government regulation. For example, following the Supreme Court decision granting First Amendment protection to motion pictures, the Movie Production Code fell apart.[294] Similarly, DISCUS's decision to eliminate the prohibition on advertising distilled spirits followed the Supreme Court's decision in *44 Liquormart*.[295]

Economics is another important incentive. One might explain the effect of the NAB's limitation on cigarette advertising by looking at broadcasters' advertising revenues. The limitations on the amount of advertising per hour and the number of products advertised in a single spot increased broadcasters' revenues by raising the price of advertising time, while limits on cigarette advertising would have cut into advertising revenues. Yet, economic incentives cannot provide the sole explanation, for surely the NAB's and DISCUS's prohibition on advertising distilled spirits also had the effect of reducing advertising revenues.[296] Ultimately, the distilled spirits industry's

291. Some of the media examples demonstrate that the failure of self-regulation does in fact lead to government regulation. For example, the NAB's inability to voluntarily work out frequency assignments led to the Radio Act of 1927, under which the FCC awarded licenses for specific frequencies. Likewise, the failure of the NAB and the tobacco industry to restrict cigarette advertising contributed to the passage of a law prohibiting broadcast advertising. Repeal of the NAB Code provisions limiting the amount of children's advertising led to a law limiting the amount of advertising. However, the converse is not necessarily true—that is, that successful self-regulation will obviate the need for government regulation. *See infra* Part IV.B.2.

292. *See supra* Part III.A.2.

293. Not only did Armstrong's study indicate that CARU's efforts correlated with the degree of governmental interest, but CARU increased its activities regarding online advertising when it became clear that the FTC was considering action in this area. *See supra* Part III.B.1-2.

294. *See supra* Part III.A.2.

295. *See supra* Part III.C.1.

296. The different treatment of alcohol and tobacco advertising may be attributed to historical differences in how these products have been perceived by the public. The expe-

perceived need to advertise in order to regain market share lost to beer and wine resulted in the failure of self-regulation.

Economic incentives can sometimes combine with altruism as a motive for self-regulation. For example, in the case of the Family Viewing Hour, the district court found that CBS genuinely wished to reduce violence on its network, but did not want to act alone because it would suffer competitive harm.[297]

Michael argues that industry must not only be willing to self-regulate, but it must possess the requisite expertise. Lack of expertise presented a problem in only one of the media examples—the National News Council. One of the factors contributing to the NNC's demise was its reliance on inexperienced graduate students to conduct investigations. Of course, this lack of expertise was directly related to the lack of funds, which in turn was due to the lack of motivation within the industry.[298]

The NNC also provides the only media example where there was no preexisting organization willing to take on the self-regulation. The lack of a preexisting organization may have been a contributing factor to its failure since the new organization was unable to establish a sufficient source of funding.[299] In the other media examples, whether successful or not, a trade association was already in existence, although, in some cases—CARU and RSAC—the trade association created a separate unit or organization to actually carry out the self-regulation.

Thus, the examples of self-regulation of the media support the hypothesis that industry motivation is essential to successful self-regulation. If the source of that motivation is removed or weakened, then self-regulation is likely to falter.

2. Agency Ability to Audit

Michael's second hypothesis—that agency staff must have the authority and expertise to audit the self-regulatory activity—applies specifically to the type of self-regulation he was interested in, that is, audited self-regulation by federal agencies.[300] While none of the media examples in-

rience of Prohibition suggests that large segments of the public have traditionally disapproved of alcohol consumption, while smoking was not generally viewed as undesirable until the Surgeon General's Report publicized the health risks in the 1960s.

297. *See supra* Part III.A.3.c(ii). In advocating for protection of children online, the Author sometimes heard similar arguments from industry representatives. They would say that they wanted to protect children, but were afraid that their competition would not, and the "good guys" would suffer in the marketplace.

298. *See supra* Part III.C.2.

299. *See supra* Part III.C.2.

300. *See supra* Part II.D.

volved audited self-regulation, they suggest that even where self-regulation is not required by a federal agency, it is more effective where a federal agency has authority to regulate and is available to enforce rules against the noncompliant.

The "successful" instances of self-regulation generally involved situations where there was some government regulation. For example, NAB's implementation of advertising limits was supported by the fact that the FCC looked at the number of commercials in renewing licenses.[301] Similarly, the Children's Advertising Review Unit's efforts to deter unfair and deceptive advertising to children were backed up by FTC (and sometimes FCC) enforcement actions.[302] The recent FTC case against Beck's similarly suggests that the FTC is willing to enforce restrictions on alcohol advertising where the industry fails to adequately police itself.[303] Thus, having a government agency with authority to regulate as a backup appears to be an important factor in successful self-regulation.

3. Objective v. Subjective Standards

Michael hypothesized greater success where rules were relatively narrow and susceptible to output-based standards and found that programs with the most subjective standards experienced the most difficulty in implementation. Again, the media examples confirm this finding. When Code requirements were vague and subjective, compliance was less likely than when they were concrete and measurable. For example, the FCC's Children's Television Task Force found that most stations complied with the NAB's children's advertising limits, which could be measured in terms of minutes per hour, but did not comply with the more subjective obligation to provide a variety of educational and cultural programming.[304] Similarly, compliance with an outright ban on the broadcast of advertising distilled spirits is easily determined. These examples generally support the conclusion that self-regulation is more successful when the regulation is susceptible to output-based standards.

4. Fair Process and Public Participation

Michael argued that to enhance the likelihood of success,

301. *See supra* Part III.A.3.b.

302. *See supra* Part III.B.1.

303. *See supra* Part III.C.1.

304. TASK FORCE REPORT, VOL. 1, *supra* note 136, at 4. *See also* Policies and Rules Concerning Children's Television Programming, *Notice of Inquiry*, 8 F.C.C.R. 1841, para. 7, 3 Comm. Reg. (P & F) 2291 (1993) (noting compliance with "specific, palpable performance standards" for children's advertising but little improvement concerning vague program obligations).

> [t]he self-regulatory organization should engage in its rulemaking on the record, with notice and opportunity for comment given to all affected groups to the extent possible, with particular emphasis on notice to nonmembers who might be adversely affected by the proposed rule, and responses to all significant comments required in the rulemaking record.[305]

Most of the media examples did not engage in "rule making" on the record with notice and opportunity to affected groups. Indeed, in many media examples, there appears to be little public awareness of the self-regulation, much less public involvement in the rulemaking and enforcement processes. For example, the NAB does not appear to have consulted with viewers or consumers in developing or amending the Code nor to have encouraged or accepted complaints from the public.[306] Indeed, most of its enforcement was done behind closed doors. Moreover, the public was largely unaware of the NAB seal. It is impossible to know whether this lack of public awareness and participation affected the NAB's effectiveness.

The Children's Advertising Review Unit's mode of operation is similar to the NAB's, although it occasionally acts on complaints from the public, makes some effort to publicize its actions, has an academic advisory board, and consults with nonindustry groups from time to time.[307] The industry groups that developed the V-Chip rating scheme—MPAA, NAB, and NCTA—were criticized for developing the initial rating scheme without sufficient input from the public,[308] but did eventually meet with the groups and added representatives of the public to their advisory board.[309]

Other self-regulatory groups have included nonindustry representation. A majority of the members on the RSAC, which developed video game ratings, comes from outside the video game industry.[310] Moreover, the NNC

305. Michael, *supra* note 16, at 245. He also argues that in enforcement activities, the self-regulatory organization should provide notice and opportunity for a hearing before an impartial decision maker who is required to decide on the record. *Id.* The media examples, such as the NAB Code, CARU Guidelines, and the movie ratings, seemed to comply with these procedural safeguards.

306. Several articles commented on the public's lack of awareness of the NAB Code and the muted public response to its repeal. *See, e.g.*, Maddox & Zanot, *supra* note 53, at 125.

307. *See supra* Part III.B.1. Members of CARU's academic advisory group are listed on its Web page. Some of the organizations the Author represents met with CARU representatives to comment on the draft guidelines for online media.

308. *See, e.g.*, Jube Shiver, Jr., *TV Industry to Use Ratings Before Regulatory Review*, L.A. TIMES, Dec. 19, 1996, at A1; Jenny Hontz & Christopher Stern, *D.C. Goes Rating-Baiting*, VARIETY, Feb. 24-Mar. 2, 1997.

309. *Implementation Report and Order*, *supra* note 278, paras. 12-16.

310. Balkam, *supra* note 31, at 140. Whether RSAC is ultimately successful, will, as in the case of the V-Chip, depend on whether it can earn the public's knowledge and trust.

consisted of members drawn from both the public and the journalism profession and was chaired by a member of the public. Yet, despite this public involvement, the NNC's failure was attributed in large part to its failure to obtain widespread public awareness and support.[311] On the other hand, the success of movie ratings has depended upon widespread public awareness and support.[312]

In sum, the media examples are inconclusive on whether public participation in rule making and enforcement is important for effective self-regulation. Some have enjoyed success without public participation while others have failed even with public participation.

5. Other Conditions

The media examples also suggest that the size and structure of the industry are important factors in the success of self-regulation. Logic suggests that the fewer industry participants, the easier it would be to self-regulate. The media examples also indicate that the existence of market power may play a role in being able to effectively enforce industry self-regulation.

The NAB enjoyed success in limiting the amount and kind of advertising, even though there was a large number of advertisers and advertising agencies, because the number of television stations was limited, and most belonged to one of three major networks. Since access to the network affiliates, most of whom complied with the NAB Code, was essential to reach the majority of markets, advertisers had a strong incentive to comply with the Code.[313] Similarly, there are only a small number of movie studios. When they controlled the majority of movie theaters, they could ensure that the theaters showed only films meeting the Production Code.[314]

The success CARU has achieved with television commercials compared to Web sites may also be due to the structure of those industries. The number of companies that advertise to children on television is fairly limited. However, the number of companies offering Web sites to children is quite large and includes many new entrants as well as the traditional cereal, toy,

311. *See supra* Part III.C.2. Moreover, Brogan attributes some of the NNC's problems to the requirement that it be chaired by a member of the public. BROGAN, *supra* note 222, at 17. He found that the only effective chairman was one that came from a journalism background, who, because of his background, was able to command the respect of the media and be effective in fund-raising. *Id.* at 47.

312. *See* Swope v. Lubbers, 560 F. Supp. 1328, 1340-41 (W.D. Mich. 1983) (describing public awareness and use of movie ratings based on surveys).

313. While advertisers could always find non-Code stations to carry their commercials, "faced with the choice of abiding by the Code or incurring the expense and possible public relations headaches of making two sets of ads for Code and non-Code stations, advertisers generally chose the former." Rotfeld et al., *supra* note 107, at 19.

314. *See supra* Part III.C.4.

and fast food companies.[315] Thus, additional factors affecting the success of self-regulation are the number of industry participants and whether there are dominant players that can use their market power to enforce self-regulatory provisions. With these factors in mind, this Article now analyzes the two recent proposals for self-regulatory initiatives—digital television and online privacy.

C. Implications for Digital Television

The Advisory Committee has recommended adoption of a Model Voluntary Code of Conduct for Digital Television Broadcasters. The Advisory Committee explains the reasons for its recommendation:

> A new industry statement of principles updating the 1952 Code would have many virtues. The most significant one is that it would enable the broadcasting industry to identify the high standards of public service that most stations follow and that represent the ideals and historic traditions of the industry. A new set of standards can help counteract short-term pressures that have been exacerbated by the incredibly competitive landscape broadcasters now face, particularly when compared to the first 30-some years of the television era. Those competitive pressures can lead to less attention to public issues and community concerns. A renewed statement of principles can make salient and keep fresh general aspirations that can easily be lost in the hectic atmosphere and pressures of day-to-day operations.[316]

Unlike the old NAB Code, the Model Voluntary Code does not address advertising.[317] Apart from this change, the Model Voluntary Code closely tracks the old NAB Television Code. Both include sections addressing responsibility toward children, the treatment of news and public events, com-

315. *See supra* Part III.B.2.

316. PIAC REPORT, *supra* note 1, at 46. In a draft of this section of the report, Professor Sunstein makes similar arguments in support of a voluntary code:

> The principle virtue is that it enables the broadcasting industry to identify and to adhere to high standards of public service, standards that are already followed by many (though not all) stations, and that are consistent with the best historical traditions of the industry. A code can help counteract short-term pressures that can lead to less attention to public issues, less and worse programming for children, and more sensationalism and prurience than is desirable. A code can also identify and help promote general aspirations that can sometimes be lost in day-to-day operations. Because a code involves self-regulation, it has the distinctive advantage of not permitting government officials to be in the business of making decisions about television content.

CHARTING THE DIGITAL BROADCASTING FUTURE, APPENDIX B: VOLUNTARY CODE OF CONDUCT 2-3 (draft Sept. 4, 1998) (citation omitted) (on file with author) [hereinafter PIAC DRAFT CODE OF CONDUCT].

317. Presumably, this was done in part to avoid any antitrust issues. *See* PIAC REPORT, *supra* note 1, at 120-21 (explaining why the Model Code is unlikely to be found to violate antitrust laws).

munity responsibility, controversial public issues, and special program standards (violence, drugs, gambling, etc.).[318] Unlike the old NAB Television Code, the Model Voluntary Code does not contain a section on religious programming, but has new sections on covering elections and responsibility toward individuals who are deaf or hard of hearing.[319]

Like the old NAB Television Code, the Model Voluntary Code provides for the position of Code Authority Director and a Television Code Review Board. While the NAB's work in the past was largely conducted in private, the Advisory Committee has made several recommendations designed to invite public and governmental awareness and participation. It urges the NAB to draft the Code with input from community and public interest leaders.[320] Moreover, the proposed Model Voluntary Code provides for "special public recognition" to stations with an excellent public service record.[321] It also would require that the FCC be informed at license renewal time whether or not a station is in compliance with the Code, although this notation is to "lack any legal force or effect."[322] In addition, the Television Code Review Board is to "report to the public the names of complying, noncomplying, and specially commended stations" and "report continuing or egregious violations of the code to Congress, the public, and FCC on an ongoing basis."[323]

There are three reasons to be skeptical about the Advisory Committee's recommendation for a voluntary code. First, it is unclear whether the NAB will follow it. Second, even if the NAB does adopt a voluntary code along the lines suggested by the Advisory Committee, it is doubtful that the code will be effective in achieving the stated goals. Finally, the Model Voluntary Code raises similar questions regarding voluntariness that could cause it to be subject to constitutional challenge.

318. Within these sections, some changes have been made. For example, the section on Responsibilities Toward Children in the Model Voluntary Code, which states that "[e]ach broadcaster should endeavor to provide a reasonable amount of educational programming for children each week," PIAC REPORT, *supra* note 1, at 107, is somewhat more specific than the old NAB Code's statement that "[b]roadcasters have a special responsibility to children. Programs designed primarily for children should take into account the range of interests and needs of children from instructional and cultural material to a wide variety of entertainment material." TELEVISION CODE, *supra* note 105, at 3.

319. PIAC REPORT, *supra* note 1, at 107-08, 112.

320. *Id.* at 47.

321. *Id.* at 113.

322. *Id.* at 114.

323. *Id*.

The initial reaction of many broadcasters was to oppose adoption of a voluntary code.[324] After the Advisory Committee discussed the proposed voluntary code in the summer of 1998, *Broadcasting & Cable* reported that "[w]hile broadcasters hate the idea of any so-called voluntary code of conduct, the NAB board decided . . . to proceed with caution—for now."[325] After a "robust" discussion on whether to strongly oppose such a plan, the Board yielded to arguments not to oppose the Code before it was even recommended. Instead, the Board passed a resolution expressing "serious concern" regarding any government efforts to impose limits on broadcasters' editorial freedom.[326] At its January 1999 board meeting, the Board took no action regarding the Advisory Committee Report except to decide to file comments.[327] Before the meeting, an NAB staffer was quoted as saying, "'The board may well decide that it's better off to say nothing now,'" and to wait for the FCC and Congress to act.[328]

As shown *supra*, having an organization that is willing to commit adequate resources to self-regulation is essential to a successful self-regulatory scheme. Here, the incentive for self-regulation, if any, comes from the threat of government regulation. So, the question is whether the broadcast industry's fear of government regulation provides sufficient incentive for it to engage in self-regulation.

Government regulation is certainly a real possibility here. The statute permits broadcasters to receive, free of charge, the exclusive use of extremely valuable electromagnetic spectrum. Instead of being required to bid for the spectrum in an auction, as many other spectrum licensees are, the broadcasters are expected to serve the public interest. Thus, as a condition of using the spectrum, the broadcasters are required to do something in the public interest. The only question is what that something is.

The Advisory Committee recommended (over the dissents of some broadcast members) that the FCC impose some minimal public interest

324. At the Advisory Committee meeting on September 9, 1998, some members sought unsuccessfully to get the NAB's reactions to the proposed voluntary code on record. *Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, Morning Session* 38-43 (visited Mar. 15, 1999) <http://www.ntia.doc.gov/pubintadvcom/sepmtg/> [hereinafter September Transcript]. However, one member from the broadcast industry did state his understanding that the NAB hierarchy opposed voluntary standards out of fear that they would evolve into mandatory minimum standards. *Id.* at 47-49 (comments of Paul La Camera).

325. Paige Albiniak, *Preparing for Battle*, BRDCST. & CABLE, July 6, 1998, at 22.

326. *Id*.

327. *Fox Still Undecided on Leaving NAB, Expresses Concerns*, COMM. DAILY, Jan. 14, 1999, at 6.

328. *Networks Seek Repeal of NAB Endorsement of 35% Station Cap*, COMM. DAILY, Jan. 6, 1999, at 2.

standards, but it left the content of those standards up to the FCC.[329] The FCC is expected to initiate a rule making to determine what those public interest standards will be in the spring of 1999.

It is not clear whether the FCC will propose, much less adopt, significant public interest requirements for digital broadcasters.[330] If the FCC proposes to adopt serious public interest requirements, the NAB may decide that while it opposes a voluntary code, it opposes government-mandated standards even more. From the broadcast industry's point of view, the lesser of the two evils may well be the voluntary code.

On the other hand, the NAB is likely to opt for self-regulation only if it can avoid or render insubstantial the FCC rules. If the FCC adopts serious public interest requirements for digital broadcasters, broadcasters will have little incentive to engage in voluntary self-regulation. Thus, although having both government regulation and industry self-regulation may provide the best conditions for successful self-regulation, such a scenario seems an unlikely outcome in this case.

Another reason why broadcasters may be less than enthusiastic about embracing self-regulation relates to the structure of the video industry. Since the period in which the old NAB Code was in effect, competition from outside the broadcast industry has increased. Competition comes primarily from cable television and somewhat from satellite television and the Internet. The proposed code, however, would apply only to broadcast digital television and not to other television delivery systems. To address this problem, the group drafting the Model Voluntary Code suggested that the Code should be applied to television programmers that are not broadcasters.[331] However, it seems doubtful that these other industries, which unlike the broadcasters are not getting the benefit of valuable, free spectrum, have any incentive to adopt a similar code of conduct.

While the NAB may agree to self-regulation to avoid government regulation, it is unlikely to commit the necessary resources to make self-regulation effective. As demonstrated above, when the former Television Code existed, little attention and few resources were devoted to enforcing the program provisions compared to the advertising provisions. This may have been in part due to the fact that program provisions were vague and thus it was more difficult to evaluate compliance. Similarly, many of the proposed

329. PIAC REPORT, *supra* note 1, at 47-48.

330. In an earlier rule making, the FCC put off this question. Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, *Fifth Report & Order*, 12 F.C.C.R. 12,809, paras. 3-5, 7 Comm. Reg. (P & F) 863 (1997). Since that time, the composition of the FCC has changed.

331. PIAC DRAFT CODE OF CONDUCT, *supra* note 316, at 3. *See also* September Transcript, *supra* note 324, at 41. However, this proposal does not appear in the final report.

provisions in the Model Code are vague and not easily measured or enforced.[332]

Finally, even if the NAB adopts a code of conduct, its action may be subject to constitutional challenge.[333] To be sure, just because adoption of the voluntary code is not truly voluntary does not necessarily mean that the First Amendment would be violated.[334] But it could cause delay and, as a practical matter, the ultimate abandonment of the Code, as happened with the Family Viewing Hour.

To avoid First Amendment difficulties, the Advisory Committee notes that "it is extremely important that we are arguing on behalf of a code as a simple recommendation to private organizations, above all the NAB, and *not* as a proposed mandate from the government, either the FCC or Congress."[335] The Report explains that the First Amendment is irrelevant where the industry as a whole decides what to broadcast without government involvement. However, "if a code were a product of government threat, and were effectively required by government," the First Amendment would apply, and the content regulation would be subject to scrutiny by the courts.[336]

It is difficult to take seriously the Advisory Committee's claim that the code is purely voluntary. As discussed *supra*, digital broadcasters are getting free use of valuable spectrum in return for serving the public interest. Moreover, on its face, the proposed code would require the FCC to be notified at license renewal time whether a station is in compliance with the voluntary code. Broadcast licensees must seek renewal from the FCC every

332. For example, the Model Voluntary Code states that "news programming should be both substantive and well-balanced" and should "provide appropriate coverage to topics of particular concern to the local community." PIAC REPORT, *supra* note 1, at 108, 110. However, some provisions are more objective and quantifiable. For example, one provision states that broadcasters should provide well over 75 public service spots per week. *Id.* at 110.

333. While presumably the NAB could not bring such a challenge, perhaps dissident members or third parties might have standing to bring a constitutional challenge.

334. A First Amendment violation would only arise if government coerced industry to do something indirectly that it could not require directly. While some of the proposed provisions, if they were direct government regulations, might violate the First Amendment, many would not. For example, the proposed children's television provision, *see supra* note 318, is similar to the Children's Television Act's requirement that each broadcaster provide some programming serving the educational and informational needs, but is less specific than the FCC's interpretation of that Act, which established a guideline of three hours of children's educational programming per week. *See supra* Part III.A.3.c(ii). Since neither the Children's Television Act nor the FCC rules have been found unconstitutional, presumably the broadcasters' decision to provide a reasonable amount of educational programming for children would not violate the First Amendment, even if it were the result of government coercion.

335. PIAC REPORT, *supra* note 1, at 117.

336. *Id.*

eight years, and even though nonrenewal is extremely rare, no broadcaster wants to risk a challenge to its license. Although the Model Voluntary Code states that the notation as to compliance lacks any legal force or effect, it is hard to imagine that the FCC would feel free to ignore a finding of "continuing or egregious noncompliance."[337] In sum, past experience with self-regulation of the media provides little hope that the Advisory Committee's recommended voluntary code for digital television will be successful.

D. Implications for Privacy on the Internet

There is also reason to be skeptical about the ability of self-regulation to protect consumer privacy on the Internet. Despite numerous calls for self-regulation, industry appears to be dragging its feet. Although the White House first called for industry self-regulation in the *Framework for Global Electronic Commerce* issued in July 1997, by November 1998, only limited progress had been made. In its First Annual Report, the U.S. Government Working Group on Electronic Commerce, found that "[i]ndustry was slow to respond to the President's call in the *Framework* for the development of effective self-regulation."[338] It noted that since the FTC published its *Report to Congress* in June 1998, however, serious efforts to protect privacy through self-regulation had begun, citing as an example, the efforts of the Online Privacy Alliance.[339] But it warned that "if self-regulation is to work, these efforts must expand over the next year."[340]

Likewise, the FTC began calling for industry self-regulation at least as early as the June 1996 workshop.[341] In congressional testimony in July 1998, the Chairman of the FTC gave industry until the end of the year to

337. *Id.* at 114.

338. U.S. GOVERNMENT WORKING GROUP ON ELECTRONIC COMMERCE, FIRST ANNUAL REPORT 16 (Nov. 1998), *available at* <http://www.ecommerce.gov> [hereinafter FIRST ANNUAL REPORT]. *See also* Elizabeth deGrazia Blumenfeld, *Privacy Please: Will the Internet Industry Act to Protect Consumer Privacy Before the Government Steps In?*, 54 BUS. LAW. 349, 382 (1998).

339. FIRST ANNUAL REPORT, *supra* note 338, at 16. According to its Web page, www.privacyalliance.org, the Online Privacy Alliance is a coalition of over 60 global corporations and associations, formed to "lead and support self-regulatory initiatives that create an environment of trust and that foster the protection of individuals' privacy online and in electronic commerce." Online Privacy Alliance, *Mission* (visited Mar. 15, 1999) <http://www.privacyalliance.org/mission/>. The Alliance has proposed privacy principles and advocates an enforcement system based on a seal. *Id.*

340. FIRST ANNUAL REPORT, *supra* note 338, at 17.

341. *See Privacy Workshop*, *supra* note 186, at 436 (closing statement of Chairman Pitofsky), *available at* <http://www.ftc.gov/bcp/privacy/wkshp96/pw960605.pdf>.

come up with effective self-regulation, or the FTC would seek legislation.[342] It does not appear that industry has met this challenge.[343]

Although the government argues that it is in the economic interests of business to develop effective self-regulation because "it is essential to assure personal privacy in the networked environment if people are to feel comfortable doing business online,"[344] on balance, the economic incentives probably run the other way.[345] It is quite profitable for companies to collect personal information. It costs companies little to collect personal information, and they can sell it or use it to better target their sales efforts.[346] Self-regulation that requires them to disclose their information practices and allows the public to opt-out (or even worse from the industry point of view, having to get them to opt-in) will increase the costs of information collection.[347]

Thus, the major incentive for industry to self-regulate is to avoid the threat of government regulation. Since there is no government agency that currently has sufficient authority to regulate privacy, legislation would be required. The possibility of legislation is not entirely remote. Both the Administration and the FTC have threatened to seek legislation if the industry fails to self-regulate.[348] Moreover, Congress did pass legislation to protect children's privacy online.[349] Nonetheless, the threat of legislation may not be sufficiently realistic to overcome the obstacles to effective self-regulation.

---

342. *Electronic Commerce Hearings*, *supra* note 7, at 303 (statement of Robert Pitofsky, Chairman, FTC); Jeri Clausing, *Group Proposes Voluntary Guidelines for Internet Privacy*, N.Y. TIMES, July 21, 1998, at D4.

343. In February 1999, an FTC spokeswoman stated that the Commission would still "'rather have industry regulate this than government.'" Courtney Macavinta, *Government Delivers Privacy Ultimatum* (visited Mar. 15, 1999) <http://www.news.com/News/Item/Textonly/0,25,31822,00.html>. The FTC plans a survey for March 1999 to determine the industry's progress. *Id.*

344. Elements of Effective Self Regulation for the Protection of Privacy and Questions Related to Online Privacy, *Notice and Request for Public Comment*, 63 Fed. Reg. 30,729 (NTIA 1998).

345. It has been reported that companies selling personal information had gross annual revenues of $1.5 billion. Trans Union Corp., *Initial Decision*, FTC Docket No. 9255, at 53 n.354 (July 31, 1998), *available at* <http://www.ftc.gov/os/1998/ 9808/d9255pub.id.pdf>.

346. *See, e.g.*, Budnitz, *supra* note 30, at 853; Blumenfeld, *supra* note 338, at 351.

347. *See, e.g.*, Perritt, *supra* note 32, at 108 (describing transaction costs involved in opt-out); Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1255 (1998) (noting that even disclosing the fact of collection is costly to firms).

348. Several academics have also called for legislative action to address privacy concerns. *See, e.g.*, Kang, *supra* note 347, at 1193; Budnitz, *supra* note 30. Numerous bills have been introduced in Congress that are related to privacy on the Internet. *See generally Electronic Privacy Information Center* (visited Mar. 15, 1999) <http://www.epic.org>.

349. *See supra* note 8. However, it may be easier to get the political support needed for legislation when the subject of the legislation is children and the number of companies affected is smaller.

Even if the companies were to agree to a self-regulatory regime, it may be difficult to enforce.[350] All of the self-regulatory schemes being discussed rely on "notice and choice"; that is, the Web site would disclose its privacy practices, and the consumer could exercise choice by declining or continuing to do business with the company. One problem, however, is that it is difficult for consumers to verify whether a company in fact complies with its stated policies.[351] Thus, it would be easy for companies to cheat and difficult for consumers to confirm compliance. Although the Better Business Bureau is developing an enforcement mechanism that would award a "privacy seal" to sites that meet its standards,[352] there is no reason to believe this enforcement mechanism would be any more effective than the old NAB seal.[353] These problems would be aggravated by the lack of government oversight since there is no government agency that clearly has authority to oversee privacy protection.[354]

As in the case of digital television, self-regulation as an adjunct to government regulation seems more promising. The safe harbor provisions of the children's privacy legislation provide a useful model in this regard.[355] The

350. Professor Reidenberg has similarly argued that self-regulation has not been nor is it likely to become a successful way to protect the privacy of U.S. citizens. *See* Joel R. Reidenberg, *Restoring Americans' Privacy in Electronic Commerce*, 14 BERKELEY TECH. L.J. (forthcoming Apr. 1999).

351. *See, e.g.*, Joel R. Reidenberg & Paul M. Schwartz, Legal Perspectives on Privacy 27-28 (Oct. 29, 1998) (paper presented as part of the Information Privacy Seminar Series, Georgetown University, January 1998) (discussing how actual information practices are largely hidden from public view, and barriers for individuals to discover how businesses use personal information are often insurmountable; at the same time, businesses profit enormously from trade in personal information); Swire, *supra* note 12, at 6; Mary J. Culnan, A Methodology to Assess the Implementation of the Elements of Effective Self-Regulation for Protection of Privacy 11-12 (discussion draft June 1, 1998), *available at* <http://www.georgetown.edu/culnan/>.

352. Macavinta, *supra* note 343.

353. Indeed, a recent press report illustrates one of the problems with seals. Trust-E is an organization, funded by Microsoft and nine other companies, that monitors the Internet privacy policies of about 500 companies. Companies that meet the criteria are awarded a seal of approval designed to assure consumers that their privacy will be protected. Although a customer complained to Trust-E that Microsoft was collecting personally identifiable information even when customers explicitly indicated they did not want this information collected, Trust-E declined to deny Microsoft the use of its seal or even to audit the company. *Watchdog Group Won't Pursue Microsoft*, SAN JOSE MERCURY NEWS, Mar. 23, 1999 (visited Mar. 15, 1999) <http://www.mercurycenter.com/svtech/news/breaking/merc/docs/ 009780.htm>.

354. It has been suggested that the FTC could initiate enforcement actions against companies that post privacy disclosure policies yet fail to comply with them. However, apart from the difficulties in determining whether companies are complying when they alone know what they do with the information, the remedies are also inadequate for consumers. Reidenberg & Schwartz, *supra* note 351, at 26-27.

355. *See supra* note 8.

safe-harbor approach would appear to shift some of the costs of regulation to the private sector, while ensuring that all industry participants are subject to minimum standards. Likewise, this approach can allow flexibility and take advantage of industry's superior knowledge, without having to rely solely on industry self-interested choices. The ability of the public to comment on the FTC rules and on the adequacy of industry guidelines provides an additional safeguard against industry subversion of self-regulation to its own ends.

Finally, the industry structure militates against effective self-regulation. As Professor Budnitz notes,

> meaningful regulation requires participation by the entire electronic commerce industry. Unfortunately, the presence of great diversity in this industry makes universal participation unlikely. In fact, in this context, it is probably inaccurate to talk about the electronic commerce industry in the singular, for several industries are involved.[356]

No single industry organization comparable to the NAB exists that could undertake self-regulation. Although the Online Privacy Alliance "represents significant online players, . . . the group's membership is only a drop in the bucket given the seemingly infinite number of sites on the Web."[357] Given the large number and diversity of parties involved, it is difficult to see how self-regulation could work.

V. CONCLUSION

Self-regulation has been portrayed as superior to government regulation for addressing problems of new media such as digital television and the Internet. This Article has analyzed the effectiveness of self-regulation by looking at the track record of self-regulation in other media. After describing and analyzing past uses of self-regulation in broadcasting, children's advertising, news, alcohol advertising, comic books, movies, and video games, it concludes that self-regulation rarely lives up to its claims, although in some cases, it has been useful as a supplement to government regulation. It then identifies five factors that may account for the success or failure of self-regulation. These include the industry incentives, the ability of government to regulate, the use of measurable standards, public participation, and industry structure. Applying these five factors to digital television public interest responsibilities and privacy on the Internet, it concludes that self-regulation is not likely to be successful in these contexts.

356. Budnitz, *supra* note 30, at 874.

357. Macavinta, *supra* note 343.