

# Prepared Statement of the Federal Trade Commission

regulation efforts. We think a careful analysis of current case law and enforcement guidance will alleviate much of this concern. In particular, we believe

make up a substantial percentage of the audience? And, are these advertisements intended to attract children and teenagers? After a comprehensive study, the Commission has found that the answers to both questions are plainly "yes."

Although all three industries studied have self-regulatory systems that rate or label their products to help parents make choices about their children's entertainment, the Commission found that members of all three industries routinely target children in their efforts to advertise and market entertainment products that have been rated or labeled with parental advisories due to their violent content. The Commission believes that these advertising and marketing efforts undermine each industry's parental advisories and frustrate parents' attempts to protect their children from inappropriate material.

### III. The Commission's Findings

The Commission carefully examined the structure of these rating and labeling systems and studied how these self-regulatory systems work in practice. We focused on the marketing of products designated as violent under these systems. We did not examine the content itself, but accepted each industry's determination of whether a particular product contains sufficient violent content to warrant parental caution.

The Commission found that despite the variations in the three industries' systems, the outcome is consistent: individual companies in each industry routinely market to children the very products that have industries' self-imposed parental warnings or ratings with age restrictions due to violent content. Indeed, for many of these products, the Commission found evidence of marketing and media plans that expressly target children. In addition, the companies' marketing and media plans showed strategies to note and advise parents.

realistic and interactive video games. The survey

compatibility so that consumers can make use of the widest and most convenient services.

The benefits of industry self-regulation are numerous. First, many product standards developed through self-regulation enhance safety. Industry self-regulatory bodies such as the American National Standards Institute ("ANSI") and the American Society of Mechanical Engineers ("ASME") have established thousands of voluntary standards regarding matters such as product design, fire prevention, and ethical standards of practice. By establishing a floor of common quality, such standards increase product acceptability and familiarity, which helps facilitate the emergence of new markets and the entry of previously unknown products and suppliers. This enhances competition and innovation.

Second, industry regulatory standards can improve the efficiency of industry members leading to lower costs of production and distribution. For example, industry standards can reconcile diverse systems or products, permitting greater interchangeability of parts and more compatible designs. This is critical in computer, high-tech, and network industries. As compatibility increases

enforcement actions. As the Supreme Court observed in connection with standard

There is no doubt that the

choices. Member firms now had to disclose their marketing practices to consumers and permit them to opt out. This option was previously unavailable to consumers, and unlikely to become available absent government action or regulation.

Similar efforts to provide truthful information to consumers and to expand consumer choices are likely to be found legal, as they would advance the purposes of the antitrust and the consumer protection laws.

#### V. Applying Antitrust Principles to Entertainment Industry Self-Regulation

The analysis of current case law and enforcement age





group boycott of retailers who deal with price-cutting pirates violated section 5.<sup>(22)</sup> However, while issues relating to actions against retailers may raise some of the more difficult concerns, appropriately structured collective action of this type appears unlikely to violate federal antitrust laws.<sup>(23)</sup> Other avenues that may be pursued include seal programs and "Hall of Shame" type publications of offending retailers. And of course, entertainment media producers could individually opt not to deal with offending retailers.<sup>(24)</sup>

**Advertising Restraints.** Efforts by producers to place appropriate limitations on the targeted advertising of products that are rated or labeled as warranting parental caution need not restrict competition unreasonably. If, as suggested above, it is reasonable to impose certain restrictions on actual sales or rentals of certain rated or labeled products to children, it should be reasonable under the antitrust laws to restrict advertising of these products to children. So long as the content of, and means available for, marketing products to adult audiences are not unduly restricted, consumers will continue to have access to product information, and sellers can continue to compete for their patronage.<sup>(24)</sup> Consequently, self-regulation reasonably tailored to prevent the advertising of certain entertainment products with violent content to children should not impose a significant restraint on legitimate competitive activity. In fact, reasonable regulation should further the competitive process by focusing competitive efforts on legitimate market activities and by lessening the need for government regulation.

## VI. Conclusion

The Commission's exhaustive study of certain segments of the entertainment industry reveals a continuous pattern of target marketing to underage users. Industry self-regulation designed to eliminate this marketing is unlikely to violate the antitrust laws. The kinds of self-regulation that would be necessary are likely to be analyzed under the rule of reason. Thus, the Commission concludes that an exemption from the antitrust laws is unnecessary for the industry to establish or expand codes that prohibit target marketing to children and impose sanctions for noncompliance, increase compliance at the retail level, or increase parental understanding of the ratings and labels.

Endnotes:

1. This written statement represents the views of the Federal Trade Commission. My oral presentation and responses to questions are my own and do not necessarily reflect the views of the Commission or any Commissioner.

2. See Prepared Statement of the Federal Trade Commission presented by Robert Pitofsky, Chairman, before the Committee on Commerce, Science, and Transportation, United States Senate, on "Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in Motion Picture, Music Recording, and Electronic Game Industries," September 13, 2000.

3. 15 U.S.C. §§ 41-58.

4. 15 U.S.C. §§ 12-27.



Trade Commission, Before the D.C. Bar Association Symposium (Feb. 18, 1998).

16. Restrictions on sales of entertainment products to adults inevitably raise First Amendment issues. The Commission's support for enhanced industry self-regulation in the advertising context is motivated in part by our strong belief in the benefits of self-regulation, and in part by our concern that government regulation of advertising and marketing, especially if it involves content-based restrictions, may raise First Amendment issues. The First Amendment issues that have been raised in the context of restricting or limiting advertisements for media products are identified in Appendix C of the Commission's Report, *First Amendment Issues in Public Debate Over Governmental Regulation of Entertainment Media Products with Violent Content*.

17. That the restraints have broader public origins, and are not imposed solely by agreement between competitors, is a relevant consideration under a rule of reason analysis. The Supreme Court has been skeptical of arguments that competitors alone should be permitted to restrict consumer choice on grounds that consumers may make "unwise" or "dangerous" choices under competitive market conditions. *National Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679 (1978). In *Professional Engineers*, an association attempted to justify a ban on competitive bidding by claiming that such competition would lead to "deceptively low bids, and would thereby tempt individual engineers to do inferior work with consequent risk to public safety and health." *Id.* at 693. The Supreme Court rejected the asserted justification, explaining that "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Id.* at 696. In contrast, an agreement to refrain from marketing restricted entertainment products to children would reflect a broader societal view that children occupy a special place in the marketplace.

18. Further, it is not entirely clear that the prohibited conduct—selling to children products that warrant parental caution—is one that the competitive process is intended to foster. Professional associations often adopt ethical standards to govern members' conduct. Such agreements are permissible so long as they do not unreasonably restrict competition.

19. Reasonable self-regulation to prevent targeted marketing of restricted products to children, therefore, could be defended within the parameters established by the ruling of the Supreme Court in *Professional Engineers*, 435 U.S. 679, where the Court held that the rule of reason analysis is limited to competitive considerations. Reasonable self-regulation to prevent marketing of such products to children can lend credibility to the rating system and thereby assist the functioning of the market. The situation in *Professional Engineers* was different. In that case, an association attempted to justify a ban on competitive bidding—i.e., on price competition—by claiming that such competition would lead to "deceptively low bids, and would thereby tempt individual engineers to do inferior work with consequent risk to public safety and health." *Id.* at 693. The Supreme Court rejected the asserted justification.

20. See *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 296 (1985) (expulsion from a purchasing cooperative did not create a probability of anticompetitive effect "unless the cooperative possess[ed] market power or exclusive access to an element essential to effective competition").

21. See, e.g., *Allied Tube & Conduit*

speech of other private entities.

24. Even if a restricted advertising venue has a substantial audience suitable for the advertised product, as well as a significant underage audience, competition will not be significantly affected if firms have access to other, permissible advertising venues that reach adults. Only if the various advertising or marketing restrictions, taken together, significantly restrict the flow of information to adult consumers, there be an antitrust or First Amendment concern.