Prepared Statement of the Federal Trade Commission

presented by
Robert Pitofsky, Chairman[(1)]

Before the
Committee on the Judiciary
United States Senate

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I. Introduction

Mr. Chairman and Members of the Committee, I am pleased to appear before you to present testimony of the Federal Trade Commission ("FTC") on the issue of the antitrust implications of entertainment industry self-regulation to curb the marketing of violent entertainment products to children. The Commission recently released its study concerning the marketing to children under 17 of violent entertainment products labeled or rated with parental advisories, and I discussed the conclusions of that study last week before the Senate Committee on Commerce, Science, and Transportation.[(2)]

The FTC is a law enforcement agency whose statutory authority covers a broad spectrum of the American economy, including the entertainment industry. The Commission enforces, among other statutes, the FTC Act[(3)] and the Clayton Act,[(4)] sharing with the Department of Justice authority under section 7 of the Clayton Act to prohibit mergers or acquisitions that may "substantially lessen competition or tend to create a monopoly."[(5)] In addition, section 5 of the FTC Act prohibits "unfair methods of competition" and "unfair or deceptive acts or practices," thus giving the Commission responsibilities in both the antitrust and consumer protection areas. The Commission also provides advice and guidance to states and other federal regulatory agencies on competition issues. Moreover, the Commission has experience applying antitrust principles across many different industries.

The FTC frequently considers issues involving self-regulatory initiatives, from both competition and consumer protection perspectives. In our competition role, we seek to prevent self-regulatory restraints that harm the competitive process by denying consumers the full range of choices or by preventing new forms of competition from emerging. We also play a role in counseling self-regulatory organizations on how they can perform certain collective functions without raising significant antitrust concerns. But we also seek to prevent self-regulation that unnecessarily restricts competition in the market. In our consumer protection role we have emphasized the importance of self-regulation and we work with industry groups to develop sound self-regulatory initiatives, often to complement existing laws.

We frequently hear concerns expressed that the antitrust laws pose obstacles to self-

regulation efforts. We think a careful analysis of current case law and enforcement agency guidance will alleviate much of this concern. In particular, we believe it is unlikely that the antitrust laws prevent the entertainment industry from adopting and enforcing effective restraints against the target marketing to children of violent entertainment products that industry itself labels or rates with parental advisories. Self-regulation by the entertainment industry is especially important considering the First Amendment protections that prohibit government regulation of content in most instances. However, antitrust problems would arise if the self-regulatory program was a cloak for an anticompetitive scheme, and not truly designed to protect young people from inappropriate exposure to violent material.

II. Background

On June 1, 1999, following the horrifying school shooting in Littleton, Colorado, the President requested that the Federal Trade Commission and the Department of Justice conduct a study of whether violent entertainment material was being advertised and promoted to children and teenagers.[(6)] President Clinton's request paralleled congressional proposals for such a study.[(7)] Revelations that the teen-aged shooters at Columbine High School in Littleton had been infatuated with extremely violent movies, music, and video games reinvigorated public debate about the effects of violent entertainment media on youth. While opinions vary, many studies have led experts and public health organizations to believe that viewing entertainment media violence can lead to increases in aggressive attitudes and behavior in children. Although scholars and observers generally have agreed that exposure to violence in entertainment media alone does not cause a child to commit a violent act, there is widespread agreement that it is, nonetheless, a cause for concern.

In response to the President's request, the Commission, with financial assistance from the Justice Department, collected information from the motion picture, music recording, and electronic game industries regarding their self-regulatory systems and marketing practices.[(8)] The Commission requested information from the principal industry trade associations, as well as the major motion picture studios, the music recording companies, and electronic game companies. In addition, the Commission contacted interested government agencies, public health associations, academics, and parent and consumer advocacy groups. We reviewed a substantial amount of information collected from consumers through various surveys and polls, and also designed and conducted our own surveys for this study. Specifically, we conducted a survey of parents and children regarding their understanding and use of the rating and labeling systems, and how they made purchase decisions for these entertainment products. We also conducted an undercover survey of retail stores and movie theaters to see if unaccompanied children under 17 could purchase or gain access to products rated or labeled as inappropriate or warranting parental guidance. Finally, we reviewed Internet sites to study how they are used to market and directly access these products.

The report answers two questions raised by President Clinton when he requested this study: Do the motion picture, music recording and electronic game industries promote products they themselves acknowledge warrant parental caution in venues where children

make up a substantial percentage of the audience? And, are these advertisements intended to attract children and teenagers? After a comprehensive 15-month 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 under 17. In addition, the companies' marketing and media plans showed strategies to promote and advertise their products in the media outlets most likely to reach children under 17, including those television programs ranked as the "most popular" with the under-17 age group, magazines and Internet sites with a majority or substantial (*i.e.*, over 35 percent) under-17 audience, and teen hangouts, such as game rooms, pizza parlors and sporting apparel stores.

Further, most retailers make little effort to restrict children's access to violent products. Surveys conducted for the Commission in May through July 2000 found that just over half the movie theaters admitted children ages 13 to 16 to R-rated films even when not accompanied by an adult. Even when theaters refuse to sell tickets to unaccompanied children, they have various strategies to see R-rated movies. The Commission's surveys also showed that unaccompanied children ages 13 to 16 were able to buy both explicit content recordings and Mature-rated electronic games 85 percent of the time.

Although consumer surveys show that parents value the existing rating and labeling systems, they also show that parents' use and understanding of the systems vary. The surveys also consistently reveal high levels of parental concern about violence in the movies, music and video games their children see, listen to and play. These concerns can only be heightened by the extraordinary degree to which young people today are immersed in entertainment media, as well as by recent technological advances such as

realistic and interactive video games. The survey responses indicate that parents want and welcome help in identifying which entertainment products might not be suitable for their children.

Since the President requested this study over a year ago, each of the industries reviewed has taken positive steps to address these concerns. Nevertheless, the Commission believes that all three industries should take additional action to enhance their self-regulatory efforts. The industries should:

1. *Establish or expand codes that prohibit target marketing to children and impose sanctions for noncompliance*. All three industries should improve the usefulness of their ratings and labels by establishing codes that prohibit marketing R-rated/M-rated/explicit-labeled products in media or venues with a substantial under-17 audience. In addition, the Commission suggests that each industry's trade associations monitor and encourage their members' compliance with these policies and impose meaningful sanctions for non-compliance.

2. *Increase compliance at the retail level*. Restricting children's retail access to entertainment containing violent content is an essential complement to restricting the placement of advertising. This can be done by having retailers voluntarily agree to respect the codes and check identification or require parental permission before selling tickets to R movies, and not sell or rent products labeled "Explicit" or rated R or M, to children.

3. *Increase parental understanding of the ratings and labels*. For parents to make informed choices about their children's entertainment, they must understand the ratings and the labels, as well as the reasons for them. That means the industries should all include the reasons for the rating or the label in advertising and product packaging and continue their efforts to educate parents - and children - about the meanings of the ratings and descriptors.

IV. Self-Regulation and Antitrust

The concern that the antitrust laws pose obstacles to self-regulatory efforts has some basis in historical fact. Antitrust enforcement has not always acknowledged the benefits of industry self-regulation. Early enforcement was deeply suspicious of any kind of cooperative undertaking among competitors, and not without reason. Trusts and cartels were common. In contrast, industrial product standardization was uncommon, the International Standards Organization ("ISO") did not exist, and the service sector of the economy was quite small.

However, technological innovations and the growing integration of the economy across regions spurred recognition among competitors and enforcement officials alike that some kinds of cooperation were important to efficiency and economic success, and beneficial to both sellers and consumers. Today, in our interconnected, increasingly networked world, many products such as computers, telecommunications, and ATM banking systems need

compatibility so that consumers can make use of the widest and most convenient array of 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 or more compatible designs. This is critical in computer, high-tech and network industries. As compatibility increases, so do opportunities to achieve increased economies of scale and scope, lower costs, and higher profits. Compatibility can also facilitate entry by new suppliers and growth for smaller firms, thus enhancing competition. And it offers consumers more choices by allowing them to interconnect or easily substitute rivals' products.

Third, industry regulatory schemes can provide useful information for consumers regarding product qualities, benefitting both consumers and competition. As then Circuit Judge Breyer explained, the promulgation of standards "provid[es] information to makers and to buyers less expensively and more effectively than without the standard."[(9)] Many industry associations have testing or consumer education programs, which are particularly important with respect to new or highly complex products or services. When consumers know what products to trust and how best to use them, they can make better choices, and competition on the merits is enhanced. Such information also facilitates the entry of new products and suppliers and promotes innovation.

In addition, an industry group may engage in self-regulation to enhance its reputation for fair and honest service by establishing ethical standards and disciplining in a reasonable manner those who do not abide by the standards. Through their power to repudiate and reward, industry self-regulatory bodies can rapidly achieve a high degree of compliance with their standards of competence, safety, design, or responsibility to consumers. In most fields, a good reputation with competitors, vertically-related industries, and consumers is vital to success. Few companies want to jeopardize that reputation by failing to abide by measures adopted by their peers. This risk of condemnation by other firms, and thus possible rejection by consumers, can be a potent sanction.

Of course, self-regulation can be anticompetitive. Competitors may use the self-regulatory process to disadvantage new rivals or new forms of competition, or to reduce the rigor of traditional forms of competition. When that happens, the antitrust agencies will bring

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

There is no doubt that the members of [private standard-setting] associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm. Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products. Accordingly, private standard-setting associations have traditionally been objects of antitrust scrutiny.[(10)]

In sum, prevailing antitrust doctrine is not inherently antagonistic toward self-regulatory efforts. The Supreme Court has expressly confirmed the substantial value of such activities.[(11)] At the same time, the Court has recognized the possibility that self-regulatory efforts can be abused. The role of government enforcers, therefore, is not to interdict legitimate industry self-regulation but to ensure that such efforts are consistent with the operation of competitive markets.

The antitrust laws are concerned about conduct that unreasonably restricts competition (*e.g.*, increases prices, reduces output, lowers quality or variety, or lessens innovation) and harms consumers. Under the antitrust laws, the legal test applicable to most kinds of self-regulation is called the "rule of reason." This test has two components: (1) whether the conduct significantly restricts competition; and (2) whether there are legitimate justifications for the conduct that further, rather than restrict, the competitive process.[(12)] The rule of reason test requires a balancing of these two elements. Violations of this rule of reason test involve agreements that are not truly efforts at self-regulation, but rather are attempts to fix prices or reduce output.

The Commission has followed the Court's guidance and has supported those collective efforts that, on balance, have procompetitive benefits for consumers. A recent example involves the efforts of the Direct Marketing Association ("DMA") to enable consumers to restrict their receipt of unsolicited direct mail or telephone direct marketing by providing a system that allows consumers to place their names on non-solicitation lists. DMA submitted a proposal to the FTC that in essence would require member firms not to engage in mail or telephone solicitation of consumers on the nonsolicitation lists. In addition, DMA proposed to require each member to notify consumers of its information practices (for example, that the member sometimes sells its customer list to other firms) and to allow consumers to prevent the sale or other disclosure of their name, address, or other information.

In an advisory opinion, the FTC staff noted that the requirement that DMA members not engage in direct mail or telemarketing solicitation of consumers who request such treatment could be considered a direct restriction on solicitation. Nonetheless, the staff suggested that this requirement was not vulnerable on antitrust grounds, because it would restrict solicitation only of consumers who affirmatively communicated that they do not want the information that direct marketers would otherwise seek to provide. The restraint did not limit any information consumers desired. From another point of view, the restriction improved the information available to consumers and gave consumers new

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 was unlikely to become available absent government action or self-regulation.

Similar efforts to provide truthful information to consumers and to expand consumers' 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 agency actions concerning industry self-regulation makes it clear under the special circumstances here, including the unique role of children in the marketplace and the nature of the material, that the antitrust laws are not a serious impediment to a rational, legitimate effort to control the target marketing to children of violent entertainment products labeled or rated with parental advisories. A look at some of the potential methods of restricting such marketing reveals considerable procompetitive benefits.

Industry self-regulatory efforts to discourage the target marketing and sale of entertainment media products with violent content to children can take various forms, such as: (i) creation and operation of rating or labeling systems to identify and classify those products that warrant parental caution; (ii) industry self-regulatory codes that prohibit members from selling, renting, or marketing such rated or labeled products in a way that undercuts the effectiveness of parental cautions; (iii) trade association rules that provide sanctions for failing to adhere to such a self-regulatory code; (iv) actions by manufacturers to discourage retailers from selling or renting to children violent products containing parental cautions; and (v) advertising restraints, such as codes that prohibit advertising violent products in media with a substantial underage audience. Although each of these measures has a somewhat different competitive implication, in this instance none is likely to violate the antitrust laws so long as the rules are sensibly designed and implemented to achieve the stated objective and do not restrict competition in ways unrelated to the basic objective.

Rating or Labeling Systems. The creation and operation of a rating or labeling system to identify and classify entertainment products that warrant parental caution is unlikely to have a restrictive effect on competition, because a rating or labeling system generally would not restrict the products that may be produced or sold.[(13)] Producers and retailers are still free to make, market, display, and sell the products. Rather, the function of such systems is informational. Like a safety standard for products, rating or labeling systems convey information about the suitability of a product for a particular use. Rather than restrict competition in the market, a well-designed rating or labeling system can enhance the functioning of the market by enabling consumers to make useful comparisons and purchase decisions with minimal search costs.[(14)] A rating or labeling system may increase overall demand for products by reducing consumer confusion or uncertainty, and by increasing consumer confidence that the relevant attributes of the product will be as

advertised.[15]

Restriction on Sales and Marketing to Children. Industry codes that prohibit members from selling, renting, or marketing certain entertainment products to children constitute a higher level of self-regulation and could be challenged as agreements to restrain competition. So long as the industry limits the restraint to children and pursues fair procedural rules, competition in sales to the adult audience is not likely to be affected.[16] Here, the restraints would appear to reflect a determination by the industry, reflecting public concerns, that sale to children of entertainment products that warrant parental caution is inappropriate.[17] In this situation, the sale of such products to children could undermine the efficient functioning of the market by creating mistrust of the industry rating system and apprehension among consumers, possibly leading to a longer-term dampening effect on overall sales.[18] Consequently, restrictions on sales and targeted marketing to children appear likely to have a legitimate business justification if appropriately tailored.[19]

Disciplining Members for Non-Compliance. Industry codes that impose disciplinary measures on members that fail to adhere to rules regarding the sale, rental, labeling, or marketing of restricted entertainment products to children are yet another step in the self-regulatory process. Possible forms of discipline might include expulsion from membership in the association or withdrawal of other membership privileges. Such rules could be challenged as an agreement to restrain the competition offered by the disciplined member. Although such disciplinary actions potentially could affect the disciplined member's sales not only to children but also to other segments of the market, they generally are unlikely to impose a significant restraint on competition in this situation unless the withdrawal of membership or of membership privileges would substantially impair the disciplined member's ability to compete.[20] This is unlikely in the entertainment media industry. Association membership generally is not so important that loss of membership would effectively exclude a firm from the market.

The use of clear and fair procedures in the design, implementation, and enforcement of such restrictions should further lessen any antitrust concerns.[21] Such procedural safeguards help ensure that the self-regulatory group's actions are impartial and not calculated to gain an economic or competitive advantage for particular members. Further, such rules may be justified because the prohibited conduct, if left unchecked, may subvert or distort the competitive process if other firms succumb to a temptation to compete at the same level, and consumers lose confidence in the industry's ability to market its products properly. Thus, appropriately designed self-regulating code mechanisms to enforce compliance with reasonably designed labeling restrictions also are likely to avoid antitrust problems.

Actions Against Retailers. Entertainment media producers might also act collectively to discipline retailers that voluntary agree to and yet fail to observe restrictions on selling or renting certain violent-content products to children. Of course, there may be some antitrust risk if manufacturers seek to preclude a retailer from dealing with a non-member manufacturer, as in *Fashion Originators' Guild* where the Supreme Court held that a

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

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 these 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.[(24)] 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 self-regulation should further the competitive process by focusing competitive efforts on legitimate marketing 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 other 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 of Children: A Review of Self-Regulation and Industry Practices in the 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.

5. 15 U.S.C. § 18.

6. *See* Letter from William J. Clinton, President of the United States, to Janet Reno, Attorney General of the United States, and Robert Pitofsky, Chairman, Federal Trade Commission (June 1, 1999) (on file with the Commission).

7. Legislation calling for the FTC and the Justice Department to conduct such a study was introduced in both houses of Congress following the Columbine incident. *See* Amendment No. 329 by Senator Brownback *et al.* to the *Violent and Repeat Juvenile Offender Accountability and Rehabilitation Act of 1999*, S. 254, 106th Cong. § 511 (1999); H.R. 2157, 106th Cong. (1999); 145 Cong. Rec. S5171 (1999). In May 1999, the U.S. Senate Committee on Commerce, Science, and Transportation conducted hearings on the marketing of violent entertainment media to children. *See Marketing Violence to Children: Hearing Before the Senate Comm. on Commerce, Science, and Transp.*, 106th Cong. (1999). Based on these hearings, in September 1999, the Majority Staff of the Senate Committee on the Judiciary issued a committee report on this issue. *See* Majority Staff of the Senate Comm. on the Judiciary, 106th Cong., *Report on Children, Violence, and the Media: A Report for Parents and Policy Makers* (Comm. Print. 1999).

8. The Justice Department provided the FTC with substantial funding and technical assistance to enable the FTC to collect and analyze public and non-public information about the industries' advertising and marketing policies and procedures, and to prepare the Commission's written report and appendices. The analysis and conclusions contained in the Report are those of the FTC.

9. *See Clamp-All Corp. v. Cast Iron Soil Pipe Institute*, 851 F.2d 478, 487 (1st Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989).

10. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500-01 (1988).

11. *California Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999) (procompetitive potential of self-regulation in restricting certain discount advertising mandates "a less quick look" rule of reason test).

12. *See, e.g., Chicago Board of Trade v. United States*, 246 U.S. 231 (1918).

13. However, manipulation of a rating system to put a product in a restricted category without substantial justification can be problematic. *See Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492 (1988) (manufacturers of metal pipe unlawfully manipulated the certification process to deny market access for manufacturers of plastic pipe). Participation in the process by persons without an economic interest in stifling competition can help ensure that the result is not anticompetitive. *See id.* at 501 ("When . . . private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition, those private standards can have significant procompetitive advantages." (citation omitted)).

14. *See Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 487 (1st Cir. 1989) (Breyer, J.). *See also Tropic Film Corp. v. Paramount Pictures Corp.*, 319 F. Supp. 1247, 1254 (S.D.N.Y. 1970) (independent movie producer sought preliminary injunction against movie studio's refusal to distribute an unrated film, alleging violations of Sections 1 and 2 of the Sherman Act and asking the court to enjoin Paramount and the MPAA from engaging in an asserted industry-wide refusal to deal in and distribute, advertise, and exhibit the film *Tropic of Cancer* without an X rating; court denied the motion, stating that the rating system was "not designed to eliminate competition, but to advise motion picture exhibitors and, through them, the public, of the content of films which the Supreme Court has held that states have the constitutional right to prevent minors under seventeen from viewing").

15. *See generally* Self Regulation and Antitrust, Prepared Remarks of Robert Pitofsky, Chairman, Federal

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 of 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" decisions under competitive market conditions. *See 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 unique 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*, 486 U.S. at 501.

22. *See Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941) (group of designers of higher-priced dresses unlawfully boycotted outlets that dealt with manufacturers that "pirated" the higher-priced designs).

23. If retailers voluntary agree to such a restriction, the First Amendment should not be implicated. However, any legislation giving producers power over marketing by retailers may raise First Amendment issues. In *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 737-39 (1996), all members of an otherwise divided Court accepted the notion that First Amendment analysis should be applied to enactment of a federal statute itself where that legislative enactment alters the legal relations between private entities in a way that empowers one category of private entities to control or suppress the

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 adequate 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 might there be an antitrust or First Amendment concern.