

THE VIOLENCE DEBATE II:

THE FIRST AMENDMENT, THE FTC REPORT, AND LEGAL STRATEGIES

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Background on the FTC Report

On June 1, 1999, following the horrifying school shooting in Littleton, Colorado that increased public calls for a national response to youth violence, President Clinton requested that the Federal Trade Commission conduct a study of whether the motion picture, music recording, and computer and video game industries market and advertise violent entertainment material to children and teenagers.[1] Specifically, the President requested that the study ascertain whether entertainment media products that the industries determine may be inappropriate for children or otherwise warrant a parental advisory due to their violent content are promoted in media outlets for which children comprise a substantial percentage of the audience. The President also urged the Commission to examine whether these advertisements are intended to attract underage audiences. President Clinton's request paralleled congressional proposals for such a study.[2]

The Columbine High School shooting in Littleton heightened the public's existing concerns about violence committed by children.[3] Following a plethora of news reports suggesting that the boys involved in the Columbine killings were immersed in a violent entertainment subculture,[4] many observers focused on the teenagers' exposure to images of violence in entertainment media as a cause of the Columbine murders.[5]

While the entertainment media have received a great deal of blame for youth violence in the past few years, most people agree that exposure to media violence alone does not cause a child to commit a violent act. Although several major public health organizations have voiced their shared conviction that the viewing of entertainment media violence can lead to increases in aggressive attitudes, values, and behavior in children, they also have acknowledged that it is not the sole, or even necessarily the most important, factor contributing to youth aggression, anti-social attitudes, and violence.[6] They, and the researchers and advocates who have studied youth violence, have posited that a range of other factors – such as child abuse and neglect, victimization, bullying, drug and alcohol abuse, exposure to violence in the home, neurobiological indicators, and low

socioeconomic status – can interrelate to cause youth violence.[7] Some observers have focused on children's access to handguns as the cause for the high fatality rates associated with youth violence in America.[8] Others have looked for cultural explanations.[9]

Even those who disagree that media violence causes violent behavior, however, concede that a child's exposure to violence in the media can be a concern.[10] Indeed, by including violence as a component in developing their parental advisory labeling and rating systems, the entertainment media have recognized that violence is an issue of societal concern.[11]

The FTC's Findings

After a 15-month study, in September 2000 the FTC issued its Report, "Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording and Electronic Game Industries." The Commission noted that the self-regulatory programs of the motion picture, music recording and electronic game industries each address violence, as well as sexual content, language, drug use and other explicit content that may be of concern to parents. In keeping with the President's request, the Commission focused on the marketing of entertainment products designated as violent under these systems. In its analysis, the Commission accepted each industry's determination of whether a particular motion picture, music recording or electronic game contains violent content; the Commission did not examine the content itself.

The Commission carefully examined the structure of these rating and labeling systems, and studied how these self-regulatory systems work in practice. The electronic game industry requires games to be labeled with age- and content-based rating information and requires that the rating information appear in advertising. Only the electronic game industry has adopted a rule prohibiting its marketers from targeting advertising for games to children below the age designations indicated by the rating. The Commission found, however, that despite variations in the three industries' systems, the outcome was consistent: individual companies in each industry routinely marketed to children the very products that had the industries' own parental warnings or ratings with age restrictions due to their 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, such as *Xena: Warrior Princess*, *South Park* and *Buffy the Vampire Slayer*; magazines and Internet sites with a majority or substantial (*i.e.*, over 35 percent) under-17 audience, such as *Game Pro*, *Seventeen* and *Right On!*, as well as *mtv.com*, *ubl.com* and *happypuppy.com*; and teen hangouts, such as game rooms, pizza parlors and sporting apparel stores.

With respect to electronic games specifically, the Commission's findings were as follows: Of the 118 electronic games with a Mature rating for violence that the Commission selected for its study, 83, or 70 percent, targeted children under 17. The marketing plans for 60 of these, or 51 percent, expressly included children under 17 in their target audience. For example, one plan for a game rated Mature for its violent content described its "target audience" as "Males 12-17 – Primary Males 18-34 – Secondary." Another plan referred to the target market as "Males 17-34 due to M rating (the true target is males 12-34)." Documents for the remaining 23 games showed plans to advertise in magazines or on television shows with a majority or substantial under-17 audience. Most of the plans that targeted an under-17 audience set age 12 as the younger end of the spectrum, but a few plans for violent Mature-rated games targeted children as young as six.

Further, the Commission found that most retailers make little effort to restrict children's access to products with violent content. A survey conducted for the Commission in May through July 2000 found that unaccompanied children ages 13 to 16 were able to buy Mature-rated electronic games 85 percent of the time.

Finally, the Commission noted that although consumer surveys showed that parents value the existing rating and labeling systems, they also showed that parents' use and understanding of the systems vary. The surveys also consistently revealed high levels of parental concern about violence in the movies, music and video games their children see, listen to and play. The Commission noted that the extraordinary degree to which young people today are immersed in entertainment media, as well as recent technological advances such as realistic and interactive video games, can only heighten these concerns. The survey responses indicated that parents want and welcome help in identifying which entertainment products might not be suitable for their children. The FTC's Report concluded that the practice of pervasive and aggressive marketing of violent movies, music, and electronic games to children undermines the credibility of the industries' ratings and labels and frustrates parents' attempts to make informed decisions about their children's exposure to violent content.

The FTC's Recommendations

The Commission acknowledged that each of the industries reviewed had taken positive steps to address these concerns. Nevertheless, the Commission expressed its belief that all three industries should take additional action to enhance their self-regulatory efforts. The Commission therefore recommended that the industries should:

1. *Establish or expand codes that prohibit target marketing to children and impose sanctions for violations.* 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 suggested 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. The Commission stated that this can be done by checking identification or requiring parental permission before selling tickets to R movies, and by not selling or renting 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. Industry should also take steps to better educate parents about the ratings and labels.

The Commission emphasized that its review and publication of its Report, and its proposals to improve self-regulation, were not designed to regulate or even influence the content of movies, music lyrics or electronic games. The Commission was careful to acknowledge that the First Amendment generally requires that creative decisions about content be left to artists and their distributors. Rather, the Commission stated its belief that the industries can do a better job of helping parents choose appropriate entertainment for their children by providing clear and conspicuous notification of violent content. Finally, industry self-regulation also should support parents' decisions by prohibiting the direct sale and marketing to children of products labeled as inappropriate or

warranting parental guidance due to their violent content.

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The FTC's Consideration of Possible Law Enforcement Efforts

In response to inquiries from Senator John McCain and others, the Commission staff initiated a review of whether the advertising and marketing practices documented in the Commission's Report might violate the provisions of the Federal Trade Commission Act prohibiting the use of unfair or deceptive acts or practices in or affecting commerce. After a careful review of the entertainment industry's marketing practices and an analysis of the law, the Commission concluded that there are a number of significant legal limitations, including substantial and unsettled constitutional questions, to effective law enforcement actions under the FTC Act. The Commission concluded instead that the most prompt and viable option might be for continued encouragement by Congress of further, needed reforms.

Can Targeting Ads for M-Rated Games to Children Under 17 Be Regulated as a Deceptive Practice?

Under Section 5 of the FTC Act, 15 U.S.C. § 45, a representation, omission, or practice is *deceptive* if it is likely to mislead consumers acting reasonably under the circumstances to their detriment.[12] The advertising and marketing of violent entertainment products to children is a new area for which there is little applicable precedent under the FTC Act. The staff identified at least two legal theories under which some of the electronic game industry's practices described in the Report might be challenged as deceptive in violation of the FTC Act. These are:

1. Making claims in advertising or marketing that M-rated video games are suitable for children;[13]
2. Failing to comply with the electronic game industry's self-regulatory code provision prohibiting marketing games to children under the age for which the game is rated as suitable.

In addition to having to prove the underlying factual violation (for example, that the electronic game manufacturer did target children in its advertising), the viability of each of these approaches would depend on the Commission's ability to adduce evidence that the practices in question are, in fact, likely to mislead parents or children in a material respect. For example, under the first theory, the Commission would need evidence that a given advertisement or marketing practice conveyed to reasonable consumers that the M-rated game was suitable for children under 17,[14] as well as evidence that the product was not, in fact, suitable for children under 17. However, people might have different views about the propriety of children playing different M-rated games depending on the game's educational message or artistry, for example. Thus, proving a deception case might leave the FTC in the position of differentiating which M-rated games are, in fact, inappropriate for young people. This would place the agency in a position that raises serious questions under the First Amendment. The presence or absence of the rating or label in the advertisement also would affect the analysis. That is, if the ad makes clear that the product is rated M for Mature, consumers may be less likely to interpret the ad to mean that the game is appropriate for minor children.[15]

Under the second scenario – failing to comply with the electronic game industry's self-regulatory code provision

prohibiting marketing games to children under the age for which the game is rated as suitable – there are two ways that the practice might mislead consumers. The first possibility is that the anti-targeting provision in the industry’s self-regulatory code creates a claim that misleads consumers when a company targets children in violation of the code.[16] One difficulty with this theory is that, while many parents may generally be aware of the ratings, it does not appear that the industry has made claims about the anti-targeting code provision directly to parents. Therefore, it seems unlikely that the Commission could prove that this claim is communicated to at least a significant minority of parents, which it would have to do to meet the legal definition of deception under the FTC Act.

The second possibility is that the M rating applied by the industry rating board leads consumers to believe that children will not be targeted by a company using the rating. This approach would require the Commission to prove that at least a significant minority of parents interpreted the M rating in that manner. If it could be shown that parents are aware of anti-targeting claims or representations, from the code or from the M rating – and the Commission has no evidence that they are – it might be possible to challenge marketing practices inconsistent with such representations. However, as discussed below, fashioning an effective remedy would raise significant constitutional and public policy issues.

Can Targeting Ads for M-Rated Games to Children Under 17 Be Regulated as an Unfair Practice?

The staff also reviewed the potential application of the Commission's *unfairness* authority to such practices. An act or practice is unfair if it causes or is likely to cause injury to consumers that is (1) substantial; (2) not outweighed by countervailing benefits to consumers or to competition; and (3) not reasonably avoidable by consumers themselves.[17] In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered, but public policy considerations may not serve as a primary basis for a determination of unfairness.[18] A legal challenge on the basis of unfairness would pose even higher evidentiary barriers than a deception analysis would, as well as considerable public policy issues. The staff considered the application of an unfairness analysis to several practices described in the Commission’s Report:

1. Direct marketing of M-rated games to children in a school environment or through youth organizations;
2. Placement of advertisements for M-rated games in media outlets with a substantial youth audience; and
3. Advertising M-rated games without including content descriptor information (*e.g.*, extreme violence, sexual violence, mutilation).[19]

The staff concluded that for each of the scenarios it would be extremely difficult to meet all three criteria for unfairness. As reflected in the Commission’s Report, there is considerable scholarly disagreement as to how to assess and quantify any injury resulting from children’s exposure to violent entertainment media. Thus, on the central issue of injury, it would be difficult for the Commission to prove in a legal proceeding that the marketing

of a given M-rated game to children is likely to cause substantial injury to consumers. With respect to direct marketing (e.g., free game demos) it might be easier to meet the second and third criteria of the unfairness theory, but the Commission would still need to overcome the difficult initial step of proving that substantial consumer injury resulted from the practice. Further, under any unfairness inquiry, the Commission would be required to balance the competing public policies of protecting children from violent entertainment products and preserving variety of artistic expression, as well as First Amendment values.

Generally speaking, in other industries a trade association member's failure to follow the association's restrictions on marketing has raised unfairness concerns where marketing the product not only violates the self-regulatory code provision but some other provision of law as well. For example, marketing alcohol and tobacco to young people not only violates code provisions but also various state laws.[20] In contrast, there are no corresponding laws restricting the marketing or sale of violent entertainment products to children.

The staff's review concluded that significant issues exist regarding the effect of a Commission proceeding against the advertising and marketing practices at issue. Even if the Commission could overcome the considerable difficulties it would face in proving cases based on the legal theories described above, there are also questions about whether such actions would advance the goal of providing increased protection to children. Most of the staff's proposed legal theories were based, in whole or in part, on aspects of existing industry self-regulatory programs. But, to the extent any legal action could be premised upon possible non-compliance or inconsistency with a legitimate self-regulatory requirement, that prospect might have the perverse effect of discouraging improved industry self-regulation. Additionally, significant and unsettled First Amendment issues exist that might affect the viability of an FTC action or remedy. Finally, whatever the outcome of FTC enforcement actions under these theories, it seems clear that because of the substantial First Amendment protections accorded these products, a comprehensive and effective self-regulatory response could have a more prompt and substantial impact on the problems described in the Commission's Report than would FTC enforcement actions.

ENDNOTES

. 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).

2. 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), www.senate.gov/~commerce/hearings/hearin99.htm (visited July 30, 2000). Based on those 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), www.senate.gov/~judiciary/mediavio.htm (visited July 31, 2000).

3. In the two years leading up to the Columbine tragedy, more than a dozen students or teachers had been killed

in six school-related shootings in Edinboro, Pennsylvania; Richmond, Virginia; West Paducah, Kentucky; Pearl, Mississippi; Jonesboro, Arkansas; and Springfield, Oregon. See John Kip Cornwell, *Preventing Kids from Killing*, 37 *Hous. L. Rev.* 21, 23 & n.13, 24 (2000); Sue Anne Presley, *Year of Mass Shootings Leaves Scar on U.S.; Sense of Safety Suffers As Fewer Believe 'It Can't Happen Here,'* *Wash. Post*, Jan. 3, 2000, at A1. After Littleton, school shootings occurred in several other cities including Conyers, Georgia; Fort Gibson, Oklahoma; and Flint, Michigan. *Id.*; see, e.g., David Barboza, *Boy 6, Accused in Classmate's Killing*, *N.Y. Times*, Mar. 1, 2000, at A14; *Fort Gibson Middle School to Resume Classes a Day After Shooting*, www.cnn.com/1999/US/12/06/okla.school.shooting.06/ (visited July 13, 2000).

4. In the days following the Columbine killings, many of the major news outlets featured stories about Dylan Klebold and Eric Harris's infatuation with movies, music, and video games that contained extremely violent content and reinvigorated the public debate about the effects of violent entertainment media on youth. See, e.g., Steven Levy, *Loitering on the Dark Side – The Columbine High Killers Fed on a Culture of Violence That Isn't About to Change*, *Newsweek*, May 3, 1999, at 39; Karen Thomas, *Surrounded by Sound and Fury: Whirlwind of Violence, Hate Sweeps Kids On Line and Off*, *USA Today*, Apr. 22, 1999, at D1.

5. See, e.g., Gregg Easterbrook, *Watch and Learn*, *The New Republic*, May 17, 1999, at 22; Erica Goode, *Terror in Littleton: the Motives; When Violent Fantasy Emerges as Reality*, *N.Y. Times*, Apr. 25, 1999, § 1 at 30. The Commission's study was concerned only with the marketing practices of the entertainment media that depict violence, and not with the news media's depiction of real world violence.

6. See Donald E. Cook, M.D., President, American Academy of Pediatrics; Clarice Kestenbaum, M.D., President, American Academy of Child & Adolescent Psychiatry; L. Michael Honaker, Ph.D., Deputy Chief Executive Officer, American Psychological Ass'n; & E. Ratcliffe Anderson, Jr., American Medical Ass'n, *Joint Statement on the Impact of Entertainment Violence on Children*, July 26, 2000 (statement released at Congressional Public Health Summit), www.aap.org/advocacy/release/jsttmtev.html (visited Aug. 1, 2000).

7. Researchers funded by the Office of Juvenile Justice and Delinquency Prevention ("OJJDP") of the Department of Justice are studying the characteristics of at-risk juveniles and factors that contribute to violence committed by or against juveniles. OJJDP reports that "the risk that an adolescent will become involved in violent offending and/or be a victim of violence varies based on a number of different factors, including individual characteristics, family characteristics, peer and school factors, neighborhood environment, and daily activities." OJJDP, *Report to Congress on Juvenile Violence Research 5* (July 1999) (summarizing results of seven violence studies). The National Institute of Mental Health ("NIMH"), is also involved in ongoing research into the causes of youth violence. NIMH is involved in basic research and clinical studies, and oversees research grants at universities and other institutions, on the causes of youth violence. For an overview highlighting what is known about risk factors for the development of aggressive and antisocial behavior from early childhood to adolescence and into adulthood from a research perspective, see the fact sheet on *Child and Adolescent Violence Research at the NIMH*, available at www.nimh.nih.gov/publicat/violenceresfact.cfm (visited Aug. 1, 2000). In January 2001, the Surgeon General released a report summarizing what is known about the causes and prevention of youth violence. U.S. Department of Health and Human Services, *Youth Violence: A Report of the Surgeon General* (2001). The report describes research identifying and clarifying factors that increase the risk that a young person will become violent, reviews the factors that protect youth from perpetrating violence, and identifies effective research-based preventive strategies. Exposure to media violence was not identified as a significant risk factor for later violent behavior, although it found strong evidence that such exposure can increase children's aggressive behavior in the short term. The report stated: "Despite considerable advances in research,

it is not yet possible to describe accurately how much exposure, of what types, for how long, at what ages, for what types of children, or in what types of setting will predict violent behavior in adolescents and adults." *Id.*, Appendix 4-B at 93.

8. See Barry Meier, *Terror in Littleton: The Gun Debate; In Renewed Battle Over Weapons Control, Both Sides Use Attack to Advance Agendas*, N.Y. Times, Apr. 26, 1999, at A17; see also Jill M. Ward, Children's Defense Fund, *Children and Guns: A Children's Defense Fund Report on Children Dying from Gunfire in America* (Oct. 1999), www.childrensdefense.org. In its report to Congress, OJJDP reported that firearms were "involved in no less than 80% of the incidents of each of the [OJJDP-sponsored juvenile] violence studies reporting on this topic." *OJJDP Report*, *supra* note 8, at 11-12.

9. See Sissela Bok, *Mayhem: Violence as Public Entertainment* 7-9 (1998); cf. American Academy of Pediatrics Committee on Communications, *Media Violence*, 95 *Pediatrics* 949, 951 (1995). Although most researchers attribute the lower rates of teen homicide in other countries to stricter gun control laws, some note that other countries place more controls on the media than does the United States. Many stable industrialized democracies, in the absence of a strong constitutional guarantee of freedom of expression and First Amendment-like safeguards against censorship, monitor the media and enforce regulations regarding the advertising and marketing of the media, either directly or through quasi-governmental bodies. They also employ ratings systems that contain some similarities to – and some differences from – those currently used by the media industries in the United States.

10. See, e.g., Jonathan Kellerman, *Savage Spawn: Reflections on Violent Children* (1999) (acknowledging that entertainment media violence might cause an adolescent who is already prone to violent behavior to engage in harmful conduct).

The entertainment media are a particularly important part of youth culture in the U.S. According to a Kaiser Family Foundation study released in November 1999, which examined media use among a nationally representative sample of more than 3,000 children ages 2-18, the typical American child spends an average of more than 38 hours a week – nearly the equivalent of a full-time workweek – with entertainment media outside of school. The Henry J. Kaiser Family Foundation, *Kids and Media @ The New Millennium: A Comprehensive National Analysis of Children's Media Use* (1999), www.kff.org. (visited June 26, 2000). Other studies indicate that children's use of the media may be even higher. See Appendix B of the FTC's September 2000 Report (*Children as Consumers of Entertainment Media: Media Usage, Marketing Behavior and Influences, and Ratings Effects*). Although much of that time is spent watching television, youngsters spend an average of nearly 10 hours a week listening to music, and nearly five hours a week playing video games or using a computer for fun. The Kaiser study found that younger teens spend the most time watching movies, with children aged 8-13 spending three hours per week, and teens ages 14-18 spending one hour and 17 minutes per week at movie theaters. *Id.* Data released in June 2000 by the Annenberg Public Policy Center are consistent with these results. See Emory H. Woodard, IV & Natalia Gridina, *Media in the Home 2000: The Fifth Annual Survey of Parents and Children* 8 (Annenberg Pub. Policy Ctr. U. Pennsylvania 2000). These figures highlight the significant role that the entertainment media – and advertising and promotion for the various media – play in children's lives.

11. The entertainment media – in part in recognition of their societal role and in part in reaction to public criticism and events like the Littleton tragedy – have been engaged in an ongoing process of trying to determine their level of responsibility to American children and parents. See David Finegan, *BMG's Zelnick: "Increase the Peace"*

in Media, Hollywood Reporter (Feb. 23, 2000). BMG Entertainment President Strauss Zelnick called for "more industry discussion on violent entertainment and more industry policing of its products." In addition, Zelnick advocated that "[t]he ultimate responsibility for deciding what music to listen to and what TV shows to watch rests with consumers and, in the case of kids, their parents We need to give them the tools that they need to exercise that responsibility." Zelnick did, however, emphasize that the industry "can't and won't ask our artists to eliminate any mention of sex and violence – not even loveless sex and pointless violence." *Id.*

See also Steve Chagollan, *Biz Influence Spans Beyond H'wood*, Daily Variety, June 9, 2000, at A2; Michael Mehle, *Killer Concepts: Does Entertainment Celebrate Violence for Its Own Sake? Critics and Programmers Argue Their Case*, Denver Rocky Mtn. News, Apr. 16, 2000, at D14; Claudia Puig, *Hollywood Examines Its Soul: Worried About Censorship, Leaders Debate How to Uncreate a Monster*, USA Today, Apr. 27, 1999, at D1; Ira Teinowitz & Ann Marie Kerwin, *Media Tighten Policy on Ads' Violent Themes*, Advertising Age, May 10, 1999, at 3. *But see* Sharon Waxman, *Click. Bang. It's Only A Game: Video Designers Shrug Off Blame for Teen Violence*, Wash. Post, May 27, 1999, at C1.

12. *Kraft, Inc.*, 114 F.T.C. 40, 120 (1991), *aff'd and enforced*, 970 F.2d 311 (7th Cir. 1992); *Cliffdale Assocs.*, 103 F.T.C. 110, 164-65 (1984); *see generally* *Federal Trade Commission Policy Statement on Deception*, appended to *Cliffdale Assocs.*, 103 F.T.C. at 174-83 [hereinafter *Deception Policy Statement*]. Although deceptive claims are actionable only if they are material, that is, likely to affect consumers' conduct or decisions with respect to the product at issue, the Commission need not prove actual injury to consumers. A claim is material if it is likely to deceive; it is not rendered otherwise simply because the advertising does not increase sales. *Novartis Corp. v. FTC*, 223 F.3d 783, 787 (D.C. Cir. 2000).

13. Such express or implied claims of suitability could include the failure to clearly and conspicuously disclose the rating in an ad directed to an audience with a substantial percentage of children.

14. In determining the claims that an ad conveys, the FTC looks to the "net impression" conveyed to consumers. *FTC v. Sterling Drug*, 317 F.2d 669, 674 (2d Cir. 1963). Even if the wording of an ad may be literally truthful, the net impression conveyed to consumers may still be misleading. *Stouffer Foods Corp.*, 118 F.T.C. 746, 799 (1994). When an advertisement conveys more than one meaning to reasonable consumers, one of which is false, the advertiser may be liable for the misleading interpretation. *Jay Norris Corp.*, 91 F.T.C. 751, 836 (1978), *aff'd*, 598 F.2d 1244 (2d Cir. 1979). An interpretation may be reasonable even if it is not shared by a majority of consumers in the relevant class; a material practice that misleads a significant minority of reasonable consumers is deceptive. *Deception Policy Statement*, 103 F.T.C. at 177 n.20. When representations are targeted to a specific audience, including vulnerable groups such as children or the elderly, the Commission looks to the effect of the representation or practice on a reasonable member of that group. *Id.* at 179 (citing *Bates v. Arizona*, 433 U.S. 350, 383 n.37 (1977)).

15. Disclosures of qualifying information must be clear and conspicuous. Written disclosures or fine print may be insufficient to correct a misleading representation. *Deception Policy Statement*, 103 F.T.C. at 180.

16. Currently, neither the movie studios nor the music recording companies have an industry code of conduct that prohibits them from targeting their products to children under the age for which the products are rated or labeled. Accordingly, this potential theory only applies to the electronic game companies.

17. Section 5(n) of the FTC Act, 15 U.S.C. § 45(n), *added by The Federal Trade Commission Act Amendments of 1994*, Pub. L. No. 103-312. The Commission previously relied on similar criteria to define the

scope of its authority to prohibit unfair acts or practices pursuant to Section 5(a) of the FTC Act. *See, e.g., Orkin Exterminating Co.*, 108 F.T.C. 263, 362 (1986); *International Harvester Co.*, 104 F.T.C. 949, 1061 (1984); *see generally Federal Trade Commission Policy Statement on Unfairness, appended to International Harvester Co.*, 104 F.T.C. at 1070-76.

18. 15 U.S.C. § 45(n).

19. This practice also could be analyzed as a deceptive failure to disclose material information, particularly in the case of advertisements placed in media with a significant number of child viewers or readers.

20. State laws prohibiting the sale of alcohol and tobacco to minors are an example of the kinds of established public policies the Commission could consider as a factor in an unfairness case. In challenging R.J. Reynolds' advertising for Camel cigarettes, the Commission's complaint alleged that the acts and practices were unfair, and stated that the sale of tobacco products to minors violated state laws. *R.J. Reynolds Tobacco Co. (Joe Camel)*, FTC Dkt. No. 9285 (complaint issued May 28, 1997; dismissed without prejudice Jan. 26, 1999).