

## GREAT EXPECTATIONS: CONTENT REGULATION IN FILM, RADIO, AND TELEVISION

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“I think it is important . . . to understand what the American people are actually upset about. The Superbowl incident and the debate it unleashed is not really about a bare breast. It is not whether our society can accept public displays of the human body. It can. What really upset people was the shock and amazement that such material would appear on *that* program at *that* time, without warning, and without any reasonable expectation that they would see such a thing. In other words, the debate is not best understood as one about what you can do or cannot do on radio or television. Rather, it is more about whether consumers can rely on reasonable expectations about the range of what they will see on a given program at a given time.”

--FCC Chairman Michael Powell, 2004<sup>1</sup>

Context matters. Historically, the difference in treatment of radio and film can be seen as a difference in the expectations of audiences for radio and film. The most obvious difference between the two is venue. Filmgoers had to make a decision to go out to the movies, where they would sit in a dark theater with other movie patrons and view their chosen film. Radio listeners, on the other hand, could listen to a radio broadcast in the comfort of their own homes. While some chose to see the broadcast live, even the atmosphere of radio theaters was different from that of movie theaters. Instead of a dark and anonymous setting, radio theaters were well lit, allowing performers and audiences to see each other clearly. Discussing television, a 1959 publication by the National Association of Broadcasters (NAB) explains that “television’s relationship to the viewers is that between guest and host,” since the audience is allowing television into their homes.<sup>2</sup>

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<sup>1</sup> Michael Powell, Chairman, Fed. Comm’n Comm’n, Remarks at the National Association of Broadcasters Summit on Responsible Programming (Mar. 31, 2004), *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-245663A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-245663A1.pdf).

<sup>2</sup> THE TELEVISION CODE OF THE NAT’L ASS’N OF BROADCASTERS 1 (1959).

Although on the surface, film and television appear to be similar, they are in fact very different. Both are methods of conveying a story through moving pictures, but there the similarity ends. Film developed as purely a method of entertainment, while television followed radio as a “trustee of the public interest.” Film underwent few technological changes after the implementation of sound, while television has changed drastically since its inception. Perhaps most significantly, film has always been regulated by a private regulatory body, while television has always been regulated by the government.

Regulatory bodies for both film and television (at the time, radio) were established in 1934. The Communications Act of 1934 established the Federal Communications Commission (FCC) to oversee broadcasting.<sup>3</sup> The Production Code Administration (PCA) was created in 1934 to enforce the Motion Picture Production Code of 1930 and avoid governmental control over the film industry.<sup>4</sup> The PCA’s main function was to oversee the content of motion pictures, in response to a growing public outcry over the risqué nature of film, while the FCC’s main function was to manage the broadcast spectrum and prevent stations from simultaneously broadcasting at the same frequency as one another. The FCC’s initial charter explicitly disclaims any censorship function. Since radio and television broadcasters could have their broadcast licenses revoked by the government if they did not act in “the public interest,” there was no need for the FCC to have an explicit censorship function.

At the time of the PCA, censorship was not the taboo that it is today. Film was not entitled to first amendment protection greater than that given to “the theatre, the circus, and other

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<sup>3</sup> Communications Act of 1934, 47 U.S.C. § 151 (1934).

<sup>4</sup> See generally RAYMOND MOLEY, THE HAYS OFFICE (1945).

spectacles.”<sup>5</sup> Most states had censorship boards, as did many localities, and censors were not shy about using their power. Film producers had only a limited ability to guess what would displease censors and a more limited ability to please every censor with every movie. Early radio policy was created by engineers and thinkers, concerned more with the technical issues of the medium than any major social policy considerations. Film policy was not driven by social considerations either, though it was controlled primarily by movie producers whose livelihood depended on pleasing the public. Motion Picture Producers and Distributors of America (MPPDA) head Will Hays believed that movies had a special responsibility to the public “because entertainment and art are important influences in the life of a nation.”<sup>6</sup> And yet, while the film industry was being censored on every front, radio was allowed the relative freedom of an industry thought by many to be on par with the press. President Franklin Roosevelt called radio “a great agent of public service” and encouraged the industry to “be maintained on an equality of freedom similar to that freedom that has been, and is, the keystone of the American press.”<sup>7</sup> Many newspaper writers agreed, frequently speaking out against the censorship of radio.<sup>8</sup>

Another major difference between film and radio or television is the idea of a scarce resource. Even assuming that radio had existed purely for entertainment value, as courts assumed film did (despite the prevalence of newsreels), there was a fundamental difference between film and radio. While the number of films that could be produced was theoretically infinite, the number of potential radio broadcasts was finite. With only twenty-four hours in a broadcast day

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<sup>5</sup> *Mut. Film Corp. v. Indus. Comm’n of Ohio*, 236 U.S. 230, 243 (1915).

<sup>6</sup> THE MOTION PICTURE PRODUCTION CODE (1930).

<sup>7</sup> *Censorship Plan Denied By Farley*, N.Y. TIMES, Oct. 15, 1934, at 9.

<sup>8</sup> See, e.g., *id.*; *Better Radio Urged, But Not Censorship*, N.Y. TIMES, May 24, 1934; *Ogden Reid Defies Radio Commission*, N.Y. TIMES, Jun. 18, 1934.

and a limited number of discrete frequencies on which to broadcast, it was actually possible to calculate the maximum number of broadcasts that could exist at any given time. Because radio was thus seen as a scarce resource, there was simultaneously a greater need and a greater reluctance to regulate its content. Instead of explicit content regulations like those promulgated by the PCA, the FCC contented itself with reminding broadcasters that use of the airwaves was a privilege not to be taken lightly. By holding broadcasters in high esteem and emphasizing that these broadcasts reached mixed audiences – men and women, adults and children, Republicans and Democrats, Catholics and Protestants, etc. – broadcasters were forced to take responsibility for the content of their programs.

Comparing the FCC to the PCA, it is first relevant to note that both were created to issue licenses to those wishing to present content. One was explicitly a censorship body, designed to preemptively censor that which state and local censors would find offensive; the other was explicitly not a censorship body, merely serving in an advisory capacity to remind its users that obscenity was not permissible under the law. In 1968, the MPPDA had become the Motion Picture Association of America (MPAA) and its new head, Jack Valenti, replaced the Production Code with the age-based ratings system that is still in place today.<sup>9</sup> Mimicking Britain's method of film ratings, Valenti's new system addressed the concern that people wanted to have some reasonable expectation of what they would be seeing in a film. Unlike the Code, which guaranteed uniform content regulation, the ratings system allowed a diverse range of content, but always with a caveat to potential moviegoers about that content. While the movie industry was undergoing a shift towards less censorship and more free speech, the radio and television

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<sup>9</sup> See Jack Valenti, *How It All Began*, [http://www.mpa.org/Ratings\\_HowItAllBegan.asp](http://www.mpa.org/Ratings_HowItAllBegan.asp) (last visited May 22, 2009).

industries were shifting in the opposite direction. Although the FCC continued to publicly decry censorship,<sup>10</sup> its functions became more and more censorious, culminating in the 2001 Guidelines on Indecency, which provided a laundry list of inappropriate content that had been punished.<sup>11</sup>

This article explores the historical differences between the regulation of film and radio/television and attempts to understand how those regulatory schemes influenced public perception of the two industries and shaped public expectation of content. Part I discusses the early history of radio regulation; Part II discusses the early history of film regulation; Part III compares the important figures in each industry; and Part IV addresses the role of audience expectations in shaping the regulatory scheme of each industry.

## PART I. A HISTORY OF RADIO

The origins of radio can be traced back to Alexander Graham Bell and the invention of the telephone.<sup>12</sup> Although Guglielmo Marconi and others are credited with the invention of radio, it was Bell in 1876 who first realized the possibilities of broadcasting sounds to large audiences. Marconi was still only a toddler in 1878 when the New York Daily Graphic published an illustration entitled “Terrors of the Telephone.” The illustration featured a sweating disheveled

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<sup>10</sup> Many FCC commissioners have spoken out against perceived FCC censorship. *See, e.g.*, Rachele Chong, Commissioner, Fed Comm’n Comm’n, Remarks at California Broadcasters Association 1997 50<sup>th</sup> Solid Gold Convention (Jul. 28, 1997), *available at* <http://www.fcc.gov/Speeches/Chong/sprbc709.html> (“In my view, the FCC’s general public interest mandate is not a plenary authorization to conduct broad-ranging inquiries ultimately aimed at dictating program content.”).

<sup>11</sup> FED. COMM’N COMM’N, FILE NO. EB-00-IH-0089, INDUSTRY GUIDANCE ON THE COMMISSION’S CASE LAW INTERPRETING 18 U.S.C. §1464 AND ENFORCEMENT POLICIES REGARDING BROADCAST INDECENCY (2001), *available at* <http://www.fcc.gov/Bureaus/Enforcement/Orders/2001/fcc01090.pdf>.

<sup>12</sup> *See generally* ERIK BARNOUW, A TOWEL IN BABEL: A HISTORY OF BROADCASTING IN THE UNITED STATES, VOLUME I – TO 1933 (1966); HUGH R. SLOTTEN, RADIO AND TELEVISION REGULATION: BROADCAST TECHNOLOGY IN THE UNITED STATES, 1920-1960 7 (2000).

man speaking into a telephone, with groups of people in cities all around the world listening attentively to his words. Satirical British illustrator George Du Maurier expanded upon this idea in 1879 with an illustration featuring people watching a sporting event on a screen above their fireplace, with sound provided by the telephone. Yet despite the attention given to the many possibilities opened up by Bell's invention, few changes were made to the profitable point-to-point system of communications that telephones were most successful at. The existing system was too profitable for telephone companies to worry about innovation.

In fact, telephony remained nearly unchanged until Marconi's system of wireless telegraphy entered the market at the turn of the century. Marconi's wireless quickly found a home aboard ships, eager to capitalize on both the safety features of having a radio and the potential trade benefits created by such a communication system. After a 1909 maritime accident, in which a single wireless operator saved 1200 lives, Congress passed the 1910 Wireless Ship Act, requiring every ship with a capacity greater than fifty people to be equipped with a wireless communication system capable of transmitting messages across a distance greater than 100 miles.<sup>13</sup> The Act also addressed an issue that had previously arisen, where wireless operators using Marconi's system refused to communicate with wireless operators using Lee De Forest's competing wireless system. Although most wireless operators made an exception for emergency situations, the new Act mandated that the competing wireless operators communicate with each other "as far as may be physically practicable."<sup>14</sup> The Act also required a wireless operator to oversee communications day and night in case of emergency.<sup>15</sup>

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<sup>13</sup> Wireless Ship Act of 1910, ch. 379, §1, 36 Stat. 629 (1910) (amended 1934).

<sup>14</sup> *Id.* §2.

<sup>15</sup> *Id.* §1.

While other countries addressed the issue of wireless communication and maritime safety by assuming government control of radio, the United States took a different approach. Congress did not nationalize control of the airwaves, nor did they allow private ownership and control. Instead, limited regulations like the 1910 Wireless Ship Act were enacted to allow important naval and civilian shipping use of the airwaves.

Although it made wireless communications systems mandatory aboard ships, the 1910 Wireless Ship Act did not adequately address other safety concerns raised by amateur radio users, whose broadcasts frequently interfered with maritime communications. In fact, forcing all ships to carry wireless communication systems exacerbated interference problems. Since the broadcast spectrum is limited to a certain range and the government had not enacted a system of allocating that range, many users were attempting to communicate on the same frequencies at the same time, leading to interference. When two users attempted to use the same frequency simultaneously, it was possible that neither user would be heard at all. Some amateur radio users exploited this weakness in transmission to intentionally interfere with naval communication by deliberately sending fake distress calls.<sup>16</sup>

It was not until the sinking of the *Titanic* in 1912 that Congress properly addressed the importance of wireless communications. Although there had been a push to update the 1910 Wireless Ship Act to prevent amateur radio operators from interfering with regular naval operations, Congress was in no great rush to propose new legislation and had spent nearly two years deliberating over six different proposed laws. The sinking of the *Titanic* finally brought the many issues in wireless communication to the public's attention. The closest ship to respond to

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<sup>16</sup> SLOTTEN, *supra* note 12.

*Titanic*'s distress calls was the *Carpathia*, nearly 60 miles away. It took the *Carpathia* four hours to cross the distance separating it from the *Titanic*, by which time the ship was lost. However, the *Californian*, only 10 or 15 miles away, never responded to the distress call because the wireless operator had already gone to bed for the night. Some reports also blamed interference from preventing *Titanic* from receiving iceberg warnings, once again placing the blame on amateur radio operators. Regardless of who was to blame, it was clear that something needed to be done.

Congress responded to the *Titanic* disaster by passing the Radio Act of 1912, which gave the Secretary of Commerce authority to distribute licenses to all would-be radio operators.<sup>17</sup> The Act reserved certain radio frequencies for military and emergency use, while also providing that the military could commandeer all radio frequencies, public and private, in case of war or national emergency. In addition, the Act mandated that two wireless operators be present at all times aboard ships to avoid the problems of the *Californian*.<sup>18</sup> In these ways, the Act attempted to control interference, but it was still not enough.

In addition to prompting new legislation of radio, the sinking of the *Titanic* introduced many to the possibility that Alexander Graham Bell had realized thirty years earlier – radio could be used to broadcast information to large audiences. During the three days it took for the *Carpathia* to reach New York with the passengers who had been rescued from the sinking *Titanic*, information on land was scarce. Few people knew who had survived, and the multitudes of amateur radio operators only increased confusion that ultimately led to the dissemination of false information. The New York Evening Sun ran with the headline “All Saved from Titanic After Collision,” and a story about the ship being towed to port, while the New York Times ran a

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<sup>17</sup> Radio Act of 1912, ch. 287, §2, 37 Stat. 302 (1912) (amended 1927).

<sup>18</sup> *Id.* §4.

story about the ship sinking.<sup>19</sup> In today's age of instantaneous information transfer, it is almost impossible to imagine this scenario where people simply did not know what had happened, whether the ship had sunk and whether there were any survivors. Although information was relayed from ship to ship over the wireless communication systems, the information reaching shore was not uniform. Marconi's wireless office in New York has largely been credited with providing the most complete and accurate information, including names of survivors.

Interference between various wireless operators only increased as people discovered the commercial value of broadcasting to wider audiences, rather than to discrete points. As early as 1916, Marconi competitor Lee De Forest engaged in regular broadcasts from Highbridge, New York, to an audience comprised mainly of amateur radio operators. In 1920, a Pittsburgh radio station owned by Westinghouse Electric and Manufacturing Company made history by broadcasting the presidential election returns to a large and very eager audience. A Marconi wireless operator working in New York when the *Titanic* went down, David Sarnoff was one of the first to see the potential commercial value of using radio to provide music and entertainment in addition to information. He became General Manager of the newly formed Radio Corporation of America (RCA), which combined the various radio patents held by Marconi, Westinghouse, and General Electric. In 1926, Sarnoff's vision of radio broadcasts, as expressed in his (possibly apocryphal) post-*Titanic* memo to Edward J. Nally, then vice-president of American Marconi, finally came to be. RCA formed the National Broadcasting Company (NBC), a chain of radio stations devoted to broadcasting both news and entertainment.

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<sup>19</sup> RICHARD PARTON HOWELLS, *THE MYTH OF THE TITANIC* 27 (1999).

Not long after the creation of NBC, Congress finally amended the thoroughly outdated Radio Act of 1912, replacing it with the Radio Act of 1927. Rather than continuing to place the responsibility of regulating radio on the Secretary of Commerce, the 1927 Act created a new organization, the Federal Radio Commission (FRC), whose sole purpose was to regulate the use of radio in the United States. The Act divided the country into five geographic zones, each to be separately regulated by its zone commissioner. The 1927 Act also clarified many of the points left ambiguous in the earlier 1912 law. FRC commissioners were empowered to issue licenses to individual broadcasters, oversee the various types of equipment used by broadcasters, and assign frequencies, power allotments, and broadcast hours to individual stations.<sup>20</sup> In addition, commissioners were enabled to make regulations that “will promote public convenience or interest or will serve public necessity . . . .”<sup>21</sup> The new Act established the commission to oversee not just the quickly expanding area of broadcast radio, but also the maritime, military, and government radio uses that had been previously regulated under earlier radio laws.

Although Sarnoff had a vision of radio providing entertainment to the masses, broadcasting was still primarily used for the dissemination of information at the time the Radio Act of 1927 was passed. The Act made it clear that the broadcast spectrum was owned by the public, even if licenses were granted for individuals and firms to use specific frequencies. A license was both temporary and revocable. Radio stations were explicitly ordered not to issue false distress calls or interfere with ship distress signals. Such behavior could result in the revocation of a broadcast license. However, barring such egregiously wrong conduct, the

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<sup>20</sup> Radio Act of 1927, ch. 169, §4, 44 Stat. 1162 (1927) (amended 1934).

<sup>21</sup> *Id.* §4(f).

standard for obtaining a broadcast license was very broad – licenses were to be granted “if public convenience interest, or necessity will be served thereby....”<sup>22</sup>

Notably, despite its power to deny and revoke licenses, Section 29 of the Act specifically disclaims the commission’s ability to censor content of radio broadcasts. “Nothing in this Act shall be understood or construed to give the licensing authority the power of censorship,” nor does the commission have the power to create rules “which shall interfere with the right of free speech by means of radio communications.”<sup>23</sup> At the same time, the section reminds broadcasters that just because the FRC cannot censor them does not mean they are free to say anything they want on the air. “No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communications.”<sup>24</sup> In stark contrast to the Supreme Court’s characterization of movies as “spectacles” on par with the circus,<sup>25</sup> Congress viewed radio as an extension of the press and a guardian of the public interest. While broadcasters are reminded to watch their language, there is no explicit check on their content.

In 1934, Congress consolidated the regulation of radio and telephony/telegraphy into one industry, creating the Federal Communications Commission (FCC). Keeping most of the statutory language of the 1927 Radio Act, the Communications Act of 1934 also absorbed language from the 1910 Mann-Elkins Act, which had granted power to regulate telephone/telegraph communication to the Interstate Commerce Commission (ICC). While the 1927 Radio Act was complicated enough, including in it the power to regulate both broadcast and

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<sup>22</sup> *Id.* §9.

<sup>23</sup> *Id.* §29.

<sup>24</sup> *Id.* Radio Act §29 (1927) (current version at 18 U.S.C. 1464 (1994)).

<sup>25</sup> *Mut. Film Corp. v. Indus. Comm’n of Ohio*, 236 U.S. 230, 243 (1915)..

communication radio, the decision to consolidate regulatory power in a single body was a logical one. As Alexander Graham Bell pointed out in 1876, there are really more similarities between telephonic/telegraphic communication and radio communication than there are differences. Since the FRC was already managing both broadcast radio and point-to-point communication, this expansion of its regulatory power was the next logical step.

Like the 1927 Act before it, the 1934 Communications Act retained the language that the FCC had no “power of censorship” or ability to “interfere with the right of free speech by means of radio communications.”<sup>26</sup> The 1934 Act also retained the caveat about “obscene, indecent, or profane language.”<sup>27</sup> Although the FCC had the power to issue and revoke broadcast licenses, it was explicitly not a censorship body. As Secretary of Commerce ten years earlier, then vested with the sole power to regulate radio, Herbert Hoover cautioned Congress, “We cannot allow any single person or group to place themselves in a position where they can censor the material which shall be broadcast to the public, nor do I believe that the government should ever be placed in a position of censoring this material.”<sup>28</sup>

## PART II. A HISTORY OF FILM

Debate over film censorship can be traced back to the beginning of film. Thomas Edison’s *The Kiss (1896)*, a twenty-second film depicting a man and a woman talking to each

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<sup>26</sup> Communications Act, ch. 652, § 326, 48 Stat. 1091 (1934) (current version at 47 U.S.C. § 326 (2009)).

<sup>27</sup> Communications Act, ch. 652, § 326, 48 Stat. 1091 (1934) (current version at 18 U.S.C. § 1464 (2009)).

<sup>28</sup> *Hearings on H.R. 7357 Before the H. Comm. on the Merchant Marine and Fisheries*, 68th Cong., 1st Sess. 8 (1924).

other cheek to cheek for about eighteen seconds and then sharing a chaste kiss,<sup>29</sup> was met with hearty criticism for its then-risqué subject matter. Although the kiss itself was chaste, the camera's proximity to the two lovers was a good deal closer than that of the audience to a stage play, creating an uncomfortably voyeuristic experience for many who viewed kissing as strictly a private activity.

In 1915, the Supreme Court gave legitimacy to the censorship of film, writing in *Mutual Film Corporation v. Industrial Commission of Ohio* that films were in the same category as “the theatre, the circus, and all other shows and spectacles” which could be regulated under the police power without concern for freedom of expression.<sup>30</sup> The court further explained, “We immediately feel that the argument is wrong or strained which extend the guaranties of free opinion and speech to the multitudinous shows which are advertised on the bill-boards of our cities and towns....”<sup>31</sup> After all, the court reasoned, the police power had successfully been exercised to regulate the exhibition of films in many states.<sup>32</sup>

The legality of state censorship boards had previously been upheld without considering the potential free speech implications. Freedom of expression was not at issue in those cases, the court explains, because “the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded... as part of the press of the country or as organs of public opinion.”<sup>33</sup> Since the Ohio statute at issue in *Mutual*

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<sup>29</sup> THE KISS (Edison Manufacturing Co. 1896). The original film can be found archived at Library of Congress American Memories Collection, <http://hdl.loc.gov/loc.mbrsmi/edmp.4038>.

<sup>30</sup> *Mut. Film Corp.*, 236 U.S. at 243.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 244.

<sup>33</sup> *Id.*

*Film* allows the exhibition of “such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character,” the court reasons that all the positive aspects of film will be retained while filtering out film’s potential to attract a prurient interest.<sup>34</sup> “They are mere representations of events, of ideas and sentiments published and known, vivid, useful and entertaining no doubt, but, as we have said, capable of evil....”<sup>35</sup>

Though the Supreme Court’s quick dismissal of films as potentially deserving of first amendment protection may seem harsh, it was in complete harmony with the many cases brought in state and federal courts at the time. Courts in many states upheld statutes that limited the rights of motion picture theater owners, requiring a license for their general operation and allowing a censorship board to review the content of films to be screened. In 1898, the Minnesota Supreme Court ruled: “In respect to theatrical exhibitions and amusements of similar character, a larger discretion on part of municipalities is recognized than in the case of ordinary trades and occupations, both because they are liable to degenerate into nuisances, and also because they require more police surveillance, and police service.”<sup>36</sup> In 1909, an Illinois court ruled constitutional a Chicago ordinance which stated that “the chief of police shall not issue a permit for the exhibition of any obscene or immoral picture or series of pictures, but that he shall issue a permit, without fee or charge, for all pictures which are not obscene or immoral.”<sup>37</sup> In 1912, the Minnesota Supreme Court extended its view of theaters as a potential nuisance to include motion picture theaters, allowing a small town to charge a \$200 annual fee for any who wished to obtain

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<sup>34</sup> *Id.* at 240-42.

<sup>35</sup> *Id.* at 244.

<sup>36</sup> *City of Duluth v. Marsh*, 73 N.W. 962, 962 (Minn. 1898).

<sup>37</sup> *Block v. City of Chicago*, 87 N.E. 1011, 1013 (Ill. 1909).

a license to run a motion picture theater. “[E]xperience teaches that, where amusements are furnished for pecuniary profit, the tendency is to furnish that which will attract the greatest number rather than that which instructs or elevates,” the court stated. “It must therefore be classed among those pursuits which are liable to degenerate and menace the good order and morals of the people, and may therefore not only be licensed and regulated, but also prevented by a village council.”<sup>38</sup>

In 1922, under increasing pressure from government and religious organizations, movie producers brought former Postmaster General Will Harrison Hays to Hollywood to head the newly formed Motion Picture Producers and Distributors of America (MPPDA). Lending credibility to the industry, Hays came out with the “Hays Formula,” a list of “Don’ts and Be Carefuls” for movie producers that accurately predicted which elements of a film state and local censors would find problematic. The original eleven “Don’ts” were: pointed profanity, licentious or suggestive nudity, illegal traffic of drugs, any inference of sex perversion, white slavery, miscegenation, sex hygiene and venereal diseases, actual childbirth, children’s sex organs, ridicule of the clergy, and willful offense to any nation, race or creed.<sup>39</sup>

By 1930, the combination of new sound technology and desperate producers scrambling to bring in audiences despite the devastating stock market crash precipitated the need for an updated Hays Formula. Scandalous ads became commonplace, as movies promised to deliver “brilliant men, beautiful jazz babies, champagne baths, midnight revels, petting parties in the purple dawn.”<sup>40</sup> Earlier films, though frequently also thematically questionable, were more easily

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<sup>38</sup> *Higgins v. Lacroix*, 137 N.W. 417, 419 (Minn. 1912).

<sup>39</sup> WILL HAYS, *THE MEMOIRS OF WILL H. HAYS* 434 (1955).

<sup>40</sup> *Movies & Morals*, *TIME*, Jul. 2, 1945.

dismissed because their lack of sound or color rendered them less lifelike. For example, an early MGM film, *Heart of a Painted Woman* (1915), is a love story about a prostitute who falls in love with a young millionaire who is on trial for killing another man with whom she had once been intimate. The addition of sound to already spicy plots proved to be the final straw for moviegoers. The Production Code of 1930, or Hays Code, provided a much more comprehensive list of what could and could not be shown onscreen.

Despite its thoroughness, the Hays Code lacked an enforcement mechanism. From 1930 until the Code was properly enforced in 1934, producers deliberately flouted the comprehensive yet unenforceable Code to create some of the most sin-filled movies in Hollywood history. This period is generally referred to as pre-Code because for five years, producers knew of and ignored the accepted norms and conventions in film production. Many are familiar with the sexual innuendo and suggestive films of Mae West, but even Jeanette MacDonald, who is best remembered today for her wholesome roles opposite Nelson Eddy, earned the nickname “Lingerie Queen,” for her many bedroom scenes. A 1931 review lists MacDonald’s “chief talent” as “an aptitude for undressing before the camera quickly and almost completely with becoming grace and without embarrassment.”<sup>41</sup>

Movie audiences became very familiar with bedroom scenes, bath scenes, and other excuses for actresses to be scantily clad. Pre-Code films were by and large more risqué in their depictions of women’s state of undress and the sanctity of marriage, though not every film went as far as *Call Her Savage* (1932), which featured nearly every Code violation imaginable, including, “marital infidelity, interracial marital infidelity, sadomasochistic whipping, erotic

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<sup>41</sup> *The New Pictures*, TIME, Jul. 6, 1931.

frolicking with a Great Dane, prurient exposure of female flesh, kept women, femme-on-femme catfights, a demented husband who tries to rape his wife, prostitution, gigolos, and a pair of mincing homosexual waiters.”<sup>42</sup> Obviously, not every film provides as dramatic a departure from acceptable standards. *It Happened One Night* (1934) is also a pre-Code film, but its deviance from the Code is much more limited, much of it encompassed by Claudette Colbert’s character’s revelation: “I’ll stop a car and I won’t use my thumb!” Pulling up her skirt to reveal her leg, she proceeds to do just that.<sup>43</sup>

Regardless of the degree to which producers chose to ignore the Hays Code, it quickly became clear that further change was needed in the film industry. “Thirty-six states pushed for greater censorship and regulation of films, Catholic organizations threatened to boycott the movies, and Hollywood’s effect on national morality was suddenly a hot topic for debate.”<sup>44</sup> Already hit hard by the decline in movie attendance caused by the early years of the Depression, producers could not risk a further attack on their revenue. In addition, the recently inaugurated Franklin Delano Roosevelt made it clear that government intervention in the film industry was not out of the question. Addressing the issue of Prohibition, for example, one of Roosevelt’s advisors wrote a letter to Will Hays, urging him to convince producers to tone down the onscreen drinking, lest the president be forced to intervene in the industry and tone it down himself.<sup>45</sup> Although the threat of Federal censorship is veiled and almost reluctant, it is there.

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<sup>42</sup> THOMAS DOHERTY, *PRE-CODE HOLLYWOOD: SEX, IMMORALITY, AND INSURRECTION IN AMERICAN CINEMA, 1930-1934* 104 (1999).

<sup>43</sup> *IT HAPPENED ONE NIGHT* (Columbia Pictures 1934).

<sup>44</sup> Alexandra Gil, *Here Come The Mounties!: Framing Rose Marie in 1930s Hollywood* 58 (Apr. 2005) (unpublished A.B. thesis, Duke University) (on file with Perkins Library, Duke University).

<sup>45</sup> *THE WILL HAYS PAPERS* (Douglas Gomery ed. 1988), reel 1.

In 1934, no longer able to ignore the looming threat of government intervention, Hollywood producers were forced to take action. On June 19, the Communications Act of 1934 officially became law, establishing Federal regulatory power over broadcast media – radio and television. With first amendment protection of film still nearly twenty years away,<sup>46</sup> the industry had to treat any threat of censorship as a legitimate threat. In July of 1934, the MPPDA created the Production Code Administration (PCA), an organization devoted to the enforcement of the Hays Code. Instead of merely providing guidance to filmmakers, as the MPPDA had since 1922, the new PCA issued a seal of approval to be displayed at the beginning of all Code-compliant films. Many theaters refused to exhibit films without the PCA seal of approval, which provided a serious incentive for producers to comply with the Code. In addition, the PCA was authorized to fine non-compliers up to \$25,000 for each Code violation.

Although unpopular now, the Hays Code was welcomed in 1934. Addressing the issues of potential Federal censorship as well as a growing national resentment with the salacious content of films, the Code was seen by many as a wonderful example of industry self-regulation. A retrospective article in 1945 said of the Hays Code, “Cinema’s self-regulation is a splendid example of how business can stay out of the government’s ‘paralyzing’ clutches.”<sup>47</sup>

### PART III. THE CAST OF CHARACTERS

Neither film nor radio/television would have become the powerful industry it is today without the driving force of remarkable visionaries. Each industry had its share of powerful men, yet there were two who stand apart from the rest. In film, it is Louis B. Mayer; in radio and

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<sup>46</sup> *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

<sup>47</sup> *Movies & Morals*, *supra* note 40.

television, David Sarnoff. Mayer's MGM would help to define the Golden Age of Hollywood, while Sarnoff's RCA and NBC continue to set the standard for radio and television. Both film and television also survived public outcry and national contempt, each through the help of a politician willing to bear the label of censor, regardless of its validity. In film, it was Will Hays; in television, Newton Minow. Hays, who was first brought to Hollywood in 1922, quickly became the industry's political liaison, while Minow became perhaps the most famous FCC Chairman in history with his 1961 speech declaring television to be a "vast wasteland."<sup>48</sup>

Louis B. Mayer was a man who understood the importance of image. "Because of Mayer's gift for public relations and manipulation of images, little is certain about the early life of the boy called Lazar."<sup>49</sup> Born in Russia in 1885, Eliezer Meir was quick to change his name (and even his birthday) to reflect his adopted homeland. The newly anointed Louis B. Mayer, born on the fourth of July, was willing to alter any aspect of his past that could potentially help his future. Although the town of Saint John, New Brunswick, Canada lays claim to the Mayer clan, Mayer himself insisted he grew up on the Lower East Side. "Over the course of his career, Mayer gave different Russian towns as his birthplace; he also named various cities in the United States as the place in which he was raised."<sup>50</sup> Even now, more than fifty years after his death, few people are aware of Mayer's connection to Canada.

In fact, Mayer was so good at creating a new image for himself that even his own children did not know the truth about their father's life. "In most of Mayer's stories of his

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<sup>48</sup> Newton Minow, Chairman, Fed. Comm'n Comm'n, Address to the 39th Annual Convention of the National Association of Broadcasters (May 9, 1961), in *EQUAL TIME: THE PRIVATE BROADCASTER AND THE PUBLIC INTEREST* 48, 52 (Lawrence Laurent ed., 1964).

<sup>49</sup> Gil, *supra* note 44, at 13.

<sup>50</sup> *Id.*

childhood, he quit school at an early age to assist his father” in the scrap metal business.<sup>51</sup>

According to one biographer, “Louie said he regretted quitting school when he was twelve. He should have quit when he was ten. That way everyone would not have had a head start on him.”<sup>52</sup>

“Mayer’s daughter, Irene Mayer Selznick, tells an even grander story of her father, claiming that he founded the scrap metal business, ‘although because of his youth his father’s name was attached to it.’”<sup>53</sup> And yet, some more recent biographers have found that Mayer did not grow up in New York and leave school at a young age to help his father. Rather, he grew up in Saint John and graduated from the local high school before setting out for the United States. One biographer attributes Mayer’s success in recreating his past to “the usual moviemaker’s penchant for invention” and the fact that Mayer successfully convinced his daughters, “both of whom repeated the story ad infinitum, thus bamboozling successive chroniclers.”<sup>54</sup>

“Over the span of his nearly fifty-year career in the movies, Louis B. Mayer defined Hollywood. Mayer helped to create the Academy of Motion Picture Arts and Sciences (AMPAS) in 1927, and the following year the Academy Awards that have become the Hollywood gold standard. In the 1930s Mayer was the highest paid executive in the world, working for Metro-Goldwyn-Mayer (MGM), which was the biggest motion picture production company in the world. Among the films Mayer produced in his time at MGM are *Ben Hur* (1925), *Tarzan the Ape Man* (1932), *The Wizard of Oz* (1939), *The Philadelphia Story* (1940), and *An American In Paris* (1951). Mayer’s resume boasts an impressive list of films that exemplified a time that has

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<sup>51</sup> *Id.* at 14.

<sup>52</sup> DIANA ALTMAN, HOLLYWOOD EAST: LOUIS B. MAYER AND THE ORIGINS OF THE STUDIO SYSTEM 3 (1992).

<sup>53</sup> Gil, *supra* note 44, at 14 (quoting IRENE MAYER SELZNICK, A PRIVATE VIEW 4 (1983)).

<sup>54</sup> CHARLES HIGHAM, MERCHANT OF DREAMS: LOUIS B. MAYER, M.G.M., AND THE SECRET HOLLYWOOD 10 (1993).

come to be known as the Golden Age of Hollywood. Louis Mayer's long list of accomplishments is particularly impressive for a man who immigrated to the United States alone at the age of nineteen with little more than the clothes on his back."<sup>55</sup>

Mayer's obsession with image carried over into all aspects of his life, including running MGM. "Mayer learned early on that the most important people to befriend were journalists."<sup>56</sup> Running his first theater in 1907, a converted burlesque theater in small Haverhill, Massachusetts known locally as "The Germ," Mayer immediately set about changing the public perception of his theater. "Plying local newspapermen with free tickets to shows and introductions to performers from the live acts" helped win the praise and admiration of the press.<sup>57</sup> But it was Mayer's determination to present "clean, wholesome, healthy amusement," billing the renamed Orpheum as "Haverhill's home of refined amusement" that caught the public's attention.<sup>58</sup>

Mayer was no less thorough in creating a public persona for his stars than he was for himself. *How to Write for the "Movies,"* a 1915 guide to becoming a screenwriter, emphasized the importance of the happy ending: "The average 'movie' audience would much rather have the heroine and her lover live happily ever after. The tragic story, with its harrowing scenes, appeals to only the few who are morbidly inclined."<sup>59</sup> Having learned early on the value of wholesome entertainment and happy endings, Mayer strongly adhered to this advice. He famously said, "I will make only pictures that I won't be ashamed to have my children see."<sup>60</sup> "Mayer was also

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<sup>55</sup> Gil, *supra* note 44, at 11.

<sup>56</sup> *Id.* at 15.

<sup>57</sup> *Id.* at 15-16.

<sup>58</sup> HIGHAM, *supra* note 54, at 16.

<sup>59</sup> LOUELLA PARSONS, HOW TO WRITE FOR THE "MOVIES" 102 (1915).

<sup>60</sup> THE READER'S COMPANION TO AMERICAN HISTORY 707 (Eric Foner & Arthur Garraty eds., 1991).

one of the first enforcers of a [morals] clause in actors' contracts and is said to have berated Mickey Rooney, a star in wholesome films, for his unwholesome conduct off screen. 'You're Andy Hardy!' he shouted, 'You're a symbol! Behave yourself!'"<sup>61</sup>

David Sarnoff's ability to create a lasting public image was no less than Louis Mayer's. Although neither man was associated with the 1962 film *The Man Who Shot Liberty Valance*, both benefited from the logic of the film's most famous line: "When the legend becomes fact, print the legend."<sup>62</sup> It was not until very recently that anyone thought to question the facts about either of their lives. In Mayer's case, it is only in the last ten years that anyone has made the connection between the unabashed American patriot and his true childhood home in Canada. Sarnoff's tales, too, were unquestioned until very recently.

Sarnoff's childhood bears a striking resemblance to the childhood Mayer imagined for himself.<sup>63</sup> Born in Russia in 1891, Sarnoff's family immigrated to the United States when he was nine years old. Arriving in New York, Sarnoff was forced to work at a young age in order to support his family. As the story goes, Sarnoff began by selling Yiddish newspapers in the streets, acquiring his own newsstand by the age of ten. When Sarnoff was fifteen, he was forced to leave school and begin work fulltime, first as a messenger, then later as a telegraph operator for American Marconi. It was at American Marconi that Sarnoff would first rise to fame. As legend has it, Sarnoff was the wireless operator on duty when the news came in of the *Titanic* disaster. For years, Sarnoff would tell the tale of how he stayed at his post for 72 straight hours, reporting the names of the survivors as they came in. Regardless of the truth of this story, it helped catapult

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<sup>61</sup> Gil, *supra* note 44, at 22.

<sup>62</sup> THE MAN WHO SHOT LIBERTY VALANCE (Paramount Pictures 1962).

<sup>63</sup> See generally KENNETH BILBY, THE GENERAL: DAVID SARNOFF AND THE RISE OF THE COMMUNICATIONS INDUSTRY (1986); EUGENE LYONS, DAVID SARNOFF: A BIOGRAPHY (1966).

Sarnoff into a position of authority at American Marconi, later the Radio Corporation of America (RCA).

Unlike Mayer, Sarnoff's vision for change was not through manipulation of content, but through mastery of technology. A *Time Magazine* retrospective article on Sarnoff explains, "when others would complain that his focus was more on technology than on programming, he said, 'Basically, we're the delivery boys.'"<sup>64</sup> Sarnoff expanded upon this idea in a 1955 article, *The Fabulous Future: America in 1980*. In that article, Sarnoff extolled the virtues of innovations yet to come and urged people to take control of their own destinies and make the most of new technologies. "[W]e can grovel in terror before the mighty forces of science and historic adjustment, even as savage man groveled before lightning and other natural phenomena. Or we can face those forces with courage, determination, and calm intelligence. We do have such a choice because we are not the passive objects but the active manipulators of those forces."<sup>65</sup> Sarnoff, who foresaw the day when people would have radios in their home, who created a national fervor around radio broadcasting, and who shepherded in the age of television, despite its potential to undermine his carefully created world of radio, was a man who never backed down from technological innovation. "The challenge of tomorrow fascinates me much more than the achievements of yesterday," Sarnoff said at the dedication of a Princeton research center that bears his name.<sup>66</sup> While Edward Nally, vice-president of American Marconi, was focused on

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<sup>64</sup> Marcy Carsey & Tom Werner, *Time 100: David Sarnoff*, TIME, Dec. 7, 1998, available at <http://www.time.com/time/time100/builder/profile/sarnoff.html>.

<sup>65</sup> David Sarnoff, *The Fabulous Future*, FORTUNE, Jan. 1955, reprinted in DAVID SARNOFF ET AL., THE FABULOUS FUTURE: AMERICA IN 1980 14 (1956).

<sup>66</sup> THE FABULOUS FUTURE: AMERICA IN 1980, *supra* note 65, at 12.

satisfying his existing customers, Sarnoff looked ahead to future technology and considered ways to acquire new customers.

Broadcasting quickly became a major industry, with Sarnoff at the helm. By 1928, young Sarnoff, who had spearheaded RCA's creation of a radio broadcasting network, became president of RCA. In creating the world of radio and television that would be defined by the National Broadcasting Company (NBC), Sarnoff was no less thorough in his crafting of images than Mayer was at MGM. In 1930, RCA moved to Rockefeller Center, which Sarnoff dubbed "Radio City." The moniker stuck, and Radio City Music Hall soon became the "it" venue for film premieres and radio events alike. Sarnoff also established the NBC Symphony Orchestra, conducted by Arturo Toscanini, allowing people to enjoy weekly performances by a world class orchestra in the comfort of their own homes.

Sarnoff successfully guided RCA and NBC through several massive shifts in technology, never once allowing either company to relinquish its spot at the top. Most notably, Sarnoff would see the company through the age of television. Although Philo Farnsworth is credited with inventing television, it was David Sarnoff who made the technology commercially viable. Sarnoff's team of engineers, headed by Vladimir Zworykin, worked around the clock to invent their own television technology. Yet after many years of patent litigation, Sarnoff finally conceded to Farnsworth and negotiated a cross-licensing agreement, breaking his rule that "RCA didn't pay royalties, it collected them."<sup>67</sup> RCA already dominated the market for manufacturing and selling record players, having acquired the Victor Talking Machine Company in 1929. With this licensing agreement, RCA was able to expand its market dominance of radio into a

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<sup>67</sup> ALBERT ABRAMSON, ZWORYKIN: PIONEER OF TELEVISION x (1995).

dominance of television. Along with several other companies, RCA debuted its new television technology at the 1939 World's Fair. Although Farnsworth had publicly demonstrated his own television technology more than ten years earlier, it was Sarnoff, with RCA's already established manufacturing plants, who was able to produce television sets commercially. Commenting on the situation years later, Sarnoff remarked, "Competition brings out the best in products and the worst in men."<sup>68</sup>

NBC began regular television broadcasts, along with its existing radio broadcasts, in the 1940s. But Sarnoff's clashes with technology were not yet over. In 1950, the Columbia Broadcasting System (CBS) introduced color television to the American public with great success. Although incompatible with existing black and white television sets, CBS's color broadcasts could be viewed in specified public places equipped with new color sets. In 1951, a *Time Magazine* cover story about Sarnoff exclaimed, "The public scored David Sarnoff's Radio Corp. of America with a lost round last year in the great color TV fight with Columbia Broadcasting System. Sarnoff did not stay down. Last week he showed the television industry a new tube that received clear, true color, and he showed the public that RCA's color system can do what CBS's can not: color programs broadcast by RCA can be received in black & white on present sets without any change. It looked as if radio's miracle man had not run out of miracles."<sup>69</sup> Once again, Sarnoff had triumphed over technology, helping RCA and NBC to remain at the top of the radio and television industries. During the reign of Sarnoff and Mayer, audiences knew that they could count on NBC to provide quality programming of cultural significance, just as they knew that MGM "means great movies."

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<sup>68</sup> Carsey & Werner, *supra* note 64.

<sup>69</sup> *The General*, TIME, Jul. 23, 1951.

While Mayer and Sarnoff were fighting their battles for control over the business of film, radio, and television, others were left to negotiate the politics of industry regulation. For the film industry, this job fell to Will Harrison Hays, former Postmaster General, and head of the Motion Picture Producers and Distributors of America since 1922. After the Black Sox scandal in 1919, Major League Baseball had found public redemption through its appointment of Judge Kenesaw Mountain Landis as its commissioner in 1920. The film industry hoped to find that same salvation with the appointment of Hays, an Indiana lawyer and staunch Republican, in 1922.

When Hays entered the scene in 1922, Hollywood was experiencing major problems, both onscreen and off. Onscreen antics had led to calls for greater censorship of movies, aided in great part by the Supreme Court's 1915 opinion legitimizing censorship boards and equating films with "spectacles" like the circus, which could be regulated.<sup>70</sup> Off screen, Hollywood had other troubles.<sup>71</sup> Experiencing unprecedented wealth and success, Hollywood stars lived a life of luxury. For many, that life included parties and drugs. Several actors and actresses died of overdoses, while others were arrested for possession of heroin and cocaine. But it was not until the case of Roscoe "Fatty" Arbuckle that Hollywood had finally crossed the line. Virginia Rappe, a young actress who attended a party hosted by Arbuckle, died, not of a drug overdose, but of a ruptured bladder. Immediately, there was national speculation that Arbuckle had caused her injuries during a sexual encounter between the two. Three highly sensationalized trials later, Arbuckle was finally acquitted of Rappe's rape and murder, but the damage had already been done, both to his career and to the film industry.

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<sup>70</sup> *Mut. Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 243 (1915).

<sup>71</sup> See, e.g., JOEL W. FINLER, *THE HOLLYWOOD STORY* 193 (1988); JAMES ROBERT PARISH, *THE HOLLYWOOD BOOK OF SCANDALS* (2004).

Hays had his work cut out for him from the start, brought to Hollywood to rehabilitate the film industry's reputation while also preventing government intervention in the industry.

Although early radio broadcasters sought government assistance in resolving their disputes, film pioneers were content to solve disputes among themselves, with frequent trips to federal court to litigate issues with patents and antitrust. Rather than allow government regulation of the industry, Hays adopted the Production Code of 1930 and introduced the Production Code Administration in 1934 to enforce the Code. Although commonly referred to as the Hays Code, Hays himself neither wrote nor enforced the Code. Rather, Hays provided the public face for a disgraced industry trying to regain the public's trust. A Paramount photographer famously staged a photo entitled "Thou Shalt Not," to show what the Hays Code would no longer allow onscreen.

Featuring a woman in a negligee smoking, with a gun in one hand and a glass in the other while she stands over a fallen policeman, the photo includes no fewer than ten forbidden images: the law defeated, the inside of a thigh, lace lingerie, a dead man, drugs, drinking, an exposed bosom, gambling, pointing a gun, and a tommy gun.<sup>72</sup>

Hays came to Hollywood, not as a reformer, but as a "public-spirited" man determined not to see movies fall prey to the mistakes of reformers. "I was thinking of the parallel case of prohibition – which had by no means produced the era of national sobriety its proponents had contemplated," Hays explained in his 1955 memoir.<sup>73</sup> Looking at his own children, Hays knew that "motion pictures had become as strong an influence on our children and on countless adults, too, as the daily press."<sup>74</sup> With that in mind, he accepted the post as "czar" of Hollywood and

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<sup>72</sup> A.L. "WHITEY" SCHAFFER, THOU SHALT NOT (Paramount 1946), reproduced in William Friedman Fagelson, *Fighting Films: The Everyday Tactics of World War II Soldiers*, 40 CINEMA J. 94, 107 (2001).

<sup>73</sup> HAYS, *supra* note 39, at 324.

<sup>74</sup> *Id.* at 326.

began to overhaul not just public perception of the industry, but the industry itself. As Hays described it, “acting as missionary for the democratic concept of ‘home rule’ and self-regulation was only half my job, as I envisioned it. The other half was to educate the movie-going public.”<sup>75</sup> Movie audiences needed to know what they could expect to see at the movies. The Hays Code provided the framework for moviegoers to properly anticipate the films that awaited them at the theater. Although Joseph Breen was the man who actually enforced the Code from 1934 until 1954, Hays was the idealist who believed the industry was worth saving and worked hard to do just that. “I remembered plenty of experiences in politics and in the Post Office Department which had proved that folks are willing and able to work together for a good end, if they can see it. I was sure that there were appeals in the movies capable of uniting industry and public in a joint program for better motion pictures.”<sup>76</sup>

Many years later, FCC Chairman Newton Minow fought a similar battle with the television industry. Like Hays, Minow was a longtime politician, though Minow’s loyalties lay with the Democratic party. In his first speech to the National Association of Broadcasters (NAB) in 1961, though most people only remember the phrase “vast wasteland” to describe television, Minow made some important points, sharing with Hays many sentiments about the necessity of change. As movie producers had hidden behind their box office receipts as evidence of the public’s enjoyment of their fare, so too had television producers hidden behind their ratings. “It is not enough to cater to the nation’s whims – you must also serve the nation’s needs,” Minow said in response to this argument.<sup>77</sup> “If parents, teachers and ministers conducted their

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<sup>75</sup> *Id.* at 327.

<sup>76</sup> *Id.* at 328.

<sup>77</sup> Minow, *supra* note 48, at 55.

responsibilities by following the ratings, children would have a steady diet of ice cream, school holidays and no Sunday school.”<sup>78</sup>

In the 1934 Communications Act, Congress decreed that broadcasters serve as trustees of the public airwaves and, as such, must act at all times in the public interest. Since 1934, the meaning of “public interest” has often been a subject of much debate. To the NAB, Minow explained, “I believe that the public interest is made up of many interests. There are many people in this great country, and you must serve all of us.”<sup>79</sup> He emphasized the distinction between popular interest and the public interest. Discussing the issue of ratings further, Minow asks, “What about adult programming and ratings? You know, newspaper publishers take popularity ratings too. The answers are pretty clear; it is almost always the comics, followed by the advice-to-the-lovelorn columns. But, ladies and gentlemen, the news is still on the front page of all newspapers, the editorials are not replaced by more comics, the newspapers have not become one long collection of advice to the lovelorn.”<sup>80</sup> And yet, Minow laments, broadcasters have felt the need to cater to the lowest common denominator, rather than using the powerful medium of television to uplift and educate.

Aside from the Congressional mandate set forth in the Communications Act, Minow also had an industry code of self-regulation to turn to. Although not nearly as well-remembered as the Hays Code, the NAB Code was actually in effect for a longer period of time, from 1928 until 1983, enforced by the Code Authority Board (CAB). Yet the CAB lacked the authority of the PCA, making the NAB Code ultimately a true voluntary code. Code-compliant television shows

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<sup>78</sup> *Id.* at 54.

<sup>79</sup> *Id.* at 55.

<sup>80</sup> *Id.* at 54-55.

displayed a “Seal of Good Practice” similar to the PCA’s seal of approval, though this display was oddly placed at the end of the program. The television industry also enacted other voluntary attempts to regulate content, like the 1975 Family Viewing Hour, championed by the FCC, which allocated 8 to 9 p.m. (and, unofficially, 7 p.m. to 8 p.m.) as the primetime programming hours which would air family-friendly programming. Although quickly overturned by a Federal judge in a case brought by television writers whose shows had been moved out of the coveted 8 p.m. time slot,<sup>81</sup> the policy remained in existence on an informal basis.

In his first speech to the NAB in 1961, Minow quoted text that the industry should use as guidance, its own Code. “These words are not mine. They are yours. They are taken literally from your own Television Code. They reflect the leadership and aspirations of your own great industry. I urge you to respect them as I do.... I urge you at this meeting and, after you leave, back home, at your stations and your networks, to strive ceaselessly to improve your product and to better serve your viewers, the American people.”<sup>82</sup>

In 2001, the FCC released a Guidance Statement on Broadcast Indecency. After a laundry list of egregiously inappropriate content that had resulted in censure, Commissioner Susan Ness attached a separate statement, which included a section entitled, “Broadcasters Are Part of a National Community,” in which she encouraged broadcasters to engage in self-regulation. “It is not a violation of the First Amendment for broadcasters on their own to take responsibility for the programming they air, and to exercise that power in a manner that celebrates rather than debases humankind. It is time for broadcasters to consider reinstating a voluntary code of conduct.... As stewards of the airwaves, broadcasters play a vital leadership role in setting the

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<sup>81</sup> *Writers Guild of America, West, Inc. v. FCC*, 423 F. Supp. 1064 (C.D. Cal. 1976).

<sup>82</sup> Minow, *supra* note 48, at 62.

cultural tone of our society. They can choose to raise the standard or to lower it. I hope that broadcasters will rise to the occasion by reaffirming the unique role of broadcasting as a family friendly medium. The public deserves no less.”<sup>83</sup>

Fairly or unfairly, Newton Minow was but one of the many FCC Commissioners forced to deal with the label of censor. In a speech at Northwestern University School of Law, not long after his famed “vast wasteland” speech, Minow attempted to explain the tension between regulation and censorship. “The trouble, in my opinion, is that far too many licensees do not regard themselves as ‘trustees for the public.’ The frequency is regarded as ‘theirs,’ not the public’s; and the license is seen to be not one to operate in the public interest but rather to get the greatest financial return possible out of their investment. When the Commission, in discharging *its* public interest responsibilities, challenges such operations, the first, almost reflex reaction is the cry of ‘censorship.’”<sup>84</sup>

#### PART IV. CONCLUSION

Between 1934 and today, the first amendment protections awarded to film versus television/radio changed dramatically. After 1952, film was finally afforded complete first amendment protection, while radio and television, having given up their role as an extension of the press in favor of one as purveyors of mass entertainment, were relegated to a second-class level of free speech protection.

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<sup>83</sup> FED. COMM’N COMM’N, *supra* note 11.

<sup>84</sup> Newton Minow, Chairman, Fed. Comm’n Comm’n, Address to the Conference on Freedom and Responsibility in Broadcasting (Aug. 3, 1961), *in* EQUAL TIME, *supra* note 48, at 91-92.

“In 1952, the Supreme Court overturned its decision in *Mutual Film* and found that motion pictures were entitled to first amendment protection. In *Joseph Burstyn v. Wilson*, the Supreme Court reversed nearly forty years of precedent which had relegated motion pictures to the same category as ‘the theatre, the circus, and all other shows and spectacles’ which could be regulated under the police power without regard for freedom of expression.<sup>85</sup> In *Burstyn*, the court held that motion pictures were indeed entitled to first amendment protection, and that there could be no censorship of films on the grounds that censors felt them to be ‘sacrilegious’ since religions did not need state protection from views they found distasteful.<sup>86</sup> This decision allowed Roberto Rossellini’s *The Miracle (1948)*, the story of a pregnant peasant woman who believes herself to be the Virgin Mary, to be screened in New York over the objections of the New York State Board of Regents and the Catholic Church.”<sup>87</sup> With film finally entitled to full first amendment protection, the Hays Code lost its *raison d’etre*. Head censor Joseph Breen retired two years after the *Burstyn* decision, and the PCA slowly began its decline into irrelevance.

Meanwhile, as film was experiencing a surge of unexpected free speech protection, radio was losing its once sacred position as a member of the American press. In a 1947 Senate hearing to debate the government’s ability to regulate the content of radio broadcasts, Senator Edwin Johnson ridiculed the notion of equating radio to the press, calling it “as far-fetched as comparing an elephant to a flea.”<sup>88</sup> Other senators were equally critical, including Senator Wallace White, one of the principal architects of the 1927 Radio Act and the 1934

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<sup>85</sup> *Mut. Film Corp. v. Indus. Comm’n of Ohio*, 236 U.S. 230, 243 (1915).

<sup>86</sup> *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

<sup>87</sup> Alexandra Gil, *Breaking the Studios: Antitrust and the Motion Picture Industry*, 3 N.Y.U. J.L. & LIBERTY 83, 120-21 (2008).

<sup>88</sup> Minow, *supra* note 84, at 89.

Communications Act.<sup>89</sup> Comparing radio to newspapers, White said, “there is a vast difference in principle between the absolute right of anyone who wants to go into the newspaper business and the necessarily limited right to operate a broadcasting station.... I do not accept in any degree that there is no difference between the power of Government with respect to newspapers and the power of Government with respect to radio communications.... If you [radio people] are placing your feet on that foundation, [you] are just indulging in dreams.”<sup>90</sup> This is a far cry from Roosevelt’s statement that “Radio broadcasting should be maintained on an equality of freedom similar to that freedom that has been, and is, the keystone of the American press.”<sup>91</sup>

Despite the particular content presented by film, television, or radio, the latter two media are still held to a higher standard than the former. In his 2004 speech to the NAB, FCC Chairman Michael Powell explained that “free spectrum has always been premised on your industry acting as a public trustee. People feel they have a right to demand higher standards from the industry and have different expectations about what they will see, as compared with the movie theater, a comedy club, HBO, or the Internet.”<sup>92</sup> The expectations people have when they go to a movie theater are very different from the expectations they have when they turn on the television or radio. Each industry has dealt with those expectations differently, whether through government regulation or industry self-regulation, guidelines or censorship, and each industry has ultimately found itself in the same place it began. Movies are entitled to first amendment protection today, but are still treated as merely entertainment; radio and television, though used more for

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<sup>89</sup> For more information on White, see Donald G. Godfrey & Louise M. Benjamin, *Radio Legislation's Quiet Backstage Neighbor: Wallace H. White, Jr.*, 10 J. RADIO STUD. 93 (2003).

<sup>90</sup> Minow, *supra* note 84, at 88-89.

<sup>91</sup> *Censorship Plan Denied By Farley*, N.Y. TIMES, Oct. 15, 1934.

<sup>92</sup> Powell, *supra* note 1.

entertainment today than anything else, will always be the guardians of the public interest. The regulatory regimes affecting film, radio, and television reflect the inherent differences in each industry, but also reflect the different expectations of the audiences for each medium. Although it is tempting to imagine a future in which these regulatory schemes remain static, as they have for decades, with the advent of the internet as a new medium for mass entertainment and dissemination of information, each industry will be forced to reassess its place in society and its ability to meet audience expectations.