

**THE MPAA:  
A SCRIPT FOR AN ANTITRUST PRODUCTION**

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## I. INTRODUCTION

“Horrific, deplorable violence is okay, as long as people don’t say any naughty words!”

- Kyle’s Mom, *South Park*<sup>1</sup>

The motion picture industry is a major market in the United States and the world alike, and is continuing to grow even larger.<sup>2</sup> But, as the industry is growing, more and more production companies are getting increasingly smaller, while a very concentrated few of the studios are gaining steam and maintaining that momentum. What do these studios have in common? Each of the six largest studios is a member of the Motion Picture Association of America (“MPAA”), an organization providing an independent, voluntary ratings system for theatrically released films.<sup>3</sup> Most people know about the MPAA, as they have likely been subjected to its guidelines for a majority of their lives. The MPAA designates ratings to movies and categorizes the films into five categories: G, PG, PG-13, R, and NC-17.<sup>4</sup> However, most people probably do not know about the MPAA’s arbitrary, unjust, and outdated<sup>5</sup> ratings system—the Classification and Ratings Administration System (“CARA”).

In short, CARA is a voluntary ratings system,<sup>6</sup> operated by the MPAA, in which a group of undisclosed parents rate films in an effort to inform all other parents of the films’ appropriateness.<sup>7</sup> Though the ratings system is held out as a voluntary system, submission to the ratings system has become a de facto standard in the industry, compelling submission for an MPAA rating in order to be shown in theaters and, in turn, to make money.<sup>8</sup> The raters remain undisclosed and all remarks and ballots are held confidential, with no guide to assist studios in how they might improve their movie’s rating. Further, the

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<sup>1</sup> Simran Khurana, *Funny “South Park” Quotes*, ABOUT.COM, <http://quotations.about.com/od/southparkquotes/a/southpark2.htm> (last visited Sept. 12, 2013). This quote is *South Park* co-creator Matt Stone’s way of mocking the arbitrary movie ratings system employed by the Motion Picture Association of America.

<sup>2</sup> See *infra* Part III.A.

<sup>3</sup> See *infra* Parts II.A.2, II.A.4.

<sup>4</sup> See *infra* Part II.A.2.

<sup>5</sup> See generally Margaret Hartmann, *Ridley Scott Slams the MPAA over Prometheus Rating*, HOLLYWOOD.COM (Apr. 10, 2012), [http://www.hollywood.com/news/Ridley\\_Scott\\_Slams\\_the\\_MPAA\\_Over\\_Prometheus\\_Rating/23612948](http://www.hollywood.com/news/Ridley_Scott_Slams_the_MPAA_Over_Prometheus_Rating/23612948) (acclaimed director Ridley Scott expresses similar notions about the MPAA and its system CARA).

<sup>6</sup> See *infra* Part II.A.3. Most would likely recognize this as the G, PG, PG-13, R, and NC-17 ratings system found attached to motion pictures.

<sup>7</sup> See *infra* Part II.A.3.

<sup>8</sup> See *infra* Part III.B.1.a.

member-studios of the MPAA often receive a significant amount of deference,<sup>9</sup> receiving more favorable ratings<sup>10</sup> even though the ratings may not be justified by the content of the movies.<sup>11</sup>

To better understand the absurdity of the system, consider an illustration:

You are a student aspiring to be published in the school journal, as that is the only medium in which you can reach readers. Your grade on your article determines the amount of readers your work will reach (“A” papers are published in more editions than are lower grades, etc.). Your grade is not based upon style or journalistic quality, but on appropriateness of the content in regards to the assignment.

Excited about what lies ahead, you finish your article. You are told you do not have to submit it for grading, but you know that is the only way it will be published and reach readers. You submit your article for grading with high hopes for the potential to reach such an audience. But when you receive your grade, a “C,” you are quite frustrated, as much fewer readers will get to see your work in the journal. You are told you can re-submit your article, but all grading notes are confidential and the name of your grader will not be disclosed. And since there is no rubric, you don’t know what needs to be changed in your article in order to improve your score.

Still frustrated, you compare your paper to others in the class. You find that your article bears a striking resemblance to the six highest graded papers. As it turns out, these six students’ parents have ties to the administration, and the grader knew of the affiliations when the articles were graded. Even though your article is substantially the same as those that received an “A,” these six students will be published in every edition of the journal and you will not. You are left blind as to what could be done to your article in order to receive a better grade, leaving you to guess as to how you should edit your work.

Throughout the year, the same six students receive the best marks and reach the most readers. Despite your best efforts to guess at the desires of the graders, you have been unable to raise your grade. You are left behind while the same six students grow and maintain their audience.

There is a reason that grading submissions in academic institutions do not follow this model—it is arbitrary, inconsistent, and unjust. This model, though amplified for the sake of illustration, closely reflects the design of the MPAA/CARA ratings system in terms of deference given to the six major players in the course.<sup>12</sup>

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<sup>9</sup> See *infra* Parts II.A.4, III.B.1.c.

<sup>10</sup> As seen in Parts III.B.1.a and III.B.1.c, some ratings have greater potential for profitability and some even serve as a death sentence for the profitability of a movie.

<sup>11</sup> See *infra* Part III.B.1.b.

<sup>12</sup> Throughout this Note, it helps to relate back to this analogy to better understand the premise of the issues with the MPAA rating system.

This Note argues that the MPAA, through its members, or vice versa, has obtained, or is on its way to obtaining, monopoly power in the motion picture industry, as the member production companies (comprising the MPAA) have attained a collective market share of nearly 80% in the industry.<sup>13</sup> Using this monopoly power to its advantage, the MPAA has constructed a significant barrier of entry into the market through its compulsory, vague, and deferential Classification and Ratings Administration rating system.<sup>14</sup> By using monopoly power to create this ratings barrier, the MPAA has stunted the potential for growth of non-member production companies,<sup>15</sup> demonstrating anticompetitive conduct that restricts industry competition in violation of Section 2 of the Sherman Antitrust Act (“Sherman Act”).<sup>16</sup>

In Part II.A, this Note briefly discusses the genesis of the MPAA, the endurance of the MPAA, the CARA ratings system, and the studios comprising the MPAA as its members. In Part II.B, a “teaser trailer” into antitrust law will introduce the policies reinforcing the body of law and will establish the elements and considerations taken into account when determining a violation of Section 2 of the Sherman Act (monopoly power in the relevant market and the construction of market entry barriers).

In Part III, the Section 2 analysis is tailored to the MPAA’s position in the movie industry, attempting to prove monopolization, or attempted monopolization, under Section 2 of the Sherman Act. Parts III.A and III.B proceed to show the breadth of the MPAA’s overwhelming monopoly power in the relevant market and that the ratings system has constructed an entry barrier that allows for further concentration of MPAA member market power. Part III.B, in particular, discusses how the CARA system is an entry barrier comprised of an involuntary, vague, and deferential system that hides behind a cloak of nondisclosure.

The MPAA and its members have succeeded in achieving monopoly power in the relevant movie market and have demonstrated anticompetitive conduct in constructing a significant market barrier to entry through the CARA ratings system. As the student from the illustration would say, “School is out for the MPAA and its members.”

## II. BACKGROUND

In tailoring the Section 2 analysis concerning monopoly power and anticompetitive conduct to the MPAA, it is important to understand the history of the organization, its practices, and its members prior to learning the law. Relevant portions of the law should then be understood and applied to the

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<sup>13</sup> See *infra* Part III.A.

<sup>14</sup> See *infra* Parts II.A.3, III.B.

<sup>15</sup> See *infra* Parts II.A.3, III.B.

<sup>16</sup> 15 U.S.C. § 2 (2012).

organization and industry at issue. As such, Part II.A begins to explain the genesis of the MPAA and its endurance until today, progressing to explain some of its practices and detailing the members that comprise the organization. Part II.B then explains the foundations of the Sherman Act and addresses the specific factors to be considered in tailoring the Section 2 analysis to the MPAA and the movie industry.

#### A.      *History and Make-Up of the MPAA*

To better understand the MPAA and its practices, this Part discusses the nature of the MPAA from its formation until now. Part II.A.1 explores the censorship that once controlled the motion picture market. Part II.A.2 covers the origin of the MPAA and establishes the practices that have endured through today. Part II.A.3 highlights the CARA movie ratings system partly at issue in this Note, simply stating the operational aspects of the system. Lastly, Part II.A.4 lists the movie production companies that make up the MPAA and oversee much of its operations.

##### 1.      Saving Us from Censorship

In the early 1900s, American cinema was subject to several local, city, and state censorship boards across the country.<sup>17</sup> At the time, films lacked Constitutional protection under the First Amendment, requiring licensure by state mandated censoring regimes prior to allowing a movie's release.<sup>18</sup> Because of this, filmmakers had to tailor their movies to the requirements of each board or otherwise face being banned from that market.<sup>19</sup>

In 1922, in response to public objection to the perceived immorality of mainstream films and the growing efforts of city and state governments to censor films,<sup>20</sup> the presidents of the major motion picture studios, including

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<sup>17</sup> See Ken Robichaux, *Movie Censorship in the United States*, THE PICTURE SHOW MAN (2007), [http://www.pictureshowman.com/articles\\_genhist\\_censorship.cfm](http://www.pictureshowman.com/articles_genhist_censorship.cfm). See generally *Ratings History*, MPAA, <http://www.mpa.org/ratings/ratings-history> (last visited Sept. 12, 2013) [hereinafter *Ratings History*].

<sup>18</sup> See, e.g., *United Artists Corp. v. Thompson*, 171 N.E. 742 (Ill. 1930); *Edwards v. Thompson*, 262 Ill. App. 520 (1931); *Illinois ex rel. Guggenheim v. City of Chicago*, 209 Ill. App. 582 (1918); *Bainbridge v. City of Minneapolis*, 154 N.W. 964 (Minn. 1915); *Message Photo-Play Co., Inc. v. Bell*, 179 A.D. 13 (N.Y. App. Div. 1917); *In re Goldwyn Distrib. Corp.*, 108 A. 816 (Pa. 1919); see also Jason K. Albosta, Note, *Dr. Strange-Rating or: How I Learned that the Motion Picture Association of America's Film Rating System Constitutes False Advertising*, 12 VAND. J. ENT. & TECH. L. 115 (2009).

<sup>19</sup> See, e.g., *United Artists Corp.*, 171 N.E. 742; *Edwards*, 262 Ill. App. 520; *Guggenheim*, 209 Ill. App. 582; *Bainbridge*, 154 N.W. 964; *Message Photo-Play Co.*, 179 A.D. 13; *In re Goldwyn Distrib.*, 108 A. 816; see also Albosta, *supra* note 18.

<sup>20</sup> See GREGORY D. BLACK, *HOLLYWOOD CENSORED: MORALITY CODES, CATHOLICS, AND THE MOVIES* (Cambridge Univ. Press 1994); ROBERT SKLAR, *MOVIE-MADE AMERICA: A CULTURAL*

Samuel Goldwyn, Louis B. Mayer, Jesse Lasky, and Joseph Schenck, formed the Motion Picture Producers and Distributors Association of America (“MPPDAA”) to resist swelling calls for government censorship of American films.<sup>21</sup> In addition, the founders of the non-profit trade association wanted to foster a more favorable public image for the motion picture industry and safeguard the role of then-silent films’ place in mainstream America; this required submitting movies for approval prior to distribution.<sup>22</sup> The MPPDAA later became the MPAA.<sup>23</sup>

## 2. Genesis and Endurance of the MPAA

The MPAA made its initial attempt to assume responsibility of controlling the content of publicly exhibited films in 1930 when it adopted the Motion Picture Production Code, which listed content prohibited from depiction in cinema.<sup>24</sup> Former Postmaster General William Hays, a member of President Warren Harding’s Cabinet, led the organization and instituted initiatives to forestall government interference in filmmaking.<sup>25</sup> He oversaw the creation of The Production Code, which later assumed the title “The Hays Code,” a regime requiring the review of all film scripts to ensure the absence of “offensive” material.<sup>26</sup> The Hays Code imposed a detailed and extensive list of rules on filmmakers. Only “correct standards of life” could be presented.<sup>27</sup> For example, there could be no depictions of childbirth, no criticisms of religion, “lustful” kissing, or “suggestive” dancing, to name a few.<sup>28</sup> Under the Hays Code, films were simply approved or disapproved based on whether they were deemed “moral” or “immoral.”<sup>29</sup>

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HISTORY OF AMERICAN MOVIES (Vintage Books 1994); *see also* DAVID M. WAGUESPACK & OLAV SORENSON, THE RATINGS GAME: ASYMMETRY IN CLASSIFICATION 10 (2010), *available at* <http://orgsci.journal.informs.org/content/22/3/541.full.pdf>; *Motion Picture Association of America*, ENCYCLOPEDIA BRITANNICA ONLINE, <http://www.britannica.com/EBchecked/topic/394174/Motion-Picture-Association-of-America> (last visited Sept. 12, 2013).

<sup>21</sup> *History of the MPAA*, MPAA, <http://www.mpa.org/about/history> (last visited Sept. 5, 2013) [hereinafter *MPAA History*]; *see also* WAGUESPACK & SORENSON, *supra* note 20, at 10.

<sup>22</sup> *MPAA History*, *supra* note 21; *Ratings History*, *supra* note 17.

<sup>23</sup> *See* WAGUESPACK & SORENSON, *supra* note 20, at 10 n.1. Any further reference to the Motion Picture Producers and Distributors Association of America or the Motion Picture Association of America in this Note will be noted as the “MPAA.”

<sup>24</sup> *See Motion Picture Association of America*, *supra* note 20.

<sup>25</sup> *MPAA History*, *supra* note 21.

<sup>26</sup> *Id.*; *see also* WAGUESPACK & SORENSON, *supra* note 20, at 10–11.

<sup>27</sup> MOTION PICTURE PRODUCTION CODE OF 1930 (The Hays Code), *available at* <http://www.artsreformation.com/a001/hays-code.html>.

<sup>28</sup> *Id.*

<sup>29</sup> *Ratings History*, *supra* note 17.

In 1945, former United States Chamber of Commerce President Eric Johnston succeeded Hays.<sup>30</sup> Johnston added to his mission the promotion of American films,<sup>31</sup> which were gaining in popularity overseas in the post-World War II era.

In the late 1960s, alongside the progress of the civil rights, women's rights, and labor movements, a new kind of American film was emerging: frank and open.<sup>32</sup> Amid our society's expanding freedoms, the measures in place had become outdated and ineffective because of the more relaxed social and sexual standards of the time.<sup>33</sup> In 1966, former Special Assistant to President Lyndon Johnson, Jack Valenti, was named MPAA president.<sup>34</sup> That same year, sweeping revisions were made to the Hays Code to reflect changing social mores, liberalizing the code.<sup>35</sup>

In 1968, Valenti, who went on to hold the position for thirty-eight years,<sup>36</sup> founded the voluntary film rating system, CARA,<sup>37</sup> with its core purpose of informing parents about the content of films so they could determine what movies were appropriate for their kids. The ratings established were G, M, R, and X, which were later replaced by the ratings G, PG, PG-13, R, and NC-17.<sup>38</sup> Valenti abhorred the Hays Code's strict limitations on artistic freedom, noting "there was about this stern, forbidding catalogue of '[d]o's and [d]ont's' the odious smell of censorship."<sup>39</sup> Valenti reached out to the National Association of Theatre Owners ("NATO") and other stakeholders in developing his new system.<sup>40</sup> Out of this effort came the very simple notion that continues to define the rating system today: movies would no longer be "approved" or "disapproved."<sup>41</sup> Instead, an independent ratings body,

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<sup>30</sup> *MPAA History*, *supra* note 21.

<sup>31</sup> See DAVID PUTTNAM, *MOVIES AND MONEY* (Vintage Books 1997); *MPAA History*, *supra* note 21. American movies lost popularity as preferences switched to television during World War II. The Hays Code came under consumer pressure due to the switch and filmmakers saw riskier material as a way to bring back audiences to the silver screen.

<sup>32</sup> *MPAA History*, *supra* note 21.

<sup>33</sup> *Motion Picture Association of America*, *supra* note 20.

<sup>34</sup> *MPAA History*, *supra* note 21.

<sup>35</sup> *Motion Picture Association of America*, *supra* note 20.

<sup>36</sup> *MPAA History*, *supra* note 21.

<sup>37</sup> See *infra* Part II.A.3.

<sup>38</sup> WAGUESPACK & SORENSON, *supra* note 20, at 12; *Motion Picture Association of America*, *supra* note 20.

<sup>39</sup> TERRY CHRISTENSEN & PETER J. HAAS, *PROJECTING POLITICS: POLITICAL MESSAGES IN AMERICAN FILMS* 47 (M.E. Sharpe, Inc. 2005).

<sup>40</sup> See 150 CONG. REC. 18,046 (2004); JON LEWIS, *HOLLYWOOD V. HARD CORE: HOW THE STRUGGLE OVER CENSORSHIP SAVED THE MODERN FILM INDUSTRY* 150 (N.Y. Univ. Press 2002); see also Part II.A.3.

<sup>41</sup> *Ratings History*, *supra* note 17; see also Part II.A.3.

comprised of anonymous parents, would give advance cautionary warnings to parents so that they could make informed decisions about which films their children could see.<sup>42</sup> More than forty years later, the system still exists.<sup>43</sup>

Following Jack Valenti's retirement in 2004, former Kansas Congressman and United States Agriculture Secretary Dan Glickman was selected as MPAA Chairman and CEO. Glickman, who held the post until the spring of 2010, led the association during a period of significant industry transformation into the digital era and an epidemic of online copyright theft.<sup>44</sup>

Today, under the leadership of Chairman and CEO Chris Dodd, the MPAA "continues to champion the creative and artistic freedoms of filmmakers, while working to rally public and private institutions around the world to the cause of safeguarding intellectual property rights, advancing technology-driven innovation, and opening markets to the uniquely powerful and increasingly global medium of film."<sup>45</sup> Throughout its history and into the modern era, the MPAA holds true to maintaining its mission to advance the business and the art of filmmaking and its enjoyment around the world.<sup>46</sup> The effectiveness of the MPAA's rating system has been heavily debated for many years and both sides have genuine concerns that have postponed any real action.<sup>47</sup>

### 3. Classifications and Ratings Administration (Current System)

The CARA movie ratings system<sup>48</sup> is a voluntary system operated by the MPAA and NATO. The ratings are given by a board of parents who view each film and, after a group discussion, vote on its rating.<sup>49</sup> The ratings are intended to provide parents with information in advance so they can decide for

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<sup>42</sup> *Ratings History*, *supra* note 17; *see* STEPHEN FARBER, *THE MOVIE RATINGS GAME* (Public Affairs Press 1972); *see also* Part II.A.3.

<sup>43</sup> *MPAA History*, *supra* note 21; *Ratings History*, *supra* note 17.

<sup>44</sup> *MPAA History*, *supra* note 21.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *See* Scott Beggs, *The MPAA Must Die*, *FILM SCHOOL REJECTS* (Feb. 1, 2012), <http://www.filmschoolrejects.com/opinions/the-mpaa-must-die-and-how-you-can-help-make-that-happen.php> (the organization has drafted a petition to end the MPAA). *See generally* *The MPAA: The Motion Picture Atrocity of America*, *DONOTCENSOR.BLOGSPOT* (Mar. 17, 2008), <http://donotcensor.blogspot.com/2008/03/pros-and-cons.html> (demonstrating some of the concerns).

<sup>48</sup> The MPAA also rates film trailers, print advertising, posters, and other media used to promote films. *How does the MPAA Rate Movies?*, *INNOVATEUS.NET*, <http://www.innovateus.net/innopedia/how-does-mpaa-rate-movies> (last visited Sept. 12, 2013).

<sup>49</sup> Clifton Smith, *This Documents is Rated X . . . for Aberrational Honesty: Arguments for Ignoring MPAA Ratings*, *[SIC] MAG.*, <http://sicmagazine.org/mpaa/> (last visited Sept. 12, 2013).

themselves which films are appropriate for their own children.<sup>50</sup> The Board uses criteria “any parent” might use when making a judgment.<sup>51</sup> Theme, language, violence, nudity, sex, and drug use are among content areas considered in the decision-making process.<sup>52</sup>

The raters of films remain undisclosed to studios and all ballots and remarks cast by the raters remain confidential, leaving no recommendations for filmmakers as to how they can improve their MPAA rating if it is unfavorable.<sup>53</sup> Upon receiving a rating, filmmakers may accept the rating, edit and resubmit the movie, appeal the rating, or simply reject the rating altogether, leaving the film dormant in terms of profitability potential, as most theaters will not accept unrated films.<sup>54</sup>

#### 4. “Members” of the MPAA

Although the MPAA does not like to disclose its raters, it is not so bashful about disclosing the identities of the studios that comprise its members. The MPAA proudly lists its members as the “six major U.S. motion picture studios”: Walt Disney Studios Motion Pictures; Paramount Pictures Corporation; Sony Pictures Entertainment, Inc.; Twentieth Century Fox Film Corporation; Universal City Studios, LLC; and Warner Bros. Entertainment, Inc.<sup>55</sup> These six production companies combine to form the members of the MPAA as a single ratings issuance organization with the purpose of administering film ratings, combatting illegal piracy, and controlling the distribution of films.<sup>56</sup> Further, the MPAA website advertises movies for each of its member-studios on its home page and bares all six of the studios’ trademarks; non-member films and studios are nowhere to be found.<sup>57</sup>

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

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

<sup>52</sup> *Id.*; WAGUESPACK & SORENSON, *supra* note 20, at 12–13.

<sup>53</sup> Scott Bowles, *Debating the MPAA’s Mission*, USA TODAY (Apr. 10, 2007, 9:56 AM), [http://usatoday30.usatoday.com/life/movies/news/2007-04-09-movie-ratings-main\\_N.htm](http://usatoday30.usatoday.com/life/movies/news/2007-04-09-movie-ratings-main_N.htm); Smith, *supra* note 49; *see infra* Parts III.B.1.a, III.B.1.d.

<sup>54</sup> *See* WAGUESPACK & SORENSON, *supra* note 20, at 12 (citing *Questions & Answers: Everything You Always Wanted to Know About the Movie Rating System*, CARA (2008), <http://www.filmratings.com/questions.htm>). The unfavorable practices of the ratings system are discussed in Part III.B.

<sup>55</sup> *About Us*, MPAA, <http://www.mpa.org/about> (last visited Sept. 5, 2013) [hereinafter *About Us*]. *See infra* Part III.A to see how “major” these six studios really are.

<sup>56</sup> *What is the Motion Picture Association of America (MPAA)?*, WISE GEEK, <http://www.wisegeek.com/what-is-the-motion-picture-association-of-america-mpaa.htm> (last visited Sept. 5, 2013).

<sup>57</sup> *Motion Picture Association of America*, MPAA, <http://www.mpa.org> (last visited Sept. 5, 2013) [hereinafter *MPAA*]. This may also help show the deference given to the MPAA members in the CARA ratings system, as noted in *infra* Part III.B.1.c. Non-member films are, obviously,

*B. A “Teaser Trailer” of the Sherman Act*

The spirit of unfettered market competition is important and essential to the market economy of the United States.<sup>58</sup> This is so true that Congress believed that consumers deserved protection from the failures of natural competition.<sup>59</sup> Monopolistic schemes frustrate natural competition in such a way that Congress felt the need to create the Sherman Act<sup>60</sup> to protect consumers and the spirit of competition.<sup>61</sup> The Sherman Act thus protects consumers and attempts to cure such market failures by promoting unfettered competition in order to best allocate economic resources, achieve the lowest prices, and create the highest quality products.<sup>62</sup>

First, Part II.B.1 steps through some of the foundations of the Sherman Act and explains some of the policies reinforcing the Act’s creation. Later, in Parts II.B.2 and II.B.3, the intricacies of Section 2 of the Sherman Act, obtaining monopoly power in the relevant market, are fleshed out, allowing specific tailoring of the Act’s workings and elements to the motion picture industry and the MPAA’s actions therein.

1. Foundational Reasoning of the Sherman Act

The focus of Section 2 of the Sherman Act,<sup>63</sup> and the Sherman Act in general, is not to prevent companies from using monopoly power that certain legitimacies of success have created, but rather to protect the spirit of competition spurring from a firm’s efforts to succeed.<sup>64</sup> The Supreme Court of the United States has instructed that the purpose is not actually to protect businesses from natural workings of the market, but to protect public

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included if they were in collaboration with an MPAA member, but the non-member studio’s name is detached. The identity and size of the members comprising the MPAA is important in demonstrating monopoly power and anticompetitive conduct in violation of Section 2 of the Sherman Act.

<sup>58</sup> U.S. DEP’T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT AND SECTION 2 OF THE SHERMAN ACT ch. 1 (2008), available at <http://www.justice.gov/atr/public/reports/236681.htm>. This 2008 Report was withdrawn in 2009 for raising too many hurdles to antitrust enforcement by the government, making it more difficult for the department to prosecute. The changes were made to weaken the hurdles and allow more aggressive prosecuting, not for lack of legal authority contained in the Report. The legal principles cited in the Report are still accurate. See Press Release, Dep’t of Justice, *Justice Department Withdraws Report on Antitrust Monopoly Law*, (May 11, 2009), available at [http://www.justice.gov/atr/public/press\\_releases/2009/245710.htm](http://www.justice.gov/atr/public/press_releases/2009/245710.htm).

<sup>59</sup> *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993).

<sup>60</sup> 15 U.S.C. § 2 (2012).

<sup>61</sup> U.S. DEP’T OF JUSTICE, *supra* note 58, at ch.1.

<sup>62</sup> *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

<sup>63</sup> 15 U.S.C. § 2 (2012).

<sup>64</sup> U.S. DEP’T OF JUSTICE, *supra* note 58, at ch.1.

consumers from certain failures of the market.<sup>65</sup> The law essentially aims at encouraging all firms, dominating and challenging alike, to continue to strive to best competitors; this is done by preventing firms from achieving certain monopolistic levels and from taking steps to cement their existing monopoly power through means incompatible with competition's natural process.<sup>66</sup> As the Supreme Court has explained:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress . . . .<sup>67</sup>

In essence, the natural process of free competition spurs companies to reduce costs, improve the quality of offerings to the public and consumers, to innovate and invent products and services, to inform consumers, and to participate in a wide variety of other activities that will benefit consumers' welfare as a whole. Competition is, at its basic elements, the process by which more efficient companies beat out those less efficient; in theory, society's resources naturally become allocated in the most efficient manner possible.<sup>68</sup> Thus, efficient firms may collect business from the unsatisfied customers of their less efficient rival. This is precisely the type of competitive action that promotes the consumer interests that the Sherman Act fosters.<sup>69</sup>

The focus, though, is not always on economic factors.<sup>70</sup> There is a certain judicial preference in decentralizing economic power, reducing the scope within which private discretion can be used in matters materially affecting others' welfare, enhancing the opportunity for people to exercise independent entrepreneurial impulses and, most importantly, recognizing the social preference for the small instead of the large, as is the foundation and purpose of the Act.<sup>71</sup>

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<sup>65</sup> *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993).

<sup>66</sup> U.S. DEP'T OF JUSTICE, *supra* note 58, at ch.1.

<sup>67</sup> *N. Pac. Ry. Co.*, 356 U.S. at 4.

<sup>68</sup> U.S. DEP'T OF JUSTICE, *supra* note 58, at ch.1 (citations omitted).

<sup>69</sup> *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984).

<sup>70</sup> Mark E. Roszkowski & Ralph Brubaker, *Attempted Monopolization: Reuniting A Doctrine Divorced from Its Criminal Law Roots and the Policy of the Sherman Act*, 73 MARQ. L. REV. 355, 398 (1990).

<sup>71</sup> *Id.*

## 2. Section 2 of the Sherman Act

In furthering the foundations of the Sherman Act, specific sections of the Act are applied to certain situations that create monopolistic tendencies. As such, Section 2 of the Act is especially applicable to the MPAA (and its members) and its ratings system. Section 2 of the Sherman Act makes it unlawful to “monopolize, or attempt to monopolize, or combine or conspire with any other . . . to monopolize any part of the trade or commerce among the several States . . . .”<sup>72</sup> Conviction for monopolizing trade is a felony with quite high repercussions.<sup>73</sup>

The offense under Section 2 of the Act has two prongs: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.<sup>74</sup> The first prong of this test has two elements: (a) the possession of monopoly power (b) in the relevant market. The first element (a) tends to be the focus of the analysis in the first prong of Section 2 of the Act.

“Monopoly power,” according to the Supreme Court, means substantial market power that is durable rather than fleeting—possessing the requisite market power with the ability to raise price profitability above what would be possible in a competitive market or having the power to exclude competition altogether.<sup>75</sup> In relation, the Supreme Court has recognized that monopoly power encompasses a substantial amount of market power.<sup>76</sup>

To identify and prove monopoly power, courts have relied on a showing of an entity’s control of a certain dominant share of relevant markets.<sup>77</sup>

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<sup>72</sup> 15 U.S.C. § 2 (2012).

<sup>73</sup> *Id.* 15 U.S.C. § 1 (2012) would be violated in tandem with Section 2 of the Act, as “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States” is declared illegal by Section 1, as well. *Id.* The analysis of this Note follows the workings of Section 2 because of the challenges facing Section 1 based upon constitutionality concerns, some repealing and preemption rulings, and proposed legislation that could amend the statute. As Section 2 focuses on the results of Section 1 acts, it is important to note that any formal prosecution for violation of Section 2 would include the workings of Section 1 of the Act involving agreements unreasonably restraining competition and affecting interstate commerce.

<sup>74</sup> *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

<sup>75</sup> *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 109 n.38 (1984) (defining market power); *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956) (defining monopoly power as power to control prices or exclude competition).

<sup>76</sup> *Eastman Kodak Co. v. Image Technical Serv., Inc.*, 504 U.S. 451, 481 (1992).

<sup>77</sup> *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945); *see Grinnell Corp.*, 384 U.S. at 571; *Am. Tobacco Co. v. United States*, 328 U.S. 781, 813–14 (1946); *United States v. Dentsply Int’l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005); *Colo. Interstate Gas Co. v. Natural Gas Pipeline Co. of Am.*, 885 F.2d 683, 694 n.18 (10th Cir. 1989); *Exxon Corp. v. Berwick Bay Real Estates Partners*, 748 F.2d 937, 940 (5th Cir. 1984) (*per curiam*).

In *United States v. Grinnell Corporation*,<sup>78</sup> the Supreme Court held that the existence of such monopoly power could ordinarily be drawn where an entity controls a “predominant share of the market.”<sup>79</sup> And in *American Tobacco Company v. United States*,<sup>80</sup> the Court decided that an entity possessing over 80% market share constituted a “substantial monopoly.”<sup>81</sup> Other courts have expanded upon the amount of market share that will suffice to show monopoly power,<sup>82</sup> and the Supreme Court has recognized some of the expansions.<sup>83</sup>

Market share has not been the only factor in deciding whether monopoly power exists. For instance, the Second Circuit will draw an inference of monopoly power only after “full consideration of the relationship between market share and other relevant market characteristics.”<sup>84</sup> In addition to market share, other factors may be considered in deciding monopoly power, such as entry barriers; number and size of competitors; degree of market competition; actual reality of using monopoly power to affect market prices or exclude competitors; excessive profits, margins, or prices; and absolute size of the firm.<sup>85</sup>

In explaining the second prong of Section 2, the “willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident,” the Court has reasoned that simply possessing monopoly power, in and of itself, is not unlawful and is actually quite an important element in the free-market system.<sup>86</sup> The opportunities afforded by monopoly power in the short-term attract “business acumen” in the first place; it encourages risks that can produce innovation and growth of the economy.<sup>87</sup> In order to safeguard the incentive to innovate, the Court decided that the

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<sup>78</sup> 384 U.S. 563 (1966).

<sup>79</sup> *Grinnell Corp.*, 384 U.S. at 571.

<sup>80</sup> 328 U.S. 781 (1946).

<sup>81</sup> *Am. Tobacco Co.*, 328 U.S. at 797.

<sup>82</sup> *Aluminum Co. of Am.*, 148 F.2d at 424 (90% market share is definitely enough to show monopoly power); *Colo. Interstate Gas Co.*, 885 F.2d at 694 n.18; *Dentsply Int'l, Inc.*, 399 F.3d at 187 (70–80% market share is enough to show monopoly power); *Exxon Corp.*, 748 F.2d at 940 (per curiam). Detail is paid to these delineations in Part III.A of this Note.

<sup>83</sup> *Grinnell Corp.*, 384 U.S. at 571 (recognizing the delineation in *Aluminum Co. of Am.*, 148 F.2d at 424).

<sup>84</sup> *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 98 (2d Cir. 1998) (these characteristics include the “strength of the competition, the probable development of the industry, the barriers to entry, the nature of the anticompetitive conduct[,] and the elasticity of consumer demand” (citing *Int'l Distribution Centers, Inc. v. Walsh Trucking Co. Inc.*, 812 F.2d 786, 792 (2d Cir. 1987))).

<sup>85</sup> Roszkowski, *supra* note 70, at 359.

<sup>86</sup> *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (citing *Grinnell Corp.*, 384 U.S. at 570–71).

<sup>87</sup> *Id.*

possession of monopoly power must be coupled with an element of anticompetitive conduct (such as collusion, refusals to cooperate, or the construction of entry barriers) in order to be unlawful.<sup>88</sup>

### 3. Attempting to Monopolize

As stated in Section 2 of the Sherman Act, an “attempt to monopolize” is also considered a felony.<sup>89</sup> In analyzing attempted monopolization, the same principles are applied as were applied in monopolization claims (analysis from Part II.B.2 of this Note).<sup>90</sup> Principally, similar elements must be proven in both monopolization claims and attempted monopolization claims. An essential difference, though, is that in attempt claims, monopoly power has not yet been reached—the defendant is effectively attempting to reach that level of power.

In developing attempted monopolization analysis, courts have added further requirements beyond those needed for monopolization claims. In addition to establishing that a defendant has engaged in predatory or anticompetitive conduct,<sup>91</sup> courts have required there be a finding of a specific intent to monopolize,<sup>92</sup> that there be entry barriers accelerating exercisable market power,<sup>93</sup> and that there be a “dangerous probability” of achieving the sought monopoly power.<sup>94</sup>

As in monopolization claims, predatory or anticompetitive conduct serves to prove the second prong of Section 2 of the Sherman Act, “the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”<sup>95</sup> But certain behaviors must be viewed differently when conducted by monopolists and those attempting monopolization.<sup>96</sup> Conduct that

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<sup>88</sup> *Id.*; *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985). Notions of anticompetitive conduct are discussed more in Part III.B of this Note.

<sup>89</sup> 15 U.S.C. § 2 (2012).

<sup>90</sup> *See* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 310 (7th ed. 2012) (“The same principles used in the monopolization context to distinguish aggressive competition from anticompetitive exclusion thus apply in attempt cases.”).

<sup>91</sup> *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

<sup>92</sup> *Id.*

<sup>93</sup> *AD/SAT v. Associated Press*, 181 F.3d 216, 227 (2d Cir. 1999) (citations omitted); *see also* *United States v. Dentsply Int’l, Inc.*, 399 F.3d 181, 188–89 (3d Cir. 2005) (“In evaluating monopoly power, it is not market share that counts, but the ability to *maintain* market share.” (quoting *United States v. Syufy Enters.*, 903 F.2d 659, 665–66 (9th Cir. 1990))).

<sup>94</sup> *Spectrum Sports, Inc.*, 506 U.S. at 456.

<sup>95</sup> *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966)). Refer to Part III.B of this Note to see requirements for showing anticompetitive conduct.

<sup>96</sup> *Dentsply Int’l, Inc.*, 399 F.3d at 187 (“Behavior that otherwise might comply with antitrust law may be impermissibly exclusionary when practiced by a monopolist.”).

is illegal for a monopolist may be legal for a firm that lacks the requisite monopoly power—certain conduct may have no anticompetitive effects unless undertaken by a firm already possessing monopoly power.<sup>97</sup>

In an attempt to prove defendants in attempted monopolization cases have harbored specific intent to monopolize, courts have differed. In some instances, specific intent analysis has been encouraged,<sup>98</sup> and in others, it has been abhorred.<sup>99</sup> In cases upholding the analysis, specific intent has not been viewed as the intent to vigorously compete, but the specific intent to destroy competition or monopolize.<sup>100</sup> Yet other courts have criticized this intent element as nebulous and distracting from the proper analysis of potential competitive effects of challenged conduct.<sup>101</sup>

Courts have held that entry barriers, including ones created by the firm's own conduct, permitting the firm to exercise substantial market power must be in place for an appreciable period without erosion by new entries or expansion.<sup>102</sup> That is to say, the power possessed by the firm is durable, not fleeting or temporary.<sup>103</sup> And not only must there be barriers to entry, these barriers must be significant.<sup>104</sup>

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<sup>97</sup> *Id.* For example, drastically undercutting competitors can be anticompetitive, but only in the instance that a monopolist firm is trying to undercut a smaller competitor, not in the instance a smaller competitor is trying to oust the larger, monopolistic leader in the market.

<sup>98</sup> *Spectrum Sports, Inc.*, 506 U.S. at 459.

<sup>99</sup> *See, e.g.*, *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989) (Easterbrook, J.) (“Intent does not help to separate competition from attempted monopolization and invites juries to penalize hard competition . . . . Stripping intent away brings the real economic questions to the fore at the same time as it streamlines antitrust litigation.”).

<sup>100</sup> *Spectrum Sports*, 506 U.S. at 459.

<sup>101</sup> *See, e.g.*, *A.A. Poultry Farms, Inc.*, 881 F.2d at 1402 (Easterbrook, J.) (“Intent does not help to separate competition from attempted monopolization and invites juries to penalize hard competition . . . . Stripping intent away brings the real economic questions to the fore at the same time as it streamlines antitrust litigation.”). Because of the fading relevance of specific intent in these claims, specific intent analysis is outside the scope of, and is not discussed in, this Note.

<sup>102</sup> *AD/SAT v. Associated Press*, 181 F.3d 216, 227 (2d Cir. 1999) (citations omitted); *see also Dentsply Int'l, Inc.*, 399 F.3d at 188–89 (“In evaluating monopoly power, it is not market share that counts, but the ability to *maintain* market share.” (quoting *United States v. Syufy Enters.*, 903 F.2d 659, 665–66 (9th Cir. 1990))).

<sup>103</sup> *Colo. Interstate Gas Co. v. Natural Gas Pipeline Co. of Am.*, 885 F.2d 683, 695–96 (10th Cir. 1989) (finding a firm lacked monopoly power because its “ability to charge monopoly prices will necessarily be temporary”); *see, e.g.*, *W. Parcel Express v. UPS*, 190 F.3d 974, 975 (9th Cir. 1999) (finding that a firm with an allegedly “dominant share” could not possess monopoly power because there were no significant “barriers to entry”); *Colo. Interstate Gas*, 885 F.2d at 695–96 (“If the evidence demonstrates that a firm’s ability to charge monopoly prices will necessarily be temporary, the firm will not possess the degree of market power required for the monopolization offense.”); *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 252 (D.C. Cir. 1987) (finding that a firm did not have monopoly power when a competitor was able to supply customer’s demand within a year); *Borough of Lansdale v. Phila. Elec. Co.*, 692 F.2d 307,

In finding a dangerous probability of achieving monopoly power in attempted monopolization cases, lower courts have relied on the same factors used in ascertaining possession of monopoly power in monopolization cases.<sup>105</sup> Courts have realized, though, that a lesser quantum of market power can suffice in proving a dangerous probability of monopoly power.<sup>106</sup> This inquiry requires consideration of “the relevant market and the defendant’s ability to lessen or destroy competition in that market.”<sup>107</sup>

All in all, antitrust analysis must always be adapted to the particular configuration and contexts of the industry at issue.<sup>108</sup>

### III. BEHIND THE SCENES OF THE MPAA: THE MAKING OF A MONOPOLY

As mentioned, the appropriate section of the Sherman Act must be applied to the industry at issue in order to determine illegal monopolistic behavior. As Section 2 of the Sherman Act is especially appropriate in terms of the members of the MPAA combining and conspiring with one another,<sup>109</sup> the specific considerations, outlined in Parts II.B.2 and II.B.3, should be tailored to the workings of the MPAA and the movie industry. In molding the analysis to the MPAA and the movie industry, Part III.A uses the collective market share of the members combining to form the MPAA to show that it has obtained monopoly power in the relevant market. Further, Part III.B uses the same collective market share to show that a dangerous probability of achieving monopoly power exists, proving that the MPAA is, at the very least, attempting monopolization in violation of Section 2 of the Sherman Act.

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312–14 (3d Cir. 1982) (affirming finding that power company did not have monopoly power when customer could have built its own power line within sixteen months).

<sup>104</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 82 (D.C. Cir. 2001) (en banc) (per curiam); *see also* *Harrison Aire, Inc. v. Aerostar Int’l, Inc.*, 423 F.3d 374, 381 (3d Cir. 2005) (“In a typical section 2 case, monopoly power is ‘inferred from a firm’s possession of a dominant share of a relevant market that is protected by entry barriers.’” (quoting *Microsoft Corp.*, 253 F.3d at 51)).

<sup>105</sup> *See, e.g., Microsoft Corp.*, 253 F.3d at 81 (“Defining a market for an attempted monopolization claim involves the same steps as defining a market for a monopoly maintenance claim . . .”) (factors considered by courts include, most importantly, market share and barriers to entry).

<sup>106</sup> *See, e.g., Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir. 1995) (“[T]he minimum showing of market share required in an attempt case is a lower quantum than the minimum showing required in an actual monopolization case.”).

<sup>107</sup> *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

<sup>108</sup> *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004). This Note focuses on tailoring this analysis to the movie production industry.

<sup>109</sup> *See supra* Parts II.A.2, II.A.4; *infra* Part III.A.

A.      *Monopoly Power in the Relevant Market*

When analyzing the practice of the MPAA and its members, it is easy to draw the conclusion that a substantial amount of monopoly power exists, given the overwhelming concentration of media, as a whole, and the increasing concentration of power of the MPAA members in terms of market share. First thing's first, though. Six mega-corporation conglomerates own and collectively control nearly all media in the United States: Time Warner, NBC Universal, CBS Corporation, Rupert Murdoch's News Corp., Walt Disney, and Viacom.<sup>110</sup> These organizations are often referred to as the "big six" (not to be confused with the members of the MPAA), as they dominate the news and entertainment industry and continue to concentrate the segments of the media market that they do not completely control.<sup>111</sup> In proving the increasing concentration of media, author Ben H. Bagdikian tracks the concentration of the market from the early 1980s to 2000:

[I]n 1983, fifty corporations dominated most of every mass medium and the biggest media merger in history was a \$340 million deal . . . . [I]n 1987, the fifty companies had shrunk to twenty-nine . . . . [I]n 1990, the twenty-nine had shrunk to twenty-three . . . . [I]n 1997, the biggest firms numbered ten and involved the \$19 billion Disney-ABC deal, at the time the biggest media merger ever . . . . [In 2000,] AOL Time Warner's \$350 billion merged corporation [was] more than 1,000 times larger [than the biggest deal of 1983].<sup>112</sup>

The "big six" conglomerates own the members of the MPAA.<sup>113</sup>

Monopoly power, as mentioned in Part II.B and as laid down by the Court, has been defined as the power to control prices or exclude competition.<sup>114</sup> It seems apparent that the members of the MPAA have the power to exclude smaller, competing companies either by the hereditary power

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<sup>110</sup> Michael Snyder, *Who Owns the Media? The Six Monolithic Corporations that Control Almost Everything We Watch, Hear, and Read*, THE ECONOMIC COLLAPSE (Oct. 4, 2010), <http://theeconomiccollapseblog.com/archives/who-owns-the-media-the-6-monolithic-corporations-that-control-almost-everything-we-watch-hear-and-read>.

<sup>111</sup> *Id.*

<sup>112</sup> BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* xx–xxi (Beacon Press, 6th ed. 2000).

<sup>113</sup> Snyder, *supra* note 110 (much of the information in the chart comes from [mediaowners.com](http://mediaowners.com) and reveals only a small fraction of the media outlets that these six behemoths actually own).

<sup>114</sup> *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 109 n.38 (1984) (defining "market power"); *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956) (defining monopoly power as power to control prices or exclude competition); *see Am. Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 501 (1940); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 58 (1911).

from their concentrated parent media conglomerates or by the constraints in the market requiring smaller companies to submit to the “voluntary” MPAA ratings board, mentioned later in this Note.<sup>115</sup>

Further, it could be practically impossible for new, small companies to produce a movie with the hopes of substantial profit without giving full access to the MPAA and consequently the will of its members.<sup>116</sup> For example, Metro-Goldwyn-Mayer (“MGM”) was a member of the MPAA until 2005, when a deal with Sony Pictures Entertainment (a more substantial member of the MPAA) fell through.<sup>117</sup> Though Sony landed a 20% stake in MGM at the end of negotiations, Sony initially wanted to buy MGM outright, and MGM’s refusal to comply with the outright offer seemed to land it a one-way ticket out of the MPAA.<sup>118</sup> Even before a market share analysis, the MPAA and its members seem to entertain at least some initial level of monopoly power in the relevant market.

### 1. Using Market Share to Demonstrate Monopoly Power

In deciding whether a firm has the requisite monopoly power in the relevant market,<sup>119</sup> courts have looked to whether the firm has a high market share of the relevant market. In developing the market share to monopoly power correlation, the Second Circuit in *United States v. Aluminum Company of America*<sup>120</sup> decided that 90% share of the relevant market was most definitely an initial indicator of the requisite monopoly power for violation of Section 2 of the Act.<sup>121</sup> Further, as mentioned in Part II.B, anywhere from 70% to 80% share of the relevant market has been held to indicate, at least initially,

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<sup>115</sup> See *infra* Part III.B.1.a.

<sup>116</sup> This contention is further communicated in Part III.B.

<sup>117</sup> *Sony and MGM Merger Acquisition*, MAPSOFWORLD.COM, <http://finance.mapsofworld.com/merger-acquisition/company/sony-mgm.html> (last visited Sept. 4, 2013) (MGM stipulated that the deal be done in cooperation with TPG Capital).

<sup>118</sup> *Id.*; MPAA, *supra* note 57 (MGM is no longer a member of the MPAA).

<sup>119</sup> Though a simple concept, as an initial matter, the relevant market must be defined in two contexts: product and geographic. DON MAYER ET AL., LEGAL ASPECTS OF MARKETING AND SALES ch. 23.6 (1st ed. 2012). Concerning this Note, the product market can be viewed as motion picture productions and distributions, except where it is specifically identified that the movie ratings “market” and the productions/distributions market are to be separated for analysis. The geographic market, in terms of analyzing market share, is considered the U.S./Canada box office (global data is at times used in this Note to emphasize the scale of the industry world-wide).

<sup>120</sup> 148 F.2d 416 (2d Cir. 1945).

<sup>121</sup> *Aluminum Co. of Am.*, 148 F.2d at 424; see *Am. Tobacco Co. v. United States*, 328 U.S. 781, 813–14 (1946).

acquisition of the requisite monopoly power needed for a Section 2 violation.<sup>122</sup> In following this guide in determining violation of Section 2 of the Sherman Act (the conspiring of industry competitors to collectively monopolize the market),<sup>123</sup> the market shares of the members comprising the MPAA (a single organization) must be examined to decide if they collectively hold the requisite dominant share of the market to reach monopoly power in the relevant market.

To help demonstrate the vastness of the relevant box office market, some of the MPAA's own statistics may shed some light. In 2011, the global box office climbed to a staggering \$32.6 billion, with a 35% increase in the Chinese box office in the same year.<sup>124</sup> In the U.S./Canada, in 2011, the box office grossed \$10.2 billion, which is a 6% increase from five years prior.<sup>125</sup> Further, more than two-thirds of the entire U.S./Canada population—nearly 221.2 million people—traveled to theaters at least once over the course of 2011, and 51% of these individuals paid to see a 3D movie.<sup>126</sup> This industry has become a staple in American culture and is growing rapidly in other cultures.

Though MPAA member films have declined in number since 2004, their collective market share has become more and more concentrated.<sup>127</sup> Members released just over 140 films, while non-member MPAA rated films increased to nearly 470 films in 2011.<sup>128</sup> But these statistics, gathered by the MPAA in its annual report, are somewhat deceptive. Of all 610 movies rated and released in 2011, 110 films made up 90% of the total box office; likewise, only two non-member films were in the top twenty-five grossing productions in 2011.<sup>129</sup>

In 2012, the U.S./Canada box office topped results of 2011, grossing \$10.822 billion.<sup>130</sup> Further, in 2012, the six members of the MPAA have toppled their competition.<sup>131</sup> The members of the MPAA make up more than 79% of the gross U.S./Canada box office, leaving only five non-member studios with a market share over 1%, showing how concentrated this market

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<sup>122</sup> United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3d Cir. 2005); Colo. Interstate Gas Co. v. Natural Gas Pipeline Co. of Am., 885 F.2d 683, 694 n.18 (10th Cir. 1989); Exxon Corp. v. Berwick Bay Real Estates Partners, 748 F.2d 937, 940 (5th Cir. 1984) (per curiam).

<sup>123</sup> 15 U.S.C. § 2 (2012).

<sup>124</sup> MPAA, THEATRICAL MARKET STATISTICS 2 (2011), available at <http://www.mpa.org/resources/5bec4ac9-a95e-443b-987b-bff6fb5455a9.pdf>.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 16.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 16–17.

<sup>130</sup> *Studio Market Share, BOX OFFICE MOJO*, <http://boxofficemojo.com/studio/?debug=0&view=parent&p=.htm> (last visited Sept. 4, 2013).

<sup>131</sup> *Id.*

has become.<sup>132</sup> If the market share to monopoly power correlation standards from several circuit courts are applied, the MPAA members have reached the initial level of market share to indicate monopoly power in the relevant market.<sup>133</sup>

## 2. A Dangerous Probability of Monopoly Power in Attempt

As mentioned in Part II.B.3, courts, commentators, and panelists have recognized that situations exist where “there [is] a dangerous probability that the defendant’s conduct would propel it from a non-monopolistic share of the market to a share that would be large enough to constitute a monopoly for purposes of the monopolization offense.”<sup>134</sup> The dangerous probability of obtaining monopoly power, as mentioned, requires consideration of the ability to lessen competition in the relevant market—the same factors are used in assessing monopoly power in monopolization claims while recognizing that a lower level of market power can suffice in proving attempted monopolization.<sup>135</sup>

If nearly 80% of the market (gross box office in the U.S./Canada) is not enough to demonstrate, at least initially, monopoly power of the MPAA and its members, then some other facts should be considered in deciding whether there is a dangerous probability that monopoly power will be obtained. If MGM, who was booted from the MPAA’s membership, were to regain its membership in the MPAA, a serious amount of revenue would be attributed to the already vast market share held by the members, further concentrating the already dominant market share of the MPAA members.<sup>136</sup> For instance, in 2012 alone, *Skyfall*,<sup>137</sup> the latest installment in Ian Fleming’s James Bond franchise, and *The Hobbit: An Unexpected Journey*,<sup>138</sup> another powerful franchise adapted from J.R.R. Tolkien’s children’s classic, contributed over \$1.36 billion to the worldwide

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<sup>132</sup> *Id.* (Lionsgate comes the closest to reaching the level of any of the MPAA members, grasping a 7.3% market share).

<sup>133</sup> *United States v. Dentsply Int’l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005); *Colo. Interstate Gas Co. v. Natural Gas Pipeline Co. of Am.*, 885 F.2d 683, 694 n.18 (10th Cir. 1989); *Exxon Corp. v. Berwick Bay Real Estates Partners*, 748 F.2d 937, 940 (5th Cir. 1984) (per curiam).

<sup>134</sup> *Colo. Interstate Gas Co.*, 885 F.2d at 694.

<sup>135</sup> *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993); see, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34, 81 (D.C. Cir. 2001) (en banc) (per curiam) (“Defining a market for an attempted monopolization claim involves the same steps as defining a market for a monopoly maintenance claim . . .”) (factors considered by courts include, most importantly, market share and barriers to entry); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir. 1995) (“[T]he minimum showing of market share required in an attempt case is a lower quantum than the minimum showing required in an actual monopolization case.”).

<sup>136</sup> See *supra* Part III.A.

<sup>137</sup> *SKYFALL* (MGM 2012).

<sup>138</sup> *THE HOBBIT: AN UNEXPECTED JOURNEY* (MGM 2012).

box office totals—each are MGM films.<sup>139</sup> In the midst of its comeback, MGM is exploring selling its operations, adding to the expectation that a member studio will acquire MGM, subsequently adding to the members' collective market share.<sup>140</sup>

Further, in 2010, Lionsgate and MGM were in talks to merge to become one of the most powerful independent studios with its library of movies and television shows.<sup>141</sup> Though this deal fell through, it was dangerously close to becoming reality, as major holder of Lionsgate Carl Icahn pushed for the merger by offering \$500 million to MGM to relieve the faltering studio's debts.<sup>142</sup> Had this deal resulted in a merger, and in the event MGM regains its membership, the MPAA would see its market share push over the 85% mark and possibly make the push to over 90% of total market share as Lionsgate and MGM continue to recover.<sup>143</sup> With talks that MGM will sell its operations in the near future, Lionsgate is again listed as a likely purchaser of the studio.<sup>144</sup>

In assessing a “dangerous probability” in obtaining monopoly power in attempt cases and in using the same factors as are used in monopolization cases, the standard from *Aluminum Company of America*, as mentioned and applied in Part III.A.1, seems appropriate.<sup>145</sup> The dangerous probability of obtaining a 90% market share is definitely an indicator of the requisite

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<sup>139</sup> *Skyfall Closes in on \$1 Billion Worldwide*, BUSINESS INSIDER, <http://www.businessinsider.com/skyfall-closes-in-on-1-billion-worldwide—heres-your-box-office-roundup-2012-12> (last visited Sept. 4, 2013); *The Hobbit: An Unexpected Journey*, BOX OFFICE MOJO, <http://www.boxofficemojo.com/movies/?id=hobbit.htm> (last visited Sept. 4, 2013) (these films were still in theaters at the time these statistics were counted, meaning that more box office revenues were brought in before the films finished running in theaters) (these films were done in collaboration with MPAA member studios, but the rights to the franchises and the respective studio revenues add to monopoly power and market share alike).

<sup>140</sup> See Brooks Barnes, *Latest Overhaul of the MGM Studio Appears to Be a Moneymaker*, N.Y. TIMES, Sept. 9, 2013, at B1, available at [http://www.nytimes.com/2013/09/09/business/media/latest-overhaul-of-the-mgm-studio-appears-to-be-a-moneymaker.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/09/09/business/media/latest-overhaul-of-the-mgm-studio-appears-to-be-a-moneymaker.html?pagewanted=all&_r=0).

<sup>141</sup> Claudi Eller & Ben Fritz, *Lions Gate, MGM in Merger Talks*, L.A. TIMES, June 24, 2010, <http://articles.latimes.com/2010/jun/24/business/la-fi-ct-mgm-20100624>.

<sup>142</sup> *Icahn Said to Push MGM-Lionsgate Merger*, N.Y. TIMES, Oct. 1, 2010, <http://dealbook.nytimes.com/2010/10/01/icahn-said-to-push-mgm-lions-gate-merger/>.

<sup>143</sup> See *Studio Market Share*, *supra* note 130.

<sup>144</sup> Barnes, *supra* note 140.

<sup>145</sup> *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945); see *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *Am. Tobacco Co. v. United States*, 328 U.S. 781, 813–14 (1946); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005); *Colo. Interstate Gas Co. v. Natural Gas Pipeline Co. of Am.*, 885 F.2d 683, 694 n.18 (10th Cir. 1989); *Exxon Corp. v. Berwick Bay Real Estates Partners*, 748 F.2d 937, 940 (5th Cir. 1984) (per curiam).

monopoly power for a Section 2 violation.<sup>146</sup> Because a lesser quantum of monopoly power has been noted proper when dealing with monopolization attempt cases, the conclusion that the MPAA members at least possess a dangerous probability of obtaining monopoly power is especially appropriate.<sup>147</sup>

Though the evidence lends to the conclusion that the MPAA has obtained, or is dangerously close to obtaining, monopoly power in the relevant market, this power must be coupled with an element of anticompetitive conduct.<sup>148</sup> Further, entry barriers allowing the exercise of substantial market power are significant evidence in showing anticompetitive elements of monopolistic power.<sup>149</sup> As such, Part III.B serves to prove that the CARA ratings system employed by the MPAA is a significant entry barrier to the market, showing anticompetitive behavior coupled with monopoly power.

*B. Significant Barriers to Entry: The MPAA Ratings System*

Though market share has been a significant marker in determining whether a firm possesses the requisite monopoly power for a Section 2 violation, other factors have been considered in solidifying the inquiry.<sup>150</sup> As mentioned,<sup>151</sup> these other factors include entry barriers; number and size of competitors; degree of market competition; actual reality of using substantial market power to affect market prices or exclude competitors; excessive profits, margins, or prices; and absolute size of the firm. Further, entry barriers, even those created by the firm itself, permitting the firm to exercise substantial market power for an appreciable period without erosion by other or new entries or expansions, have become significant evidence in proving monopolistic power;<sup>152</sup> this power must be durable and not fleeting or temporary.<sup>153</sup> The

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<sup>146</sup> *Aluminum Co. of Am.*, 148 F.2d at 424; see *Grinnell Corp.*, 384 U.S. at 571; *American Tobacco Co.*, 328 U.S. at 813–14; *Dentsply Int'l, Inc.*, 399 F.3d at 187; *Colo. Interstate Gas Co.*, 885 F.2d at 694 n.18; *Exxon Corp.*, 748 F.2d at 940.

<sup>147</sup> See, e.g., *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir. 1995) (“[T]he minimum showing of market share required in an attempt case is a lower quantum than the minimum showing required in an actual monopolization case.”).

<sup>148</sup> *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (emphasis omitted).

<sup>149</sup> *AD/SAT v. Associated Press*, 181 F.3d 216, 227 (2d Cir. 1999) (citations omitted); see also *Dentsply Int'l, Inc.*, 399 F.3d at 188–89 (“In evaluating monopoly power, it is not market share that counts, but the ability to *maintain* market share.”) (quoting *United States v. Syufy Enters.*, 903 F.2d 659, 665–66 (9th Cir. 1990)).

<sup>150</sup> Roszkowski & Brubaker, *supra* note 70.

<sup>151</sup> See *supra* Part II.B.

<sup>152</sup> *AD/SAT*, 181 F.3d at 227 (citations omitted); see also *Dentsply Int'l, Inc.*, 399 F.3d at 188–89 (“In evaluating monopoly power, it is not market share that counts, but the ability to *maintain* market share.”) (quoting *United States v. Syufy Enters.*, 903 F.2d 659, 665–66 (9th Cir. 1990)).

possession of monopoly power will not be found unlawful unless it is accompanied by an element of this anticompetitive conduct.<sup>154</sup> This Part focuses mostly on entry barriers in further proving anticompetitive conduct coupled with monopoly power in the market, as the other factors bear a correlation to the market share analysis above.<sup>155</sup>

#### 1. CARA is an Avenue for Member Deference

As mentioned in Part II.A.3, the ratings system established by the MPAA is the Classifications and Ratings Administration. This system is “voluntary” and the MPAA collaborates with NATO in operating the system, according to the MPAA.<sup>156</sup> Contrary to the MPAA’s contentions, this ratings system creates an entry barrier allowing substantial member deference by necessitating submission to the system that hides behind a cloak of ambiguity and non-disclosure.

In Part III.B.1.a, this Note shows how the ratings system is truly involuntary, requiring submission in order to generate any substantial profit. Parts III.B.1.b and III.B.1.c discuss the ambiguity of the ratings system, which has allowed a recognizable amount of deference to be given to the members of the MPAA. Part III.B.1.d continues by detailing the unfair practice of refusing to disclose raters, which has provided a shelter of excuses for the MPAA and its members to continue the market constraining activity. Lastly, Part III.B.1.e suggests a simple, proven solution to cure the inadequacies of the system, lessening the MPAA’s ability to use the ratings barrier in maintaining its monopoly power.

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<sup>153</sup> See *Colo. Interstate Gas Co. v. Natural Gas Pipeline Co. of Am.*, 885 F.2d 683, 695–96 (10th Cir. 1989) (finding a firm lacked monopoly power because its “ability to charge monopoly prices will necessarily be temporary”); see, e.g., *W. Parcel Express v. UPS*, 190 F.3d 974, 975 (9th Cir. 1999) (finding that a firm with an allegedly “dominant share” could not possess monopoly power because there were no significant “barriers to entry”); *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 252 (D.C. Cir. 1987) (finding that a firm did not have monopoly power when a competitor was able to supply customer’s demand within a year); *Borough of Lansdale v. Phila. Elec. Co.*, 692 F.2d 307, 312–14 (3d Cir. 1982) (affirming finding that power company did not have monopoly power when customer could have built its own power line within sixteen months).

<sup>154</sup> *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (emphasis omitted).

<sup>155</sup> See *supra* Part III.A.

<sup>156</sup> As is seen in Part III.B.1.a, the ratings system is not really “voluntary” at all, nor does the MPAA “collaborate” with theater owners in enforcing their ratings on the consumers.

a. A “Voluntary” Ratings System

As mentioned above,<sup>157</sup> the MPAA ratings system (CARA) is voluntary and has no force of law. These notions do not hold so true throughout the motion picture industry, however, especially if a filmmaker expects a wide release to theaters to generate large profits for an expensive film. This Part draws attention to the correlations between ratings and profitability and how wide-release films depend on submission to the MPAA’s system to avoid industry suicide.

CARA is designed to protect children by informing parents about the contents of movies.<sup>158</sup> Further, children account for roughly one-third of all film-receipts in theaters; movies that restrict the ability of children to attend earn less on average.<sup>159</sup> Even though the MPAA ratings hold no legal weight,<sup>160</sup> studios’, cinemas’, and retailers’ participation in the MPAA’s system has been so pervasive for so long that the system has been adopted as a de facto standard in the industry and is practically mandatory.<sup>161</sup> Since children make up a large section of the market and because the MPAA ratings have become a “requirement” in the industry, production companies much prefer more lenient ratings.<sup>162</sup>

Conditional upon the MPAA rating received, films with more explicit sexual content and more violence will attract more viewers, leaving filmmakers with an incentive to “push the envelope” of the desired rating category and further deceiving parents in what their children may see in a film.<sup>163</sup> The PG-13 rating seems to compromise these incentives particularly well, allowing a younger demographic to be reached while still pushing the boundaries in terms of sex and violence.<sup>164</sup> To further demonstrate how profitability hinges on

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<sup>157</sup> See *supra* Part II.A.3.

<sup>158</sup> See *supra* Part II.A.3. These ratings do a very poor job of informing parents about any wary content of a film.

<sup>159</sup> WAGUESPACK & SORENSON, *supra* note 20, at 3.

<sup>160</sup> See *infra* Part III.B.1.b.

<sup>161</sup> *AMC Defies MPAA Bullies: Will Show Unrated Documentary to Kids with Permission Slips*, TECHDIRT (Mar. 28, 2012, 12:12 PM), <http://www.techdirt.com/articles/20120328/10242818279/amc-defies-mpaa-bullies-will-show-unrated-documentary-to-kids-with-permission-slips.shtml>.

<sup>162</sup> WAGUESPACK & SORENSON, *supra* note 20, at 3.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* As a side note, the PG-13 ratings system exists mostly thanks to Steven Spielberg. Spielberg’s 1975 film *Jaws* straddled the line between the then-existing PG and R ratings, and in 1984, the release of his films *Indiana Jones and the Temple of Doom* and *Gremlins* received some criticism for the PG ratings due to the fairly graphic scenes in both films. At Spielberg’s behest, the MPAA settled upon the “PG-13” designation later that year. Kevin Burt, *The History of the PG-13 Rating*, LDS CINEMA ONLINE, <http://motleyvision.org/ldscinema/2012/06/the-history-of-the-pg-13-rating/> (last visited Sept. 6, 2013). Spielberg’s films had generated vast

ratings, consider some statistics for box office revenues in 2012: PG - \$2,118,490,869; PG-13 - \$5,624,694,444; R - \$2,969,612,903.<sup>165</sup> The category with the capability to reach a younger target audience but also “push the envelope” in its content has landed the biggest percentage of revenue out of the three largest rating categories by gross revenue—PG-13 reigns supreme. Out of all releases, PG-13 films earn over 50% of gross revenues in the industry.<sup>166</sup>

Though any film can be released without a rating, it is considered commercial suicide, pinning the nail in the coffin of a film before it draws its first breath. Most theaters treat a film that does not bear a rating as if it harbors something even less favorable—the dreaded NC-17.<sup>167</sup> An NC-17 rating renders a film relatively stagnant and is a rating under which success is nearly impossible, as most theaters will not show these films at all.<sup>168</sup> These least favorable ratings (or non-ratings in this case), combined, account for only 0.5% of the gross revenues in the market, and the NC-17 rating only generated \$2,145,270 in the United States.<sup>169</sup> Once the MPAA has handed down this death sentence, nobody dares touch the project. The project will receive no promotion or screen time, and nobody outside of film circles would even know it exists.<sup>170</sup>

Non-member Harvey Weinstein, in his battle with the MPAA, as mentioned later,<sup>171</sup> agrees with these notions. His movie *Grindhouse*<sup>172</sup> with all of its graphic violence brought it perilously close to an NC-17 rating that would have kept it from being shown in many theaters or rented or sold in many stores.<sup>173</sup> Millions were at stake for Weinstein because NC-17 films do not make money and unrated or independent films seem to perform just as poorly.<sup>174</sup> As Mr. Weinstein recognizes, submitting to the MPAA’s system is

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amounts of revenue for the MPAA member studios and have continued to do so since the creation of the PG-13 rating. *Steven Spielberg*, THE NUMBERS.COM, <http://www.the-numbers.com/person/135430401-Steven-Spielberg> (last visited Sept. 6, 2013).

<sup>165</sup> *Yearly Box Office*, BOX OFFICE MOJO, <http://boxofficemojo.com/yearly/?view2=mpaa&p=.htm> (last visited Sept. 6, 2013). In 2012, the average PG-13 film generated approximately \$45.4 million, towering above the \$38.5 million PG film average and the \$15.9 million R film average. *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *AMC Defies MPAA Bullies*, *supra* note 161.

<sup>168</sup> *Id.*; WAGUESPACK & SORENSON, *supra* note 20, at 13.

<sup>169</sup> *Yearly Box Office*, *supra* note 165.

<sup>170</sup> It is important to keep in mind that other avenues of release have been successful for these unfavorable ratings (or non-ratings) but have not come close to landing the maximized profits that occur with cinema releases.

<sup>171</sup> Weinstein’s battle with the MPAA mostly concerns the ambiguity of the CARA ratings system. Refer to Part III.B.1.b for more information regarding his criticisms of the system.

<sup>172</sup> *GRINDHOUSE* (Weinstein Co. 2007).

<sup>173</sup> Bowles, *supra* note 53.

<sup>174</sup> *Id.*

practically involuntary as it has become somewhat of a mandatory private law or de facto industry standard by which all with capitalistic ambitions must succumb in order to exist.<sup>175</sup> The financial improbability of bypassing the ratings system creates an entry barrier to the market, thereby proving anticompetitive conduct coupled with monopoly power as determined by market share.<sup>176</sup>

i. “Tying” and the MPAA

As if submission to the MPAA ratings system is not compulsory enough, the MPAA has taken greater steps to ensure that the involuntary nature of its system is maintained. In this effort, the MPAA and its member-studios have contracted and created pressures to force the CARA ratings upon theaters downstream.<sup>177</sup> The MPAA and its members, in creating this contractual pressure between the two markets, have participated in “tying,” an illegal tactic targeted by the Sherman Act.<sup>178</sup>

By conditioning the sale of one commodity upon the purchase of another, a seller compels the relinquishment of buyers’ independent judgment as to the product that is “tied” to another—the tied product is insulated from the competitive stresses of the open market.<sup>179</sup> These tying agreements ignore the Sherman Act’s policy to let competition rule the markets of trade based upon the faith that free economy best promotes public wealth and goods must stand the stern test of competition; tying agreements serve hardly any purpose besides suppression of competition.<sup>180</sup> And, to the extent the enforcer of a tying agreement enjoys market control, other potential market players are foreclosed from offering goods in free competition and are effectively excluded from the marketplace altogether.<sup>181</sup> A buyer’s wielding of lawful monopoly power in one market becomes unlawful if it is used to coerce concessions that handicap competitive challenges in another market.<sup>182</sup> Further, monopolistic results do

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<sup>175</sup> *AMC Defies MPAA Bullies*, *supra* note 161.

<sup>176</sup> See generally STEPHEN VAUGHN, *FREEDOM AND ENTERTAINMENT: RATING THE MOVIES IN AN AGE OF NEW MEDIA* (Cambridge University Press 2005); WAGUESPACK & SORENSON, *supra* note 20, at 13.

<sup>177</sup> William Bibbiani, *B-Movies Extended: Should the MPAA be Destroyed?*, CRAVE ONLINE (Feb. 6, 2012), <http://www.craveonline.com/film/articles/182565-b-movies-extended-should-the-mpaa-be-destroyed>.

<sup>178</sup> *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 608 (1953) (citing *United States v. Griffith*, 334 U.S. 100, 106–08 (1948)).

<sup>179</sup> *Id.* at 605.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 608 (citing *Griffith*, 334 U.S. at 106–08).

not have to be reached for violation of the Sherman Act, as monopolistic designs are just as easily reached by the Act.<sup>183</sup>

As mentioned, CARA has become somewhat of a de facto standard in the industry and has acquired a quasi force of law.<sup>184</sup> In furthering this reaction, theaters have been making more and more contracts with the big studios, and independent or non-member filmmakers have been somewhat relegated to certain “aesthetic ghettos” like the “straight-to-video” or the “online-only” markets.<sup>185</sup> Instead of owning theaters, the member-studios have contracted and created pressures that force the downstream theaters to abide by their CARA ratings.<sup>186</sup> These contracts also concern how revenue will be split between the theaters and the studios.<sup>187</sup> Major studios do not completely depend on the theaters for their revenue generation, though, they can survive in other market avenues in the instance a theater will not show a film.<sup>188</sup> This relationship is not the same for theater owners, as their only chance of survival is to receive the large blockbusters from the major studios in hopes of generating revenue from ticket sales and concessions, adding a great amount of pressure to theaters.<sup>189</sup> Part of “playing nice” involves abiding by the MPAA/CARA ratings and agreeing not to show movies that are not rated by the MPAA.<sup>190</sup> The member-studios stay happy, and their control is sustained.

If the MPAA/CARA ratings can be viewed in a different market than the MPAA member-studios,<sup>191</sup> it is clear that the members are tying

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<sup>183</sup> *Id.* at 622–23 (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 402 (1927)).

<sup>184</sup> *See supra* Part III.B.1.a.

<sup>185</sup> Bibbiani, *supra* note 177.

<sup>186</sup> The movie industry has come under scrutiny, before, as acting in a monopolistic manner. In *United States v. Paramount Pictures*, several major movie production companies were brought under scrutiny for price fixing, pooling agreements, formula deals, block-booking, competitive bidding, expansion of theater holdings and divestiture, and intervention practices, among other questionable practices. 334 U.S. 131 (1948). The Supreme Court ruled that the major production companies involved could not own the down-stream distribution channels as well. *Id.* at 177. Additionally, during the adoption of Valenti’s ratings system, Valenti noted that smaller American independent producers and distributors “will have to accept [the MPAA’s] classification as [the non-member studios] must get booking for their films and exhibitors will demand that [every film] be classified.” LEWIS, *supra* note 40, at 150.

<sup>187</sup> Beggs, *supra* note 47.

<sup>188</sup> For example, online streaming, such as Netflix, Hulu, and Amazon, would suffice in accelerating a major blockbuster to success.

<sup>189</sup> Beggs, *supra* note 47; *see supra* Part III.B.1.a. Imagine if your existence depended upon the revenue to be generated from huge blockbusters like *The Dark Knight Rises* or *The Avengers*. Theaters typically must play nice or otherwise perish when it comes to this mounted pressure.

<sup>190</sup> Beggs, *supra* note 47.

<sup>191</sup> Entertain the possibility of a ratings “market” (as there seems to be one (see Parts III.B.1.c and III.B.1.e for reference to other ratings organizations)) and separate the MPAA members into their movie producing market in determining whether tying exists between the two markets.

enforcement of the ratings to receipt of major motion pictures that generate substantial revenues for theaters. The members are forcing the hand of theaters into their other practices (ratings) in order to benefit their further collected monopoly power in the motion picture industry.<sup>192</sup> Tying the enforcement of the MPAA/CARA ratings effectively helps the members of the MPAA to ensure the survival of their antitrust conduit and eliminates any competition that would stifle their ratings system dominance. This furthers the advantages gained when MPAA practices yield substantial deference and revenue generating opportunity based upon the potential audience for each ratings classification.<sup>193</sup> Even if the practices of the MPAA and its members do not yield monopolistic results, this scheme proves that the MPAA bears a monopolistic design and should equally be reached by the Sherman Act.<sup>194</sup>

This contractual scheme further aggregates the financial improbability of bypassing the ratings system, solidifying the anticompetitive entry barrier constructed by the MPAA, and its members,<sup>195</sup> for the purpose of ensuring the maintenance of its monopoly power in the market.

*b. Vague Ratings/No Clear Standards*

As mentioned above,<sup>196</sup> a board of parents who view each film and collectively vote on the rating it deserves determines the CARA ratings administered by the MPAA.<sup>197</sup> The MPAA intends these ratings to provide information to parents in advance so they can decide for themselves whether or not a film is appropriate for their child.<sup>198</sup> The MPAA denies labeling a movie “good” or “bad” but instead tries to make parents aware of certain elements in films, including sex, violence, language, nudity, and drug use.<sup>199</sup> These guidelines seem to be the MPAA’s explanation for statements like, “The

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<sup>192</sup> See *supra* Part III.A.; LEWIS, *supra* note 40, at 150.

<sup>193</sup> See *supra* Parts III.A., III.B.1.a., III.B.1.c.

<sup>194</sup> *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 622–23 (1953) (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 402 (1927)).

<sup>195</sup> LEWIS, *supra* note 40, at 150 (stating that “the . . . motion picture rating system successfully established a national film censorship standard, but, more importantly, it gave the [MPAA and its member] studios control over entry into the . . . marketplace”).

<sup>196</sup> See *supra* Part II.A.3.

<sup>197</sup> Smith, *supra* note 49; *Film Ratings*, MPAA, <http://www.mpa.org/ratings> (last visited Sept. 6, 2013) [hereinafter *Film Ratings*].

<sup>198</sup> Smith, *supra* note 49; *Film Ratings*, *supra* note 197.

<sup>199</sup> Smith, *supra* note 49; *Film Ratings*, *supra* note 197. As is seen in this Part, many other elements creep into the decision-making system without any proper designation or system behind it, as the rating parents are entitled to their discretion in deciding what other parents would want to know before letting their child view a film.

[b]oard uses the same criteria as any parent,”<sup>200</sup> even though “any parent” has no designation or definition, leaving most parents without any true guidelines to apply in determining whether a film is “appropriate for viewing by their own children.”<sup>201</sup>

Harvey Weinstein, a huge player in the movie production industry and a non-member of the MPAA, has had run-ins with the MPAA and discusses how vague, ambiguous, and unpredictable the ratings often are, leaving the companies at the board’s whim in determining the ratings or a ruling on an appeal to the ratings board.<sup>202</sup> “They’re hard to read,” says Weinstein, reaffirming the notion held by most of the industry.<sup>203</sup> This unpredictability has become a mounting crux of criticism against the MPAA, accusing the organization of being inconsistent and out of touch with American mores.<sup>204</sup>

The MPAA rebuts the negative arguments about their vague system by explaining that “[b]y providing clear, concise information, movie ratings provide timely, relevant information to parents, and they help protect the freedom of expression of filmmakers and this dynamic American art form.”<sup>205</sup> Further, CARA claims to be intentionally vague because the organization does not want to be identified with censorship, as it was developed to extinguish the inhibiting practice.<sup>206</sup> This argument fails, as vagueness, or the lack thereof, bears no correlation to censorship.

In demonstrating how practically unpredictable, uninformative, and ridiculous the system can be, consider a “top ten” list of examples compiled by Perry Seibert and Jeremy Wheeler of *All Movie Guide*:

10. *Mother’s Boys* (1994) “Rated R for language and for a mother’s sociopathic behavior”

9. *Indian in the Cupboard* (1995) “PG for mild language and brief video images of violence and sexy dancing”

8. *All I Wanna Do* (1998) “PG-13 for teen sex-related material, language, and substance misuse”

7. *The Hunted* (1997) “R for strong bloody ninja violence and a humorous drug related scene”

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<sup>200</sup> Smith, *supra* note 49.

<sup>201</sup> *Id.*

<sup>202</sup> Bowles, *supra* note 53.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> MPAA      *Ratings*,      COMING      ATTRACTIONS      THEATRES,  
<http://www.catheatres.com/Page.asp?NavID=277#.UidoiEnD9rO> (last visited Sept. 6, 2013).

<sup>206</sup> See *supra* Part II.A.1.

6. *War of the Buttons* (1994) “PG for mischievous conflict, some mild language, and bare bottoms”
5. *Alien vs. Predator* (2004) “PG-13 for violence, language, horror images, slime, and gore”
4. *Skateboard Kid II* (1995) “PG for brief mild language and an adolescent punch in the nose”
3. *Bushwhacked* (1997) “PG for language and a mild birds and bees discussion”
2. *Twister* (1996) “PG-13 for intense depiction of very bad weather”
1. *Jefferson in Paris* (1995) “PG-13 for mature theme, some images of violence, and a bawdy puppet show”<sup>207</sup>

As if these examples were not bizarre enough, the 2004 movie *Team America: World Police* bore the tagline, “graphic crude and sexual humor, violent images and strong language—all involving puppets.”<sup>208</sup> In viewing these examples, it is easy to see how absurd the ratings system really is. These ratings are uninformative to parents and filmmakers in assessing what is appropriate for viewers, children, and adults alike. Often, these vague standards hinder the filmmaking process and delay release, as a producer must re-edit and re-submit a film if a rating is unsatisfying.<sup>209</sup> And, out of fear of creating an implicit contract, the MPAA/CARA will not advise filmmakers as to how they

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<sup>207</sup> Matt Holmes, *The MPAA's Top Ten Dumb Rating Descriptions*, WHATCULTURE (Sept. 13, 2007), <http://whatculture.com/film/the-mpaas-top-ten-silliest-rating-reasons.php>.

<sup>208</sup> *Id.* As a note, the film *The King's Speech* was rated R based purely on a thirty-second scene in which swear words were used. The Weinstein Company (a non-member production studio) was told that if three of the five uses of a certain swear word were muted, the picture would receive a lesser rating than its current R rating. After removing two swear words, an alternative version of the film received the more favorable PG-13 rating. Prominent film critic Roger Ebert expressly criticized the MPAA in his review, as did other critics and film makers. Nikki Finke, *MPAA Gives Oscar Fave 'The King's Speech' PG-13 Rating for Removing Two Swear Words*, DEADLINE.COM (Feb. 25, 2011, 2:36 PM), <http://www.deadline.com/2011/02/mpaa-gives-oscar-frontrunner-the-kings-speech-pg-13-rating-for-removing-two-swear-words/>.

<sup>209</sup> *How does the MPAA Rate Movies?*, *supra* note 48.

could receive a less restrictive rating.<sup>210</sup> This tends to create a system where “[n]o information gets out at all . . . like a black hole.”<sup>211</sup>

In further proving the outlandishly vague nature of the ratings system, case law has lent a hand, concluding that the ratings are unconstitutionally vague when adopted by state law.<sup>212</sup> The MPAA avoids constitutional challenges in most cases, though, because it is not a governmental organization<sup>213</sup> and the ratings are not actually laws to be enforced.<sup>214</sup>

In 1970, Pennsylvania modified its Penal Code by adding to it a Section applying the CARA/MPAA rating standards as law.<sup>215</sup> The district court stated that “[o]ne thing is immediately apparent. The ratings employed by the [MPAA] do not correspond to the statutory standards of ‘suitable’ or ‘not suitable for family or children’s viewing.’”<sup>216</sup> The district court went on to state that “[t]he evidence clearly establishe[s] that the [Ratings Administration] of the [MPAA] has itself no defined standards or criteria against which to measure its ratings”<sup>217</sup> and that the system is “so patently vague . . . as to render it unconstitutional.”<sup>218</sup> The district court criticized the structure of the ratings system: “Twelve persons, four in New York and eight on the Pacific coast, do the rating, a voluntary [MPAA] undertaking. Films viewed are simply graded according to the individual reactions of the viewing members.”<sup>219</sup> This system and the criticism thereof bare a striking resemblance to the system employed by the MPAA today, hearkening back to arguments about the lack of definition and clear-cut standards in the ratings system.<sup>220</sup>

The vague nature of the CARA rating system does not show monopolistic activity in and of itself, but shows a structure that is susceptible to

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<sup>210</sup> WAGUESPACK & SORENSON, *supra* note 20, at 14.

<sup>211</sup> *Id.* (citations omitted).

<sup>212</sup> *Motion Picture Ass’n of Am. v. Specter*, 315 F. Supp. 824 (E.D. Pa. 1970).

<sup>213</sup> *See supra* Part II.A.

<sup>214</sup> This Note, in Part III.B.1.a.i, shows that even though the ratings are not law enforced by the hand of the government, theaters must enforce the ratings as private law in order to receive distribution from the members of the MPAA and, in turn, to make any profits from the major blockbusters.

<sup>215</sup> *Motion Picture Ass’n of Am.*, 315 F. Supp. 824.

<sup>216</sup> *Id.* at 825.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 826 (citing *Interstate Circuit v. Dallas*, 390 U.S. 676 (1968)).

<sup>219</sup> *Id.* It should be noted that this case involved the prior ratings system employed by the MPAA. The guidelines are very similar and, in reality, only the letter designations (i.e., R, PG, etc.) were changed (the system has been cited for its long enduring tenure as the set “standard” for rating motion pictures). *See supra* Parts II.A.3, III.B.1.a.

<sup>220</sup> In Part III.B.1.c, the “vagueness” of these standards is referred to as a means for the MPAA to show deference to its members and facilitate their already concentrated market share and monopoly power.

manipulation and favoritism. As such, this ambiguously operated ratings system has allowed the MPAA to show great deference to its members, resulting in monopolistic tendencies further solidifying the maintenance of monopoly power through this manipulable, anticompetitive entry barrier.

*c. Deference to Members: Anticompetitive Conduct*

The MPAA is often criticized as harboring a certain bias for its members' big-budget studio films.<sup>221</sup> David Waguespack<sup>222</sup> and Olav Sorenson<sup>223</sup> have conducted a thorough study of the MPAA's rating system and have collected empirical evidence recording the bias lent by the MPAA to its members. This Part focuses on Waguespack and Sorenson's piece *The Ratings Game: Asymmetry in Classification*.<sup>224</sup>

The authors' work focuses on the notion that when industry participants enact restrictive codes, the enacted regulations essentially help to ensure sustained profitability of the participants as to promote the public good.<sup>225</sup> It goes on to note, "[s]ince the ratings that films receive have real consequences in terms of their sales, and hence for profitability, the MPAA rating system serves as a stratifying device, preventing lower status participants from matching the profitability of the more prominent players in the industry."<sup>226</sup>

The authors' findings highlight three things. First, classifications like those enacted by the MPAA can catalyze cumulative advantage; this is even the case when categories do not reflect quality but nonetheless have differing values.<sup>227</sup> Second, the potential for asymmetry in these systems increases when the organizations involved can influence their classification or categorization.<sup>228</sup> And third, the extent to which this categorization can contribute to stratification depends on ambiguity in the mapping of category attributes. Without ambiguity, bias in the system would likely delegitimize the classification system itself—there would be no cloak of ambiguity to hide the

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<sup>221</sup> *The MPAA: The Motion Picture Atrocity of America*, *supra* note 47.

<sup>222</sup> Robert H. Smith School of Business, University of Maryland.

<sup>223</sup> School of Management, Yale University.

<sup>224</sup> WAGUESPACK & SORENSON, *supra* note 20.

<sup>225</sup> *Id.* at 4.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 4–5.

<sup>228</sup> *Id.* at 5.

bias.<sup>229</sup> The authors then mapped out three primary routes in which such an asymmetry might emerge: power, a halo effect, and proto-typicality.<sup>230</sup>

The power route potential for asymmetry is particularly potent when two conditions occur: (1) when production companies perceive one classification as more valuable than another, and (2) when these companies have the ability to influence the classification process.<sup>231</sup> Together, these conditions give motive and means to the possessor.<sup>232</sup> As mentioned,<sup>233</sup> different ratings categories do entail more value, as it can mean the difference in millions of dollars. Accordingly, the members of the MPAA (and the rest of the market) meet the first prong of this “power” test. But, the members of the MPAA are in a rather unique position when it comes to the second prong, allowing them a means to further progress their motives and desired results.<sup>234</sup>

A halo effect can occur when a rater is simply aware of the producer of an offering.<sup>235</sup> This lends to sorting these “high-status” or preferred producers into categories or rating classifications that are perceived as having a higher value, placing a “halo” over the identity of a producer that “can do no wrong.”<sup>236</sup> This, again, leaves the members of the MPAA in a unique position, as they are the most profitable production companies and have strong affiliations with the MPAA. Even if not on purpose, the members may receive the benefits of rater bias in submitting films to the system.

The third route of asymmetry suggested by the authors is proto-typicality. Proto-typicality exists when a certain production company becomes strongly identified with some particular category, such as family films, action blockbusters, or any other category.<sup>237</sup> For example, audiences and raters alike may genuinely view a scene as less threatening simply because Disney has offered to distribute the film.<sup>238</sup> The raters may also be affected by this proto-typicality when viewing offerings of the members of the MPAA.

As demonstrated, there are some obvious ways that bias can exist in the MPAA/CARA rating system and, regardless of the pathway of bias employed, one would expect higher status producers to receive more desirable

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<sup>229</sup> *Id.* This draws a parallel to how the MPAA and its members use their practices to help facilitate their own bias without being blatantly discoverable by outsiders.

<sup>230</sup> *Id.* at 6.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> See Part III.B.1.a.

<sup>234</sup> This is discussed more, below.

<sup>235</sup> WAGUESPACK & SORENSON, *supra* note 20, at 7.

<sup>236</sup> *Id.* at 7–8 (the phrase “can do no wrong” is not found in the cited material, but is used in commonality to emphasize the bias given to the “high-status” producers).

<sup>237</sup> *Id.* at 8–9.

<sup>238</sup> *Id.* at 9.

designations.<sup>239</sup> But without underlying information, identifying biases cannot be distinguished as stemming from the identities of the producers or simply from the contents of the films offered for ratings.<sup>240</sup>

In gathering this underlying information, Waguespack and Sorenson analyzed data collected by *Kids-in-Mind*, a website created to provide parents with more detailed, objective information about the contents of movies.<sup>241</sup> The website designates three scores on a zero to ten point scale based upon sex, violence, and profanity, adding the three into a composite thirty point total.<sup>242</sup> The authors plotted the *Kids-in-Mind* scores against the ratings dealt by the MPAA and found some interesting results.<sup>243</sup> Each rating category used by the MPAA (G, PG, PG-13, R, NC-17) significantly overlapped the distribution of other categories, and each category had very murky borders.<sup>244</sup> This helps point out the substantial ambiguity of the system when assigning ratings to films.

The authors went on to compile data concerning MPAA member film ratings compared to the composite score awarded by *Kids-in-Mind*.<sup>245</sup> The data compiled begins to answer the question of whether the identities of production companies influence the assignment of ratings to films.<sup>246</sup> Though more mature content tended to increase the proportion of films with an R rating, a gap between member and non-members exists.<sup>247</sup> For example, of non-member films receiving a content *Kids-in-Mind* composite score of twelve, 40% of the films had been dealt an R rating by the MPAA.<sup>248</sup> This draws a distinct contrast to the treatment of members, as only 20% of these offerings receiving an identical *Kids-in-Mind* score received an R rating from the MPAA.<sup>249</sup> At a certain level of content, higher status producers appeared to receive less restrictive ratings.<sup>250</sup>

Waguespack and Sorenson determined that MPAA member films, on average, have a 24.2% lower unconditional probability of receiving an R

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<sup>239</sup> *Id.* at 8.

<sup>240</sup> *Id.* at 9.

<sup>241</sup> *Id.* at 15; see KIDS IN MIND, <http://www.kids-in-mind.com> (last visited Sept. 6, 2013).

<sup>242</sup> KIDS IN MIND, *supra* note 241. These scores were cross-referenced to another independent ratings site, *Screen It*, and correlated .92; analyses using both sites have yielded the same results. WAGUESPACK & SORENSON, *supra* note 20, at 16 n.10.

<sup>243</sup> WAGUESPACK & SORENSON, *supra* note 20, at 17.

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

<sup>245</sup> *Id.* These were also cross-referenced with “cast centrality” and a measure of potential proto-typicality. *Id.* at 17–18.

<sup>246</sup> *Id.* at 18.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 18–19.

rating.<sup>251</sup> In other words, there is empirical proof that, first, MPAA members are able to pressure CARA over their films' ratings or, second, that raters are influenced by their knowledge of the producer's identity.<sup>252</sup>

This establishes that there truly is substantial deference given to members of the MPAA through the CARA ratings system. The fact that the ratings system is so vague<sup>253</sup> and submission to the system is practically involuntary<sup>254</sup> lends a helping hand to allow the MPAA to show such great deference to its members and to withstand criticism by hiding behind these cloaks of rules and policies. This deference solidifies the existence of a significant barrier to entry into the market and hinders anybody, except the members of the MPAA, looking to become substantial players, regardless of the quality of film produced.<sup>255</sup> The concentrated power of the members and their desire to sustain that power has fed this anticompetitive practice that has been coupled with their monopoly power.

Though the conclusion that the CARA ratings system serves as a significant entry barrier to the motion picture industry seems apparent in light of the evidence thus far, the MPAA has been able to divert criticism and hide behind the ambiguity of the system.<sup>256</sup> Further, the MPAA claims that it does not disclose its raters, or their rating materials, in order to protect the safety and independence of the individuals.<sup>257</sup> This, along with ambiguity in the system, provides a means for the MPAA to shield its practices, prolonging the existence of the entry barrier and enabling the MPAA to divert any accusations of bias.

Part III.B.1.d details the MPAA practice of non-disclosure that provides a shield from accountability, allowing the anticompetitive actions of the MPAA to persist.

*d. Rater Identities Remain Undisclosed*

As mentioned above,<sup>258</sup> a board of parents who view each film and collectively vote on the rating it deserves delivers the ratings administered by CARA.<sup>259</sup> The MPAA explains that the “[r]atings are assigned by an independent board of parents with no past affiliation to the movie business. Their job is to rate each film as they believe a majority of American parents

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<sup>251</sup> *Id.* at 19.

<sup>252</sup> *Id.* Even with the most conservative specification, MPAA members still have nearly a 7% lower probability of receiving an R rating. *Id.* at 20.

<sup>253</sup> *See supra* Part III.B.1.b.

<sup>254</sup> *See supra* Part III.B.1.a.

<sup>255</sup> *See supra* Part III.A.

<sup>256</sup> *See supra* Part III.B.1.b.

<sup>257</sup> *See infra* Part III.B.1.d.

<sup>258</sup> *See supra* Part II.A.3.

<sup>259</sup> Smith, *supra* note 49; *Film Ratings*, *supra* note 197.

would rate it, considering relevant themes and content.”<sup>260</sup> What the MPAA does not like to draw attention to is that the identities of the parent-raters are kept secret and that the raters’ ballots are at all times treated as confidential and are not disclosed outside of the MPAA.<sup>261</sup> The MPAA usually employs between ten and thirteen parent-raters whose identities are kept secret, though there are three senior raters who oversee the process and whose names have been disclosed under swelling public pressure to do so.<sup>262</sup> MPAA officials say that the board members’ identities are sealed in order to prevent pressures from large studio executives or filmmakers from mounting on the raters.<sup>263</sup> But Director Kirby Dick, with his movie *This Film is Not Yet Rated*, proposes that this anonymity allows the MPAA to act without any accountability.<sup>264</sup> He says, “City officials, school board officials, they make important decisions and their identities are known. It’s ludicrous to think that these people shouldn’t be known, too. Their decisions can affect millions of dollars in business.”<sup>265</sup>

The MPAA requires that these undisclosed raters have children ranging from ages five to fifteen; a rater is to be rotated out of the ratings board when his or her child ages over eighteen.<sup>266</sup> These board members have no special or specific training in film or child behavior or psychology.<sup>267</sup> The MPAA claims that because the ratings system was designed for parents, the experience of raising a child trumps any professional training in film or child psychology.<sup>268</sup> The MPAA looks for average parents who “know what other parents think about in terms of making choices for [their] children.”<sup>269</sup> This standard is so subjectively applied by the raters that there is no way that all parents could be represented in the ratings, as each parent has his or her own subjective standard in determining what is appropriate for his or her child. It is a falsity to think the subjective will of these raters is an empirical truth by which all parents will willfully follow and adhere.

For a typical movie, eight raters view the motion picture, designating the rating each believe to be appropriate (G, PG, PG-13, R, NC-17) and listing

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<sup>260</sup> *MPAA Ratings*, *supra* note 205.

<sup>261</sup> Bowles, *supra* note 53; Smith, *supra* note 49.

<sup>262</sup> Bowles, *supra* note 53.

<sup>263</sup> *Id.*

<sup>264</sup> See *THIS FILM IS NOT YET RATED* (Kirby Dick 2006).

<sup>265</sup> Bowles, *supra* note 53. See Part III.B.1.a in further explaining what hinges on these ratings in terms of potential profitability and success in the motion picture industry.

<sup>266</sup> Bowles, *supra* note 53; *How does the MPAA Rate Movies?*, *supra* note 48. The sources cited maintain conflicting views on the required age-range of parent-raters’ children, including the child’s age at which the rater must be rotated from the ratings board. The more conservative age range and limit was chosen in the context of the sentence accompanying this footnote.

<sup>267</sup> Bowles, *supra* note 53.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

the factors used in making the decision, often citing violence, nudity, drug use, language, and other similar factors.<sup>270</sup> Because of this system and the vague rating standards it entails,<sup>271</sup> we cannot simply ask the raters what is appropriate and what needs to be done to fix an unsatisfying rating, as specifics are not cited and the ballots remain confidential.<sup>272</sup>

The structure of the system thus provides a way for the raters to show substantial deference to members, disadvantaging non-members upon their compelled submission to the ratings system. This non-disclosure further aggregates the power of the ratings entry barrier, amplifying the anticompetitive conduct and further providing a means for the MPAA and its members to maintain their monopoly power.

Part III.B.1.e suggests a simple, proven solution to help cure the inadequacies of the CARA ratings system, alleviating some of the pressures the MPAA applies on the market.

*e. A Simple Fix*

What, if anything, could ameliorate the MPAA's rating system as a downstream barrier for its large player members? As mentioned above,<sup>273</sup> other organizations have been able to apply a more objective standard that informs parents about certain levels of different themes in a movie, letting parents determine what is important. For instance, *Kids-in-Mind*,<sup>274</sup> unlike the MPAA, does not assign an "inscrutable" rating based upon age but applies three objective ratings for sex/nudity, violence/gore, and profanity.<sup>275</sup> These three ratings are on a scale of zero to ten and the site explains in much detail why a film rates high or low in a specific category.<sup>276</sup> *Kids-in-Mind* also includes instances of substance use, maintains a thorough list of discussion topics that may elicit questions from children, and even provides an interpretation of the message the film conveys to the audience.<sup>277</sup> The site prides itself on its objective standards and denies basing its ratings on the viewer's age or on the

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<sup>270</sup> *Id.* This harkens back to the "vagueness" of the ratings system in general and helps demonstrate how the ratings are really up to the whims of the raters' mores, attitudes, and preferences on the day the film is viewed.

<sup>271</sup> See *supra* Part III.B.1.b.

<sup>272</sup> Bowles, *supra* note 53.

<sup>273</sup> See *supra* Part III.B.1.c.

<sup>274</sup> See *supra* Part III.B.1.c for how Waguespack and Sorenson proved the consistency, reliability, and effectiveness of these ratings in their piece *The Ratings Game: Asymmetry in Classifications*.

<sup>275</sup> KIDS IN MIND, *supra* note 241.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

artistic merits of a film.<sup>278</sup> As *Kids-in-Mind* and others have proven, there is a more effective, objective, consistent system that would dissolve many of the problems caused by the MPAA system.

The most extreme solution would be forcing the MPAA to cut all ties from its members, becoming a completely independent agency receiving no funding from studios but from rating fees and other revenue generators. As this is highly unlikely due to the amount of financial support received from its members, adopting a much more objective classification system to better stifle any bias that may surface from the raters and the agency would cure the inadequacies of the ratings system.

Adopting an objective standard, like the system used by *Kids-in-Mind*, would ameliorate the qualms with the ridiculously vague and inconsistent system;<sup>279</sup> would relieve raters of any pressure, allowing their identities to be disclosed and holding them accountable for objective, detailed evaluations, adding more validity and effectiveness to the system;<sup>280</sup> would destroy the dependence on ratings and their correlations to revenue generating potential, as producers would know what is and is not acceptable in different ratings categories, ending the “pushing the envelope” practice;<sup>281</sup> and, lastly, eliminating these barriers would leave no cloak for the MPAA to hide behind to justify any deference given to its members.<sup>282</sup>

Not only would the MPAA be more transparent, but this full disclosure would let parents subjectively evaluate films based upon the values important to them instead of those harbored by unknown raters. The raters would no longer be the messengers of some seemingly empirical truth, but would simply be conduits of information for parents and moviegoers alike. This result strikes a resemblance to the purpose the MPAA hoped to serve in providing the ratings.<sup>283</sup> More stringent standards would dissolve the cloak behind which the MPAA hides in operating to concentrate the monopoly power of its members, exposing it to greater criticism and demanding that the deferential practice be stopped. These changes, if made, could deconstruct the entry barrier created by the ratings system, thereby making the MPAA and its members susceptible to natural, aggressive competition.

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<sup>278</sup> *Id.* As mentioned in Part III.B.1.c, *Kids-in-Mind* and another independent ratings organization, *Screen It*, correlate at .92 consistency based upon their objective standards.

<sup>279</sup> *See supra* Part III.B.1.b.

<sup>280</sup> *See supra* Part III.B.1.d.

<sup>281</sup> *See supra* Part III.B.1.a.

<sup>282</sup> *See supra* Part III.B.1.c.

<sup>283</sup> *See supra* Part II.A.3.

#### IV. CONCLUSION

Although the MPAA began with a positive outlook to save the motion picture industry from government censorship by developing a system that proved somewhat effective in the past, it has become obsolete and must undergo certain innovations to survive.

The members of the MPAA, using the MPAA and CARA as its antitrust conduit, have gained an increasingly concentrated share of the market, approaching a dangerously high percentage in the United States. This concentration and affiliation indicates the requisite monopoly power in the relevant market for violation of Section 2 of the Sherman Act; these markets could be narrowed down or expanded, but regardless, due to the concentration of media ownership, this monopoly power is in a relevant market. If it is decided that the MPAA and its members have not reached the requisite monopoly power for violation of the Act, there is most definitely a dangerous probability that this monopoly power could result, given the recent activity of the organization and merger discussions in the industry, resulting in an attempted monopolization violation.

Further, anticompetitive conduct has been demonstrated in operating the ratings system (CARA) as an entry barrier to the market. The system's vague, arbitrary, and inconsistent standards; its lack of accountability due to its refusal to disclose its raters; and the false sense of "voluntary" submission to the system have provided a conduit for the MPAA to show great deference to its members, further concentrating their market power and ensuring their sustainability.

The MPAA, through its members, or vice versa, has obtained, or is obtaining, monopoly power in the motion picture industry and has constructed a significant barrier of entry to the market, demonstrating anticompetitive conduct that restricts industry competition in violation of Section 2 of the Sherman Act.

Simply dissolving member affiliations with the MPAA and introducing objective standards in the ratings scheme would ameliorate the unfavorable practices of the MPAA. If deference were still shown to members under the new system, it would be readily identifiable, destroying the inadequacies behind which the MPAA has hidden in the past, delegitimizing the system completely.

This funnel of bias through which the entire motion picture industry must flow has overstepped its bounds and must give way to a system more suitable for today's society and laws.

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“No art passes our conscience in the way film does, and goes directly to our feelings, deep down into the dark rooms of our souls.”

- Ingmar Bergman